

1 Tuesday, 3 February 2009  
 2 (10.30 am)  
 3 THE CHAIRMAN: Welcome to Lancaster House, a place where  
 4 many constitutions have been made -- though not for  
 5 quite a long time -- and I am very glad to see some of  
 6 the faces who were here in December 2002, when we got  
 7 quite a long way down the road. As far as my memory  
 8 takes me, but correct me if I am wrong, there was  
 9 certainly Kurt, Alden, Edna, McKeever Rolston and me.  
 10 That is it, I think.  
 11 Welcome to everybody. I am in a smaller team this  
 12 time, and I had better explain. I am hoping that  
 13 Michael Bradley will join us around lunchtime, if he is  
 14 able to get through from Somerset by car. It was  
 15 impossible for him to get down by train yesterday.  
 16 Tragically, Susan Dickson, my "hard nut" legal  
 17 advisor, is not with us and won't be with us this week  
 18 because her father is having to undertake serious  
 19 surgery tomorrow in Glasgow, so Susan has gone up to  
 20 Glasgow to be with him and her mother. So we hope  
 21 everything will come out all right in that respect.  
 22 So we are a bit denuded. Helen (Inaudible) got up  
 23 from Hampshire, risking and limb to get here. Sara is  
 24 back with us, who had sadly to miss the second round.  
 25 I thought we would try to spend today dealing with some

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1 contact with Susan, will you please give her our best  
 2 wishes. Hopefully we will get a good distance today.  
 3 THE CHAIRMAN: Well, just running through the corrections  
 4 that I have noticed, if you have the latest draft, the  
 5 first one is on page 4. On page 4, you will see in  
 6 subsection 3, near the top of the page, it refers in the  
 7 second and third line to "oath or affirmation" in both  
 8 lines and the words "or affirmation" can be deleted  
 9 because right at the end of section 123 oath defined as  
 10 including affirmation, so it is not necessary to say "or  
 11 affirmation".  
 12 And then in section 7(1), half-way down the page,  
 13 there is a reference to section 60(4); that should be  
 14 60(3), so a cross-reference that failed to pick up on a  
 15 first reading.  
 16 The next one is on page 11, and on page 11 for some  
 17 reason, this may not have happened in the printed  
 18 versions you have, but the preambular bullet, "a country  
 19 with a vibrant and diversified economy which provides  
 20 full employment", has on my copy come out both at the  
 21 bottom of page 10 and at the top of page 11, but I am  
 22 sure that in the electronic version there is only one of  
 23 those; it may have come out all right in your printed  
 24 versions. So I will obviously check that with the  
 25 electronic version.

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1 technical issues. For example, I been through the draft  
 2 and found few small errors which I would like to point  
 3 out to you in a moment, so that we are all reading from  
 4 the same document and if you spotted any errors then you  
 5 can tell me, obviously.  
 6 Then I know that the Minister will be in a much  
 7 better frame of mind when she joins us tomorrow --  
 8 I hope that she will -- if we have cracked a few of the  
 9 ten outstanding points, or at least had a good look at  
 10 them and minimised the number of issues between us for  
 11 her to have to deal with.  
 12 So as I understand it, the Governor(?) is on the way  
 13 but stuck at the moment in Essex. Jeffrey Jowell is in  
 14 Glasgow, having been diverted, and probably won't join  
 15 us today but we will try and manage without him. There  
 16 are enough lawyers in the room, I think, to be able to  
 17 crack on ahead.  
 18 Unless anybody would like to say anything to open --  
 19 once the wires have been made safe -- I would like to  
 20 mention, first of all, to start, just a few little  
 21 errors that I found in the text. Would you like to say  
 22 anything?  
 23 MR TIBBETTS: Mr Chairman, just to quickly say that we are  
 24 grateful for you hosting this, and we look forward to  
 25 continuing it tomorrow and Thursday and if anyone is in

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1 The next one is on page 21. Now here in the middle  
 2 Section 13(5), it says:  
 3 "In this section 'permanent resident' has the  
 4 meaning assigned to in the immigration laws for the  
 5 Cayman Islands", and I think it would be better to add  
 6 at the end, "for the time being in force"; "in the  
 7 immigration laws of the Cayman Islands for the time  
 8 being in force."  
 9 The reason for that is that unless you make it  
 10 clear, "for the time being in force", there is a doubt  
 11 about which immigration laws in the Cayman Islands we  
 12 are talking, and obviously you want to have the one  
 13 that's current at the time.  
 14 MR MCLAUGHLIN: Good morning, sir, in that case then might  
 15 I suggest that we lose the capital letters that start  
 16 Immigration Laws, so that it ...  
 17 THE CHAIRMAN: Yes, okay. I think that is --  
 18 MR MCLAUGHLIN: The alternative could be the immigration  
 19 law, whatever, what year it is now or, or legislation  
 20 which replaces whatever form of language.  
 21 THE CHAIRMAN: Well, I think if you say "immigration laws",  
 22 with a small I and L, "for the Cayman Islands for the  
 23 time being in force", so it covers it. So whichever is  
 24 the one at the time we are looking at --  
 25 The next one is way down on page 58, and here it is

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1 the fourth line in section 80, and I remember vividly  
 2 the second ground saying:  
 3 "And the Governor shall forthwith advise the  
 4 Speaker", and I forgot to put "forthwith" in, which is  
 5 a shocking omission on my part, so I am happy to put it  
 6 back in. I love the word "forthwith". It is very  
 7 important because the Governor must not delay if this  
 8 ever occurs, which is very unlikely. He must not delay.  
 9 So it is:  
 10 "The Governor shall forthwith advise the Speaker of  
 11 that hearing."  
 12 The next one is on page 61.  
 13 MR TIBBETTS: Mr Chairman, I don't know if it's an  
 14 appropriate time but there is a question on 7(9), which  
 15 relates to what you just said, or should I wait until  
 16 you finish? I don't want you to lose your train of  
 17 thought.  
 18 THE CHAIRMAN: Okay. Can I just finish the list and then we  
 19 will come back to it because after I have done this I am  
 20 going to ask you whether you have any points on the  
 21 thing.  
 22 On page 61, half-way down, you will see the  
 23 numbering of the subsections has gone a bit screwy and  
 24 there are two subsections 2. So the one which begins,  
 25 "The chairman of an electoral ...", that one should be 4

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1 rather than 2.  
 2 The next one is page 63; you will love this one.  
 3 There is a stray comma in 90(1)(b)(ii), it has a stray  
 4 comma and the comma there should be deleted. It is  
 5 always good to come across a stray comma.  
 6 MR BUSH: Could you go back to that, sir.  
 7 THE CHAIRMAN: Section 90(1)(b)(ii), there is a stray comma  
 8 after the word "attained", which should be deleted.  
 9 At page 64, at the beginning of Section 91(1):  
 10 "A person shall not be entitled to be registered as  
 11 an elector", rather than "a elector".  
 12 The next one is page 75. Now again this might be  
 13 a print-off problem, but my printed off version at the  
 14 top of page 75 is missing a 9. It is probably still  
 15 there in the fashion, we will obviously check that. On  
 16 mine the words, "In relation to an award granted before  
 17 ...".  
 18 MR TIBBETTS: I have it.  
 19 THE CHAIRMAN: The next one is page 77. I am nearly  
 20 finished. Again there's subsection number right at the  
 21 top of the page. There are two subsection 6s you will  
 22 see, so the last one beginning:  
 23 "The Auditor General shall submit the ..."  
 24 That should be 7 rather than 6, page 77.  
 25 The last one is on page 83. There are a couple of

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1 points here. The first and easiest one is that in the  
 2 definition of "oath", it says "oath and the Queen's  
 3 affirmation", and it has stray inverted commas. The  
 4 inverted commas after "affirmation" should be deleted in  
 5 the definition of "oath".  
 6 Now the one above that is Minister, the definition  
 7 of "Minister". It means:  
 8 "A member of the cabinet who is appointed a Minister  
 9 under section 44."  
 10 Then when I looked back, I see that the Premier is  
 11 appointed actually under section 49, and also there was  
 12 a question raised last time about whether the word  
 13 "Minister" includes the Premier, and actually there are  
 14 other places which says "the Premier or other Minister",  
 15 so it's quite clear that the word "Minister" does  
 16 include the Premier. But if you then come to this  
 17 definition, and it doesn't mention the Premier, who is  
 18 not appointed under section 44, it could be confusing.  
 19 So I thought it would be good to change this definition  
 20 slightly to read:  
 21 "Minister means a member of the cabinet who is  
 22 appointed as the Premier or as another Minister under  
 23 section 44."  
 24 "Premier or as another Minister"; that makes it  
 25 clear the Premier or another Minister under section 44.

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1 Then a little bit further down, you will see:  
 2 "'Premier' means the Premier appointed under  
 3 section 49."  
 4 MR MCLAUGHLIN: Wouldn't it read better if it simply said,  
 5 "appointed as the Premier or other Minister"??  
 6 THE CHAIRMAN: Well, that would do, yes:  
 7 "Means a member of the cabinet who is appointed as  
 8 the Premier or ..."  
 9 MR MCLAUGHLIN: Or other Minister, yes.  
 10 THE CHAIRMAN: Yes, full stop, and do away with the  
 11 reference to "under section 44"? I think that would be  
 12 fine, actually.  
 13 Now there is one other thing on this page and that  
 14 is I suggest putting in, above a definition of  
 15 "Minister", a new definition, "legislature":  
 16 "'Legislature' means the legislature established by  
 17 section 59(1)."  
 18 And the reason for this is that there are many  
 19 references to legislature, and the one that caught my  
 20 eye right at the beginning is in the covering order  
 21 which crops up in section 5(2) as a result of the  
 22 discussion we had in the second round. This is on page  
 23 3:  
 24 "The legislature made by law makes such amendments  
 25 to any existing law."

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1 The question immediately arises: what is this  
 2 legislature? And so I looked to section 1(23) and there  
 3 isn't a definition of it. So I thought it would be, for  
 4 the sake of clarity, a good idea to say, in  
 5 section 1(23):  
 6 "legislature means the legislature established by  
 7 section 59(1)."  
 8 Bearing in mind that legislature is not the same as  
 9 a legislative assembly, the legislature is the  
 10 legislative assembly and the Queen as section 59(1)  
 11 says.  
 12 That concludes my list of nitpicks and for the sake  
 13 of good order I would like to ask you, with some  
 14 trepidation, if you have any points you came across when  
 15 reading this through or any new points that you want to  
 16 mention, so that we know what the scope of the task  
 17 before us is today.  
 18 I mean, this is in addition to the ten outstanding  
 19 points listed in the note on page 1, and I am aware of  
 20 three points in addition to those ten.  
 21 One is the appropriateness of keeping references to  
 22 Caymanian status, bearing in mind the latest immigration  
 23 law which, as I understand it, does away with Caymanian  
 24 status and simply has one category of belonging, which  
 25 is Caymanian. That is my understanding but it would be

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1 interesting to hear your view on that. We can come back  
 2 to that in a moment.  
 3 The second point is whether to keep in the  
 4 constitution, as a constitutional right, the right to  
 5 trial by jury of a person indicted before a Crown Court.  
 6 If you remember, this crops up in section 7(2)(g):  
 7 "... when charged on an indictment in the Crown  
 8 Court to have the right to trial by jury."  
 9 And I raised the question last time as to whether it  
 10 would be sensible to have that as a constitutional right  
 11 which is not required by any international treaty  
 12 obligation, bearing in mind that there may be  
 13 exceptional cases where you will want in the future to  
 14 legislate for trial by judge alone in certain  
 15 circumstances. I don't know whether you have thought  
 16 about that one or have an answer on it.  
 17 The third issue I am aware of is that I have seen  
 18 a letter from the Chief Justice raising a number of  
 19 points, some minor points and some policy questions.  
 20 But I guess we have to take a little time to look at  
 21 that when you are ready.  
 22 But other than those points, outside the list of ten  
 23 ... but over to you if you let me know if you have any  
 24 issues. You mentioned one.  
 25 MR TIBBETTS: Thank you, Mr Chairman. On page 57 of the

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1 draft of January 20, section 79 (1), sir, and I wish to  
 2 jog your memory.  
 3 THE CHAIRMAN: Yes.  
 4 MR TIBBETTS: Unfortunately His Excellency isn't here but  
 5 I think we can proceed with him being absent. As it  
 6 reads in your draft:  
 7 "The Governor may, within 60 days of receiving it,  
 8 return to the legislative assembly and it will either  
 9 (inaudible) him or her for his or her assent,  
 10 transmitting with it any amendments which he or she may  
 11 recommend and the reasons for them and the assembly  
 12 shall consider such recommendation."  
 13 My memory tells me that when we discussed this  
 14 issue, the whole idea was to fix a time period by which  
 15 the Governor shall.  
 16 Now, there is the question here of the way this is  
 17 worded it would simply replace the word "may" with  
 18 "shall", whether or not that would apply to every single  
 19 bill in having to return it, and the whole idea of this  
 20 subsection is only referring to those where any  
 21 amendments are required, and the idea was to give a time  
 22 limit 60 days by which time he shall.  
 23 So without having the wording provided, although  
 24 there was a suggested wording before now, but the point  
 25 is that as this is worded it does not accomplish the

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1 intent is what I'm saying. But I don't think the cure  
 2 is simply to replace the word "may" with "shall".  
 3 THE CHAIRMAN: No, it won't because the last thing you want,  
 4 I imagine, is to oblige the Governor within 60 days to  
 5 return every bill to you.  
 6 MR TIBBETTS: That's my point.  
 7 THE CHAIRMAN: It provides a discretion at the moment by  
 8 saying "the Governor may".  
 9 MR TIBBETTS: But when we -- if I might -- when we were  
 10 talking, we came to the agreement that 60 days is fine  
 11 as the time limit by which he shall return it. So I am  
 12 saying we need to reword this section, I believe, to  
 13 speak to those bills which will require amendment and  
 14 say that "the Governor shall return". It says "may".  
 15 MR BULGIN: If he decides earlier this within 60 days he may  
 16 return if there is (inaudible) a reason for him to this  
 17 is within 60 days.  
 18 MR TIBBETTS: I take your point, sir. I don't wish to be  
 19 rude, but I am a lay person and not a lawyer. I think  
 20 there are more lay people in the word than lawyers, and  
 21 I understand what you are saying.  
 22 MR BULGIN: What you hoping to achieve if you making it  
 23 word-specific the "shall" at the end of the sentence  
 24 (inaudible) when he decides to do so must do so within  
 25 60 days, that's all.

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1 THE CHAIRMAN: I was thinking of that. So if we took out  
 2 the words in commas, "within 60 days of receiving it",  
 3 and then at the end we put a semi-colon after  
 4 "recommendation" and put in:  
 5 "But if the Governor ..."  
 6 MR TIBBETTS: A semi-colon after "recommendation".  
 7 THE CHAIRMAN: Yes, and then it runs on:  
 8 "... but if the Governor wishes to exercise this  
 9 power, he or she must do so within 60 days of receiving  
 10 the bill."  
 11 MR TIBBETTS: "He or she shall"?  
 12 THE CHAIRMAN: You could have "and" rather than "but":  
 13 "... and if the Governor wishes to exercise this  
 14 power, he or she must do so within 60 days of receiving  
 15 the bill."  
 16 "Shall" rather than "must"? "Shall do so within 60  
 17 days of receiving the bill."  
 18 Is everyone happy with that?  
 19 MR MCLAUGHLIN: Mr Chairman, might I suggest a simpler way,  
 20 rather than the proviso? If we start that subsection by  
 21 saying, "Where the Governor wishes to return any bill to  
 22 the legislative assembly, he or she shall", and then the  
 23 rest of it is fine, rather than a proviso, which is I  
 24 think a bit cumbersome:  
 25 "... where the Governor wishes to return any bill to

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1 the legislative assembly he or she shall ..."  
 2 The attorney has suggested where the attorney  
 3 decides, rather than wishes. I don't have a problem  
 4 with that.  
 5 THE CHAIRMAN: We have to deal with the bit as it runs on:  
 6 "He or she shall within 60 days of receiving it,  
 7 return it to the assembly transmitting with it any  
 8 amendments ..."  
 9 "... any bill presented to him or her transmitting  
 10 with it any amendment which he or she may recommend and  
 11 the reasons for them ...(Reading to the words)... such  
 12 recommendation."  
 13 All right?  
 14 "Shall do so ..."  
 15 MR MCLAUGHLIN: Yes, sir. The first line should say "return  
 16 it", saying, "he or she shall do so within 60 days of  
 17 receiving it". Yes.  
 18 THE CHAIRMAN: "Transmitting with it any amendments".  
 19 Splendid. Thank heavens we have the Speaker here with  
 20 us.  
 21 MR MCLAUGHLIN: Drafting by committee is such fun.  
 22 MS MOYLE: Can you read that?  
 23 THE CHAIRMAN: What I have down is:  
 24 "Where the Governor decides to return any bill to  
 25 the legislative assembly, he or she shall do so within

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1 60 days of receiving it, transmitting with it any  
 2 amendments which he or she may recommend and the reasons  
 3 for them, and the assembly shall consider such  
 4 recommendation."  
 5 MR MCLAUGHLIN: Mr Chairman, if we might move on, if we  
 6 could talk a little bit about the Cayman Islands'  
 7 status, the Caymanian point.  
 8 I'm having a note sent to me by one of my lawyer  
 9 friends, who specialises in immigration, on this. But  
 10 having discussed it with him and having thought about it  
 11 myself, I think the easiest way to deal with this is to  
 12 put a definition in which says that Caymanian has the  
 13 meaning ascribed to it in the immigration law, or  
 14 whatever the correct (inaudible) of that. Because that  
 15 law has a saving provision, which is save persons who  
 16 were granted Caymanian status, the old (inaudible). So  
 17 I am pretty sure it will be fine. Then we can change  
 18 all references to Caymanian status throughout the  
 19 document to simply Cayman.  
 20 THE CHAIRMAN: Well, that was the conclusion we reached so,  
 21 for example, on page 82 we will change the definition of  
 22 "Caymanian" to read:  
 23 "Caymanian has the meaning defined in or ascribed to  
 24 it in the immigration laws of the Cayman Islands for the  
 25 time being in force."

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1 (inaudible) The rest of the definition as it now is  
 2 would be deleted, so that it would simply say:  
 3 "Caymanian has the meaning ascribed to it in the  
 4 immigration laws of the Cayman Islands for the time  
 5 being in force."  
 6 The definition of "Caymanian status" would be  
 7 deleted and we would do the same thing in section 29 for  
 8 the right definition.  
 9 MR TIBBETTS: Mr Chair, if you would forgive me, can you  
 10 just run that one more time/  
 11 THE CHAIRMAN: Yes, sure. On page 82, section 123, the  
 12 definition of Caymanian would be changed. All this  
 13 stuff about a person who possesses Caymanian status  
 14 which is the (Inaudible) would be deleted. Instead it  
 15 would simply say:  
 16 "Caymanian has the meaning ascribed to in the  
 17 immigration laws of the Cayman Islands for the time  
 18 being in force."  
 19 MR MCLAUGHLIN: Ascribed to it?  
 20 THE CHAIRMAN: You could say "defined".  
 21 MR MCLAUGHLIN: "Ascribed" is a nicer word.  
 22 THE CHAIRMAN: The definition underneath "Caymanian", which  
 23 is "Caymanian status", that one would be deleted  
 24 altogether.  
 25 SPEAKER: Mr Chairman, (inaudible) the entire application

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1 for the time being in force, that means at the time of  
 2 bringing the constitution --  
 3 THE CHAIRMAN: No. It means it has an ambulatory meaning,  
 4 so that "for the time being" is whenever the  
 5 constitution comes to be interpreted, after it has come  
 6 into force. "For the time being in force"; so in 2010  
 7 or 2015, it's the immigration laws in force at that  
 8 time.  
 9 MR TIBBETTS: What it does is it allows the laws to be  
 10 changed without having to change the constitution. In  
 11 other words, ten years from now, that definition may  
 12 change in the law, but the constitution will still be  
 13 valid because it will be for that law for the time being  
 14 in force. So whenever you need an interpretation,  
 15 whatever the law is at that time is how the definition  
 16 will read.  
 17 THE CHAIRMAN: That's right. So we would have to do the  
 18 same thing in section 28. In section 28 on page 30 --  
 19 MR TIBBETTS: Mr Chair, are we still under definitions?  
 20 THE CHAIRMAN: Yes. We have to do the same thing on  
 21 page 30:  
 22 "Caymanian [delete the words "or Caymanian status"]  
 23 has the meaning ascribed to it in the immigration laws  
 24 of the Cayman Islands for the time being in force."  
 25 And then to complete the job, I have made a note of

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1 all the references to Caymanian status, and if you would  
 2 like me to tell you where they are -- should I do that?  
 3 Because we need to delete all references to Caymanian  
 4 status. Shall I tell you where they are?  
 5 MR MCLAUGHLIN: No.  
 6 THE CHAIRMAN: You going to leave that to me?  
 7 MR MCLAUGHLIN: I will.  
 8 THE CHAIRMAN: I will delete all references to "Caymanian  
 9 status", so the result will be this draft constitution,  
 10 when amended in this way, will refer only to  
 11 "Caymanian", there will be no longer any references to  
 12 "Caymanian status", and the justification for doing  
 13 that, as I understand it, is the latest immigration law  
 14 provides that people who before that law had Caymanian  
 15 status become Caymanians for the future. So that the  
 16 old description "Caymanian status" is gone and it would  
 17 therefore be silly for the new constitution to refer to  
 18 a status which has been abolished by the immigration  
 19 legislation.  
 20 So if you need me to make the necessary changes  
 21 I will do that but if you would like me to run through  
 22 them I can obviously do that, or we could do that at  
 23 another time.  
 24 MR TIBBETTS: Mr Chairman, just before you go on to  
 25 something else, I just want to query something. If we

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1 could go back to 79(1), if I understood how we had it  
 2 worded prior, the reference to "presented to him or her  
 3 for his or her assent", are you deleting that?  
 4 THE CHAIRMAN: Yes.  
 5 MR TIBBETTS: Are you saying that there is no need to have  
 6 that in? I just want to make absolutely certain.  
 7 THE CHAIRMAN: Well, we could put it back in. It may be  
 8 a good thing to do that. We could say:  
 9 "Where the Governor decides to return any bill to  
 10 the legislative assembly when it is presented for his or  
 11 her assent, he or she ..."  
 12 MR TIBBETTS: I think that is more complete, sir.  
 13 THE CHAIRMAN: It is probably right to do that because  
 14 otherwise you could do it at any time. This is the  
 15 point when it is presented --  
 16 MR TIBBETTS: The trigger is when it is given to him for his  
 17 assent.  
 18 THE CHAIRMAN: When it is presented for his or her assent,  
 19 he or she shall do so within 60 days, et cetera  
 20 et cetera. Thank you very much. That is a good point.  
 21 I am sorry we missed.  
 22 I wondered if you had a view on the trial by jury  
 23 right. I know I was talking to Sam about this and he is  
 24 of a cautious nature and would prefer it not to be a  
 25 constitutional right but...

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1 MR TIBBETTS: Mr Chair, if my memory serves me, I think the  
 2 argument put forward was that in recent times there have  
 3 been trials by jury where there was apparent or  
 4 perceived or real intimidation from the persons charged,  
 5 and it was considered that on many occasions a fair  
 6 result was not had because of fear on the part of the  
 7 jurors. Is that the main argument?  
 8 MR BULGIN: (Inaudible) constitutional rights. There is an  
 9 issue of jury potential jury intimidation and the  
 10 flexibility of a state to have trials without jury as  
 11 (inaudible) the UK where you have (inaudible) it to be  
 12 problems you have (inaudible).  
 13 MR TIBBETTS: So, Mr Chair, if it were not a constitutional  
 14 provision, how then will it work? Domestic legislation  
 15 will decide on what conditions there is trial by jury or  
 16 not?  
 17 MR BULGIN: (Inaudible) defendant has the option of  
 18 (inaudible).  
 19 MR TIBBETTS: So if we had a constitutional provision it  
 20 would interfere with our law. Okay, I understand.  
 21 THE CHAIRMAN: Exactly. I mean, it's only in the text at  
 22 the moment because one or two of the other OT  
 23 constitutions have this as their constitutional right,  
 24 and I think it was simply borrowed from the Turks and  
 25 Caicos, or wherever it is, but, as Sam says, if we

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<p>1 delete it, then you have more flexibility to decide in 2 ordinary legislation which cases, and the vast majority 3 will no doubt continue to be trial by jury, but there 4 may be circumstances where you don't want that to 5 happen, where it's not a good idea.</p> <p>6 So to get that flexibility we should just simply 7 delete -- it is section 7(2)(g) on page 15. Well, 8 that's what I would suggest in order to give yourselves 9 more flexibility. We, for our part, don't mind doing 10 this because there's not a treaty obligation that has to 11 be fulfilled here; this is a matter of your discretion 12 or the discretion of your legislative body.</p> <p>13 MR TIBBETTS: Mr Chairman, there are continual complaints 14 from employers about employees having to take time off 15 to serve on juries. That's another point.</p> <p>16 THE CHAIRMAN: Well, they would be very happy then to see 17 this go, wouldn't they? Shall we delete it then? Okay, 18 we will delete it. Thank you for sorting that out. Is 19 there anything else you would like to raise apart from 20 the CJ's letter?</p> <p>21 Should we have a look at the CJ's letter because he 22 raises a number of technical points and then a big 23 policy point as far as I could see from his letter.</p> <p>24 MR MCLAUGHLIN: I thought at least, sir, we should have had 25 a moment of silence for the -- for the demise of this</p> <p style="text-align: center;">Page 21</p>	<p>1 THE CHAIRMAN: He has misunderstood that this is about 2 rights against anyone other than the Governor; not 3 rights of anyone other than Governor. So that is easy 4 to deal with, if you agree. The next point on the right 5 to life, he says:</p> <p>6 "It is advised that subsection 2(b) includes a 7 provision ...(Reading to the words)... for the carrying 8 out in a lawful manner an order of a court, eg for the 9 execution of warrant, arrest or for recovery of 10 possession of property an order of (inaudible)."</p> <p>11 I don't regard that as acceptable because the limits 12 on or the exception to the right to life are very 13 closely defined in the European Convention and they do 14 not include this one. What we are talking about here is 15 people losing their lives as a result of action taken by 16 the State and Article 2 of the ECHR does not include 17 this one; it includes only the exceptions referred to in 18 section 2 of the draft.</p> <p>19 MR MCLAUGHLIN: In any event, Mr Chairman, I believe that 20 the point is dealt with adequately in section 15(2) in 21 relation to property rights.</p> <p>22 THE CHAIRMAN: Yes.</p> <p>23 MR MCLAUGHLIN: Which deals specifically with the execution 24 of judgments on the orders of the court.</p> <p>25 THE CHAIRMAN: Right. So the next one is the right to</p> <p style="text-align: center;">Page 23</p>
<p>1 ancient (inaudible).</p> <p>2 THE CHAIRMAN: It's not dead. You can keep it.</p> <p>3 MR MCLAUGHLIN: I know when it makes no sense to fight, so.</p> <p>4 MR TIBBETTS: Where are you going to now, sir?</p> <p>5 THE CHAIRMAN: Well, I was asking whether it would be 6 courteous to look at the Chief Justice's letter, which 7 we have been sent a copy of.</p> <p>8 MR TIBBETTS: Mr Chairman, are you going to give us your 9 position on each of the comments as we go, so that we 10 can --</p> <p>11 THE CHAIRMAN: Yes. What I thought I would do is if you 12 like I will give you my take on each of these points 13 because I did study them a few days ago as soon as I 14 received this memo, if it would be helpful. Starting 15 with -- if you all have a copy of the memo, his memo 16 dated January 30, addressed to Governor, Legal and 17 Government Business, Minister of Education, 18 Attorney-General, Professor Jeffrey Jowell, and 19 I presume everyone here has seen it.</p> <p>20 MR MCLAUGHLIN: It's the same document, just a different --</p> <p>21 THE CHAIRMAN: Okay. I hope it is the same document. The 22 first point on page 1 relates to section 1(2)(c), and 23 I have put in the margin "No" because I think he has 24 completely misunderstood.</p> <p>25 MR MCLAUGHLIN: So did I, sir.</p> <p style="text-align: center;">Page 22</p>	<p>1 personal liberty, section 5(2)(e). Then he says:</p> <p>2 "Section 5(2)(e) should be expanded to recognise that 3 the right to liberty may be infringed for the purpose of 4 ensuring that a person attends for trial for a criminal 5 offence."</p> <p>6 And I thought this was probably covered by (d), "for 7 the purpose of bringing him or her before the court in 8 execution of the order of the court."</p> <p>9 MR MCLAUGHLIN: And subsection 5 and subsection 6 as well.</p> <p>10 THE CHAIRMAN: Yes, so I think that's that one. The next 11 one is section 7(2)(b).</p> <p>12 MR MCLAUGHLIN: Mr Chairman, just a very small point. If we 13 look at subsection 5(b), there is a space between the O 14 and N, which your typist --</p> <p>15 THE CHAIRMAN: A space between?</p> <p>16 MR MCLAUGHLIN: The O and the N. This is just a typo, sir.</p> <p>17 THE CHAIRMAN: I can't see where it is.</p> <p>18 MR MCLAUGHLIN: No, the word "on". There is a space between 19 the "O" and the "N" on mine.</p> <p>20 THE CHAIRMAN: Okay, I will look at the electronic version. 21 I will put in margin "check space."</p> <p>22 The next point relates to legal aid, 7(2)(d), and he 23 says:</p> <p>24 "Would the words, 'the interests of justice so 25 require' be intended to override any more permissive</p> <p style="text-align: center;">Page 24</p>

<p>1 provision in a scheme prescribed by law. If not so 2 intended, should this subclause not simply omit those 3 words?"</p> <p>4 I have put in the margin "No" in very big letters. 5 Because in the first place I don't think it does 6 override any more permissive provision, but the key test 7 in the European Convention is "where the interests of 8 justice so require". I think the right way to look at 9 this is that what you have to do in making legislation 10 with legal aid provision is do no more than what is 11 necessary in the interests of justice. But it is 12 optional. You can go further and be more generous if 13 you want to do that but the baseline is the interests of 14 justice, which is obvious.</p> <p>15 So I don't agree with him here either, actually. 16 I would be against changing anything in this delicate 17 provision.</p> <p>18 SPEAKER: I agree with you, sir. (Inaudible) is doing very 19 well.</p> <p>20 THE CHAIRMAN: The next one is section 7(2)(e), and it is 21 about: 22 "The right to examine or have examined witnesses 23 against him or her to attend as ... (Reading to the 24 words)... as witnesses against him or her." 25 This is the equality of arms as regards witnesses.</p> <p style="text-align: center;">Page 25</p>	<p>1 THE CHAIRMAN: Mr Chairman, could you all either speak 2 closer into the mike, because at this end we are hardly 3 hearing what you say? It is real difficult.</p> <p>4 MR GLIDDEN: I don't know if you plan to e-mail it or not --</p> <p>5 THE CHAIRMAN: The next point is on section 7(8) which the 6 Chief Justice mentions, and I have puzzled about this 7 for a long time and read the provision many times and 8 I have to say that I couldn't really see the doubt that 9 he is mentioning here. I mean, the point here is under 10 subsection 8, that when a person has been convicted of 11 a criminal offence, and later the conviction has been 12 quashed or he or she has been pardoned on the ground 13 that a newly disclosed fact shows there has been a 14 miscarriage of justice, it seems to me obvious that the 15 reference to a miscarriage of justice applies either to 16 quashing the conviction or a pardon. There's no doubt 17 about it. You couldn't read it in any other way. So 18 I really don't grasp the point he is making here. 19 I don't know what you think.</p> <p>20 MR BULGIN: I think what he is quering is whether -- what 21 would trigger the compensation is whether conviction has 22 been quashed or (inaudible) hand out as a result of 23 a newly disclosed fact, only in those circumstances 24 where newly disclosed fact conviction is quashed or 25 a pardon given that would trigger (inaudible).</p> <p style="text-align: center;">Page 27</p>
<p>1 He says: 2 "Existing provisions of the evidence law which allow 3 the statements ... (Reading to the words)... unless a 4 further proviso is placed in section 7(11) to say so."</p> <p>5 I put in the margin "How?" But perhaps I was rather 6 shocked to hear that a person who is on trial for 7 a criminal offence can be convicted on the basis of 8 a statement of a dead person, which cannot be checked. 9 Is this true?</p> <p>10 I was just asking, Sam, is it true that a person 11 charged with a criminal offence can be convicted on the 12 basis of the statement of a person who is dead or 13 outside the jurisdiction or uncontactable?</p> <p>14 MR BULGIN: (Inaudible).</p> <p>15 THE CHAIRMAN: That's very shocking. How can that evidence 16 be properly tested?</p> <p>17 MR BULGIN: We have (inaudible) that says that (inaudible). 18 That is the position here.</p> <p>19 THE CHAIRMAN: What did you take, Sam, under section 2, 20 subsection 2(e)? Do you think that rules that out?</p> <p>21 MR BULGIN: I agree with Chief Justice that (inaudible) 22 establish right has been recognised must be (inaudible).</p> <p>23 THE CHAIRMAN: (Inaudible) not quite sure what to do with 24 it.</p> <p>25 MR BULGIN: Do you want us to come back to --</p> <p style="text-align: center;">Page 26</p>	<p>1 THE CHAIRMAN: I see.</p> <p>2 MR BULGIN: (Inaudible).</p> <p>3 THE CHAIRMAN: I think what we could do is move the phrase 4 "on the ground that a newly disclosed fact shows that 5 there has been a miscarriage of justice", move that up 6 after the word "subsequently": 7 "... and subsequently on the ground that a newly 8 disclosed fact shows that there has been a miscarriage 9 of justice, his or her conviction has been quashed or he 10 or she has been pardoned." 11 Then it carries on with that. Do you think that 12 would solve it?</p> <p>13 MR BULGIN: As long as it remains clear that (inaudible).</p> <p>14 MR GLIDDEN: Sam, you need to turn on the mike.</p> <p>15 THE CHAIRMAN: Okay. I think that would do. And then he 16 deals with R v Sand(?)</p> <p>17 MR TIBBETTS: Mr Chairman, before you go on could you tell 18 us --</p> <p>19 THE CHAIRMAN: What I have done?</p> <p>20 MR TIBBETTS: Yes.</p> <p>21 THE CHAIRMAN: What I have done, or what I propose to do is, 22 you see after the word "subsequently" in the second line 23 of subsection 8, page 16, the phrase "his or her 24 conviction has been quashed". I would then delete the 25 comma after "quashed", and then it goes:</p> <p style="text-align: center;">Page 28</p>

<p>1 "... or he or she has been pardoned"; that whole 2 phrase, "his or her conviction had been quashed or he or 3 she has been pardoned," I would move that down to the 4 next line, after the word "justice," so that the whole 5 subsection would read like this: 6 "Where a person has by a final decision of the court 7 been convicted of a criminal offence and, subsequently, 8 on the ground that a newly disclosed fact shows that 9 there has been a miscarriage of justice, his or her 10 conviction has been quashed or he or she has been 11 pardoned, he or she shall be compensated out of public 12 funds", et cetera. 13 I think that would do. How delighted I am to 14 welcome Michael here, who has got here in record time. 15 You must have come up like a bullet. What we are doing, 16 Michael, at the moment is just going through the Chief 17 Justice's letter and we have reached the point at the 18 bottom of page 2: 19 "Consideration should be given to adding a provision 20 to the section ...(Reading to the words)... obtained 21 without a search warrant where the law requires one." 22 MR BULGIN: Mr Chairman, can you go back (inaudible). 23 THE CHAIRMAN: Okay, we will defer that one. But I am very 24 grateful because I really didn't understand it. I have 25 in the margin "(which)" and then "(how)", being not very</p> <p style="text-align: center;">Page 29</p>	<p>1 to be perfectly honest, is a concern felt very deeply by 2 the Chief Justice, at present suspended, of Gibraltar, 3 who is Derek Schofield, who I think some of you will 4 remember from his time in the Cayman Islands, and he was 5 obsessed with having it set out in the new constitution 6 of Gibraltar that the Chief Justice was the head of the 7 judiciary and all this kind of thing. 8 MR TIBBETTS: I am not suggesting anything. 9 THE CHAIRMAN: Well, this was highly controversial, 10 actually -- I am just telling you the story -- because 11 when it came to the passage of legislation in Gibraltar, 12 the President in the Court of Appeal was named as the 13 head of the judiciary, being a senior judge to the Chief 14 Justice. The CJ was very unhappy about this, and it 15 goes on and on. And these guys, you know, they do feel 16 terribly strongly about these things, but it isn't 17 actually just as straightforward as all that to say: the 18 Chief Justice is the head of the judiciary and has 19 precedence over everybody else. Other people might not 20 agree. 21 So my heart sank when I read this paragraph. 22 I thought: don't say we are going to have to get into 23 a long discussion about this. I don't know what the 24 Grand Court law says on this at the moment. Does it set 25 out basically what the position of the Chief Justice is</p> <p style="text-align: center;">Page 31</p>
<p>1 technical. 2 The next point is section 57(2) and here I think 3 things get a bit easier, at least from my point of view. 4 In section 57(2), the CJ points out that the word 5 "civil" appears in paragraph (a), which is: 6 "The DPP has power to institute and undertake 7 criminal proceedings against any person before any civil 8 court." 9 And I am happy to delete the word "civil" because he 10 thought it was ambiguous. Under the present 11 constitution the word is not there in the equivalent 12 place. 13 MR TIBBETTS: Instead of defining civil court? 14 THE CHAIRMAN: Yes, you could define it but why not take it 15 out? There's no need for it. 16 MR MCLAUGHLIN: We agree, sir. 17 THE CHAIRMAN: Okay. You have no military courts, anyway, 18 in the Cayman Islands. 19 MR TIBBETTS: Unless one might be imposed. 20 THE CHAIRMAN: Now the next one, section 95, office of Chief 21 Justice, and ... 22 MR MCLAUGHLIN: Mr Chairman, we think this is a useful 23 observation. I just wish that the Chief had proposed 24 some text so that we didn't have to start from scratch. 25 THE CHAIRMAN: Well, yes. I mean, what this reminds me of,</p> <p style="text-align: center;">Page 30</p>	<p>1 in sufficient terms? 2 MR BULGIN: Sections 4 and 6 of the Grand Court law provides 3 that (inaudible) judges, one of whom is a Chief Justice 4 who is a senior judge and has responsibility for all 5 matters of adjudication. It does not say anything more. 6 Just says senior judge has responsibilities for matters 7 of adjudication. The problem with (inaudible) is that 8 in quite a number of other jurisdictions the Chief 9 Justice is also president of the Court of Appeal and 10 that solves the problem here (inaudible) not the case. 11 In the (inaudible) Caribbean, Montserrat, Chief Justice 12 of the Eastern Caribbean (inaudible) we don't have that 13 problem (inaudible). 14 MR MCLAUGHLIN: Actually, I don't think that the issue which 15 arose in Gibraltar would arise in the Cayman Islands. 16 We have an itinerant Court of Appeal, none of them are 17 resident judges. So it really wouldn't follow logically 18 that the President of the Court of Appeal would be the 19 head of the judiciary. He is almost never there. He 20 comes in for two or three weeks, three or four times 21 a year. So just based on my experience and knowledge of 22 the jurisdiction, I don't think that this would create 23 an issue locally in the way it did in Gibraltar. I 24 would actually support it because I think it's important 25 that we resolve these issues about who is in charge of</p> <p style="text-align: center;">Page 32</p>



<p>1 the judiciary locally and deals with the administrative 2 (inaudible) and so on. 3 THE CHAIRMAN: Well if we can get hold of the relevant 4 provisions of the Grand Court perhaps we could come 5 back. I don't mind in principle if you are happy to 6 write into this section something brief which is already 7 in the Grand Court law, which elevates its status in the 8 course of the constitution. If everybody is content 9 with that, and if it's established law, then we could 10 look at that. 11 MR BULGIN: (Inaudible). 12 THE CHAIRMAN: Sorry? 13 MR BULGIN: Just draft (inaudible). 14 THE CHAIRMAN: That would be very helpful. Then we make 15 a note to come back to look at that point. 16 The remaining point covers four pages and 17 predictably it is the question of the composition of 18 judicial Legal Services Commission which we discussed at 19 some length in both the first round and the second 20 round, and this is really a matter of policy; it is not 21 for the Chief Justice to determine. He might have 22 a view. 23 The only comment I would make before asking you for 24 your view is that he is mistaken on page 4 towards the 25 bottom, in saying:</p> <p style="text-align: center;">Page 33</p>	<p>1 provide for an option but not an obligation. 2 MR TIBBETTS: To give scope. 3 THE CHAIRMAN: So I don't know what your view on this point 4 is. 5 MR MCLAUGHLIN: Well, sir, the news of what we had decided 6 travelled very swiftly and after that meeting concluded, 7 we met with the Chief Justice, the leader, (inaudible) 8 myself and Professor Jowell, and he expressed grave 9 concerns at what he thought had been proposed, although 10 he hadn't appreciated at that time that what we were 11 proposing would involve an ability of this Commission to 12 resolve itself into a disciplinary framework for the 13 purpose of advising the (inaudible). I think he was 14 quite taken aback by that. 15 We have had cause to reflect on this and I just 16 haven't had a chance to meet with Professor Jowell 17 since, although we have corresponded, and we actually 18 think that we perhaps should look again. We certainly 19 don't want to create a situation where the Chief Justice 20 and the President of the Court of Appeal's noses are out 21 of joint about the whole arrangement, and to see how 22 best we can accommodate that. 23 The chief has suggested that some of the concerns, 24 including those of the Attorney-General, might be met by 25 including on this new Commission a member of the public</p> <p style="text-align: center;">Page 35</p>
<p>1 "Presumably section 105(1)A means such persons other 2 than those currently held in high judicial office within 3 the Cayman Islands, not only the Chief Justice and 4 President of the Court of Appeal." 5 And that is not right because as drafted 6 section 105(1)A can include -- it just refers to persons 7 who hold or have held high judicial office. It does not 8 say where. You go to the definition at the end and the 9 definition at the end in section 123, of high judicial 10 office at the foot of page 82, means: 11 "The office of the judge of the court having 12 unlimited jurisdiction in civil and criminal matters 13 ...(Reading to the words)... having jurisdiction in 14 appeals in such a court." 15 That includes manifestly any of the Grand Court 16 judges, any of the Court of Appeal judges in the Cayman 17 Islands or of any other part of the Commonwealth. So 18 it's not ruled out. It is an option under the draft at 19 the moment that the Chief Justice or the President of 20 the Court of Appeal or any of the other judges of those 21 two courts could be appointed to the Judicial and Legal 22 Services Commission, if the Governor after consulting 23 the Premier and the leader of the opposition so 24 appoints. It is not ruled out, and we did this 25 deliberately, as I recall, from the second round to</p> <p style="text-align: center;">Page 34</p>	<p>1 Bar as well as a member of the private. Bar because 2 I do take his point that for us to have to go overseas 3 to find senior lawyers to be on this Commission is 4 rather defeating a big part of the exercise, which is to 5 reduce the -- or to create a model which is not 6 economical and viable. If we have to bring in foreign 7 lawyers to sit on the Commission, if we potentially have 8 to bring in senior members of the Bench to do it, 9 I think two things will happen: the Commission will not 10 meet regularly, and secondly it becomes an awfully 11 expensive exercise. 12 So what I would suggest is that once we have 13 Professor Jowell in our midst again, that the Attorney 14 and myself and everybody else who wishes to have an 15 input could sit down again and see if we can come up 16 with a model which might be a little more amenable to 17 everyone concerned. 18 THE CHAIRMAN: Okay. Well, that's fine. The programme 19 allows for that to happen and I hope Professor Jowell 20 will be able to get here tomorrow. So why don't we 21 leave it like that? If you could come back to us when 22 you -- tomorrow, if possible, but if not then the next 23 day. 24 MR MCLAUGHLIN: We will try and draft something. 25 THE CHAIRMAN: Yes.</p> <p style="text-align: center;">Page 36</p>

<p>1 Well, I think that we probably have deserved a 2 break. Shall we have a break till 12.00? 3 (12.10) 4 (A short break) 5 THE CHAIRMAN: Just to summarise, as far as the Chief 6 Justice's memo is concerned, we are going to come back 7 in due course on his point at the foot of page 2 and the 8 top of page 3 when Sam has been able to think about it 9 a bit more. We are going to come back to section 95 and 10 the CJ's wish to have some description of the office of 11 Chief Justice, and we are going to come back to his 12 major point about the composition of the Judicial and 13 Legal Services Commission, so there are three points to 14 come back to. 15 MR TIBBETTS: Just for clarity in our thought process, the 16 composition of the Commission, the 20 January draft, 17 that draft is based on our recommendations, or a mixture 18 of our recommendations and your thoughts. 19 THE CHAIRMAN: The way section 105(1) is now drafted is 20 a possible solution; a possible solution, which we 21 discussed at the second round. This is a different 22 solution to the one in the previous draft, which 23 resulted from the first draft in which the Chief Justice 24 and the President of the Court of Appeal were named as 25 members. Then we had some further discussion in the</p> <p style="text-align: center;">Page 37</p>	<p>1 Government and Professor Jowell have been able to ... 2 MR BUSH: Because I thought that when we were in Cayman, we 3 thought -- I know I did ask the question on page 7, 4 the third and clause 6 on the definition of misbehaviour 5 for magistrates and so on. 6 THE CHAIRMAN: Yes, I remember that. 7 MR BUSH: I don't know that we got to the point where we had 8 cleared it. I can't recall it, sir. 9 THE CHAIRMAN: I remember reading out some words which came 10 from the United Nations' declaration which said 11 something to the effect that misbehaviour means unfit to 12 hold office. But I don't think we agreed that we would 13 need to define "misbehaviour". I mean, it's a thing 14 that can be determined by the person or the body that 15 has to make that judgment. 16 MR BUSH: So you would leave it up to the Commission to make 17 that definition, or that determination? 18 THE CHAIRMAN: Well, it depends who has the power to form 19 a view on it. In some cases it's the Commission, in 20 some cases it's the Governor and in some cases it's the 21 Privy Council if it's the removal of a senior judge. 22 There are different references in different places, but 23 nowhere is misbehaviour defined as such. I mean you 24 asked me what I thought and the only authoritative sort 25 of international definition I could come across was one</p> <p style="text-align: center;">Page 39</p>
<p>1 second round, and we decided to do it in a rather 2 different way. Really what I was trying to reflect in 3 this draft, at least as far as (a) and (b) are 4 concerned -- because (c) is the same, there is no 5 argument about (c), the two non-legal members -- (a) and 6 (b) were concerned was my attempt to reflect what 7 I thought was the consensus that we had reached at the 8 end of the second round. However, you know, we can come 9 back to this in the next couple of days once you have 10 had a chance to re-think it on your side because it is 11 essentially -- 12 MR TIBBETTS: That's the most important thing. 13 THE CHAIRMAN: It is essentially a matter of policy, this, 14 and obviously there are financial implications, there 15 are fairness implications; one needs to make sure that 16 the rights of the people can be put on to this important 17 body. 18 MR TIBBETTS: That's fine, sir. 19 THE CHAIRMAN: Okay. Well, put that aside. During the 20 break, one or two people mentioned to me the question 21 about defining a Caymanian, and I don't know, would any 22 of you like to say something about that? 23 MR BUSH: Before we do that, Mr Chairman, have you finished 24 with the matter of the Legal Services Commission? 25 THE CHAIRMAN: No, we are going to come back to it when the</p> <p style="text-align: center;">Page 38</p>	<p>1 with some United Nations body relating to judicial 2 matters, and they define misbehaviour as being behaviour 3 which renders a person unfit to hold office, which 4 actually doesn't take you very much further. But 5 I think the sense of it is pretty clear. I mean, are 6 you arguing for a definition in the constitution? 7 MR BUSH: I thought that we might want some definition in 8 there as you are dealing with the AG, the 9 Attorney-General, the Director of Public Prosecutions or 10 magistrates. I know that further down, their inability 11 to discharge functions goes wide when it says "any other 12 cause", so that is very wide. Again, misbehaviour 13 I think is very wide, and I just thought perhaps we 14 might want to have a definition as to what misbehaviour 15 is, but I guess ... 16 MR BULGIN: I recall a discussion in Grand Cayman and we 17 made a point that it is almost impossible to have a sort 18 of prescriptive definition because it takes its meaning 19 from the set of facts and circumstances of a particular 20 case. 21 Certainly three of the cases that I am familiar with 22 that are made to the Privy Council, the judges make it 23 quite clear that it was impossible to have a sort of 24 universally accepted definition. In the case from 25 Grenada, for example, the Auditor General was removed</p> <p style="text-align: center;">Page 40</p>

1 from office for misbehaviour for simply accusing the  
 2 Prime Minister and the Finance Minister of tampering  
 3 with an audit report. In the case of the judge from  
 4 Trinidad, he was removed from office because of his  
 5 conduct in dealing with this court list when he refused  
 6 to deal with certain cases. And in Belize it was  
 7 a completely different thing.

8 But what was noticeable was that throughout the  
 9 hearing, because the lawyers were pushing for a sort of  
 10 definitive designation as to what amounts to  
 11 misbehaviour and the court makes it quite clear and made  
 12 it quite clear that it was impossible to do that,  
 13 because it is a very fluid sort of concept, and so it's  
 14 best left as to its meaning from the particular facts at  
 15 the time.

16 So whilst I understand the concern of the leader,  
 17 the truth is that misbehaviour means different things to  
 18 different people arising out of different circumstances.

19 MR BUSH: But that is exactly what I was a bit worried  
 20 about, that it would mean all things to all people; to  
 21 those people there that would be that matters, and that  
 22 was a bit my concern. But if you are satisfied with  
 23 this, then I guess I'm prepared to take your advice and  
 24 decision of the SAU. But the AG would be one of them  
 25 that would be affected by it.

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1 THE CHAIRMAN: The question, as I understand it -- Ellio,  
 2 would you like to say something because you asked me  
 3 particularly?

4 MR SOLOMON: I would like to raise -- when the issue arose  
 5 about the definition of Caymanian that was being made by  
 6 reference to immigration law. I think the particular  
 7 term (inaudible) was in force at the time being or time  
 8 being in force. I raise it and I also (inaudible)  
 9 discuss the issue with my colleagues. I think we agree  
 10 that the (inaudible) different position on the issue.  
 11 I want to stress, and I believe in large part, that we  
 12 are here talking about the constitution. I know the  
 13 definition stated (inaudible) talking about attempting  
 14 to make this constitution as Caymanian as possible.  
 15 With that now (inaudible) to be the constitution could  
 16 consistently make a reference to the law in force at the  
 17 time along with the definition of Caymanian mean  
 18 something dynamic. I know that some of the arguments  
 19 has been raised is one that (inaudible) of the  
 20 definition of Caymanian and perhaps there is some need  
 21 for it to be (inaudible).

22 I stress that I believe in large part the Caymanian  
 23 people is as we have been attempting to do all along in  
 24 the constitution by way of preamble is to one, define  
 25 who we are as a people, and (inaudible) culture, the

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1 culture and values and (inaudible) that we have in our  
 2 society.

3 With that in mind I raise the question as to why we  
 4 would take the position of simply making reference to  
 5 the law and not attempting to define it properly in the  
 6 constitution, would agree perhaps some difficulty. I  
 7 don't think we will be able perhaps to go over it much  
 8 more long-winded than we have in the first place.  
 9 (Inaudible) the constitution I believe that's what the  
 10 Caymanians would like to know. I think the argument  
 11 being raised for example in terms of the Bill of rights  
 12 is that the Bill of Rights should be in the  
 13 constitution, the argument always been because it should  
 14 not be able to be changed willy-nilly. If that's the  
 15 case I would like it to define who we are as a people.  
 16 It should also not be subject to being able to change  
 17 willy-nilly. So I guess (inaudible) why would we not  
 18 attempt to define who we are as Caymanian into the  
 19 constitution?

20 MR BRADLEY: I haven't it in front of me, but my memory of  
 21 the definition of Caymanian in the immigration law is  
 22 that it extends because it has been amended from time to  
 23 time, that is four or five times in my memory, by  
 24 amending laws, some of which made the criteria more  
 25 strict. There has always been in it the saving clause

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1 for people who previously held the status with the  
 2 result now, from memory, that the definition of  
 3 "Caymanian" is at least two pages long and unless you  
 4 have got a good lawyer with you it is practically  
 5 impossible to comprehend. And I think that to put into  
 6 a constitution a very lengthy definition may not be  
 7 inappropriate, but when that definition itself refers  
 8 itself to at least three laws of the Cayman Islands  
 9 which have since been amended or repealed, it would make  
 10 it look very odd indeed.

11 The thought that I had was that there's two points  
 12 of view; that the immigration law which has passed with  
 13 the local legislature should not be constrained so as to  
 14 prevent the local legislature in its wisdom in the  
 15 future to change further the definition of Caymanian if  
 16 it finds it necessary or prudent to do so, being  
 17 balanced against the necessity to have some fixed point  
 18 in the constitution from which you can read the  
 19 definition of Caymanian, so it can be changed to the  
 20 detriment of people being qualified to be put into those  
 21 posts. The thought that I had -- and I have not  
 22 discussed it with my colleagues -- just off the top of  
 23 my head, is that you could put in here: "Caymanian means  
 24 as defined from time to time by any local law except  
 25 that in the case of the officer specified in the

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1 constitution, named so and so and so, that the  
 2 definition of Caymanian shall be such as it was at the  
 3 time of coming into force of this constitution", which  
 4 would have the advantage that it would produce certainty  
 5 and stability as to what the situation is now, yet  
 6 enabling the local legislature to change for all other  
 7 purposes the definition of Caymanian if they so wished  
 8 in future.

9 I am sorry if I have been long-winded.

10 MR MCLAUGHLIN: Mr Chairman, I agree with almost everything  
 11 Mr Bradley says, just that I add this bit. One of the  
 12 big difficulties, and part of the reason why we have two  
 13 or three pages to define Caymanian is because of the  
 14 various means by which you can become Caymanian. There  
 15 is Caymanian as a right because you have the historical  
 16 connection to the island and because of your forebears.  
 17 There is Caymanian by grant. There are various ways  
 18 that you can get to be Caymanian. There's Caymanian as  
 19 a result of marriage. And they all have the same  
 20 entitlements. There aren't categories of Caymanians,  
 21 except that if you are not Caymanian as of right, you  
 22 may lose it if you do certain things or don't do certain  
 23 things.

24 So a definitive definition of "Caymanian" for the  
 25 purposes of the constitution is I believe next to

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1 impossible, something we thought about long and hard.  
 2 To your last point, Mr Bradley, the way that issue  
 3 has been dealt with in the current constitution and the  
 4 various amendments to it; that is to ensure that we  
 5 limit those who qualify, in particular to stand for  
 6 public office and to a lesser extent to vote, is by  
 7 creating what are called qualifications, so that in  
 8 addition to being Caymanian, you have to meet those  
 9 various qualifications.

10 If we go to the relevant provision, which I am happy  
 11 to if necessary, you will see that it is extremely  
 12 difficult; not impossible, but extremely difficult for  
 13 anyone who is not a born Caymanian in the sense that we  
 14 understand that to be able to stand for public office,  
 15 even though they are Caymanian. That is because, over  
 16 the years, they have developed this very strict  
 17 additional qualification which requires you to have  
 18 a parent or grandparent who was born in the island and  
 19 was Caymanian at birth.

20 But I don't understand Mr Solomon's issue to be with  
 21 the qualifications. I think he is expressing what many  
 22 Caymanians express; that they would like to see written  
 23 somewhere, particularly into the constitution, what  
 24 a Caymanian is. We have struggled with that for nigh on  
 25 eight years, but we have come to the conclusion that you

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1 have, that because of the way our system is set up, we  
 2 could write the two pages in, but no one would  
 3 understand it, so we wouldn't get the result that is  
 4 being sought.

5 THE CHAIRMAN: Sorry, there's just another option rather  
 6 than writing two pages. At the moment the way we left  
 7 it earlier this morning was to have a sort of ambulatory  
 8 definition, saying:

9 "Caymanian has the meaning ascribed to it in the  
 10 immigration laws of the Cayman Islands for the time  
 11 being in force."

12 An option would be to say:

13 "... ascribed to it in the immigration laws of the  
 14 Cayman Islands at the commencement of this  
 15 constitution", which would fix it so that you would then  
 16 need to go and look at the immigration law in force at  
 17 the time the constitution comes into force.

18 Now that would be a shorthand way, and you would  
 19 have to go and look somewhere else to see what the  
 20 definition was, but that would be a shorthand way of  
 21 making the definition certain at the cost, as Michael  
 22 has said, of losing the opportunity to change it in the  
 23 future.

24 MR TIBBETTS: Exactly, but that's the point. When you do it  
 25 like that, that fixes it and that's it.

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1 MR BUSH: I think that would be counterproductive.  
 2 SPEAKER: I don't know if it would be permanent (inaudible)  
 3 because you would be able to make more (inaudible) as  
 4 has been proposing to the constitution. And I would  
 5 imagine if you were going to be making changes to it  
 6 they would have significance and that's important. Then  
 7 you should be able to sell it to the Caymanian people  
 8 and say (inaudible) the definition.

9 MR MCLAUGHLIN: The great problem with that conceptually is  
 10 that you immediately set up the possibility of creating  
 11 different categories of Caymanians, ie those who meet  
 12 the definition in the constitution and those who meet  
 13 the definition in amended immigration legislation.

14 We have struggled for years, and my friend Rolston,  
 15 who is on the committee of immigration, the review  
 16 committee, came in 2001, and so was Mr Connor, in which  
 17 the overall, or one of the overriding objectives was to  
 18 avoid creating categories of Caymanians, some with some  
 19 rights and some with others. Hence the removal of this  
 20 concept of Caymanian status.

21 Now I think it would be wrong, a backward step, to  
 22 fix in stone the definition of Caymanian in the  
 23 constitution with the very real possibility that in very  
 24 short order amendments may well be made by subsequent  
 25 houses to the immigration law, and so we have another

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1 category of Caymanians over there who do not have the  
 2 same rights as those who qualify under the present  
 3 constitution. As I say, the concern about ensuring that  
 4 people who are able to stand for office and to vote is  
 5 fixed by providing qualifications, additional  
 6 qualifications in the constitution.

7 That's time-honoured, that's been done I believe  
 8 since 1972 and the present constitution does that. The  
 9 proposed constitution does that as well, and what we  
 10 need to be sure about is that we are satisfied that  
 11 those qualifications are sufficiently restrictive. But  
 12 if a person is Caymanian, a person is Caymanian.

13 I think, as I say, it would be a huge step backwards to  
 14 create an arrangement which gives the potential to have  
 15 different categories of Caymanians, in other words  
 16 second-class citizens.

17 THE CHAIRMAN: Rolston asked for -- I think it's lunchtime,  
 18 so after Rolston, we will break for lunch and after that  
 19 I think we will have to move on because we have a lot of  
 20 other things to do, but Rolston first, please.

21 MR ANGLIN: Mr Chairman, this issue arose in 2002 and at  
 22 that time, whilst all (inaudible) from then we struggled  
 23 and we wouldn't come up with a definition, I clearly  
 24 remember that, and I clearly remember coming to  
 25 Lancaster House and I clearly remember us having this

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1 exact same discussion about what happens in the future.  
 2 Unfortunately, sir, what you may not have  
 3 appreciated with this very emotive issue is the fact  
 4 that Caymanian is a legal status and not a nationality,  
 5 and we keep trying to tell people this and we keep  
 6 trying to say it, but we keep coming back to this thing  
 7 about Caymanian believing it's a nationality and it's  
 8 not; it's a legal status in which you enjoy certain  
 9 rights, privileges, in the Cayman Islands.

10 I will add to that that in the area we are currently  
 11 in, and in the current case (inaudible) district we need  
 12 to be talking about who -- we need to be talking about  
 13 ourselves as Caymanians. And so you get sometimes  
 14 inadvertently people who look and say and believe  
 15 that -- if you take a ball and you say here is the  
 16 population, use a (inaudible) here is the population you  
 17 dealing with and here is a set number of people, these  
 18 are Caymanians, we do anticipate a number of things, one  
 19 of which is human behaviour. And so a Caymanian goes  
 20 off and does one(?) in terms of behaviour that creates  
 21 a human being, who for all intents and purposes all of  
 22 us (inaudible) consider Caymanian, but because it was  
 23 not anticipated that this would happen, the constitution  
 24 bars that person and (inaudible). We then as a  
 25 (inaudible) assembly have to go create a law and create

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1 a person that has a very different status in the  
 2 country, legal status, because when we talking about  
 3 legal status it was not anticipated by the constitution  
 4 perhaps the middle ground that could work and then would  
 5 allow all people to enjoy a legal and equal standing,  
 6 would be if we crystallised what exists today but if we  
 7 add at the very end the saving provision that is similar  
 8 in code and language which we currently have that will  
 9 allow us to ensure that anyone who in future -- future  
 10 legislators, and therefore future society in Cayman,  
 11 decides should enjoy that legal status, could also  
 12 conform on them by way of legislation, and that would  
 13 then automatically have them in the same provision in  
 14 the constitution. That could very well be a concept.

15 In other words -- I see the Honourable Member looks  
 16 puzzled. In other words what we have, you have  
 17 crystallised the one-liner(?) that picks the definition  
 18 into the future, could still be typed on at the very end  
 19 so that no one, no definition, no person, would get left  
 20 behind, and so anyone that still meets that definition  
 21 would still be a Caymanian.

22 MR TIBBETTS: You mean for the time being in force?  
 23 MR ANGLIN: Right. So in other words, you could attempt to  
 24 define -- and still have that provision.

25 MR MCLAUGHLIN: Mr Chairman, the bit that's puzzling me is

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1 -- because I don't disagree, but the bit that's puzzling  
 2 me is this. If we define "Caymanian" as we propose,  
 3 that is it has the meaning ascribed to it in the  
 4 immigration laws of the Cayman Islands as are in force  
 5 from time to time, or for the time being, or whatever  
 6 the language is, that I believe would meet precisely  
 7 what Rolston is proposing, because I know he and I -- or  
 8 I lead him on this point, I lead him on it for at least  
 9 eight years, so ... I think we just need to talk  
 10 a little bit amongst ourselves to make sure ...

11 THE CHAIRMAN: Let's do that. I think we have to break  
 12 because we don't want to lose lunch. But actually  
 13 I have two pieces of papers circulate to you over lunch.  
 14 Well, we will do it now so that you can consider them  
 15 over lunch.

16 One is to do with section 31(3), and the other is to  
 17 do with public debt. So could you hand them round?  
 18 Because after lunch I really would like to try and look  
 19 at some of the ten outstanding points, and I am  
 20 confident that with goodwill and co-operation we can  
 21 solve some of them today and make the Minister very  
 22 happy when we can tell her tomorrow morning that we have  
 23 been working very hard and we have knocked off some  
 24 points, or at least had a good go at them. So on two of  
 25 them we have got some language which we are circulating

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1 now.

2 When will we come back? 1.30. Yes. Lunch is

3 downstairs in the State Dining Room.

4 (1.40 pm)

5 (The short adjournment)

6 (1.50 pm)

7 THE CHAIRMAN: Ladies and gentlemen, I think we should

8 resume. There is one question I just wanted to mention

9 of procedure. Can we have had a message from the

10 Governor's office that the Human Rights Committee have

11 produced a paper. You may know about this paper.

12 Apparently it is 27 pages long, and they have asked that

13 it be circulated to everybody before the discussion of

14 Bill of Rights which will be on Thursday morning to

15 allow Sarah Collins to take part.

16 So if you agree, what we will do is to try and get a

17 copy of this from the FCO, and then it can be copied

18 here and then circulated to everybody in the course of

19 tomorrow. I don't know what it says but one can imagine

20 that they are putting their arguments.

21 MR TIBBETTS: You don't have a copy?

22 THE CHAIRMAN: No. It is either that or Sarah Collins

23 brings it with her and it is copied and circulated on

24 Thursday morning, but no one having a chance to read it.

25 MR TIBBETTS: It was e-mailed to some of us last night, so

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1 we could give you a hard copy to copy if you want. It

2 is being copied now.

3 THE CHAIRMAN: That's great. Before we close this afternoon

4 somebody could do it.

5 Now what I would like to do this afternoon, without

6 fail, is to at least touch upon each of the 10

7 outstanding points, and in some cases I mean really only

8 touch upon and in some cases I mean to try and go a bit

9 further and try and solve some of them, or go as far as

10 we can to solve some of them.

11 Before we broke we circulated two bits of paper, one

12 of them related to section 31(3), to the Governor's

13 functions, and the other one to do with public debt and

14 perhaps we could start by looking at those papers.

15 Can we start by looking at the one to do with public

16 debt. On this piece of paper is the original -- at the

17 top is the original Cayman draft with at the end in

18 square brackets three lines suggested, it seemed to me

19 almost as an afterthought by Minister Clifford(?) at the

20 end of the second round. At the bottom of the page is

21 a version with some amendments in bold, which result

22 from discussions that Damian Green had last week in

23 Cayman.

24 The only point of drafting I would mention is that

25 where it says, "and agreed with the Foreign and

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1 Commonwealth Office in terms of constitutional

2 drafting", that really needs to say "with the Secretary

3 of State". It means the same thing.

4 I wondered what you thought of these changes.

5 I mean, there are two key points, and it doesn't seem

6 to me that the points in 1B and C are really all that

7 significant but the key changes would be, first, that

8 there would not be a specified percentage in terms of

9 the constitution, there will be a percentage of

10 government revenue set out and agreed with the Secretary

11 of State, which could vary year by year. And the second

12 main point is that the words in square brackets at the

13 end of subsection (3), which were added at the end of

14 the second round by Minister Clifford, would not be

15 included because they are an extension of normal

16 government revenue and public and private partnership.

17 MR TIBBETTS: We were warned about that, Mr Chair, prior to

18 arriving here.

19 THE CHAIRMAN: So I don't know what you think about amending

20 it in the way which is suggested on this piece of paper.

21 MR MCLAUGHLIN: I think it's very good, sir.

22 THE CHAIRMAN: Good. So can we go with that?

23 MR BUSH: Mr Chairman, can you just without (inaudible) and

24 explain how you have your draft here? What is going to

25 be the position once this comes into play?

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1 THE CHAIRMAN: What will be the position, sorry?

2 MR BUSH: For the whole clause or section of the

3 constitution, how is it going to operate?

4 THE CHAIRMAN: Well, as I understand it, the way it would

5 operate is that there would not be stated in the

6 constitution a particular percentage of 10 per cent or

7 any other percentage of the maximum public debt per

8 financial year, and instead there would be a percentage

9 that would be set out in law and agreed with the

10 Secretary of State. I mean, one would obviously have to

11 have agreed with the Secretary of State what that

12 percentage should be and then that would be prescribed

13 in law.

14 Now that figure might remain the same for several

15 financial years or it might vary up or down. The reason

16 behind our suggesting this change is that all this comes

17 from the UK government borrowing guidelines, which we

18 regard as very important, and it is in the end

19 a potential contingent liability for the UK; not a legal

20 contingent liability but a political or moral one. If

21 the borrowing of the Cayman Islands is so great that you

22 can't pay for it and you go bust, then morally and

23 politically the UK would be looked to, to help out. So

24 that's where our interest lies. We don't think it wise

25 to have a stated percentage of 10 per cent inscribed in

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1 the constitution which can't be varied from time to  
 2 time. That's the thinking. Do I have that right?  
 3 MR TIBBETTS: If you are through, Mr Chair, just in  
 4 subsection 3, I just want to make sure that I am  
 5 understanding what it says very clearly:  
 6 "For the purposes of this section, 'government  
 7 borrowing' means borrowing in the name of the government  
 8 regardless of whether payments are made directly by the  
 9 government or by a public or governmental body including  
 10 a statutory body ..."  
 11 Now the key operative words here for me are "means  
 12 borrowing in the name of the government". Okay, so we  
 13 have a Cayman Islands Airports Authority, and they are  
 14 doing an expansion programme and they engage in  
 15 borrowings in the name of the Cayman Islands Airports  
 16 Authority, and they are making the payments. Is the  
 17 government -- is that amount included in this?  
 18 MR BRADLEY: Do you think it should be?  
 19 MR TIBBETTS: No, I am making sure that it's not, because if  
 20 I might just explain to you, from time to time this  
 21 happens, and in some instances there is a government  
 22 guarantee, and in some instances the authorities are  
 23 able to borrow on the strength of their own balance  
 24 sheet.  
 25 So I am simply saying that if the authority borrows

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1 the money while that authority is owned by the  
 2 government, it is not in the name of the government, so  
 3 it should not be in. I am wanting to make sure that  
 4 this is not saying that.  
 5 MR BRADLEY: So it's only when government gives a guarantee  
 6 that it would be caught.  
 7 MR TIBBETTS: But the way our law also reads, our domestic  
 8 legislation on the part of management and finance law,  
 9 whenever there is a government guarantee, depending on  
 10 the risk factor as is understood by -- what is that  
 11 terminology, those international principles? The GAPP  
 12 thing, GAAP or whatever -- the total amount of that  
 13 guarantee is not necessarily considered by the  
 14 government as a part of its public debt.  
 15 It is weighted. My good friend is coaching as we go  
 16 along. It is weighted to the point where it is equated  
 17 to the risk factor, and I mean that's how we have been  
 18 operating forever. So I am sure within the borrowing  
 19 guidelines that is a normal practice, if you understand  
 20 what I'm saying. All I'm wanting to ensure is that "in  
 21 the name of government" means clearly name of government  
 22 and not the fact that it's a government-owned entity is  
 23 all I'm saying.  
 24 MR BRADLEY: That is what I was asking.  
 25 THE CHAIRMAN: Well, we are not suggesting changing the

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1 phrase "in the name of government".  
 2 MR ANGLIN: (Inaudible) Mr Chairman, just to say that that  
 3 phrase is taken directly off the law and that is what  
 4 absolutely it comes to. (Inaudible) all of the items  
 5 that are (inaudible) is agreed on et cetera. So it is  
 6 always (inaudible).  
 7 MR BUSH: Mr Chairman, I hear these things buzzing around  
 8 but any country has to be concerned about the amount of  
 9 public debt we have, and I was never satisfied with the  
 10 law. And it's one of those things I had to live with,  
 11 and perhaps I still do, but it doesn't stop me from  
 12 voicing my concern that we can get ourselves in a debt  
 13 position just because the law says we can do so and  
 14 government go and do so, and at the end of the day we  
 15 put ourselves in jeopardy by doing so.  
 16 I want to put that on record because we referred to  
 17 the law. As I say, I was never satisfied with the  
 18 entire law. There are things, talking about the public  
 19 management finance law, that we have to look at in that  
 20 law from my standpoint as opposition.  
 21 MR TIBBETTS: Mr Chairman, not to belabour the point, but  
 22 I think one of the things that we continually need to  
 23 appreciate when we are looking at this, whatever that  
 24 fixed figure is, which will be determined by law, as  
 25 outlined in your proposed draft, is I'm not suggesting

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1 no attention be paid to what the total debt is, but the  
 2 most important factor in looking at it and trying to  
 3 create any creation, whether it's sustainable or not, is  
 4 based on the government's revenue and what the payback  
 5 amounts are, is its ability to service the debt. It's  
 6 not just necessarily looking at the total global figure  
 7 and that seeming to be a huge amount. It is more  
 8 important about the government's ability to service  
 9 whatever that debt is.  
 10 MR BUSH: And that is true, Mr Chairman, but that's where  
 11 the problem comes in because the government will tell  
 12 you: this is sustainable. What they are not taking into  
 13 consideration is when times get rough and they will have  
 14 to come to the people because the revenue is not what  
 15 you had projected, and I think you must have been around  
 16 government long enough, Mr Chairman. (Pause)  
 17 Sorry, Mr Chairman, I was saying that I don't think  
 18 I need to tell you because you must have been around  
 19 government long enough to know that governments will  
 20 say: this is sustainable, but when times get rough,  
 21 that's the crunch and the revenues are not being met and  
 22 then they got to come to burden the people to be able to  
 23 pay. They have to increase the bill at the airport, the  
 24 departure fees, which may impact something else.  
 25 These are all the concerns I have and, sir, while

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1 the UK will say what you saying here, I know the UK are  
 2 not going to pay the bill, because we have been told  
 3 that. They are not going to pay the bill for Cayman  
 4 Islands (inaudible) for anything. Their concern is what  
 5 you have said. But the concern that will have to be,  
 6 how much will it impact the people when the revenues  
 7 cannot be met and therefore that is why we all have to  
 8 be most careful.

9 MR MCLAUGHLIN: Mr Chairman, I follow all that but might  
 10 I ask Mr Bush what he is suggesting?

11 MR BUSH: Mr Chairman, what I am suggesting is that you have  
 12 to be careful what you borrow, and if that means putting  
 13 a limit, then we have to put a limit, or we should  
 14 consider it. I am all in favour of that. I was part of  
 15 the discussions when the United Kingdom -- I mean, the  
 16 White Paper brought this to the forefront about the  
 17 10 per cent, and there were people at home who, in my  
 18 group in my party, were not in favour of it. But when  
 19 you reach the kind of positioning the Cayman position  
 20 is, we have to be concerned. And as I said, the UK can  
 21 say: well, this is what we going to look at. The UK is  
 22 not going to pay back any bills or any loans for us.  
 23 They can't, they have got their own problems, and it's  
 24 going to be us, and when we cannot meet the revenue,  
 25 when the revenue is not there, then they are coming to

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1 the people. It might not be before a general election,  
 2 it may be afterwards.

3 So perhaps the government will find a position more  
 4 than what they say.

5 THE CHAIRMAN: Well, are we --

6 MR MCLAUGHLIN: Mr Chairman, for our part we are happy with  
 7 this.

8 THE CHAIRMAN: I hear everything you say, McKeever, but are  
 9 you happy with this text as it is, bearing in mind  
 10 everything you have said, that in the operation one has  
 11 to be very careful? In the operation of it, you have to  
 12 be very careful, obviously. Are you content with this  
 13 text?

14 MR BUSH: Mr Chairman, I think I have given the warning that  
 15 I need to give.

16 THE CHAIRMAN: All right. Good. Well, that will be the  
 17 text then for section 113.

18 Could we turn to section 31(3). I am taking these  
 19 out of order but there's method in my madness, I assure  
 20 you.

21 This is the other piece of paper. Now this is  
 22 slightly different wording from the wording proposed by  
 23 the Cayman Islands delegation at the second round, and  
 24 I just like to say the following about it.

25 First of all, it would be unprecedented to state in

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1 an overseas territory constitution that the government  
 2 must act in the best interests of the territory. On the  
 3 other hand, it does not seem to me an unreasonable thing  
 4 to say, provided that the wording is such as to fit with  
 5 the reasoning of the House of Lords in the case that  
 6 Professor Jowell reminded us of in the second round, the  
 7 Banku(?) case which was decided some months ago, which  
 8 made it clear that where there is a conflict of  
 9 interest, the interests of the United Kingdom can  
 10 prevail. Now we are not actually using words such as  
 11 "prevail", "be superior to", or anything like that. So  
 12 what we have done is to say:

13 "Shall endeavour to act in the best interests of the  
 14 Cayman Islands, so far as in his or her judgment such  
 15 interests are consistent with the interests of the  
 16 United Kingdom."

17 The United Kingdom rather than Her Majesty because,  
 18 as I explained last time, referring to Her Majesty is  
 19 ambiguous; it could be Her Majesty of the Cayman  
 20 Islands, it could be Her Majesty of the United Kingdom.  
 21 And the other point that we added here is:

22 "Shall endeavour to promote good governance ..."

23 And this is very important to us and to our Minister  
 24 to have somewhere in the constitution a reference to  
 25 good governance. Now, remember this would be an

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1 obligation on the Governor. All Governors are told when  
 2 they are sent to an overseas territory that their  
 3 principal duty is to promote good governance in the  
 4 territory. So this, I hope, would be uncontroversial,  
 5 and the words "endeavour to" and "in his or her  
 6 judgment" are put there deliberately, not to make this  
 7 weaker but to reduce the risk of a whole series of  
 8 judicial reviews on the actions of the Governor which  
 9 would serve no useful purpose.

10 I am serious about this because if we put in  
 11 obligations on the Governor which are in some cases  
 12 difficult to carry out or to ensure, and they are then  
 13 judicially reviewed, what one is doing is handing over  
 14 to the judges determination of whether the Governor is  
 15 doing his job or not, and we are not prepared to do  
 16 that.

17 So this language here is not exactly as you would  
 18 like it but it is, as far as we can see, and we have  
 19 thought about this very carefully, something that we  
 20 could accept and it would be unique in any overseas  
 21 territory constitution to state even that a Governor  
 22 acts in the best interests of the territory, which  
 23 I think has to be balanced but is in principle a good  
 24 thing.

25 I don't know what you think about the language.

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1 MR MCLAUGHLIN: Well, Mr Chairman, I have only just seen  
 2 this but I am fairly certain that our side would be  
 3 relatively happy with the inclusion of the provision  
 4 that the Governor shall endeavour to perform good  
 5 governance. I don't think we would have any difficulty  
 6 with that at all.  
 7 I am a bit disappointed though that in your effort  
 8 to achieve the result of not subjecting or unduly  
 9 subjecting the Governor's actions to a judicial review,  
 10 you have injected into this provision a degree of  
 11 subjectivity which I think fundamentally weakens what we  
 12 are trying to achieve. Because if it is simply a matter  
 13 for the Governor in his judgment to decide whether or  
 14 not the interests of the Cayman Islands are consistent  
 15 with the interests of the United Kingdom, I'm not sure  
 16 how much further we are actually taking the matter. It  
 17 would, I believe, be far better if there were some  
 18 objective standard against this work to be measured.  
 19 THE CHAIRMAN: You see, if you don't have those words, if  
 20 there isn't some sort of subjective judgment that  
 21 somebody performs, then it is for the court to weigh it  
 22 up, if there's a challenge and it goes before a court.  
 23 Whilst the action of the Governor in that particular  
 24 matter where the Governor prefers the interest of the  
 25 United Kingdom, was that objectively speaking, in the

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1 view of the court, consistent with the interests of the  
 2 United Kingdom and therefore the overriding interests of  
 3 the Cayman Islands?  
 4 Now that's a very difficult thing for a court to do  
 5 and we don't think it's right that a court should decide  
 6 that sort of thing. It is a matter of political  
 7 judgment whether, in weighing the balance between the  
 8 interests of the territory and the interests of the UK  
 9 as the administering state, which should prevail.  
 10 Actually, the House of Lords' case that was decided  
 11 a couple of months ago was not particularly on this  
 12 issue; it was to do with an order in council being made  
 13 for a territory by the Queen, advised by UK Ministers.  
 14 And the House of Lords confirmed that if there  
 15 a conflict between the interests of the territory and  
 16 the interests of the UK, then the interests of the UK  
 17 may be preferred, but of course the Queen doesn't decide  
 18 to make an order in house herself. She is advised on it  
 19 by her Ministers who make that judgment, that political  
 20 judgment.  
 21 So if one is trying to express, in a new, novel type  
 22 of constitution a provision of principle, somewhere one  
 23 has to say who can make that political judgment, and  
 24 that is why we put those words in. I think they are  
 25 crucial.

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1 MR TIBBETTS: "In his or her judgment"?"  
 2 THE CHAIRMAN: Yes.  
 3 MR MCLAUGHLIN: Sir, I hear what you say, but it does  
 4 fundamentally weaken the provision as far as  
 5 consideration of the interests of the Cayman Islands are  
 6 concerned. I give you that it goes further than what we  
 7 have now, which is nothing, but it is less than  
 8 satisfactory, I think, from my standpoint.  
 9 MR TIBBETTS: Mr Chair, this is going to be your advice to  
 10 the Minister?  
 11 THE CHAIRMAN: Well, my advice to the Minister is that this  
 12 wording would be acceptable. We have not considered the  
 13 alternative of dropping those words, but I fear our  
 14 advice would be that these words are important.  
 15 MR MCLAUGHLIN: But, sir, could I attempt to preserve the  
 16 position by saying: could you give us the evening to  
 17 reflect on it?  
 18 THE CHAIRMAN: Yes, that's fine.  
 19 MR TIBBETTS: And if necessary, sir, possibly to lean on the  
 20 Minister to see if she would allow it to be taken out.  
 21 THE CHAIRMAN: Well, leave us to think about it further as  
 22 well. I mean, I do hear what you say.  
 23 MR TIBBETTS: Just to let you know, if that's out, we are  
 24 happy, but we believe, sir, that understanding what you  
 25 need to preserve, that even with that being out, you

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1 would still be able to do so, and you would not have a  
 2 myriad of judicial reviews. Because usually the  
 3 Governor's judgment is such that it is not very often  
 4 you have a lot of questions.  
 5 THE CHAIRMAN: Well, okay, so let's be clear. Your position  
 6 is that this language would be acceptable without the  
 7 words, "in his or her judgment", that is your position  
 8 at the moment. I think it's helpful and encouraging  
 9 that you are happy to accept the reference to good  
 10 governance here, which I think is important here, and  
 11 I think our Minister would regard as important. I know  
 12 she would.  
 13 MR TIBBETTS: Hence, sir, we consider the fact that we are  
 14 quite happy to have that, to satisfy that end of the  
 15 equation, that you would allow us a little satisfaction  
 16 at our end.  
 17 THE CHAIRMAN: Very nicely put.  
 18 MR MCLAUGHLIN: The Leader is far more charming than I, sir.  
 19 THE CHAIRMAN: What I would like to look at next is this  
 20 difficult question of public officers resigning and  
 21 standing for election, and it is section 62(1)(b).  
 22 I have read the letter from the Civil Servants  
 23 Association, which seem to me to make a lot of good  
 24 points. I wonder where you are coming from on this now  
 25 collectively. I know that there was a disagreement at

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1 the second round. Perhaps you could update us as to  
 2 what you all think about it.  
 3 MR MCLAUGHLIN: Sir, we didn't have the benefit of the  
 4 letter when we had our discussions yesterday afternoon,  
 5 although we knew that it was coming, and I am not sure  
 6 now where the opposition are in their thinking. But our  
 7 position is the same as it was at the start, because we  
 8 had these representations made to us, though not in  
 9 letter form, in the constitutional discussions. So we  
 10 entirely see and hear what the civil servants are  
 11 saying, that this is not really a constitutional issue,  
 12 that it is an employment issue, it is a matter, if it is  
 13 to be dealt with, or that should be dealt with either  
 14 through the provisions of the public management, the  
 15 public service management law or the various  
 16 regulations, and so forth, which govern their employment  
 17 within the civil service.  
 18 MR TIBBETTS: If I might just add, Mr Chair, as I understand  
 19 it, none of the other constitutions in the overseas  
 20 territories, old or new, contain such a provision, and  
 21 at the risk of my good friend misunderstanding me, but  
 22 I will run that risk, I thought it curious and strange  
 23 for your side to be the ones who brought the issue up  
 24 first.  
 25 THE CHAIRMAN: Right, thank you.

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1 I did take the chance to meet with the civil service  
 2 management council and they did put their case  
 3 forcefully. Mind you, I don't think that anyone is  
 4 stopping anyone from running, but this wouldn't stop  
 5 anybody from running. It just sets a parameter that  
 6 they must abide by, and that can be done in the  
 7 management -- in their contracts, their hiring contracts  
 8 and in law.  
 9 What that would give rise to, though, is politicians  
 10 getting up and saying: see this, a plum (inaudible)  
 11 issue, I am going to change that because A, B, C, D, and  
 12 so it makes it subjective to all those kind of politics.  
 13 But if we can live with the constitution saying  
 14 something must be done, if we can live with it in the  
 15 law, they will now say then: I am satisfied because the  
 16 constitution says that something must be done.  
 17 MR TIBBETTS: Mr Chairman, I would just ask you to, if you  
 18 can, explain to me why, throughout the other  
 19 territories -- you meaning the UK, not you personally --  
 20 the UK did not find issue with this in any one of the  
 21 constitutional reviews to the point where it was brought  
 22 up and asked to be included and why single out the  
 23 Cayman Islands?  
 24 THE CHAIRMAN: Well, I think the answer is simple, that only  
 25 in the Cayman Islands was there a commission of inquiry

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1 MR BUSH: Mr Chairman, firstly, let me say that the clause  
 2 is not one that the opposition put there. It is one  
 3 that the Commission of Inquiry found necessary, and  
 4 sadly they have to find it so. In my 24/25 years,  
 5 whatever it is, of service, I have never asked a civil  
 6 servant to do anything that he ought not to do. I do  
 7 not believe that the whole civil service subscribe to  
 8 Clifford's backstabbing(?). They would not disrespect  
 9 the honour and uprightness of the civil service, no  
 10 matter how much they are prevailed upon by politicians  
 11 who seek to be at an advantage over the Minister.  
 12 As I said in Cayman, and as I said to the management  
 13 council because I took the opportunity to meet with the  
 14 management council, something needs to be done and the  
 15 constitution can and should at least say that it would  
 16 be done in law or hiring contracts, et cetera.  
 17 While we don't want to rule out anyone who wants to  
 18 stand, and a provision here will not rule anyone out, so  
 19 too, Mr Chairman, must we ensure that such a powerful  
 20 body do not have the ability to do what was done and can  
 21 be done again. So I believe that the constitution  
 22 should, as I say, should say at least that it would be  
 23 done in law, hiring contracts, et cetera, and perhaps,  
 24 Mr Chairman, not in this section but in another area of  
 25 the constitution.

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1 on this very point. However, having read the paper and  
 2 the letter from the Civil Service Association President,  
 3 it seemed to me that he accepts, the Association  
 4 accepts, that there do need to be some rules regulating  
 5 the transition. What they object to, however, is the  
 6 hiatus period being inscribed into the constitution and  
 7 that made me jot down some possible words that we can  
 8 think about perhaps. I mean, if you like I will read  
 9 them out and see whether you think --  
 10 MR TIBBETTS: We have heard everything else. We may as well  
 11 hear that.  
 12 THE CHAIRMAN: 62(1)(b) would end, would say only "holds or  
 13 is acting in any public office". All the words in  
 14 square brackets would come out. All the words within  
 15 the square brackets would be deleted.  
 16 Then, this is the thought I had, a new subsection 3  
 17 in this section 62, a new subsection 3 reading something  
 18 like this:  
 19 "Rules governing the transition between a person  
 20 ceasing to be a public officer and standing as  
 21 a candidate for election to the Legislative Assembly,  
 22 and in particular restricting the use of information  
 23 required as a public officer, shall be prescribed in  
 24 a law or in contractual terms applicable to such  
 25 persons."

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<p>1 So the idea is that the constitution would not 2 prohibit somebody who has been a public officer from 3 standing for election -- it would not be a hiatus period 4 but there would be an obligation in a separate 5 subsection that there must be rules regulating the 6 transition and those rules must either be set out in law 7 or in contractual terms applicable to people who find 8 themselves in that position.</p> <p>9 Now that, I hope, will go some way or all the way to 10 meeting the leader of the opposition's concerns that the 11 constitution should actually say something about this. 12 As the commission of inquiry found, you know, there 13 needs to be something done. As I understand it from 14 reading Mr Watford's letter, they accept that there 15 needs to be something to cover the transition, and it is 16 something that needs to be done, but not, they argue, by 17 providing a constitutional bar to stand for 12 months. 18 That is the wrong approach. So this is a different 19 approach and if you find it helpful, we can get it typed 20 up and we could look at that.</p> <p>21 MR MCLAUGHLIN: I think we could find that helpful, sir, but 22 I still question the need for there to be any 23 constitutional provision. All of this can and could 24 have been dealt with quite some time ago, either by 25 dealing with the regulations governing (inaudible),</p> <p style="text-align: center;">Page 73</p>	<p>1 everyone can live with. So we will get it typed up and 2 then we can study it.</p> <p>3 MR TIBBETTS: Yes, sir.</p> <p>4 MR BRADLEY: Could I just have a brief word? I had a moment 5 of quiet reflection and the thing that seems to be 6 forgotten is that when it states here "12 months 7 immediately preceding the date of an election", it goes 8 on the (inaudible) presumption that everybody knows when 9 the election is going to be, but under the constitution, 10 there is a possibility of holding a snap election.</p> <p>11 So this gentlemen here could be a public servant, he 12 could have resigned in April last year in anticipation 13 that the election would be in May this year. The Leader 14 of Government Business in his wisdom could recommend to 15 the Governor to have a snap election next month, and the 16 person who is a civil servant, who had retired properly 17 under this provision, in anticipation of being allowed 18 to stand, could find himself disqualified. And having 19 thought about it, I think that the basic formula which 20 was suggested by the Commissioner of a fixed period of 21 12 months doesn't really work --</p> <p>22 MR TIBBETTS: We brought it up --</p> <p>23 MR BRADLEY: -- when an election can take place like that.</p> <p>24 THE CHAIRMAN: I think we are all moving in the direction of 25 deleting the words in square brackets, and that's</p> <p style="text-align: center;">Page 75</p>
<p>1 whichever goes first, or by (inaudible) public 2 management, public service management as well. It does 3 not need a constitutional provision to be able to do 4 that.</p> <p>5 MR TIBBETTS: Mr Chairman, if you read that man's -- what 6 was his name? -- Tucker, if you read his whole 7 synopsis, he goes in a meandering way to speak about an 8 arrangement with the constitution and he goes on to talk 9 about something else.</p> <p>10 So all I'm saying is that if you read the entire 11 thing, there was no fixation on where it should be and 12 the real truth of the matter is while I understand what 13 people's thoughts are, and I genuinely try to be as 14 objective as I can in understanding that, it is 15 unprecedented for there to be a constitutional 16 arrangement of this nature. It is totally 17 unprecedented, and I am not suggesting there should not 18 be what you are suggesting, generally speaking, but at 19 the level of a constitution.</p> <p>20 THE CHAIRMAN: Well, it is not an arrangement, what I'm 21 suggesting. It is not an arrangement, it is not 22 a prohibition, it is not a ... All it is is 23 a recognition.</p> <p>24 MR TIBBETTS: I understand.</p> <p>25 THE CHAIRMAN: And I am trying to find a solution here that</p> <p style="text-align: center;">Page 74</p>	<p>1 something, and then we will get this language which I 2 have suggested as a new subsection 3 and have a look at 3 it and I hope we can resolve this today. I think it is 4 a particular point which we can settle.</p> <p>5 Now, what about the vexed and ancient question of 6 term limits for Premier? I remember the heat that this 7 generated in 2002, downstairs, and a lot of heat was 8 generated about this but it is a very unusual provision. 9 Do you want to speak on the question of the term limits 10 for the premier?</p> <p>11 MR BUSH: Term limits? Mr Chairman, I don't know why 12 I should speak on it. I had a (inaudible) saying what 13 a good thing it is. Perhaps they can continue to tell 14 us how good it is.</p> <p>15 MR MCLAUGHLIN: Mr Chairman, I don't believe you need us to 16 rehearse those arguments. I take it the question really 17 is whether or not the opposition feels quite as strongly 18 now as they once did that they want no part of that 19 arrangement.</p> <p>20 MR TIBBETTS: Mr Chair, if I might just add, and I just want 21 to say this, that one of the main reasons for the 22 government's position being what it has been is that 23 during both exercises on our part, both as opposition in 24 2001 and 2002, and as the government since 2005, and 25 I speak from personal experiences in our public</p> <p style="text-align: center;">Page 76</p>

1 discussions, there were many, many representations which  
 2 agreed with the term limit provisions from the public.  
 3 I am not even suggesting that all of those  
 4 representations were based on sheer logic. I'm not even  
 5 suggesting that. But every time the matter was brought  
 6 up and we asked for those present, after whatever the  
 7 discussion were, to give a show of hands if they prefer  
 8 the term limit provision or not, the vast majority of  
 9 those people present always agreed with the provision to  
 10 be included. I am just stating that as a fact from my  
 11 own personal experiences.  
 12 So even though we sit and logically go through the  
 13 arguments, it is not only difficult but it is impossible  
 14 for us to disregard the exercise itself, and that is  
 15 where we find the position to be like it is. And again,  
 16 because we are with the spirit of co-operation and  
 17 willingness throughout the table, I am presuming, is why  
 18 I am saying what I am saying, I just don't know from the  
 19 public's standpoint how they would receive a new  
 20 constitution without that provision. I just want to  
 21 make that point.  
 22 THE CHAIRMAN: Right. Well, I mean, it was one that you  
 23 were very close to conceding in the second round and  
 24 tied to the point we have just discussed, we are now  
 25 (inaudible).

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1 be that if there were a constitutional arrangement like  
 2 this, which if and whenever that were to occur within  
 3 any party or group and the constitutional arrangement  
 4 was known, which it would be known, no one but no one  
 5 would put their party or their group in such  
 6 a precarious position so as not to have any succession  
 7 planning whatsoever.  
 8 The only way that would occur in my view is if it is  
 9 purposely done to seek reversal of the provision. If  
 10 I were involved, and I were a part of that and that were  
 11 to happen that's how it would happen. It wouldn't  
 12 happen perchance, in my view. So the merits of it being  
 13 in the constitution aside, I am just saying you to, sir,  
 14 and I respect your thought, I just don't see that  
 15 happening under any circumstance that is normal unless  
 16 there was a real high level of lack of thinking of  
 17 preparation. Because obviously between elections it  
 18 will be known.  
 19 So I am placing myself in a situation like you have  
 20 described. It wouldn't happen then and there. It would  
 21 be between an election for a normal four-year period  
 22 that that would be known. So no one in their right  
 23 senses or with any good thinking would simply wait until  
 24 that last minute to let that situation occur is all I'm  
 25 saying.

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1 I think the only -- if you would allow me my own  
 2 personal view on it, it is this: that first of all it is  
 3 a provision which is completely alien to anything we  
 4 have in this country. This is not to say that you  
 5 should -- it is, of course, not alien to the situation  
 6 in the United States. However, and I think this is  
 7 a crucial point, if I was looking at it objectively, as  
 8 I am, you could wind up the situation -- I remember  
 9 thinking this at the time when I tried to draft it back  
 10 in 2002, that you get a situation where the Governor is  
 11 faced with choosing a Premier, and there is one person  
 12 who everybody is prepared to support in the victorious  
 13 party after a general election, but this provision comes  
 14 in the way and that person may be the only leader a  
 15 party is prepared to follow. No one else is prepared to  
 16 do it and no one else wants to do it.  
 17 So one ends up with the one person that has led the  
 18 party hitherto, has helped to win the election and is  
 19 not allowed to become Premier. None of his colleagues  
 20 are prepared to do it. So you end up with a reluctant  
 21 leader, someone who is pushed forward, who may not want  
 22 to do the job, who has to do it for a term before --  
 23 MR TIBBETTS: Mr Chairman, that scenario in my view is  
 24 a most unlikely circumstance, and this is not to argue  
 25 against your point. But the logic, as I see it, would

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1 THE CHAIRMAN: I understand that. Of course it would mean  
 2 that the party placed in that situation would be forced  
 3 to change its leadership, and that might be difficult or  
 4 it might be prejudicial to it to do that. So I mean you  
 5 know the thing is six of one and half a dozen of the  
 6 other.  
 7 MR TIBBETTS: I know that risk, yes, but my God.  
 8 THE CHAIRMAN: Pardon?  
 9 MR TIBBETTS: Nothing, sir.  
 10 THE CHAIRMAN: I mean, I just wonder whether it's useful.  
 11 In America they have millions of people that can be  
 12 President. In the Cayman Islands you don't have  
 13 millions of people to choose who could become Premier.  
 14 The pool is obviously smaller, much smaller. But,  
 15 anyway, is there anything more to be said about this?  
 16 Does this section and subsection come out?  
 17 MR BRADLEY: I think that it's very rare for a government to  
 18 stay in power for more than two terms in Cayman.  
 19 MR TIBBETTS: Mr Chairman, (inaudible) the argument.  
 20 I notice the Chairman looking opposite from you and not  
 21 having it at all. Mr Chairman seriously, though,  
 22 certainly the discussion always helps and I don't think  
 23 at this point in time, unless the opposition has  
 24 a changed position, that we want to close the matter  
 25 right at this minute, but the few minutes that we did

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1 discuss it was still worthwhile and we know that we will  
 2 have to close the matter, sir.  
 3 THE CHAIRMAN: Yes, okay. I understand. While we are  
 4 checking over this language that we have had typed up,  
 5 would it be sensible to have a break? We have actually  
 6 solved one point of the ten and we have discussed three  
 7 others. Let's have a break so you can have a look at  
 8 it. Ten minutes.  
 9 (2.44 pm)  
 10 (Short adjournment)  
 11 (3.03 pm)  
 12 THE CHAIRMAN: Shall we continue then, ladies and gentlemen?  
 13 Shall we get back to what we were looking at before we  
 14 rose, section 62, and I hope that the piece of paper has  
 15 been circulated. Is this proposed subsection (3) in  
 16 use? Is it any use, the proposed section 62(3)? Is it  
 17 any help or hindrance, or what?  
 18 MR MCLAUGHLIN: Mr Chairman, as I say, I think we need to  
 19 have a chat with the Civil Service Management Council to  
 20 see what they think about it, because quite frankly, if  
 21 they object strenuously to this, we are not going to be  
 22 able to support it.  
 23 MR TIBBETTS: Mr Chair, if I may just add, and I was  
 24 thinking about this for some time and, Mr Chair, in  
 25 matters regarding the civil service and their

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1 contractual arrangements and everything else, His  
 2 Excellency the Governor is with full authority, some of  
 3 that authority delegated under our present  
 4 constitutional arrangements to the Chief Secretary.  
 5 If this is a matter for the civil service to be  
 6 dealt with, then we have the public service management  
 7 law, and we also have whatever contracts of the  
 8 contractual arrangements under which the civil servants  
 9 are held, and I think the net end result of any  
 10 arrangements relating to this matter would be reflected  
 11 within either legislation or the contractual  
 12 arrangements. Either His Excellency the Governor  
 13 through his office or the delegated powers would be the  
 14 proponent of such measures and I am pretty certain that  
 15 anything of that nature, there would be consultation  
 16 with the civil service.  
 17 I maintain sir, as a matter of principle, that this  
 18 need not and should not be elevated to the status of  
 19 a constitutional provision. It need not have  
 20 a constitutional provision for the matter to be dealt  
 21 with. If the matter were considered a matter of enough  
 22 importance to be dealt with, the matter should have been  
 23 dealt with prior to this, or should be, or we should be  
 24 hearing while we are in the process of seeking the best  
 25 way to deal with it.

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1 I will tell you this. Of this I am  
 2 convinced: nothing would be done without consultation  
 3 with the Civil Service Association management structure,  
 4 and I say let them handle it. I am not going to argue  
 5 as to what the end result will be. All I am saying is  
 6 that this is not one of those situations where the  
 7 politics of it should be elevated to where the  
 8 politicians at this point in time are making those  
 9 decisions.  
 10 I believe that is fair comment throughout, because  
 11 there is the separation of powers and there is the  
 12 constitutional arrangement which every one of us who are  
 13 in office uphold, and even in the new constitutional  
 14 arrangement, we have ensured that the status quo remains  
 15 with regards to authority over the civil service, and  
 16 that's the realm in which it should be and I do believe  
 17 again that what I just said is fair comment, Mr Chair.  
 18 MR BULGIN: Can I just clarify something. There are two  
 19 issues. There is the issue of the recommendation from  
 20 the Commissioner, which is a matter for the government  
 21 to accept. That's a separate issue.  
 22 There is what becomes a constitutional discussion;  
 23 it is simply this. The constitution is what daily needs  
 24 the qualification for a person to become an elected  
 25 member of the Legislative Assembly. That is all the

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1 section that is set out in section 62 as the  
 2 constitution and therefore, if you going to disqualify  
 3 someone from becoming a member, it has to be by way of  
 4 constitutional amendment. In other words, you can't  
 5 have a situation where you qualify under the  
 6 constitution section 62 and then you have another piece  
 7 of legislation or some regulation which says that you  
 8 are not eligible. That would be a constitutional  
 9 conundrum and that is what elevates it to  
 10 a constitutional exception. So if you going to  
 11 disqualify someone, assuming that you accept that --  
 12 MR TIBBETTS: Mr Chairman, our position is that we are not  
 13 wanting to disqualify anyone if there are contractual  
 14 arrangements which need to be fulfilled. That's why  
 15 I said it should be in that realm.  
 16 MR BULGIN: The point I am making -- I accept what you  
 17 saying -- unless if you going to restrict someone's  
 18 right to run for an elected office, and if you propose  
 19 to do so by some sort of regulation, then those  
 20 regulations will have to have some sort of a direct  
 21 correlation with the language of the constitution,  
 22 otherwise they will be ultra vires the constitution.  
 23 That is the only reason --  
 24 MR TIBBETTS: And I am saying to you, hearing everything  
 25 that you say, I am saying to you that we should not be

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1 around this table. I don't care which Commissioner he  
 2 was, and I know everybody has their own position on the  
 3 matter, and I am not defending it for any other reason  
 4 than what I believe. I am saying to you that any  
 5 specific instance which has occurred, and I am not  
 6 arguing about that, but I don't think that  
 7 constitutionally we should be disqualifying anyone under  
 8 those conditions from seeking office is what I am saying  
 9 to you. That's what I am trying to say. It has even  
 10 been suggested, for instance -- let me just show you --  
 11 it has even been suggested what the terms of  
 12 disqualification be for chief officers, okay? That's  
 13 part of the whole deal.

14 MR BULGIN: No, no --

15 MR TIBBETTS: Wait a minute. Let me finish, please, I am  
 16 not saying this is your point.

17 MR BULGIN: I don't have a point --

18 MR TIBBETTS: That's what I am saying. But that has even  
 19 been a part of the argument put forward. We talk to  
 20 chief officers or we talk about chief officers. How  
 21 many people we have that are above chief officer status,  
 22 they are going to be exempt? What are we saying? We  
 23 are taking a specific situation and trying to make  
 24 a general rule and create total dissatisfaction.  
 25 I am having no part of it is all I'm saying.

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1 Because whoever made that ruling about what should  
 2 happen did not think it through, and Mr Bradley's point  
 3 is quite correct also, what the constitutional  
 4 arrangement is about the time, the time period.

5 There can easily occur a point in time when an  
 6 election is held within that timeframe, and what is  
 7 considered to be a year is suddenly six months, and  
 8 somebody bona fide doesn't qualify and doesn't even know  
 9 where the next dollar is coming from. And I say this --  
 10 and I say this very seriously -- we need to consider  
 11 this very carefully, Mr Chairman, not about who is going  
 12 to win this issue, but if you are talking about a  
 13 constitutional arrangement, this is something that we  
 14 will have to live with for a long time and we will have  
 15 imposed on the largest group of employees in our  
 16 country. And I just want us to ensure that after we get  
 17 past the motion, that we make sure that what we are  
 18 doing is right and fair and just for all concerned.

19 That's my point, nothing more.

20 MR MCLAUGHLIN: Mr Chairman, if I may try and take  
 21 a slightly different path, I think we are trying to  
 22 employ a nuclear weapon to deal with a problem which  
 23 a couple of fiscals(?) might sort out.

24 The issue at hand is the use of potential -- or  
 25 abuse, perhaps, of information in the course of an

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1 office, where there should be some degree of loyalty and  
 2 confidentiality between the Minister and those who work  
 3 closely with him or her. That's what had happened.

4 So it seems to me that what needs to be done, if it  
 5 is not already provided for, is to sanction the use or  
 6 abuse of that information, if an individual were to  
 7 stand for office as the case may be -- maybe make some  
 8 amendment to the election clock, make some amendment to  
 9 the public service regulations, write something into the  
 10 employment contract, some means like that.

11 I do not think we need a constitutional provision to  
 12 deal with these issues. We have, in Cayman, a history  
 13 of two former financial secretaries both standing  
 14 successfully in elections following their retirement  
 15 from public service. And unless my memory is faulty,  
 16 neither of them were out of office for a year at the  
 17 time they stood, and one of them, someone I ran it for,  
 18 ran with my good friend the Leader of the Opposition.

19 So what I am saying is the situation they are proposing  
 20 to deal with is not unprecedented and for us to dream up  
 21 a provision now which prevents a qualified experienced  
 22 people and population, such as we have, where less than  
 23 half the population qualifies to stand for election,  
 24 much less than the level of those with experience, is to  
 25 do the country a great disservice.

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1 Let us address what the issue is, which is the  
 2 misuse, alleged misuse, potential misuse of confidential  
 3 information and relationships rather than trying to  
 4 exclude 3,000 civil servants potentially from the  
 5 opportunity to stand for public office.

6 THE CHAIRMAN: Yes, I mean, as I said before we broke,  
 7 I thought we had used reached a consents that the  
 8 prevention of a public officer who seem ceases to be  
 9 a public officer from standing for election for 12  
 10 months was no longer an issue, the issue now. So we are  
 11 not talking about disqualification, I think that is  
 12 accepted. All we are considering now is: is there any  
 13 value in putting in something along the lines that  
 14 I dreamt up, and I freely admit to something I dreamt up  
 15 today, off the top of my head, or not? I mean, I am  
 16 convinced that the right way to deal with the problem is  
 17 in contractual terms or regulations or a law which binds  
 18 the public officers concerned even after they have  
 19 ceased to be public officers, so that there is some  
 20 sanction to be applied. I am not talking about  
 21 a disqualification of standing for election.

22 MR BUSH: Of course not.

23 MR TIBBETTS: Mr Chairman, just a quick point, please. I am  
 24 just thinking that hearing what the Honourable  
 25 Attorney-General was saying, I just want to make sure

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<p>1 that the Attorney-General agrees with me that this 2 proposed subsection (3) does not address anything of 3 what you have said about disqualification. Because what 4 is proposed here says that rules shall be made, however 5 they are made, within laws or whatever else. But it 6 doesn't say anything about any disqualification in the 7 constitution itself, so what I am saying to you is that 8 the constitution -- if this were even agreed upon, by 9 some strange chance, that this were agreed upon, you 10 would still have the problem you talking about.</p> <p>11 MR BULGIN: Not necessarily because the law that is going to 12 be made by the Legislative Assembly which is what this 13 contemplates can determine how the person -- at what 14 stage you run, as opposed to not being able to run at 15 all. So my understanding --</p> <p>16 MR TIBBETTS: So if you have nothing that says it --</p> <p>17 MR BULGIN: The point I am making is that you have to be 18 careful because as it is now, those civil servants are 19 able to run and they are able to run because they would 20 qualify under the constitution. But you cannot have 21 a constitutional conundrum where the constitution 22 says: you can run, you are eligible to run but you have 23 some lesser legislation or rules which 24 says: notwithstanding the fact that you qualify under 25 the constitution, you can't.</p> <p style="text-align: center;">Page 89</p>	<p>1 law, this will be giving constitutional standing to that 2 law.</p> <p>3 THE CHAIRMAN: I don't see it quite like that because 4 I think, even without this provision, you don't need 5 this provision to authorise such a law being made or 6 such contracts being entered into.</p> <p>7 MR TIBBETTS: That's the whole point.</p> <p>8 THE CHAIRMAN: You don't need it, so it is really a sort 9 of -- it's an object thing, rather than a substantive 10 provision.</p> <p>11 MR GLIDDEN: So if you make a law, going back to the 12 Attorney-General's point, if you make a law that has no 13 provision that according to our constitutional 14 requirements the person is entirely eligible to run for 15 office but there is a separate law that then makes that 16 person ineligible to run, what occurs in that situation?</p> <p>17 THE CHAIRMAN: Well, no, I think the constitution would be 18 the end of the story as to who would be entitled to run 19 or not. I mean, as I see it, I think Alden is right 20 that what we are talking about really is some deterrent 21 to senior public officers to cease to be public officers 22 and then stand for election, taking with them and using 23 the information they acquired while --</p> <p>24 MR TIBBETTS: Say what they can't do. You don't make them 25 ineligible.</p> <p style="text-align: center;">Page 91</p>
<p>1 MR TIBBETTS: So if the constitution says nothing at all, 2 what does it do then?</p> <p>3 MR BULGIN: If the constitution says nothing?</p> <p>4 MR TIBBETTS: If the constitution says nothing at all?</p> <p>5 MR BULGIN: Then the status quo remains, which is that 6 people can run.</p> <p>7 MR TIBBETTS: Okay.</p> <p>8 MR GLIDDEN: Mr Chairman, just so we understand, because I 9 have heard talk about using, like you said, nuclear 10 weapons and trying to make a big issue, and my 11 understanding, picking up on the Attorney-General's 12 point, was simply that this would be a provision and 13 while there is no discussion or there seemed to be 14 agreement from the government side as to the right place 15 for this to be prescribed in a law or in contractual 16 terms applicable to such persons, this provision is 17 giving that possibility at whenever time such a law will 18 be deemed necessary or if such a law was to be deemed 19 necessary.</p> <p>20 So all you are proposing with this section would be 21 to give the power or potential power for those laws that 22 may become required, like you said, in the purview of 23 the Governor, who may decide, in line with the 24 Commissioner of Inquiry's recommendation that something 25 needs to be done. When at such time that is done in the</p> <p style="text-align: center;">Page 90</p>	<p>1 THE CHAIRMAN: Exactly. So the contractual terms, which 2 would continue to bind that person, could result in 3 severe financial penalties, for example, so it's 4 a deterrent.</p> <p>5 Now all I am trying to do is to get through this 6 difficult and knotted problem. But I think we are 7 agreed, I hope we are agreed, that the way to hit it is 8 not with a nuclear weapon or prohibition from standing 9 for election for 12 months, that is that, and with or 10 without this provision which I dreamt up it is possible 11 now, and it would still be possible under a new 12 constitution, to have, by law or contractual provisions, 13 the deterrent effect that is desired.</p> <p>14 MR TIBBETTS: In other words, Mr Chair, and I would say no 15 more on the matter because I think I have exhausted what 16 I am trying to say, but just to reinforce what 17 Minister McLaughlin is saying, in other words instead of 18 speaking to ineligibility, you speak to sanctions 19 because you don't want to make people ineligible, 20 because that is an irreversible situation, whereas the 21 deterrents that you put in the law, or however else you 22 put it -- whatever they are, make them as severe as you 23 wish -- it's just that the ineligibility is where I 24 believe that we are going beyond where we should.</p> <p>25 THE CHAIRMAN: All right. Thank you very much.</p> <p style="text-align: center;">Page 92</p>

1 MR BUSH: Mr Chairman, there is something that I feel that  
 2 I should reply to. The Leader of Government Business  
 3 has asked why it must be a constitutional provision and  
 4 he went on to say also that it should be the civil  
 5 service management structure, let them handle them and  
 6 not politicians.  
 7 Well, first of all, Mr Chairman, if we say that  
 8 something needs to be done and contracts are in the law,  
 9 why can't the constitution say it, that it must be done?  
 10 Why are you leaving it to a politician, who can get up,  
 11 Mr Chairman, and say: I'm not doing this, civil service,  
 12 I'm not (inaudible), I ain't going to do it, I support  
 13 you, if you want to go back and do that to the next  
 14 Ministers, and not me, then go ahead and do so.  
 15 Well, that exactly might be the case, Mr Chairman.  
 16 If the effort is to be fair to all -- if the effort here  
 17 is to be fair to all, then I believe that it needs to be  
 18 settled in the constitution, as I said before. The law  
 19 and the contracts can deal with them how it's done.  
 20 Don't we just say in our constitution, sir, that the  
 21 politician can get a law to add more members to the  
 22 House? Don't we say in a law to the constitution that  
 23 the politician can appoint new members to the cabinet?  
 24 So all are we saying in the law is to the constitution  
 25 that this must be done, because I am scared and wary to

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1 leave it open, where nothing might be done simply  
 2 because people might not want anything to be done and  
 3 a government of the day or a government of the future  
 4 might be tempted to say: no, we are not doing it because  
 5 you have 3,000 votes.  
 6 Mr Chairman, the constitution says who can be and  
 7 how they can be a member of the legislature, and  
 8 I believe that this is the right place for what you are  
 9 saying in the proposal -- how we twist it, let that  
 10 happen. But I believe that the constitution needs to  
 11 point out, as we are doing with other things, and it  
 12 should be satisfactory.  
 13 I don't want to get into a confrontation with them  
 14 but if they keep hinting and testing this matter, why  
 15 then I will reply to it because a commission of inquiry,  
 16 if it is not a court, then it is judicial, and if  
 17 somebody is found guilty and the chairman or the judge,  
 18 or whatever you want to call him, is saying: look, this  
 19 is serious enough for something to be done here, then  
 20 I don't know what -- how else -- we can just leave it  
 21 alone? I don't think so.  
 22 Mr Chairman, the matter of the two previous  
 23 financial secretaries that ran. Tom Jefferson ran with  
 24 me in 1992. He left in May of 1992, and the election  
 25 was in November -- seven months. Sir Vassel ran with me

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1 also in 1984. He left again -- I think six maybe --  
 2 I think he might have been gone a year when he ran. The  
 3 former clerk, an old national hero, Mrs McLaughlin ran,  
 4 but she left probably close to a year or six months at  
 5 least.  
 6 Mr Chairman, no, I didn't sabotage anybody. No  
 7 (inaudible) was taken with politicians hanging on to  
 8 their back pocket. None of them, none of them. So when  
 9 anybody points out who ran with me and who I supported,  
 10 I say again I have never asked a civil servant to do  
 11 anything they ought not to do, in my 25 years, and  
 12 I will never do so and those arguing should remember  
 13 that.  
 14 The civil service, you cannot have your cake and eat  
 15 it too; you cannot be so close to the Minister that you  
 16 know everything about him and everything he is doing and  
 17 then he leaves, within a couple of days the Minister  
 18 doesn't know anything about it, your Ministry is left in  
 19 a shambles, the staff don't even know you going?  
 20 Sir, I tell you what, if it wasn't so close to home  
 21 I would leave it alone, but the truth is that we don't  
 22 know what mindset there is and which Minister, and we  
 23 talk about our political system -- we don't have a lot  
 24 of people, it's true -- what about young people? Do you  
 25 think they are saying: do I want to get into this public

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1 service, when (inaudible) has told me that I would never  
 2 trust my Chief Minister again, if I were a politician,  
 3 my chief officer again, or permanent secretary again?  
 4 THE CHAIRMAN: Right, well --  
 5 MR BUSH: This has two sides.  
 6 MR TIBBETTS: Mr Chair, just quickly, sir, just to say to  
 7 you, and I'm not going to get into the discussion about  
 8 who said what and what, but the point that the Leader of  
 9 the Opposition was making in comparison to this issue  
 10 with the other two proposals in the new constitution  
 11 with regards to constituencies and increasing numbers,  
 12 the difference is this can be rectified as is. Those  
 13 two matters cannot without new constitutional  
 14 provisions.  
 15 MR BUSH: Maybe you ought to stay with new constitutional  
 16 provisions.  
 17 MR TIBBETTS: So there is a difference there.  
 18 MR BUSH: Mr Chairman, I agree there's a difference but it's  
 19 a serious matter, because you are giving a politician  
 20 that right, whereas before the whole electorate had to  
 21 sort of agree to an extent, where you are going through  
 22 the various processes.  
 23 THE CHAIRMAN: That is another one we will have to come back  
 24 to. (Pause).  
 25 At the end of or near the end of the second round,

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<p>1 I said that, with regard to your proposal about a 2 constitutional amendment being normally subject to a 3 referendum that we might be able to find, or might be 4 able to say something in a letter about this. So we 5 have drafted a letter and I would like to circulate that 6 now so that we can ...</p> <p>7 MR MCLAUGHLIN: Sir, this is in lieu of the whole section 8 119 in our working document.</p> <p>9 THE CHAIRMAN: Yes. (Handed) This is the new draft.</p> <p>10 MR TIBBETTS: Mr Chair, while that is being distributed and 11 read, just for everybody's benefit, if you do not mind, 12 sir, if you could just quickly go through the rationale, 13 why not have it as a constitutional provision rather 14 like the way you are proposing?</p> <p>15 THE CHAIRMAN: Yes. Well, the starting point, and a very 16 important point, is that power to make constitutional 17 provision for the Cayman Islands, the legal power, is in 18 the West Indies Act, 1962, section 5. If you look at 19 section 5, there is no qualification or inhibition or 20 limitation at all on the power of Her Majesty by order 21 of council to make constitutional provision for the 22 Cayman Islands, none whatsoever.</p> <p>23 So we have to be very careful not to invent some 24 hurdle or to impose some limitation which an Act of 25 Parliament does not allow for. So we are treading quite</p> <p style="text-align: center;">Page 97</p>	<p>1 what are --</p> <p>2 MR TIBBETTS: That exactly would be capital punishment.</p> <p>3 THE CHAIRMAN: Well a good example would be if there were an 4 adverse judgment against the United Kingdom by the 5 European Court of Human Rights Strasbourg for example, 6 or that some other Treaty obligation been violated in 7 the Cayman Islands and the UK, discussed it with you, 8 whatever with the government at the time in the 9 Caymanian who absolutely refuse to have anything to do 10 with change, says: well our people are against it 11 (inaudible). But under the current situation the UK 12 would have to decide whether it needed to change the 13 constitution in line with the treaty obligations or not. 14 I know that is an extreme example which I hope would 15 never arise but it is one possible one. Now another 16 one.</p> <p>17 MR TIBBETTS: Can I tell you what I say about capital 18 punishment. The beauty of that is that I am confident 19 that if we were to have a referendum tomorrow to seek 20 for the people of the Cayman Islands an indication 21 whether they wanted capital punishment to continue or to 22 be returned or not, it would be returned. But you all 23 will not be able to do that as a matter of lawing 24 a change of constitution for us. If you see my point. 25 Same thing as violation of --</p> <p style="text-align: center;">Page 99</p>
<p>1 a delicate line here.</p> <p>2 Now I do not envisage that a letter such as this, if 3 it were sent from our Minister to yourself, or to the 4 Premier -- well, I think it would be sent to yourself at 5 the time the new constitution was about to come into 6 force. I do not envisage that this would be a private 7 letter; it would be a public letter. But it would not 8 be appropriate, in our view, and not be legally 9 acceptable to put any inhibition in an order in council 10 made under the Act itself which contains no such 11 inhibition. That's why we have looked in terms of 12 a letter containing political assurances, which is 13 I think as much we can do. You will see that 14 paragraph 1 merely sets out quotes from your own 15 document on the constitutional modernisation proposals, 16 and then paragraph 2 says in the first sentence what 17 I think is in general UK government policy:</p> <p>18 "In general, the UK government approves the idea 19 that substantial constitutional changes should be 20 supported by the people of the Cayman Islands in a 21 referendum. Accordingly, the United Kingdom Government 22 would normally use its best endeavours to honour ..."</p> <p>23 And then we have to point out that there may be 24 exceptional circumstances where it's not appropriate to 25 do so (inaudible) this matter. And you may say well</p> <p style="text-align: center;">Page 98</p>	<p>1 THE CHAIRMAN: Yes, I mean we are simply being cautious. 2 I think.</p> <p>3 MR TIBBETTS: We take your point.</p> <p>4 THE CHAIRMAN: There is another situation that occurs to me, 5 unfortunately this never occurred in the Cayman Islands 6 as far as I'm aware but it has happened in other 7 territory and could conceivably happen in any territory, 8 that the UK is forced to have to -- let's just a jargon 9 term -- suspend the constitution, take direct rule 10 because the situation in the territory has become so bad 11 for one reason or another and it is simply not 12 practicable to have a people in the referendum whether 13 they are content with that. You know what I am 14 referring to.</p> <p>15 Now, God willing this will never happen to Cayman 16 Islands but (inaudible) we're not talking about this 17 government or the next government. So that's why we 18 have had to draft it in this rather cautious manner. 19 But I think it actually does the first two sentences go 20 a very long way to indicate what the normal policy of 21 the UK government would be on this matter. Let's say if 22 we agreed on the terms of the (inaudible) it could be 23 published -- Alden is shaking his head -- very 24 unsatisfactorily.</p> <p>25 MR MCLAUGHLIN: No, no.</p> <p style="text-align: center;">Page 100</p>

25 (Pages 97 to 100)

<p>1 THE CHAIRMAN: Michael has just reminded me quite rightly 2 timing. It the same applies to any other matter in 3 particular the adjustment matter which is out there. We 4 would envisage that any deal which is done this week 5 with a draft constitutional text and any accompanying 6 political letters will be published as drafts together, 7 so that people will see the whole picture. And I'm not 8 suggesting for a moment there should be a draft 9 constitution to publish any secret letters which 10 (inaudible) people have to see the whole provision, and 11 they will see how you cope with something along these 12 lines, the UK government are not giving you -- are not 13 responding with (to an interpretation (inaudible) ways 14 you might question, at least as far as they think it 15 reasonably can, in meeting that recommendation. 16 Now don't reply immediately if you want to think it 17 over that is fine but -- I . 18 MR MCLAUGHLIN: I think you can say this section 109 and the 19 working document which we produced for the September 20 document, says: 21 "I propose that amendments to this constitution 22 should only and made by (a) a provision of the Act of 23 Parliament authorising approval by referendum to the 24 people of the Cayman Islands (inaudible)", 25 Whatever the section is. And I should frankly</p> <p style="text-align: center;">Page 101</p>	<p>1 political animals, (inaudible) that will give certain 2 far more than currently happen. So if could I just 3 leave it there for the moment. 4 MR BUSH: Mr Chairman, I am glad that it has come back 5 because if I have difficulty with the proposal because 6 moving a comma, as we all know, achieves a (inaudible) 7 something different as English language goes. And so I 8 had difficulty with the change being declared by the 9 premier and the leader of the opposition to be 10 controversial. We cannot bar the ones -- a member's 11 right to move a motion in the House asking the UK to do 12 something. I think that's as it stands, so we cannot 13 bar anybody from doing that. And (inaudible) thought 14 that changes should be made, carry a motion asking the 15 government to ask the UK to do something perhaps the 16 government do something if that motion is passed by the 17 House. It gets more (inaudible) if it's passed by the 18 House. 19 So I have that difficulty with the changes as 20 proposed here with the government. This could be a 21 minor -- not uncontroversial. We have contacts at the 22 referendum but I don't hope that we will (inaudible) on 23 the referendum. As Minister (Inaudible) was saying, 24 even come back with something else -- 25 THE CHAIRMAN: Maybe not, we just want to look at it.</p> <p style="text-align: center;">Page 103</p>
<p>1 (inaudible) that we always knew that would be 2 a difficult point, but objectively was and still is the 3 limit as far as possible changes to the constitution 4 which have not been approved by the people in a 5 referendum, and those changes include not just changes 6 which the collective members of the House would like 7 a change in (inaudible). 8 So I think for my side of the hearing, we can say 9 that we have always understood that this would be 10 a difficult point. And while we would all like to 11 ensure we have a full say in whatever decision is taken 12 in relation to the constitutional changes, we must 13 acknowledge the (inaudible) constitutional changes, and 14 that Her Majesty's government would, in fact is, 15 required to reserve the position accept. And so while 16 we would like to take some time to consider the actual 17 text of this letter, I believe that the proposal of the 18 letter is the subject and will go a long way to achieve 19 what it is we are trying to do so we could have 20 a (inaudible) to have a look at this, and perhaps hear 21 your views on the text, but I think our views in the 22 letter which is public and which therefore carries 23 considerable political weight with it because to do 24 otherwise than to abide by the letter will have obvious 25 political implications. Most of us on either side are</p> <p style="text-align: center;">Page 102</p>	<p>1 (Overspeaking) Proposed letter you are satisfied. 2 MR BUSH: I am reading the letter saying (inaudible) 3 government position. 4 MR TIBBETTS: In other words what you are saying, instead of 5 this being in a constitutional arrangement there would 6 simply be a letter of this nature to give a political 7 undertaking for any major changes in the constitution to 8 be agreed on by referendum but they would have to agree 9 to it afterwards. I think that's what the letter says 10 generally. In other words you got the UK government 11 would reserve the right to give a final (inaudible). 12 MR BUSH: But that would be normal anyway. We could pass 13 all the referendum we want. If they say no, then we 14 have to do something else. 15 MR BRADLEY: You happy with the letter? 16 MR TIBBETTS: We tried hard, Mr Bush, to cause for any major 17 change in the constitution to be agreed on by the 18 people, meant that it would be changed, but we knew it 19 would be difficult. 20 MR BUSH: I think we said that too many times. 21 MR TIBBETTS: (Overspeaking) the UK government. So anyway 22 you are saying it wasn't that you are not satisfied with 23 it, you just want to look at it very carefully to be 24 satisfied. 25 MR BUSH: I wait to see what you all have to say.</p> <p style="text-align: center;">Page 104</p>

<p>1 MR TIBBETTS: But if it remains as (inaudible)?</p> <p>2 MR BUSH: Yes. Again we not taking away any member's right</p> <p>3 to ask through a motion in the House.</p> <p>4 THE CHAIRMAN: No, of course not. Okay. Well, thank you,</p> <p>5 for your more than warm reception (inaudible). We are</p> <p>6 trying I mean honestly we have said there is no</p> <p>7 (inaudible).</p> <p>8 MR TIBBETTS: This morning we would be in really good shape.</p> <p>9 THE CHAIRMAN: Can I then move on to the other one, which</p> <p>10 I am not sure that I did say we contemplated. I have</p> <p>11 always secretly thought that we might, and since my</p> <p>12 outline legal adviser was in Glasgow I might be able</p> <p>13 to -- no. This is one similar draft, a letter about</p> <p>14 orders in council. (Overspeaking) If you have a problem</p> <p>15 about any of this (inaudible).</p> <p>16 MR MCLAUGHLIN: Simply going to staple that to the</p> <p>17 constitution.</p> <p>18 MR TIBBETTS: When we -- assuming everything works well and</p> <p>19 we do get a new constitution, whatever these as part of</p> <p>20 the agreement are will be printed in the document.</p> <p>21 THE CHAIRMAN: Oh, yes. Well they won't be printed in the</p> <p>22 order in council because they can't be, but you could</p> <p>23 print them.</p> <p>24 MR TIBBETTS: (Inaudible) meant to be distributed.</p> <p>25 THE CHAIRMAN: Exactly.</p> <p style="text-align: center;">Page 105</p>	<p>1 in the governing act of Parliament at all. There are no</p> <p>2 restrictions. So it is the same point that has done --</p> <p>3 what we are trying to do here is to take out of the</p> <p>4 grand constitution your proposal, but set it out as</p> <p>5 political undertaking insofar as we think it acceptable</p> <p>6 and wise to do so. I confirm that such consultation</p> <p>7 would be in most circumstances modern practice. I think</p> <p>8 that is undeniably true:</p> <p>9 "Accordingly the Governor will whenever practical</p> <p>10 ... (Reading to the words)... unless ..."</p> <p>11 MR TIBBETTS: Such consultation would be prejudicial to the</p> <p>12 interest of the United Kingdom, unless such</p> <p>13 consultation --</p> <p>14 THE CHAIRMAN: That's the same point as we had earlier.</p> <p>15 Somebody has to make that judgment.</p> <p>16 MR MCLAUGHLIN: That's not my problem with this. I am</p> <p>17 having real difficulty seeing how section 5 of the West</p> <p>18 Indian Act as you have said actually prevents this</p> <p>19 provision, because this is not as -- this is not</p> <p>20 a limitation in any shape or form on the UK's ability to</p> <p>21 legislate for the territories. What it is, it is</p> <p>22 perhaps a precondition which I think is distinguishable</p> <p>23 from a limitation.</p> <p>24 Now the situation in relation to the referendum bit</p> <p>25 on constitutional changes is different. It is different</p> <p style="text-align: center;">Page 107</p>
<p>1 MR TIBBETTS: That's what I'm saying.</p> <p>2 MR MCLAUGHLIN: Mr Chairman, the earlier letter I understand</p> <p>3 entirely, but what we have is mere consultation, and the</p> <p>4 language of your letter is:</p> <p>5 "I confirm that such ... (Reading to the words)... of</p> <p>6 the United Kingdom."</p> <p>7 That sounds like wonderful constitutional language.</p> <p>8 THE CHAIRMAN: Sorry?</p> <p>9 MR MCLAUGHLIN: That sounds like wonderful constitutional</p> <p>10 language.</p> <p>11 THE CHAIRMAN: Well, yes, it's very close to your</p> <p>12 provision -- your draft provision.</p> <p>13 MR MCLAUGHLIN: What I don't quite follow is the principle</p> <p>14 which would prevent this from going to the constitution.</p> <p>15 THE CHAIRMAN: Well it's the same thing, really, because at</p> <p>16 the moment the West Indian Act section 5, I think it is</p> <p>17 subsection (4), allows constitutional provisions to be</p> <p>18 made provided the power is reserved by Her Majesty to</p> <p>19 legislate for the Cayman Islands without limitation.</p> <p>20 There is no limitation.</p> <p>21 Now I accept that consultation is consultation.</p> <p>22 There is a political matter whether the British</p> <p>23 Government authorises the Governor to consult before UK</p> <p>24 Ministers advise the Queen to make order in council for</p> <p>25 Cayman Islands. It's not something which is addressed</p> <p style="text-align: center;">Page 106</p>	<p>1 because what we were asking for there is that before you</p> <p>2 make any changes we have to approve it. So that clearly</p> <p>3 runs straight up against section 5 of the West Indian</p> <p>4 Act. This is a consultation provision. That is all.</p> <p>5 So at best it is a precondition to your legislating, is</p> <p>6 than the Governor has a word, says, this is what is</p> <p>7 going to happen, tell me what you think, hear what you</p> <p>8 say but nevertheless we going ahead. So we (inaudible)</p> <p>9 limiting in any shape or form the ability to legislate.</p> <p>10 I really do think, sir, that this could and should be go</p> <p>11 to the constitution and that it won't offend the West</p> <p>12 Indies Act or the UK government --</p> <p>13 MR TIBBETTS: Or tie your hands in any way.</p> <p>14 THE CHAIRMAN: Well I have to be frank here. A number of</p> <p>15 proposals that remain as the constitutional</p> <p>16 modernisation (inaudible) can be perfectly well</p> <p>17 supported in argument as you have done, and they raised</p> <p>18 a number of novel issues. I can't think of any</p> <p>19 constitutional reviews, I have been involved with all of</p> <p>20 them, that raises many novel issues for us in the UK</p> <p>21 than this attribute to your (inaudible).</p> <p>22 MR TIBBETTS: We did our best so you wouldn't be bored.</p> <p>23 THE CHAIRMAN: And you know there becomes a weight that is</p> <p>24 difficult because, you know -- I know what you say in</p> <p>25 response to this, you will say: well, in the Cayman</p> <p style="text-align: center;">Page 108</p>

27 (Pages 105 to 108)

1 Islands territories (inaudible) from our perspective we  
 2 have to look at how we can manage doing something, not  
 3 for you, which with the best will in the world we will  
 4 do so far as reasonable and sensible from our  
 5 perspective, without creating difficulties for ourselves  
 6 with another territory. And in no territory  
 7 constitution, none, not even Bermuda or Gibraltar or BVI  
 8 or any of those you could think of, is there provision  
 9 of the kind you suggested, none of them, in the  
 10 constitution. Nor indeed is there a letter. So this  
 11 actually will be a novelty to write a letter, which as  
 12 I've said, some of my (inaudible) are very unhappy,  
 13 without letting the cat out the bag. Without letting  
 14 the cattle out the bag and running down the table some  
 15 of our delegation are not happy with that proposal.  
 16 So please bear in mind that we are at the edge of  
 17 what is for us exceptional. If you don't like this  
 18 letter we won't send it, we will take it away. But we  
 19 cannot (inaudible) the provision on the constitution on  
 20 this point, I'm telling you. I don't think you do get  
 21 any further with it by arguing the point with our  
 22 Minister because it is not -- it has not been done. It  
 23 is inhibited by the West Indian Act and other statutes,  
 24 and so on, and it is -- there is an element of risk in  
 25 us sending even this. You may think is completely

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1 text. The issue is whether this is a letter that is  
 2 constitutionally (inaudible) is certainly not going to  
 3 say because we cannot get what we want we take what we  
 4 can get. But we would like to go away and think about  
 5 it for a couple of days.  
 6 THE CHAIRMAN: All right.  
 7 MR TIBBETTS: Mr Chair, if I might just sort a bit of  
 8 curiosity on my part. I have listened very carefully to  
 9 you, not that I don't all the time but this time I even  
 10 more so because I could smell it, and I listen to my  
 11 colleagues and I totally agree with them. But when you  
 12 mentioned that no other territory has either  
 13 a constitutional provision or indeed a letter, was it  
 14 asked for?  
 15 THE CHAIRMAN: Well --  
 16 MR TIBBETTS: In the vein that we have.  
 17 THE CHAIRMAN: Yes, it was, very strongly. Very strongly  
 18 for this. And if you have ever spent a few minutes  
 19 arguing with Mr (Inaudible) you will know how exhausting  
 20 it is. (Overspeaking)  
 21 MR TIBBETTS: Just a normal discussion, sir, not even an  
 22 argument. I understand you very well.  
 23 THE CHAIRMAN: And he said, no.  
 24 MR MCLAUGHLIN: Of course he is a lot smarter than all of  
 25 us.

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1 unreasonable for me to say that but there is an element  
 2 of risk.  
 3 Sometimes we do have to with (inaudible) care, UK  
 4 Ministers have to advise going to make an (inaudible).  
 5 We know the situation. And normally of course it is  
 6 a matter for consultation as a matter of constitutional  
 7 convention or practice. But once you start writing it  
 8 down in law, then it becomes a different thing. So what  
 9 I am opting for here, or what I am suggesting here, is  
 10 a middle path between writing it down in law, which  
 11 I think there is great difficulties, both the  
 12 political -- and leaving the status quo, which is an  
 13 understanding between us in this day and age. Normally  
 14 the government of the territory will be consulted  
 15 normally. A middle way in which there's a political  
 16 undertaking given on paper which can be produced quoted  
 17 against us. Even if it is necessary to take it to a  
 18 court as a legitimate limitation. We would have some  
 19 legal value, have greater political (inaudible) to  
 20 decide something. And so I urge you to think about this  
 21 text carefully and not ask for too much.  
 22 MR MCLAUGHLIN: I hear what you say. I believe these things  
 23 ought to be dealt with on the basis of what you write,  
 24 on basis of principle. But (inaudible) regrettably take  
 25 precedence. But we don't have any difficulty with the

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1 THE CHAIRMAN: And you mentioned (inaudible). He didn't  
 2 even get a letter.  
 3 MR TIBBETTS: He didn't have a (inaudible)?  
 4 THE CHAIRMAN: He didn't even have (inaudible), so this  
 5 would be a first. So I urge you to look at it with care  
 6 and sympathy.  
 7 MR MCLAUGHLIN: Care and sympathy, okay.  
 8 THE CHAIRMAN: And recognition -- novel -- I am content for  
 9 you to think it over because I know that Professor --  
 10 I hope he comes in time and you could talk it over with  
 11 him amongst your wider delegation.  
 12 MR TIBBETTS: Only a certain amount of shocks before the  
 13 day. (Overspeaking)  
 14 THE CHAIRMAN: Just before we have a break I see there is  
 15 tea and coffee. There are four other things, as  
 16 I recall, on this side of the counter, which I just  
 17 might touch on. But I am in your hands as to whether to  
 18 come back to them. On this, on page 1 of the draft,  
 19 the note, (inaudible) section 29, National Security  
 20 Council, and I would like to just touch on this before  
 21 we (inaudible) we have nearly an hour so you. Would  
 22 like to have a little bit break and we will come back at  
 23 3.20. I don't think we need to take very long on those  
 24 things.  
 25 MR BUSH: Mr Chairman, I have four questions and I wonder at

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<p>1 which point we can do that.</p> <p>2 THE CHAIRMAN: Are they going to take a long time, do you</p> <p>3 think?</p> <p>4 MR BUSH: Shouldn't. In fact will be three because one of</p> <p>5 them will be in a discussion on the Bill of Rights, but</p> <p>6 it's to do with the constitutional commission that we</p> <p>7 propose. The matter with (inaudible) as to question of</p> <p>8 clarity and awarding system of (inaudible). I guess</p> <p>9 that will be --</p> <p>10 THE CHAIRMAN: All right, let's have a break now. I will</p> <p>11 come back to it no later than 4.20.</p> <p>12 (4.07 pm)</p> <p>13 (Short break)</p> <p>14 (time 5.28 pm)</p> <p>15 THE CHAIRMAN: We have a few points to touch upon and then</p> <p>16 the leader of the opposition has a few points to raise.</p> <p>17 I am going to touch upon four points in the group of</p> <p>18 ten. First of all, I think I know the answer to this</p> <p>19 and it should take no more than ten seconds. On the</p> <p>20 question of your wish that the premier should be</p> <p>21 consulted about handover to the Governor, your position</p> <p>22 is the same as it was before, I assume. And on that</p> <p>23 point I will brief the Minister tomorrow morning and you</p> <p>24 will want to address her about that because I don't</p> <p>25 think there is anything I can do today. So if you could</p> <p style="text-align: center;">Page 113</p>	<p>1 concerns relate to issues of confidential, particularly</p> <p>2 as it impacts timing of decisions or timing of</p> <p>3 announcement of decisions which have been made by the</p> <p>4 council and matters which the council really needs to</p> <p>5 keep in confidence for the long-term. Because we are</p> <p>6 talking about security issues, I don't think I need say</p> <p>7 much more about how important these issues are, leaving</p> <p>8 aside the political considerations which are that</p> <p>9 potentially if the leader of the opposition disagrees</p> <p>10 with the decision of the council, more likely than not,</p> <p>11 absent some provisions, sanction, or whatever, or what</p> <p>12 he can and should say the government is likely to be</p> <p>13 barred from the public platform about it.</p> <p>14 So I think that all around the table, including the</p> <p>15 perhaps in particular the NGOs, the NGOs are anxious</p> <p>16 that both sides of the House are seen to be working</p> <p>17 together on a matter of critical importance as national</p> <p>18 security. And so there is a real desire on our part to</p> <p>19 reach an arrangement which would allow participation by</p> <p>20 the opposition in the work of the council.</p> <p>21 On the other point, which is section 3, that is the</p> <p>22 ambit of the remit of the -- an ambit of the council.</p> <p>23 We are still very firmly of the view that the council</p> <p>24 ought to be the decision-maker in relation to matters of</p> <p>25 national security, save in exceptional circumstances</p> <p style="text-align: center;">Page 115</p>
<p>1 confirm.</p> <p>2 MR TIBBETTS: Yes.</p> <p>3 THE CHAIRMAN: That's that point. National Security</p> <p>4 Council. There are two National Security Council.</p> <p>5 There are two issues as far as I'm aware that are</p> <p>6 outstanding on this, and without discussing them further</p> <p>7 today I just want to be up to date with what your</p> <p>8 position is. The two issues are one the extent to which</p> <p>9 the council would be merely advisory or (inaudible)</p> <p>10 Governor that is point one.</p> <p>11 Point two is the extent to which the leader of the</p> <p>12 opposition might participate in the National Security</p> <p>13 Council. So if you would be so good as to tell us your</p> <p>14 up-to-date position on both of those, because I know you</p> <p>15 will want to address the Minister personally on these</p> <p>16 things, it would be very helpful to us.</p> <p>17 MR MCLAUGHLIN: Mr Chairman, we had a long discussion about</p> <p>18 this yesterday and I think we have made some progress,</p> <p>19 not sufficient for us to be able to say: well there is</p> <p>20 an agreed position. But I think there is -- there</p> <p>21 always was, but more so now than ever, there is a desire</p> <p>22 to involve opposition in the work of the council to</p> <p>23 ensure that they can have input. There are concerns</p> <p>24 about how this will work in political system which is</p> <p>25 unfortunately by its very nature adversarial. And those</p> <p style="text-align: center;">Page 114</p>	<p>1 which will always be part of the (inaudible) understand</p> <p>2 which the Governor would (inaudible). But we think the</p> <p>3 decision-making ought to be in the hands of the council,</p> <p>4 and so the council that we propose is a council similar</p> <p>5 to the one which is given to (inaudible) any</p> <p>6 constitution rather than the sort of advisory council</p> <p>7 which your draft (inaudible).</p> <p>8 MR TIBBETTS: Mr Chair, just to add to the first point about</p> <p>9 the National Security Council. In our pursuit of common</p> <p>10 ground, on our side, is there any reserve situation,</p> <p>11 from your point of view, that you may have which we</p> <p>12 might need to consider in the equation?</p> <p>13 THE CHAIRMAN: I don't think so. But leave it with me</p> <p>14 because we will need to talk through this. I mean one</p> <p>15 thought that we had was if you are considering seriously</p> <p>16 leader of the opposition being a member of the National</p> <p>17 Security Council that seems to me, without wanting to</p> <p>18 sound patronising, an enlightened view. I think it's</p> <p>19 a good thing to have co-operation on these matters which</p> <p>20 are of interest to national interest as a whole</p> <p>21 territory obviously.</p> <p>22 One other thought, and I don't know whether anybody</p> <p>23 has given thought to this, in the UK there are police</p> <p>24 authorities for the various regions on which there is</p> <p>25 political representation, also public representation,</p> <p style="text-align: center;">Page 116</p>

<p>1 and I wondered whether you had given any thought to --</p> <p>2 or you might given some thought to having the</p> <p>3 composition of the National Security Council not only in</p> <p>4 the leader of the opposition but maybe one or two</p> <p>5 representatives of the society, one would have to think</p> <p>6 carefully about how such persons could be selected, but</p> <p>7 in that natural way it would be the Governor after</p> <p>8 consulting with (inaudible), something like that, in</p> <p>9 order to get wider representation. And then you mention</p> <p>10 the possibility of writing in something as a safeguard</p> <p>11 against, or a deterrent against, unauthorised disclosure</p> <p>12 of sensitive information.</p> <p>13 MR TIBBETTS: Not limited to the leader of opposition.</p> <p>14 THE CHAIRMAN: No, any member. And the only thought I had</p> <p>15 immediately on that, although we could think on it</p> <p>16 further overnight, is suspension of such a member for</p> <p>17 a specified period of time or in its (inaudible)</p> <p>18 expulsion of that member. And then of course it poses</p> <p>19 the question who decides. And I could not think of</p> <p>20 anybody other than the chairman and the new Governor to</p> <p>21 decide this.</p> <p>22 MR TIBBETTS: He or she will not have (inaudible) to</p> <p>23 themselves.</p> <p>24 THE CHAIRMAN: So I think there is plenty to think about</p> <p>25 there. What I think we should do on this decision, this</p> <p style="text-align: center;">Page 117</p>	<p>1 of that connection and I am giving you the strongest</p> <p>2 hint I possibly can that if section 31(3) comes out all</p> <p>3 right, then we will go with your alternative section 81.</p> <p>4 The thing I am concerned about is that we get into the</p> <p>5 new constitution a reference to good governance and</p> <p>6 I know that our Minister will regard that as important.</p> <p>7 So you remember that in the text on section 31(3) there</p> <p>8 is a reference to good governance and that is what we</p> <p>9 would like to keep.</p> <p>10 Bill of Rights.</p> <p>11 MR TIBBETTS: Mr Chairman, could you just allow us to go</p> <p>12 over 31(3) quickly?</p> <p>13 THE CHAIRMAN: We did that.</p> <p>14 MR TIBBETTS: I am actually trying for the time to put my</p> <p>15 hands on what you said ... Mr Chairman, it was just that</p> <p>16 this morning you were going to think about something.</p> <p>17 THE CHAIRMAN: We were going to think about the words "in</p> <p>18 his or her judgment", and if that's the only point</p> <p>19 between us, then we will be thinking about that.</p> <p>20 MR TIBBETTS: Thank you very much. That is the only point</p> <p>21 sir, nothing wrong.</p> <p>22 THE CHAIRMAN: Bill of Rights. The first question is: do</p> <p>23 you still want to propose some language on</p> <p>24 self-determination?</p> <p>25 MR MCLAUGHLIN: Yes. Yes, sir, we knocked this around quite</p> <p style="text-align: center;">Page 119</p>
<p>1 is a difficult subject, both elements, quite difficult,</p> <p>2 is we will brief the Minister tomorrow morning before we</p> <p>3 meet, but if you would like to address me on it, of</p> <p>4 course you may do that, but perhaps we should take --</p> <p>5 she will come for an hour in the morning to open things</p> <p>6 up. Then we will have several hours without her then</p> <p>7 she will come back later in the afternoon. We can</p> <p>8 perhaps toss around some ideas between us in the interim</p> <p>9 and then you can address her later on the point if you</p> <p>10 would like.</p> <p>11 MR TIBBETTS: That's fair.</p> <p>12 THE CHAIRMAN: Now the third one is Governor reserve</p> <p>13 legislative power where you proposed in the second round</p> <p>14 the alternative text, and I having forgotten the number</p> <p>15 of the section now.</p> <p>16 MR MCLAUGHLIN: That should be an easy one.</p> <p>17 THE CHAIRMAN: 81. Now, I think it's right at this point,</p> <p>18 and in the interests of making progress, if you will go</p> <p>19 with -- for the Governor that is being referred to in</p> <p>20 section 31(3), which you said you would, I was delighted</p> <p>21 to hear, I think we could go with your alternative text</p> <p>22 for section 81, which would not refer to good governance</p> <p>23 but would refer across to the areas that the Governor</p> <p>24 has special responsibility.</p> <p>25 Now I'm tying these two provisions together because</p> <p style="text-align: center;">Page 118</p>	<p>1 a bit around yesterday and I have since had a word with</p> <p>2 the NGOs, and I'm not quite sure what their final</p> <p>3 position or the opposition is, but what we are happy</p> <p>4 with, the Government and the NGOs, is the wording from</p> <p>5 the Gibraltar constitution that is contained in its</p> <p>6 first paragraph, not the second paragraph. We would</p> <p>7 delete the second paragraph and put a full stop where</p> <p>8 they have the semi-colon.</p> <p>9 THE CHAIRMAN: So it is at the beginning of chapter 1?</p> <p>10 MR MCLAUGHLIN: Yes, sir.</p> <p>11 THE CHAIRMAN: "Whereas all peoples have the right to</p> <p>12 self-determination and by virtue of that right", all the</p> <p>13 way down to, "based upon the principle of mutual benefit</p> <p>14 in international law"?</p> <p>15 MR MCLAUGHLIN: Full stop.</p> <p>16 THE CHAIRMAN: So it's the first paragraph, and you would</p> <p>17 like that to appear at the beginning of the Bill of</p> <p>18 Rights in the same sort of place as a preface?</p> <p>19 MR MCLAUGHLIN: That's correct, sir.</p> <p>20 THE CHAIRMAN: Before section 1 starts.</p> <p>21 Yes, because the second paragraph on Gibraltar is</p> <p>22 very much Gibraltar-specific for reasons you will</p> <p>23 understand. Well, that's fine with us. We can go with</p> <p>24 that. If the opposition is content, I think it is a</p> <p>25 perfectly good thing. There is something similar in the</p> <p style="text-align: center;">Page 120</p>

<p>1 Falkland Islands constitution as well.</p> <p>2 MR BUSH: Mr Chairman, I just need for you to read what we</p> <p>3 would have.</p> <p>4 THE CHAIRMAN: Should I read it out?</p> <p>5 MR BUSH: Yes.</p> <p>6 THE CHAIRMAN: This would be a preambular paragraph between</p> <p>7 the heading "Bill of Rights, freedoms and</p> <p>8 responsibilities", and section 1:</p> <p>9 "Whereas all peoples have the right of</p> <p>10 self-determination and by virtue of that right they</p> <p>11 freely determine their political status and freely</p> <p>12 pursue their economic, social and cultural development,</p> <p>13 and may for their own ends freely dispose of their</p> <p>14 natural wealth and resources without prejudice to any</p> <p>15 obligations arising out of international economic</p> <p>16 co-operation based upon the principle of mutual benefit</p> <p>17 and international law."</p> <p>18 This wording comes from the international covenant</p> <p>19 (inaudible) so it is well established language. Okay?</p> <p>20 MR BUSH: There are several things that we would ask there</p> <p>21 to be a constitutional provision for.</p> <p>22 THE CHAIRMAN: It's very splendid language.</p> <p>23 All right. We are happy to put that in. We will do</p> <p>24 that. For the purpose of our briefing the Minister, we</p> <p>25 really will need an update from you about where things</p> <p style="text-align: center;">Page 121</p>	<p>1 Now, I will be honest with you, the two most</p> <p>2 sensitive points from our point of view are</p> <p>3 non-discrimination provision, which as it is drafted at</p> <p>4 the moment is, in my view, legally acceptable because it</p> <p>5 is in conformity with the European Convention on Human</p> <p>6 Rights, by having open-ended list but tied to the other</p> <p>7 rights in the Bill of Rights. That is what the European</p> <p>8 Convention does and what the UK Human Rights Act does.</p> <p>9 It would not be in conformity with these obligations</p> <p>10 to have a closed list. That is fundamental. Nor would</p> <p>11 it be, I think, acceptable, although Sarah is not here</p> <p>12 to argue her point, to have a two tier system, whereby</p> <p>13 some categories of people enjoy better rights than</p> <p>14 others. That in itself is discriminatory by definition</p> <p>15 and I can see no prospect of persuading our Minister</p> <p>16 that that would be a good or acceptable outcome.</p> <p>17 The second point of sensitivity is the provision</p> <p>18 about declaration of compatibility and in effect</p> <p>19 allowing, even where the courts have found an</p> <p>20 incompatibility, allowing the legislature the</p> <p>21 opportunity to decide what to do about it. Because in</p> <p>22 other territories the courts have power to hold</p> <p>23 incompatible law void, and I understand the reasons why</p> <p>24 you have argued for the system which is in this draft.</p> <p>25 It is undeniable that that is the system in the UK Human</p> <p style="text-align: center;">Page 123</p>
<p>1 stand on the Bill of Rights. Now she has agreed not to</p> <p>2 take this topic until Thursday morning because Sarah</p> <p>3 Collins, as I understand it, can't make it until</p> <p>4 Thursday morning, which is fine.</p> <p>5 On Thursday morning, I reckon that is the time --</p> <p>6 well, it has to be Thursday morning -- for points to be</p> <p>7 made to her about the draft Bill of Rights. Now we have</p> <p>8 briefed her already for the second round and we have put</p> <p>9 in a further briefing to her last week about the novel</p> <p>10 nature of some of the provisions in this Bill of Rights,</p> <p>11 quite unlike other overseas territories' constitutions</p> <p>12 but nevertheless tailored to the particular</p> <p>13 circumstances of the Cayman Islands at the moment, where</p> <p>14 there are concerns that we have done our best to</p> <p>15 understand and appreciate.</p> <p>16 Moreover, we have explained to her, and will do so</p> <p>17 again, and it is open to you to do so in your own words,</p> <p>18 that the language as it stands at the moment is a very</p> <p>19 delicate compromise. She has made it clear to us in the</p> <p>20 past, and I am sure will maintain this view, that her</p> <p>21 bottom line is that the text is compatible with the UK's</p> <p>22 international obligations. She cannot justify the UK</p> <p>23 Parliament text, which would likely lead to the UK being</p> <p>24 put into breach of its international obligations. That</p> <p>25 is absolutely fundamental.</p> <p style="text-align: center;">Page 122</p>	<p>1 Rights Act, so it is very difficult for us, without</p> <p>2 hypocrisy, to criticise it too much. But it is</p> <p>3 different from the other OTs, so she will have to make</p> <p>4 a calculation that that sort of system is acceptable in</p> <p>5 the light of everything else.</p> <p>6 MR TIBBETTS: But you will be doing your best to convince</p> <p>7 her of that.</p> <p>8 THE CHAIRMAN: Yes, indeed. I know that when we come to</p> <p>9 Thursday, she will hear different points of view from</p> <p>10 different people. She will hear, I expect from you and</p> <p>11 others here today, a realistic realpolitik view, if I</p> <p>12 could put it that way. She will have to judge whether</p> <p>13 it is better to go with what could be done now, to get</p> <p>14 for the first time a constitutional Bill of Rights in</p> <p>15 it, which is very important for us and for you, for the</p> <p>16 people of the Cayman Islands, and she will hear from</p> <p>17 Sarah Collins an idealistic view, which actually she</p> <p>18 will probably find very attractive, because we are</p> <p>19 becoming more used to it. But I have to say in the UK</p> <p>20 there are plenty of people who are cynical about human</p> <p>21 rights and think it has all gone too far. But anyway</p> <p>22 she will have to make a judgment about it and we will</p> <p>23 continue to brief her as we think best, above her bottom</p> <p>24 line on compatibility with international obligations,</p> <p>25 and then I suggest you use Thursday morning to say to</p> <p style="text-align: center;">Page 124</p>

1 her what you would like to say on the matter.  
 2 Now if anybody has any worries or new points to make  
 3 about the Bill of Rights now, without making long  
 4 speeches about it, I would invite you to do so, so that  
 5 we can give her an update on where we stand.  
 6 PASTOR O'CONNOR: Thank you very much, Mr Chairman. We  
 7 certainly appreciate your patience as you work through  
 8 this novel situation with us and we are grateful.  
 9 While we are waiting for the compromise to be worked  
 10 out in terms of limiting the rights to the constitution  
 11 that we have, and I do believe that the clause ended --  
 12 the section 16 clause will not be acceptable, now  
 13 perhaps will be inconsistent with the UK international  
 14 obligation, there remains for us a major concern that to  
 15 argue for all this is a very serious and fundamental  
 16 point.  
 17 There remains also your concern -- give us guidance  
 18 here. I'm wondering whether or not, given that that  
 19 clause has to remain open, whether we can do some  
 20 further work on the clause to provide a qualifier to  
 21 that clause. I don't know if we can continue to work on  
 22 perhaps a qualifier for that clause. Because I really  
 23 think, even as it stands, it may suit and it may fit in  
 24 well with the UK's obligation, but I am not too sure how  
 25 well it will fit with the concerns of the people back

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1 to pay attention to, has built up quite a lot of case  
 2 law which allows for exceptions to the general principle  
 3 of non-discrimination law for proportionate reasons,  
 4 provided it is proportionate and allows the state a  
 5 margin of appreciation to conclude these things, bearing  
 6 in mind its own situation.  
 7 So I think the way it is at the moment, and bearing  
 8 in mind also that subsection (1) has been qualified to  
 9 refer only to the rights under this part of the  
 10 constitution, so you know what the boundaries of this  
 11 section is going to be.  
 12 Just as an example, one of the other rights is  
 13 marriage. Now marriage is so defined in this text  
 14 without peradventure that marriage can only be between  
 15 an unmarried man and an unmarried woman, it can't be  
 16 anything else. So this doesn't make a difference.  
 17 On the other hand, if you were thinking of the areas  
 18 of public health, any other form of walks of life which  
 19 are not covered by this Bill of Rights, then the  
 20 non-discrimination provision does not apply at all,  
 21 although the Human Rights Committee would like it to for  
 22 certain categories of people, but it does not apply, and  
 23 that is the system of the European Convention itself.  
 24 So from the technical point of view, we think it's  
 25 all right and manageable in terms to see what those are.

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1 home. So to what extent, if it is possible, that we can  
 2 perhaps add a qualifier to that open-ended clause.  
 3 I don't know, do you think it's something we can work  
 4 on?  
 5 THE CHAIRMAN: Well I think that at the second round there  
 6 were actually two qualifiers. One is adding in  
 7 subsection (2) the words "and unjustifiable".  
 8 Now those two words are very important because they  
 9 immediately introduce another test; not just different  
 10 treatment, but unjustifiable.  
 11 The other one is in subsection (3):  
 12 "Where a law or decision of any public official  
 13 shall contravene the section if it has an objective and  
 14 reasonable justification and is reasonably proportionate  
 15 to its aim in the interests of defence, public safety,  
 16 public order, public morality or public health."  
 17 Now that is a very, very important subsection, which  
 18 was not there before, and allows for a derogation from  
 19 the whole prohibition on discrimination, if it is  
 20 objective, proportionate, in the interest of defence,  
 21 public safety, public order, public morality or public  
 22 health.  
 23 So already the qualifiers have been put in. They  
 24 are significant. I think they are all right from our  
 25 point of view because the European Court, which we have

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1 I mean, I think if you have a serious problem about  
 2 this, it is going to be very serious to the  
 3 acceptability of the whole package; very serious,  
 4 probably fatal. I mean, I am looking at Pastor Alden  
 5 and I hope you don't have similar worries, do you?  
 6 PASTOR EBANKS: No, sir, I am relatively pleased with the  
 7 efforts that have been made to address our concerns, and  
 8 when I say "our concerns", not just the concerns of the  
 9 CMA but the concerns of the community, and I am pleased  
 10 to hear that you believe that the ultimate goal is to be  
 11 able to say to the Minister that this deal, and if it is  
 12 novel complies with the new Convention because  
 13 ultimately I believe that is Her Majesty's concern.  
 14 While we still have some nerves about all of this, we  
 15 also -- we want to be fair and reasonable in the  
 16 process.  
 17 But the question that I have for you, and no reason  
 18 to debate it but the question -- I did have the  
 19 opportunity to look at the HRC's document last night and  
 20 there is a number of things contained in that, that are  
 21 concerning to me, that do not necessarily have to do  
 22 directly with these negotiations. But I am concerned  
 23 that we have not prepared, as we were asked not to do,  
 24 we have not prepared a written statement for this round  
 25 of the talks. Maybe you can give some guidance whether

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<p>1 having those concerns that the HRC is presenting 2 a documented position in which there are certain things 3 said that they say are irrefutable, that we believe are 4 refutable.</p> <p>5 My concern is that we have a record that makes some 6 of these statements, and nobody makes an attempt to 7 refute some of those things. Because I think they are 8 important issues that they are raising but I believe 9 that we are in position to challenge some of the 10 statements that they have made in there. But again, 11 I don't want to introduce something into this process. 12 That really is something that they will need to be doing 13 in terms of our conversations locally in Cayman, but 14 neither do I want a record to, a documentary form or 15 part of the record that we would have -- we should have 16 a response to, for a Minister or anyone else to look at, 17 and that we miss that opportunity.</p> <p>18 We are not chomping at the bit to submit a written 19 document but the fact that this one has been written, we 20 are -- you know we want to make sure that if it would be 21 appropriate to do, we are well willing and prepared to 22 make a written submission, not to change our positions 23 but to refute some of the what I see is allegations made 24 in this, some of them directed specifically at CMA. But 25 we are quite capable of defending if we need to.</p> <p style="text-align: center;">Page 129</p>	<p>1 Sarah Collins coming here and not saying her piece 2 either. I am sure she will do that.</p> <p>3 But in addition, of course, if for the record you 4 feel that it will be right to produce the paper, talking 5 about the record for historical purposes now, that is 6 fine and that is up to you.</p> <p>7 This is a very well documented process, much more so 8 than most constitutional organisational reviews that I 9 have known, where a lot of paper and a proper 10 constitutional secretariat which no doubt very carefully 11 can be there for historical purposes.</p> <p>12 I just want to turn to McKeeva now because you said 13 you wanted to say something about the Bill of Rights 14 amongst your four points.</p> <p>15 MR BUSH: Mr Chairman, I think we said we would wait until 16 Thursday morning when the Minister is here for those 17 matters, and our party have taken position with the 18 churches. We follow their line of argument.</p> <p>19 THE CHAIRMAN: All right. Well, with that there is one 20 other point I just wanted to make about the Bill of 21 Rights, but before coming to your other points, McKeeva, 22 there is just one point I wanted to say for the record 23 --</p> <p>24 PASTOR O'CONNOR: Given that you have made it absolutely 25 clear to us that the clause will not be acceptable, we</p> <p style="text-align: center;">Page 131</p>
<p>1 So I just don't want the record to reflect one side, 2 the documentary side of the story. We have documented 3 some of our arguments on some of the previous stuff, but 4 again I just -- I don't want to inject something into 5 this that's not appropriate for us to do, but neither do 6 I want the record to show one side of the story and we 7 didn't respond to it officially.</p> <p>8 THE CHAIRMAN: Well, I think I understand that entirely. I 9 have not had a chance to read their paper yet, but the 10 programme as it stands at the moment has the Minister 11 coming to chair on Thursday morning at 9.30 until 10.45. 12 That is an hour and a quarter, and we have already 13 agreed that we shall do so again, but on that occasion, 14 she should listen to any arguments or points that 15 anybody around the table wants to make about the Bill of 16 Rights. But there is a limited time and we will have to 17 suggest to her that she bangs the gavel if people go on 18 too long.</p> <p>19 There will of course also will be a lunch, which 20 might not be so easy to turn into a working lunch but if 21 necessary it could do, and the debate could continue 22 over lunch. Because in the afternoon she has to decide. 23 But I will suggest that you use that time to say what 24 you would like to say, and I am sure everybody will want 25 to come in on it and there won't be any point in</p> <p style="text-align: center;">Page 130</p>	<p>1 do appreciate that information and we will address our 2 case as far as that is concerned, and extend our 3 appreciation for the work that has been done so far in 4 this section.</p> <p>5 THE CHAIRMAN: Thank you. Thank you very much.</p> <p>6 There is just one other point, and I know the 7 Chamber of Commerce and the Human Rights Committee have 8 pressed for simple language that everybody can 9 understand, which is something which I have wrestled 10 with for all my career, really, in drafting laws and any 11 lawyer who is here, Michael, Sam, anybody who has had to 12 draft laws knows that it is a very worthy objective but 13 it is almost impossible to achieve, because the law is 14 complicated, and rules have exceptions and exceptions to 15 exceptions and qualifications and so forth. That is why 16 the text is more complicated than it might be.</p> <p>17 This Bill of Rights, with the best will in the 18 world, was produced tailored for the Cayman Islands with 19 model provisions in it, with provisions that you won't 20 find in other overseas territory constitutions, by the 21 Cayman Islands delegation, and we took it and we have 22 negotiated a few changes through it.</p> <p>23 Essentially it is their draft, which is, I would 24 stress, very delicate, and I would love to have simple 25 language. I would argue actually that many of the</p> <p style="text-align: center;">Page 132</p>

<p>1 provisions in this Bill of Rights are written in simple 2 language. I accept that there are others which are 3 complicated. They have to be complicated but there is 4 nothing we can do about that, I'm afraid. I am sorry 5 but sometimes, as I said at the last round, if one is 6 going to get a document which has consensus, one often 7 has to use more words than ideally necessary.</p> <p>8 Actually, we had a very good example this morning of 9 that very thing about the Governor returning bills 10 within 60 days, but in order to get it understood, we 11 had to turn it around and use more words than we might 12 ordinary have done. Anyway, I don't want to go on about 13 this too much. But that, I think, is the thing we are 14 going to have to live with, and as I was going through 15 this draft, not only in the Bill of Rights but the rest 16 of it, I could see that some of the traditional language 17 was rather long-winded, but actually, if you compare it 18 to the present constitution, it is in many respects much 19 simpler.</p> <p>20 Now, McKeeva --</p> <p>21 MR MCLAUGHLIN: Are you leaving the Bill of Rights? 22 THE CHAIRMAN: Yes, unless you have anything else. 23 MR MCLAUGHLIN: There is one other point which I think we 24 have all just simply missed on the secretariat. I'm 25 grateful to them for reminding me of this. It is in</p> <p style="text-align: center;">Page 133</p>	<p>1 PASTOR O'CONNOR: I ask for it to be repeated. 2 MR MCLAUGHLIN: "No person shall be compelled to marry 3 without his or her free and full consent." 4 THE CHAIRMAN: That is a good addition. We are getting 5 there. McKeeva, you had one or two other -- 6 PASTOR EBANKS: Just this one more thing, Mr Chair, that we 7 would like to ask you to do. It was part of the 8 discussion that took place among us yesterday on 9 section 9(1) in relationship to private and family life. 10 One of the suggestions that came out yesterday for us to 11 discuss with you to see if there would be any objection 12 in section 9(1), "respect every person's private and 13 family life". 14 We had a lot of discussions around that and how the 15 family was defined in the Bill of Rights and so forth, 16 and we were actually basing the conversation that we had 17 there and some of the contacts in which the discussion 18 took place were actually wondering whether it would be 19 possible in there, instead of talking about family life 20 to talk about home life, and wondered if that would 21 present any problem for the group. 22 MR BRADLEY: Do you mean in addition to? 23 PASTOR EBANKS: No, no, to replace "family" by "home" 24 because again, one of the discussions that we had, the 25 home life oftentimes is not as easily defined with the</p> <p style="text-align: center;">Page 135</p>
<p>1 relation to section 14, which is marriage, page 21. 2 You may remember that there was a long discussion 3 about the issue or the potential of persons being 4 compelled to marry someone that they didn't want to, and 5 we tried to amend subsection (1), which some people had 6 issues with, and then we decided that we would go away 7 and think about it and I think somehow it has got left. 8 So the BVI constitution actually has a subsection that 9 we think will work. It is subsection (2) and it simply 10 reads: 11 "No person shall be compelled to marry without his 12 or her free and full consent." 13 It is a stand-alone subsection, and I hope that's 14 not going to be controversial. I don't think so.</p> <p>15 THE CHAIRMAN: No, no, I would be perfectly happy to -- we 16 can put that in. I didn't put it into this draft 17 because I think we concluded at the end of the 18 discussion that it was undecided, so I left it out. But 19 if there is a general wish to put that in, I think it is 20 a very respectable thing to say. Okay, so it is BVI 21 section 20, subsection (2).</p> <p>22 MR MCLAUGHLIN: I been asked to read it again: 23 "No person shall be compelled to marry without his 24 or her free and full consent." 25 THE CHAIRMAN: Indisputable.</p> <p style="text-align: center;">Page 134</p>	<p>1 traditional family that most people may think of, and we 2 were recognising the fact that home life for some 3 purposes is different. 4 MR TIBBETTS: Mr Chair, I think if we look at 14(1) and 5 just ... I am just trying to assist this point, 6 Mr Chair, so that it is understood a little clearer, 7 that's all. 14(1) reads: 8 "Government shall respect the right of every 9 unmarried man and woman of marriageable age as 10 determined by law freely to marry a person of the 11 opposite sex and found a family." 12 PASTOR EBANKS: I have nothing more to add to it. 13 THE CHAIRMAN: Well, in which case I don't see the problem 14 with the word "family". It is clear where it comes 15 from. I do see a problem about deleting "family" 16 because Article 8 of the European Convention on Human 17 Rights in (b) and in the covenant as well, I expect, is 18 headed, "Right to respect in private and family life". 19 It begins: 20 "Everyone has the right to respect in his private 21 and family life, his home and his correspondence." 22 It is absolutely fundamental. We can check the 23 covenant if you like. 24 MR BRADLEY: Putting in "home" I think would be much 25 narrower. The family refers to the unit and can be made</p> <p style="text-align: center;">Page 136</p>

<p>1 to refer back.</p> <p>2 MR TIBBETTS: He is looking at the exact opposite of what</p> <p>3 you say.</p> <p>4 PASTOR EBANKS: Mr Chairman, it's not a critical issue for</p> <p>5 us, so please don't spend any time on this.</p> <p>6 THE CHAIRMAN: Thank you very much. Right, if we have done</p> <p>7 with updating on Bill of Rights ...</p> <p>8 MR BUSH: Mr Chairman, I will raise my first two points with</p> <p>9 the constitutional commission and the polling(?) system</p> <p>10 in the other islands, our sister islands, Cayman Islands</p> <p>11 and Grand Cayman. Before I do that, I want to ask the</p> <p>12 government whether, after the meeting at 5.00, we</p> <p>13 shouldn't take some time to discuss amongst ourselves</p> <p>14 what has been intimated to us, if I am understanding --</p> <p>15 about the Bill of Rights in respect -- I guess he was</p> <p>16 talking about when Pastor O'Connor spoke. So we can</p> <p>17 hear clearly. Notwithstanding that, sir, I certainly</p> <p>18 realise that a lot of time has gone into this matter of</p> <p>19 the Bill of Rights. I recognise how much and how</p> <p>20 important it is for the United Kingdom, and the amount</p> <p>21 of talk that has gone into this other status which we</p> <p>22 all believe again we can do, without saying so. It is</p> <p>23 something that worries me.</p> <p>24 I've seen this letter, and I have never</p> <p>25 discriminated against anyone in my life, but I can tell</p> <p style="text-align: center;">Page 137</p>	<p>1 body, which studies and informs government about</p> <p>2 treaties, about constitutional movements, about laws and</p> <p>3 regulations that affect us. And having the secretariat</p> <p>4 that we have had, we have passed that stage. I believe</p> <p>5 that a constitutional commission should be in place and</p> <p>6 one might come up and say: well --</p> <p>7 MR TIBBETTS: You mean permanently?</p> <p>8 MR BUSH: Permanently until the day we walk on our own,</p> <p>9 whenever that time is, and even after that, because the</p> <p>10 world is changing and none of us knows everything. We</p> <p>11 are just human beings and so, sir, I want to ask the</p> <p>12 government and the UK to consider putting something in</p> <p>13 place. How it's made up -- we just put in a commission,</p> <p>14 a services commission, something like that along that</p> <p>15 line I believe could be done, where the Governor and our</p> <p>16 position and the government have an opportunity.</p> <p>17 This is a civil society, of course, because it will</p> <p>18 indeed be put in through the NGOs, but I certainly</p> <p>19 believe that this needs to be done. I mean, just you</p> <p>20 sitting there, sir, without even hearing the Minister</p> <p>21 tell us what you just said in regards to this Bill of</p> <p>22 Rights. One of these days someone going to say: well,</p> <p>23 the UK, it is time for us to go on our own, and it is</p> <p>24 time that if that happens, that preparation is in place,</p> <p>25 that people have knowledge of what they are getting</p> <p style="text-align: center;">Page 139</p>
<p>1 one and all that if this has the possibility to allow</p> <p>2 anything that will change the way we do things in the</p> <p>3 islands, then no matter what kind of constitution is</p> <p>4 offered, I will have to look at that position.</p> <p>5 But that's (inaudible) because it will like to</p> <p>6 get -- from my position, we would like to get as close</p> <p>7 as we can with the UK without trampling our own beliefs,</p> <p>8 our own views, and what the people have to say, because</p> <p>9 I have not come to London to step far away from that.</p> <p>10 There are things that we can do that the people might</p> <p>11 not like but will not kill you for. There are things</p> <p>12 that people are adamant that they will not support, and</p> <p>13 I think all of us need to bear that in mind.</p> <p>14 Thank you very much, Mr Chairman, for allowing me</p> <p>15 this matter of a constitutional commission. I have</p> <p>16 raised it several times. I do believe that a proper</p> <p>17 constitutional commission, made by and backed by</p> <p>18 constitutional provision can only be good for the</p> <p>19 islands. We know life is changing. We know how much it</p> <p>20 has changed just in the 25 years that I have been</p> <p>21 involved in governments, and how much government has</p> <p>22 changed, and more and more we are impacted by what the</p> <p>23 metropolitan countries do, what the UK do, how Europe</p> <p>24 impacts the UK and the UK treaties that it has impacts</p> <p>25 us, and I think we certainly need a more high level</p> <p style="text-align: center;">Page 138</p>	<p>1 into, and in this (inaudible) I see no reason why there</p> <p>2 should not be that kind of educational processes to</p> <p>3 assist us. I will stop there on that one, sir.</p> <p>4 THE CHAIRMAN: Well that's very interesting because, I mean</p> <p>5 at the moment this draft constitution, amongst a number</p> <p>6 of innovations, would have a human rights commission, a</p> <p>7 commission on standards in public life, a judicial and</p> <p>8 legal services commission, all doing different functions</p> <p>9 from what you are describing and as I understand it,</p> <p>10 what you are thinking of is perhaps a small standing</p> <p>11 body made up of people appointed by the Governor, with</p> <p>12 the advice or after consulting the Premier and the</p> <p>13 Leader of the Opposition, drawn from the civil society</p> <p>14 which will exist to advise or write reports on --</p> <p>15 MR MCLAUGHLIN: Who reports regularly.</p> <p>16 THE CHAIRMAN: Now one would have to define what those</p> <p>17 things were. But you know from our point of view</p> <p>18 I can't see a fundamental objection to that. What would</p> <p>19 be helpful, if the government is sympathetic to this</p> <p>20 idea, will be to work out the draft text, a draft</p> <p>21 section. It need not be very long but something which</p> <p>22 we could look at and consider.</p> <p>23 MR TIBBETTS: Mr Chair, the concept, I certainly don't see</p> <p>24 a problem with it, and perhaps the simplest way to deal</p> <p>25 with it, and the opposition, is to have a very simple</p> <p style="text-align: center;">Page 140</p>

1 provision allowing for the appointment of this  
 2 commission, and then some law will prescribe terms and  
 3 conditions and how it's made up, and stuff like that, so  
 4 that all of that doesn't have to be worked out  
 5 immediately, if you understand what I am saying and then  
 6 a law could deal with making up all the different  
 7 things. Not that we don't have to talk about it. But,  
 8 I mean, I don't know what your thoughts are, how far  
 9 they have thought it through, because they may have it  
 10 all put together and it might be something simple to do.  
 11 I don't know.

12 MR BUSH: Mr Chairman, I don't see the difficulties in  
 13 setting it out. As I said, there are a lot of areas now  
 14 in this draft that are new to us, but it sets out the  
 15 parameters and I am sure with the amount of legal minds  
 16 around the table, that shouldn't be hard to do.

17 I am weary, and I am weary of all the legislation  
 18 that this constitution is leading us, or leading our  
 19 politicians to do. Because people certainly want to see  
 20 things done, and if you going to have a constitution,  
 21 the constitution should say what needs to be done. If  
 22 legislation comes, I think the parameters need to be set  
 23 out. I think that is now the issue.

24 What I think is important, maybe others may not, but  
 25 I certainly believe it is, without just leaving bare

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1 of treaties, human rights obligations, reporting and  
 2 there is an immense amount, and I think that  
 3 a committee, a constitutional commission such as this  
 4 envisaged now, could eventually perform that purpose and  
 5 slide into it. But I think that from my point of view,  
 6 a great argument in favour of it is that constitutional  
 7 amendments in Cayman, and everywhere else, have been  
 8 made on a piecemeal basis and sometimes crisis  
 9 management, and if there was a provision to establish  
 10 a constitutional commission to have it to sit and report  
 11 not every month or every year, but on a three or five  
 12 year period, presenting factually what changes they  
 13 think would be necessary, you could produce better  
 14 structured constitutional amendments that are thought  
 15 out, not on a short period of time but round the table.  
 16 So I think a constitutional commission like this would  
 17 have a great advantage for those two reasons.

18 MR TIBBETTS: And then really have to engage in a process  
 19 like we are now.

20 PASTOR EBANKS: Mr Chairman, wearing a slightly different  
 21 hat, I am co-chair of a non-government organisation  
 22 group with the Chamber and a number of other  
 23 organisations. And it is one of the things that all  
 24 education aspect which obviously would be an important  
 25 element to such a commission, is something that

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1 bones, but it should set out what is expected, who is  
 2 going to be appointed, how they will be appointed, and  
 3 then maybe by (inaudible) something can be ironed out as  
 4 to what all their duties are.

5 MR TIBBETTS: Mr Chair, just quickly, when I said what  
 6 I said, I was just not sure how far on the thought  
 7 process the opposition was. We don't have any problems  
 8 with that. I was only making the suggestion depending  
 9 on how far on they are. It is something they would  
 10 prefer to have worked out, then I don't have a problem  
 11 with that whatsoever. But in principle we don't have  
 12 any difficulty at all.

13 MR BRADLEY: Mr Chairman, I think it's very late in the  
 14 constitutional reform process, you know, for a new  
 15 subject to be brought up like this. But I personally  
 16 can see that there are many advantages in it. Because  
 17 McKeeva has spoken the unspeakable in a very oblique  
 18 way, but you have to face the realisation that sometime,  
 19 50 or 100 years in the future, that there will be  
 20 a stage when Cayman will decide to walk alone. And  
 21 I know from experience, having gone into a couple of  
 22 newly independent territories in other cases, that there  
 23 is an immense amount of work to be done in the two to  
 24 three year period between that determination being made  
 25 and the independence document being signed; a succession

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1 I believe would be greatly welcomed by a large  
 2 percentage of the population.

3 THE CHAIRMAN: Sounds as if it's a very popular idea. What  
 4 we will try to do overnight, unless you have a draft  
 5 here McKeeva, what we will do.

6 MR TIBBETTS: (Inaudible) legal minds here.

7 THE CHAIRMAN: Something. And it will have advantage which  
 8 will be to do (inaudible) we can put something down and  
 9 I hope in the course tomorrow find time to look at it.

10 MR BRADLEY: I think it's a very good idea just, please.  
 11 Let's not get engaged to quibble about the actual  
 12 composition of the actual terms of reference. Make it  
 13 a skeleton on which local legislation could be found.

14 THE CHAIRMAN: McKeeva, can you wrap.

15 MR BUSH: Mr Chairman, I am sure I understand what we are  
 16 saying in the footnote page 63, that we are leaving the  
 17 door open for single or open-ended electoral districts.  
 18 What I want to have clear understanding of, had a lot of  
 19 discussion with the (inaudible) and both of them have  
 20 stated that -- I think you have heard both of them  
 21 saying they don't want a system to change, they want it  
 22 as is. I want to ensure that we are not leaving the  
 23 door open for another system to be brought in by  
 24 legislation although if you took a referendum  
 25 (inaudible) alone the (inaudible) will tell you leave it

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<p>1 as is, because we have talked across the two hours(?)  2 and we cannot find any support for what was proposed.  3 And I just want to make sure that what is being said  4 here is not changing in the way that the two members are  5 elected. In other words, that the two members would be  6 elected as is now, the constitution should still remain  7 as is and not for legislation to do otherwise.</p> <p>8 MR TIBBETTS: Mr Chairman, if you don't mind, I just want to  9 make sure I understand what the Leader of the Opposition  10 is saying. As I understand it, there is only provision  11 being put in the constitution to allow by legislating  12 any changes in the construct of districts or  13 constituencies or single member constituencies, or  14 however that formulation is, at the end of the day if  15 any future legislative assembly agrees to do so, but  16 what it means is that the status quo remains until such  17 time as that is done, whenever that is, if ever that is,  18 the only achievement in this is that it would not have  19 to require a constitutional change for that to be able  20 to be able to happen. Is that correct?</p> <p>21 THE CHAIRMAN: That's correct. I mean as regards the  22 Caymans -- a new provision, so a new constitution, a new  23 provision is section 89 on page 62 which would provide  24 for an electoral Boundary Commission to meet from time  25 to time and to review the number of boundaries of the</p> <p style="text-align: center;">Page 145</p>	<p>1 MR BUSH: Not as it.  2 THE CHAIRMAN: No. The provision about how the elected  3 districts are divided, how they are composed, the  4 division of the islands as a whole into elected  5 districts, that is regulated under section 93(c), which  6 is exactly the same as it is in the present  7 constitution. It's a matter for your electoral  8 legislation. And the current situation continues, the  9 status quo remains until it is changed by law. The  10 constitution does not require anyone system or another.  11 It is as it is now, or the legislative assembly to  12 consider from time to time. But it will have the  13 benefit of advice, recommendations, from the Boundary  14 Position, whenever it is set up.</p> <p>15 MR TIBBETTS: Not to believe but just do say for instance,  16 Mr Chair, if the time were to come, for instance, when  17 the legislature agreed to add three more seats so that  18 you had seven elected members of the cabinet, for  19 instance, just before you appoint a -- and to bring it  20 home, and 18 seats, and you had six electoral districts,  21 you had 7,000 constituents in George Town, four in  22 Westby(?), four in (inaudible), one in North Side, one  23 in East End, that is 17,000, and in Little Cayman you  24 had 1,000, making 18,000, East End and North Side would  25 still have one seat, and Little Cayman would still have</p> <p style="text-align: center;">Page 147</p>
<p>1 elected districts. And so if you look on page 62,  2 section 89(2)(d) provides, I hope I have done it  3 accurately, that, subject to (a), (d) and (c), the  4 Boundary Commission must recommend that:  5 "So far as reasonably practical across all electoral  6 ... (Reading to the words)... that district."  7 Therefore, you know, one member per thousand or  8 whatever. Whether they are single or not  9 constituencies. Then it goes on but (b)(2):  10 "(Inaudible) ... (Reading to the words)... time the  11 return at least two members."  12 MR TIBBETTS: At least. That's a protection.  13 THE CHAIRMAN: That's a protection. Now that is put in  14 because I have always understood that to be fundamental  15 to all of these governments, irrespective of the  16 population of those (inaudible). So those two members  17 could be representing far fewer voters than members of  18 Georgetown or (Inaudible) West End or East End town  19 centre. So this would be actually an obligation on the  20 Boundary Commission to not to fiddle around with the  21 representation for those two islands.  22 MR BUSH: So there is no opportunity in this for the system  23 that was proposed? One constituency, two members but  24 one vote.  25 MR TIBBETTS: Not as it is.</p> <p style="text-align: center;">Page 146</p>	<p>1 two. That's how it would work. So I am saying it is  2 protection rather than any risk, at this point in time.  3 THE CHAIRMAN: If there is nothing else I think we have done  4 very well. I would just like to say something about  5 tomorrow first and then ask (Inaudible). The only  6 thing I would like to say is that the time -- well, the  7 only thing I will say is that the way it should open is  8 the Minister will say a few words and then will want to  9 get on to business. So I suggest that if anybody would  10 like to make some opening remarks rather than take up  11 a lot of time with opening statements, if you would like  12 to make any general opening remarks do so when you first  13 take the floor, you know, without going on at great  14 length, but simply for the purposes of using her time to  15 the utmost.  16 When she has made her opening remarks she will ask  17 me to summarise where we have got to as a result of  18 today, and I will try to do that briefly, and suggest  19 that we give you the floor to make your points such as  20 you would like to do so, not on the (inaudible) but on  21 other points, and I would suggest her starting with the  22 appointment of Governors. So after she has spoken and  23 I have summarised where we are, I will suggest that we  24 take that topic first and that she gives you the floor  25 first, Kurt, and you can say anything you like and then</p> <p style="text-align: center;">Page 148</p>

1 go in to that subject. Is that all right?  
 2 MR TIBBETTS: That's fine.  
 3 THE CHAIRMAN: And then McKeeva you do the same when you  
 4 come to speak or anybody else who might like to speak.  
 5 I don't want to sort people saying that things they want  
 6 to say, but it is simply trying to use her time --  
 7 Now, Helen has one or two things to say about the  
 8 timetable.  
 9 MR TIBBETTS: My Chair, just before that, when we start is  
 10 she going to then go on to each topic?  
 11 THE CHAIRMAN: Well, I should have made --  
 12 MR TIBBETTS: With your assistance.  
 13 THE CHAIRMAN: I should have made clear that we this think  
 14 the best way is for -- I imagine that she has only  
 15 I think an hour tomorrow morning, doesn't she, an hour  
 16 tomorrow morning. Then she will come back a few hours  
 17 later in the afternoon. I don't think you will get that  
 18 point settled but you should make your argument to her.  
 19 And then if the time still allows you can move on to  
 20 another subject you might want to.  
 21 MR TIBBETTS: Then we carry on between her leaving and her  
 22 coming back.  
 23 THE CHAIRMAN: Yes, we will meet as we are now, and I hope  
 24 we can try and sort out some of the things we discussed  
 25 today. I am sure she will want to do that. So that

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1 to take up my suggestion of meeting a couple of minutes  
 2 afterwards. But I certainly would like to meet at the  
 3 NGO and (inaudible) my point of view.  
 4 THE CHAIRMAN: If you would find it convenient to stay here  
 5 for a few minutes we can leave the room. Unless there  
 6 is anything else, thank you very much for your kind  
 7 attention and contributions and 10.00 tomorrow morning.  
 8 (5.45 pm)  
 9 (Adjourned to Wednesday, 4 February 2009 at 10.00 am)

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1 we sort out some of these points which we won't trouble  
 2 her about.  
 3 MR TIBBETTS: (Inaudible) and she will more likely say yes.  
 4 THE CHAIRMAN: Yes.  
 5 MR TIBBETTS: I don't think we will get to that point.  
 6 THE CHAIRMAN: All right.  
 7 SPEAKER: The only point is just to draw your attention to  
 8 the fact we have recirculated a new agenda for all  
 9 starting at 10.00 tomorrow. As we said the Minister has  
 10 one hour for talks in the morning so it is important  
 11 that we start on time as well as we did today.  
 12 One final point about Thursday, the very final item  
 13 on the part of Gillian Merron who chairs the final  
 14 session of talks, is not for the whole Cayman  
 15 delegation. As I understand it it is Mr Tibbetts and Mr  
 16 McLaughlin who are going to (inaudible), not the whole  
 17 delegation. That was my error in including that, but  
 18 just to make that clear.  
 19 One final issue which Sara has drawn to my  
 20 attention, for some reason the men's coats, when you are  
 21 leaving, will now be found in the ladies' cloakroom.  
 22 When you go to get your coats on the way out, if you  
 23 have left any coats downstairs, you will find them in  
 24 the ladies' cloak room.  
 25 MR BUSH: Mr Chairman, I don't know whether there is cause

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1 Wednesday, 4 February 2009  
 2 (10.00 am)  
 3 GILLIAN MERRON: It's a real pleasure to join you this  
 4 morning and see some of you again and meet some of you  
 5 for the first time. You're all very welcome. Now I  
 6 know who to blame for bringing the snow, and to say  
 7 thank you for bringing sunshine as well. I didn't know  
 8 you could bring snow from the Cayman Islands but you  
 9 learn something every day. We're looking for somebody  
 10 to blame.  
 11 I'd like to make a bit of an opening statement and  
 12 then perhaps we could move on to discussions. First of  
 13 all, I'd like to formally and warmly welcome you to  
 14 these discussions, the third round of discussions on the  
 15 constitution. I am delighted that you are here in good  
 16 spirits and good form to help us reach a satisfactory  
 17 conclusion to the process.  
 18 I understand from Ian and the UK team that they've  
 19 already made good progress in the previous rounds in  
 20 Grand Cayman, and I congratulate you again for that. It  
 21 is a difficult process of compromise and negotiation,  
 22 but you have managed to reach agreement on a number of  
 23 areas and you've also held some very constructive  
 24 discussions, I hear, on points where there are  
 25 difficulties. Of course, that is the purpose of our

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1 talks.  
 2 I'm also very pleased that you've come here as an  
 3 inclusive delegation from the Cayman Islands, and we  
 4 have representation from across the political world but  
 5 also from civil society, and you're all equally welcome.  
 6 I'm glad we're working with what is, of course, a very  
 7 experienced delegation. You've all given time and  
 8 energy to this and I know that we will manage to produce  
 9 a modern constitution for the benefit of the people of  
 10 the Cayman Islands because that's what we are here for.  
 11 You will know, because the UK has constantly  
 12 underlined this, that the UK government is indeed very  
 13 ready to consider carefully any proposals put forward by  
 14 the Overseas Territories, and you will also know that as  
 15 the 1999 White Paper set out, looking at the issues, a  
 16 balance will always need to be struck between  
 17 obligations and expectations. The UK continues to need  
 18 to retain sufficient reserve powers, including for  
 19 Governors, to protect itself against contingent  
 20 liabilities, implement its international obligations and  
 21 of course ensure good governance, which is I know  
 22 something you want to see.  
 23 As the Minister, I'm the one who has to answer to  
 24 the UK Parliament for the administration of the Overseas  
 25 Territories, and that of course focuses my mind very

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1 clearly, so I have to be assured that the UK has in  
 2 place necessarily safeguards to protect its own  
 3 interests.  
 4 However, I do genuinely believe that there is  
 5 sufficient room for agreement. Because of the hard work  
 6 that the delegations have undertaken, the UK team has  
 7 been able to draw up a draft constitution to base our  
 8 discussions over the next two days. I particularly  
 9 welcome the manner in which you have approached the need  
 10 to promote and protect human rights through a bill of  
 11 rights to be included in the new revised constitution.  
 12 This is one area that I know we will all want to look at  
 13 very carefully.  
 14 As has been made clear in earlier rounds of  
 15 discussions, nothing is considered as finally agreed  
 16 until everything in the final package is of course  
 17 resolved. I hope with your support, guidance and input,  
 18 we can agree such a package over the next few days.  
 19 I'll be here with you until 11 o'clock this morning  
 20 when I have to leave for a ministerial meeting with the  
 21 Foreign Secretary and then, of course, Prime Minister's  
 22 Question Time. I hope to rejoin you at 3 o'clock for  
 23 the final session. There is a problem for me in that  
 24 the business in Parliament has changed and I'm required  
 25 to vote and I'm too far away here to rush back. I'm

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1 waiting for guidance as to when we think the votes are  
 2 likely to be. When I get that guidance, I will join  
 3 you, but I hope you will bear with me. I do want to be  
 4 here, but you will also know the requirements of  
 5 Parliament and being a Member of Parliament.  
 6 However, I hope you make good use of the remainder  
 7 of the time under Ian's chairmanship to narrow down the  
 8 outstanding issues so we can complete our talks in good  
 9 time tomorrow, when I will be with you. I will suggest  
 10 that we now move on to discussion on the outstanding  
 11 issues, because I want to get a much better  
 12 understanding of your concerns. My purpose of being  
 13 here is very much to hear what you have to say. I know  
 14 that we will not be discussing the bill of rights until  
 15 tomorrow, and that's in order to allow a representative  
 16 of the Human Rights Committee to participate.  
 17 I'm now going to, with those words, thank you all  
 18 once again, and turn to Ian to ask if you could  
 19 summarise the outcome of discussions yesterday and  
 20 perhaps you could make a suggestion as to where we  
 21 should start this morning. Thank you.  
 22 IAN HENDRY: Thank you, Minister. Yes, we met for several  
 23 hours yesterday and I'm glad to report that the  
 24 atmosphere was good and constructive and co-operative.  
 25 We managed to solve quite a number of technical issues

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1 which were outstanding and which we were keen to get out  
 2 of the way and not have to trouble you with.  
 3 Of the ten listed outstanding points, we solved the  
 4 one on public debt, so that's out of the way, I hope.  
 5 There was another one to do with the Governor's reserved  
 6 legislative powers, which we have also dealt with, and  
 7 I think we are close -- at least I hope we are close --  
 8 to settling quite a number of the other outstanding  
 9 points. I hope that, during the course of today, after  
 10 you've had to leave us, we will make further progress  
 11 with those.  
 12 There are two of the points on which the UK is in a  
 13 rather more neutral position and they are more to do  
 14 with local politics, if I can put it that way, than an  
 15 argument between the UK and the Cayman Islands  
 16 delegation, but again we'll try and see whether we can  
 17 push those forward as well.  
 18 It's very good that Professor Jeffrey Jowell has  
 19 managed to get here today. He was diverted by the  
 20 weather to Glasgow from Cape Town or Johannesburg and  
 21 was unable to be here yesterday, but I'm very glad to  
 22 see he has managed to come today. His contribution has  
 23 always been very positive and helpful.  
 24 I think that what I would suggest is that we start  
 25 today with the second of the listed outstanding ten

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1 points, which is to do with how the Governor of the  
 2 Cayman Islands is appointed, and I know that the Leader  
 3 of Government Business would like to address you on that  
 4 point.  
 5 KURT TIBBETTS: Thank you very much and good morning to you,  
 6 Minister. On behalf of the delegation let me say a  
 7 special thank you to you and your team for facilitating  
 8 this, what we hope to be the final round of talks. Let  
 9 me say to you that your team, headed up by Mr Ian  
 10 Hendry, has been not only very cooperative during our  
 11 previous rounds but also very helpful and I believe that  
 12 they have assisted in developing the spirit of  
 13 co-operation that exists between all of the parties  
 14 around the table this morning.  
 15 Let me quickly move into the very first point which  
 16 Mr Hendry said we should talk about, and it's section 29  
 17 of the draft of January 30th, with regards to the office  
 18 of the Governor.  
 19 As you will know, it reads:  
 20 "There shall be a Governor of the Cayman Islands who  
 21 shall be appointed by Her Majesty and shall hold office  
 22 during Her Majesty's pleasure."  
 23 And the note is: "Question of prior consultation is  
 24 outstanding".  
 25 The point was raised at the second round of talks,

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1 and just so that it is clear to you, we understand quite  
 2 clearly that the appointment is your appointment, not  
 3 our appointment. However, in the very same spirit of  
 4 co-operation, and looking to modernise the constitution  
 5 and understanding very clearly that consultation is in  
 6 order for most things, that even when you have the last  
 7 say, and the decision to make, that it would be  
 8 whenever(?), not on an annual basis, but rather whenever  
 9 it is coming time for a new Governor to be appointed,  
 10 that what obtains presently is that a letter sent to us  
 11 and we're asked -- the Territories are asked as to what  
 12 qualities we would like to see in a Governor, and while  
 13 that is done perhaps even a year before the appointment  
 14 of the Governor, the fact is we presume that when you  
 15 are doing your appointment for the next Governor to  
 16 replace the existing Governor, you certainly don't just  
 17 choose one person but you'll go through a list of  
 18 possibilities.  
 19 What we are asking for is -- as I said before, not  
 20 to be repetitious but it bears emphasis that we  
 21 recognise the decision is yours. But what we're asking  
 22 for is the type of consultation where, whenever you are  
 23 down to, for instance, a short list and us not knowing  
 24 exactly what the process entails, but assuming that  
 25 under normal circumstances this is what will obtain,

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1 that we're given an opportunity to comment around that  
 2 short list, with those names, given the various  
 3 qualifications and perhaps a CV that is attached, and we  
 4 would be allowed to say: We see what you're looking at  
 5 and if we had any say in the matter, this is who we  
 6 think will be most suitable based on the evidence before  
 7 us.  
 8 That is the simple point, and the fact of the matter  
 9 is that what obtains now is we are simply advised after  
 10 the fact. So what we are seeking is a level of  
 11 consultation which doesn't interfere with the  
 12 decision-making process, but allows us an opportunity to  
 13 give all of us a way to what we believe will be the best  
 14 choice.  
 15 MCKEEVA BUSH: Mr Chairman, Minister, let me associate with  
 16 the word of thanks made by the Leader of Government  
 17 Business, and to say that we find ourselves on all fours  
 18 with the Government on this matter. It goes back to  
 19 2002, it was first raised at that time, but we would  
 20 appreciate also consultation on a short list on the  
 21 appointment of a Governor for the Islands. We feel it  
 22 is imperative that we know the kind of qualities that  
 23 the FCO is about to appoint. We believe that the  
 24 Islands today, not all the Governors can know about the  
 25 finances and so on, and they can be guided by us here,

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<p>1 we know all of that, but we believe that that is 2 important, that we have knowledge of what is coming. 3 You would know that what existed before when the 4 appointment was made and we wouldn't(?) sign the papers, 5 now they are supposed to let us know who is being 6 appointed and when that appointment is made. So we 7 would appreciate having a consultation on a short list. 8 We agree with the Government on this matter. Thank you 9 kindly.</p> <p>10 KURT TIBBETTS: There was one thing that I was remiss to 11 comment on. In the seventh report of the Foreign 12 Affairs Committee, in the 2007 session under the heading 13 of "Consultation and representation", it reads: 14 "We recommend that Territory Governments should be 15 given an opportunity to pass on their opinions of the 16 candidates for Governor before appointments are made. 17 We welcome the appointment of local individuals as 18 Deputy Governors and in some Overseas Territories would 19 urge the FCO to ensure these appointments are not seen 20 to be politically partisan individuals." 21 So we believe that our case is understood and we are 22 hoping that you will find it fit to consider it.</p> <p>23 GILLIAN MERRON: Does anyone else want to make a 24 contribution on this particular item? 25 JEFFREY JOWELL: If I may, just very briefly, I think that</p> <p style="text-align: center;">Page 9</p>	<p>1 equivalents would be invited several months before the 2 new Governor was to be appointed to an Overseas 3 Territory to ask what experience, skills and qualities 4 the Governor of the Territory should have, and that once 5 the Prime Minister had recommended a Governor to the 6 Queen as a formal appointment, the Government of the 7 Territory would be informed within 48 hours. I think 8 that's the policy, so that they weren't taken by 9 surprise by reading of the appointment in the press, 10 they would be given advance notice.</p> <p>11 Now, that is the current -- that is government 12 policy, and what you're asking for is obviously a step 13 further, to look at candidates' CVs and any information 14 that is available about them and to express a view on 15 the respective merits, as you see them, of the 16 candidates before British Government ministers make a 17 recommendation to the Queen. Is that right? What 18 you're asking for is a change of policy? 19 GILLIAN MERRON: Yes. 20 KURT TIBBETTS: Thank you, Madame Chairman. You are quite 21 right, Mr Hendry, and I just would like to make another 22 point. What obtains now is what I would term a 23 situation of idealism. We can set forth in the form, 24 but not including(?) that in an individual, all the 25 qualities that we would like to see in a Governor. Very</p> <p style="text-align: center;">Page 11</p>
<p>1 the Leader of Government Business and the Leader of the 2 Opposition have clearly expressed their position. But 3 just to add that this provision is not simply a request 4 as a matter of courtesy to the Cayman Islands, it's also 5 an element of good governance, the principle of which 6 the United Kingdom itself subscribes. Good governance, 7 firstly because the Governor himself will have a great 8 effect on the people of the Cayman Islands, his 9 decisions, so there's a notion of democracy in this. 10 But secondly because it will also assist the quality of 11 decision-making by adding to the knowledge of the UK the 12 kind of person who on the ground would be considered 13 acceptable and also the strength of opinion perhaps in 14 relation to that decision; not to be simply followed as 15 a course, but simply to add to the knowledge base of the 16 decision.</p> <p>17 GILLIAN MERRON: Anybody else? 18 IAN HENDRY: Sure. I think that the position is well 19 understood that before 2002 there was no form of 20 consultation whatsoever, and then as a result of 21 debates, I think, of Overseas Territories consultative 22 counsels when the Leader of the Opposition was the 23 Leader of the Government, and he will remember this, the 24 policy was introduced by the Minister's predecessor, 25 Baroness Amos, that Chief Ministers and their</p> <p style="text-align: center;">Page 10</p>	<p>1 likely, all of those qualities would never be met by any 2 one person, so we understand that. 3 We don't believe that doing that actually does 4 anything at all for the exercise and we're all much 5 better suited to being able to make comparisons as to 6 what each individual brings to the table, that is being 7 considered, and that is again one of the main reasons 8 why we ask the question. We believe that the territory 9 being able to express an opinion would assist in the 10 decision-making process, and certainly not create any 11 hindrance in the process.</p> <p>12 What it also does in the decision-making process is 13 the territory -- each territory claims more ownership in 14 the process from the very beginning and you don't find 15 yourselves sitting back waiting to see, and waiting to 16 understand: What do we have here? 17 IAN HENDRY: Can I just, with your permission, Chairman, 18 throw out one question, which is always -- because, you 19 know, your argument is very beguiling and very difficult 20 to find objections to in principle. But supposing that 21 the government of the day in the territory was consulted 22 about candidates, given all the information, CVs, 23 everything, and they expressed a clear preference for 24 candidate X, and candidate X was appointed and it was 25 known that candidate X was the favoured candidate of the</p> <p style="text-align: center;">Page 12</p>

1 government of the day, candidate X becomes the Governor  
 2 and the government of the day loses office at the next  
 3 election and a new government comes in, who immediately  
 4 starts -- I mean this is only a hypothesis -- starts  
 5 with a suspicion that Governor X was the favoured  
 6 candidate of the government at that time and was  
 7 therefore not to be trusted or there might be some  
 8 animus against that person. That's one possible  
 9 problem.

10 Equally, what if the government of the day in the  
 11 territory sees the CVs of the various candidates, makes  
 12 its view known that "We favour candidate X", the British  
 13 government actually doesn't believe candidate X is the  
 14 best candidate and appoints candidate Y, thereby  
 15 creating resentment that candidate Y has been preferred  
 16 to candidate X, and therefore the new Governor,  
 17 candidate Y, starts off at a disadvantage with the  
 18 government who didn't want him or her in the first  
 19 place?

20 You see, these are two problems we have to wrestle  
 21 with, I think, and we have to think about, and of course  
 22 the Governor's position has to be politically neutral,  
 23 obviously, it's an absolutely vital requirement.

24 GILLIAN MERRON: I just wanted to add -- I mean, they're the  
 25 kind of concerns -- I mean I can completely understand

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1 why you make the points that you make, and that's why  
 2 I feel -- I mean, one of the parts of the process that's  
 3 very important to me, and we have done that, of course,  
 4 in this situation, for this process, is to say: What  
 5 are the skills and expertise that you feel we should be  
 6 looking for in making a selection?

7 As you'll know, Kurt, I wrote, I think it was  
 8 in November, because I want to know what you feel are  
 9 the aspects of the Governor that we should be looking  
 10 for. I do also take your point, of course, that you  
 11 can't find everything in one person, but I take that  
 12 request for your views very seriously and it is part of  
 13 the process, that is part of the considerations that we  
 14 have when we're looking for a new Governor.

15 I understand why you ask that, but I'm also  
 16 interested, in addition to Ian's "what if?" questions,  
 17 how you feel about the current situation, which is you  
 18 are asked: What do you think skills and expertise  
 19 should be, and that, as I say, is of great assistance to  
 20 us.

21 So I understand the point. It's how we move forward  
 22 on it.

23 KURT TIBBETTS: If I am allowed another intervention, Mr  
 24 Hendry knows well that I hold his opinions in great  
 25 esteem, but I have to respond to him by saying that

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1 I think we deserve a little bit more credit for our  
 2 thoughts, simply because any government, understanding  
 3 the constitutional relationship that we have, would not  
 4 begin a relationship with a Governor either one way or  
 5 the other way. It is understood by all of us, at all  
 6 times, that it is in the best interests of both parties  
 7 for there to be good relationships between the elected  
 8 government and the appointee of Her Majesty's Governor.  
 9 So there is no forethought that would be where someone  
 10 arrives and we immediately say, "This is not the person  
 11 that we want to have here."

12 If there is a change of government, I believe that  
 13 the Territories are beyond that level of maturity where  
 14 again immediate perceptions happen to where the first  
 15 thing is, "Let's try to get this Governor changed as  
 16 quickly as we can." It doesn't operate like that in the  
 17 Territories. If you extend the argument further, you  
 18 could almost extend that thought to any decision that  
 19 rests with Her Majesty's Government with regards to any  
 20 consultation which takes place. We recognise with open  
 21 eyes the fact that the constitutional relationship that  
 22 exists allows for certain reserve powers for His  
 23 Excellency the Governor and also certain decision-making  
 24 processes which rest squarely in the hands of Her  
 25 Majesty's Governor. We understand that and we live with

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1 that. We are simply seeking a more mature constitution,  
 2 which allows a participative process where we can claim  
 3 ownership in this relationship a bit more. And that's  
 4 as far as it goes.

5 So it is not that I would think that you shouldn't  
 6 have expressed the former leading(?) comment, but I say  
 7 to you, having done that, I don't believe that that  
 8 bears enough merit not to seriously consider the  
 9 request. Because I do not believe that that is what  
 10 obtains as a rule. You might have a situation like that  
 11 occurring at some point in time in some territory,  
 12 depending on the individuals concerned, but I would have  
 13 to say to you, sir, that that could happen on any day of  
 14 the week in any given circumstances, not just because  
 15 there was a process of consultation to this level in the  
 16 decision-making process.

17 GILLIAN MERRON: Thank you for that. What I would suggest  
 18 is -- I mean, I've heard your views -- that perhaps you  
 19 could leave that with us and we will return to it. It's  
 20 a useful discussion and you've clearly articulated why  
 21 you feel as you do and we've had an exchange on the  
 22 "what ifs?", which I do think is important, as you  
 23 understand. I have heard what you have to say. Perhaps  
 24 if we can consider it and then come back to you on that.

25 IAN HENDRY: If you like, I will suggest another subject to

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<p>1 use the time available.</p> <p>2 GILLIAN MERRON: I'd be delighted if you would.</p> <p>3 IAN HENDRY: Especially as you might be otherwise engaged</p> <p>4 for part of this afternoon. One of the interesting</p> <p>5 innovations that we've been discussing in this</p> <p>6 constitutional modernisation is the possible</p> <p>7 establishment of a National Security Council. There are</p> <p>8 such bodies recently established in the Turks and Caicos</p> <p>9 and the British Virgin Islands in their new</p> <p>10 constitutions and this would be a rather similar body,</p> <p>11 which would consist of the Governor with some elected</p> <p>12 ministers, possibly the Leader of the Opposition and</p> <p>13 perhaps some members of civil society. We're discussing</p> <p>14 the sort of details of the composition, but the main</p> <p>15 function of which would be to discuss with the Governor</p> <p>16 his constitutional responsibility for internal security</p> <p>17 and the police force.</p> <p>18 Underlying all this is a desire, which I think is</p> <p>19 perfectly understandable, for elected ministers to be</p> <p>20 involved in sharing some of the responsibility for this</p> <p>21 sometimes sensitive matter, and of course police</p> <p>22 operations and the level of crime and so forth is a</p> <p>23 matter of concern to society as a whole.</p> <p>24 So there are some points outstanding in this</p> <p>25 context. I don't think there's any argument about the</p> <p style="text-align: center;">Page 17</p>	<p>1 not having the availability of advice of counsel from</p> <p>2 other corners. So that is where we're at.</p> <p>3 We're certainly open to any suggestions with regards</p> <p>4 to the activities of the National Security Council and</p> <p>5 how it would function and what necessary sanctions would</p> <p>6 need to be in place to preserve the positive existence</p> <p>7 of such a council without the politics of it interfering</p> <p>8 with its actions.</p> <p>9 Mr Hendry I noticed you mentioned the word</p> <p>10 "operations", but just so that it is very clear, in our</p> <p>11 discussions, we understand and respect the need for</p> <p>12 there to be a separation between the operational</p> <p>13 functions of the police and such a council, but rather</p> <p>14 such a council would involve advice on policy.</p> <p>15 The other question which we would need to know from</p> <p>16 the Minister would be the decisions of that council: At</p> <p>17 what level are they taken, by His Excellency the</p> <p>18 Governor, whether it's on an advisory basis, whether</p> <p>19 it's on a binding basis and at what level can he opt out</p> <p>20 of that advice, as would be the case with several other</p> <p>21 provisions of the constitution, for His Excellency's</p> <p>22 position?</p> <p>23 GILLIAN MERRON: That's very helpful, thank you. Any</p> <p>24 further comments on this issue that would be helpful for</p> <p>25 me to hear?</p> <p style="text-align: center;">Page 19</p>
<p>1 principle of having such a body, if that is what is</p> <p>2 desired, but I know that members of the Cayman Islands</p> <p>3 delegation would probably want to say something to you</p> <p>4 about that. I think if we use the remaining time this</p> <p>5 morning while we know you're here, then that won't get</p> <p>6 passed by and lost.</p> <p>7 GILLIAN MERRON: I would be very keen to hear people's</p> <p>8 views, so I don't know who would like to go first.</p> <p>9 Please.</p> <p>10 KURT TIBBETTS: I think where we've arrived at, as Mr Hendry</p> <p>11 has said, is that we both agree, meaning the delegation</p> <p>12 agrees, having such a council and we were with some</p> <p>13 contemplation and we had several discussions with</p> <p>14 regards to whether the Leader of the Opposition should</p> <p>15 have membership of the council. I think we have moved</p> <p>16 beyond that now, where we're not in disagreement about</p> <p>17 that post being a member, but we have to consider</p> <p>18 seriously what type of sanctions for the membership</p> <p>19 should any member cause any disruption in good</p> <p>20 governance in that regard.</p> <p>21 I can also say to you, and certainly he can speak</p> <p>22 for itself, that our present Governor is in favour of</p> <p>23 the existence of such a council because of his own</p> <p>24 experiences, he finds great difficulty with certain</p> <p>25 situations where (inaudible) an issue on this and him</p> <p style="text-align: center;">Page 18</p>	<p>1 IAN HENDRY: Thank you very much. Yes, I think Kurt has</p> <p>2 summarised very succinctly where we are on this. I hope</p> <p>3 that in the course of today we can take further some of</p> <p>4 the ideas we were discussing yesterday about a more</p> <p>5 inclusive membership of such a council, and look at the</p> <p>6 important question of sanctions for members who breach</p> <p>7 confidentiality, basically because one obviously has to</p> <p>8 trust the members of any such council, who will hear</p> <p>9 briefings from the Commissioner of Police, to keep the</p> <p>10 information they learn to themselves unless the Governor</p> <p>11 as chairman feels that it can be disclosed. So there is</p> <p>12 that little set of problems to work our way through.</p> <p>13 I think we'll try to do that in the course of today.</p> <p>14 I must say, I think it's an enlightened approach</p> <p>15 that, rather like the police authorities we have here,</p> <p>16 there are politicians on and then there are</p> <p>17 non-political people on, so there's a mixture of</p> <p>18 representatives of society as well as elected</p> <p>19 representatives on such bodies. Of course, they have</p> <p>20 different functions, but some of them are similar.</p> <p>21 Then the question of to what extent the advice of</p> <p>22 such a council would be binding on the Governor and to</p> <p>23 what extent the Governor could act against the advice of</p> <p>24 the council is obviously a political issue which we</p> <p>25 shall need to come to. To be fair, everybody knows that</p> <p style="text-align: center;">Page 20</p>

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<p>1 the two precedents that we have agreed to, that the UK 2 have agreed to in recent years, in the Turks and Caicos 3 Islands the National Security Council is purely 4 advisory; in the British Virgin Islands its advice is 5 binding on the Governor, although the Governor has power 6 to depart from its advice "in the interests of Her 7 Majesty" is the phrase, whether in respect of the UK or 8 of the Virgin islands, which really means that if the 9 Governor believes that the advice would be damaging to 10 public order or good order or good government -- none of 11 those phrases are used -- the interests of Her Majesty, 12 then he or she can decline that advice.</p> <p>13 That is the proposition, as I understand it, that 14 the Cayman Islands government has made, to have 15 something rather like the British Virgin Islands' 16 arrangement, but I have, being a cautious chap, reserved 17 it, because in each of the previous two cases there has 18 been a decision by our Minister. I think I've had to 19 reserve it for you to consider.</p> <p>20 But I'm very keen that if anybody else would like to 21 say anything on this subject, they should use this 22 opportunity in case the Minister is detained at the 23 House of Commons this afternoon. I know it's an 24 important matter.</p> <p>25 KURT TIBBETTS: I am sure Mr McLaughlin would wish to</p> <p style="text-align: center;">Page 21</p>	<p>1 else around here that we continue to have serious issues 2 with that, with the police establishment at home and 3 that something needs to be done to improve that 4 arrangement. And so, as the day goes on, I think we'd 5 like to explore -- I've had a quick word with the 6 opposition and a quick word with the Attorney General 7 about the matter but we certainly haven't discussed the 8 matter at any length at all, but it was something I'd 9 like to put on the table for consideration as we look at 10 the National Security Council and the whole question of 11 police -- of the police in the round.</p> <p>12 KURT TIBBETTS: Thank you very much. Madam Chair, I only 13 wanted to point out to your good self that with regards 14 to what Mr Hendry mentioned, the fact that the Turks and 15 Caicos constitutional provision allows for the advice to 16 simply be that, advisory, within the council, but the 17 one in the BVI is binding, we will know that the Turks 18 and Caicos constitution was decided prior to the one in 19 the BVI. This one will be decided after both of them 20 and we certainly --</p> <p>21 GILLIAN MERRON: Indeed. It will be better informed, yes.</p> <p>22 KURT TIBBETTS: -- notice the progression as we have gone 23 along. So I don't think there's any problem there, but 24 I do respect the fact that Mr Hendry would leave the 25 final decision to you without committing the United</p> <p style="text-align: center;">Page 23</p>
<p>1 address it and then I will have the final comment.</p> <p>2 ALDEN M MCLAUGHLIN: Thank you, Madam Chairman. Good 3 morning. We had the opportunity to reflect overnight on 4 the discussions yesterday, and one of the concerns which 5 was articulated involved matters of elected ministers in 6 operational issues, matters relating to the appointment 7 and discipline of the police. Now, I suppose 8 subsection 3, which was in the British Virgin Islands 9 constitution, section 57, could be interpreted as being 10 capable of investing a council with authority to deal 11 with matters of police appointment and discipline and so 12 forth. And that is a concern, understandable concern. 13 But in the case of the British Virgin Islands, they 14 actually also have a police commission specifically 15 charged with appointments, removal and discipline of 16 police officers, and so one of the considerations that 17 we now have is whether or not we should seek to include 18 such a provision in our constitution which would be set 19 apart from the National Security Council, so that it 20 would be very clear that those issues involving police 21 appointments and removal and discipline and related 22 areas is not something within the province of the 23 National Security Council but is separate from that 24 commission in relation to these matters. Because I 25 don't think it's a surprise to the Minister or anyone</p> <p style="text-align: center;">Page 22</p>	<p>1 Kingdom. Thank you.</p> <p>2 MCKEEVA BUSH: Minister, before you speak. On the matter of 3 operational aspects of the police, we have no agreement 4 from the people whom we represent. The people feel, and 5 we feel as an opposition, at our stage in our 6 development, and taking serious note of what I have seen 7 in other Territories, that the police must be 8 independent and free from political interference, if we 9 delve into it, it is going to cause problems in our 10 small territory, problems that we don't want, problems 11 that will not move the country forward, but will bring 12 more division and could cause harm to people's lives. 13 We are not in agreement with any interference with 14 operational aspects.</p> <p>15 Up until now, we as the legislature bring the 16 Commissioner of Police in to the finance committee, open 17 finance committee, for the public to be there or closed, 18 as the commissioner might wish, on certain issues, but 19 we have the ability to bring him in and to ask questions 20 and to go certain distances there for our own education 21 on what is happening.</p> <p>22 We can refuse to spend money. If it's of a serious 23 nature, of course, His Excellency can move to the FCO 24 and get permission, but we do have some control at that 25 extent, and no one has yet shown us why we should move</p> <p style="text-align: center;">Page 24</p>



1 differently. So we're not in agreement with any  
 2 operational -- on having control or some control over  
 3 the operational aspects of the police service.  
 4 KURT TIBBETTS: Madam Chair, just to make absolutely  
 5 certain, I want to make sure that my command of the  
 6 Queen's English is not lacking that much. I trust that  
 7 no one around the table is believing that we're  
 8 suggesting anything otherwise. I just want to make  
 9 sure.  
 10 GILLIAN MERRON: No, quite clear. Thank you for your  
 11 contributions. I wondered if the Governor wanted to  
 12 make any comment? You don't have to if you don't wish  
 13 to.  
 14 STUART JACK: Thank you, Madam Chair and Minister. As the  
 15 Leader of Government Business said, I have no problem in  
 16 principle with there being a National Security Council  
 17 and a more inclusive approach to policing, which in the  
 18 absence of any such provision in the constitution we  
 19 would attempt to do anyway, and I have no problem with  
 20 regularising it. But I think some careful thought needs  
 21 to be given to the membership and the powers of that  
 22 body, as Ian has said.  
 23 I think if I only make one point, I think it's  
 24 important to the perception in the territory of policing  
 25 that the policing should appear to be a national

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1 activity and not politically dominated one.  
 2 GILLIAN MERRON: I think we're all agreed on that one, for  
 3 sure.  
 4 Again, thank you very much for the discussions.  
 5 It's very helpful for me to hear the points direct and  
 6 we will take them away and come back to you all and that  
 7 was a very useful discussion for me to hear.  
 8 Just in the few minutes I have remaining before  
 9 I have to leave for the House, are there any other  
 10 points you would like me to know about directly?  
 11 Although you will know I'm very well informed and  
 12 briefed, advised, educated, et cetera, by my officials.  
 13 So the whole purpose of me being here is to hear direct  
 14 from you. So are there any other matters? Obviously  
 15 we'll come back to talk about human rights tomorrow.  
 16 MCKEEVA BUSH: The humble opposition awaits the powerful  
 17 government.  
 18 GILLIAN MERRON: What a refreshing description. I might  
 19 suggest that to our opposition here.  
 20 Are there any further points? I think you actually  
 21 have a coffee break. We can adjourn for coffee and have  
 22 a little break before you continue with your  
 23 discussions. Would that be okay?  
 24 Can I thank you very much for this morning. It was  
 25 very useful for me and part of the purpose of going back

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1 to the House of Commons is so that I can more clearly  
 2 establish the pattern of voting, all being well. I'll  
 3 keep my fingers crossed to be able to return to you this  
 4 afternoon. Thank you very much and if we can adjourn,  
 5 that would be useful.  
 6 KURT TIBBETTS: Madam Chair, just before you go, this very  
 7 small thing. I'm sure Mr Hendry has briefed you. The  
 8 bill about self-determination, which is a fairly simple  
 9 matter, but we had proposed yesterday a paragraph to be  
 10 added at the beginning of the constitution, based on the  
 11 bill of rights, which spoke to the bill of  
 12 self-determination. I just wanted to make sure that  
 13 there was no problem with that addition in the  
 14 constitution.  
 15 GILLIAN MERRON: There is no problem.  
 16 KURT TIBBETTS: Thank you.  
 17 GILLIAN MERRON: There you go. That's a good note to end  
 18 on.  
 19 (10.02 am)  
 20 (A short break)  
 21 (11.11 am)  
 22 IAN HENDRY: Ladies and gentlemen, I'd like to try and crack  
 23 on and see if we can make some progress on the issues we  
 24 left over from yesterday, but I think, McKeeva, you  
 25 would like to say something.

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1 MCKEEVA BUSH: Mr Chairman, yes, briefly and quickly if I  
 2 can. I have noted a press release by the government.  
 3 I would hope that any future communicate, that the media  
 4 would be joint between government and opposition or from  
 5 the Cayman delegation. Certainly I would like to know  
 6 about it. I think it's appropriate to do that, and so  
 7 I will ask the government if they're going to say  
 8 something that includes the opposition, that it would be  
 9 better if we did it together on this matter of the  
 10 constitution.  
 11 KURT TIBBETTS: Mr Chairman, just to say that we would be  
 12 delighted.  
 13 IAN HENDRY: Sorry?  
 14 KURT TIBBETTS: We would be delighted.  
 15 IAN HENDRY: Okay. I haven't seen the statement referred  
 16 to.  
 17 ALDEN M MCLAUGHLIN: It is very innocuous. I don't think he  
 18 is complaining. He is just saying they would like to  
 19 participate.  
 20 MCKEEVA BUSH: No, it is not so much the content. I haven't  
 21 read--  
 22 ALDEN M MCLAUGHLIN: It said we are doing well. That's all  
 23 it said.  
 24 MCKEEVA BUSH: But I know how people work.  
 25 IAN HENDRY: All right. You've had a positive response from

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1 the government listening to your request.  
 2 There are some draft papers coming around, which  
 3 I did some work on last evening, and I think it would be  
 4 useful perhaps to start with -- there are some concerns  
 5 that we had left over from the memo by the Chief Justice  
 6 and one of the three bits of paper, I think it's the  
 7 shortest one, which I hope won't be at all difficult,  
 8 section 95, one of the concerns of the Chief Justice was  
 9 that there be translated into the constitution some  
 10 language which at present is in the Grand Court law and  
 11 thanks to Sam getting hold of a copy of the Grand Court  
 12 law. So what I've done here is take in, with two  
 13 exceptions, the language of the Grand Court law.  
 14 The exceptions are that I don't think that law says  
 15 that the Chief Justice is head of the judiciary, but  
 16 that's the point the CJ was very keen to make clear, and  
 17 I discerned no objection to that from anybody here  
 18 yesterday, and he added as well the words "including the  
 19 administration of the court", so I put that at the end,  
 20 which seems to me only common sense. So as a whole, it  
 21 would read:  
 22 "The Chief Justice shall take precedence as head of  
 23 the judiciary and have seniority over the other judges  
 24 ..."  
 25 The "seniority over the other judges" comes from the

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1 Grand Court law:  
 2 "... and the Chief Justice shall have responsibility  
 3 for and management of all matters arising on  
 4 judicature~..."  
 5 That phrase comes from the Grand Court law and  
 6 I have added, "including the administration of the  
 7 courts".  
 8 So I hope that will make him happier and no one will  
 9 see any objection to it.  
 10 STUART JACK: Sorry, Mr Chairman, can I ask a question for  
 11 clarification? The reference to the administration of  
 12 the courts, there is potentially an issue over conflict  
 13 with the public service management law and the public  
 14 management finance law. Because at the moment, as  
 15 I understand it, while the Chief Justice has if you like  
 16 overall responsibility for the courts, some of the  
 17 issues of finance and staffing, those kinds of resource  
 18 issues, are actually vested in practice in the law, and  
 19 those two laws, in the chief officer, not in the Chief  
 20 Justice, and that has presented some problems in the  
 21 past as to who actually has authority. I think if this  
 22 is a decision to put this in, it has to be a conscious  
 23 one to take account --  
 24 IAN HENDRY: I wasn't aware of that. I think if there's a  
 25 potential problem, it's probably best to leave out

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1 "including the administration of the courts", and just  
 2 end with the language of the Grand Court law, "all  
 3 matters arising in the judicature".  
 4 ALDEN M MCLAUGHLIN: That would cause major issues with the  
 5 Chief Justice. This is a bone of contention of his, and  
 6 has been from day one, that he as Chief Justice has  
 7 overall responsibility for the administration of the  
 8 courts.  
 9 I think it would be easier to make whatever  
 10 adjustments that we need to make for the public  
 11 management and finance(?) law than to mess around with  
 12 that because that ought to be a cardinal principle.  
 13 There are many aspects of the public management and  
 14 finance law that don't work very well in practice  
 15 because it attempts to force rather artificial  
 16 arrangements, to foist them upon a system and in the  
 17 next term -- and we are already thinking about it -- the  
 18 government must turn its attention to try to rationalise  
 19 various aspects of the public management and finance  
 20 law. So I wouldn't do justice(?) to this principle by  
 21 trying to get it to conform to the P&FL, but actually do  
 22 it the other way around.  
 23 STUART JACK: Sir, I don't necessarily disagree with  
 24 Mr McLaughlin. I just say that we shouldn't actually  
 25 prejudge that issue in the constitution because there is

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1 a question, and I cannot and I will not go into  
 2 specifics, but there have been cases that have come to  
 3 my attention, certainly, where exactly who is  
 4 responsible for what has been a very active bone of  
 5 contention. One of the specific issues is the question  
 6 of whether public servants working in the court system,  
 7 who are technically civil servants at the moment, how  
 8 far they have the protection afforded to other civil  
 9 servants under the public service management law.  
 10 There's a clear bone of contention here, as  
 11 Mr McLaughlin says. Some tidying-up undoubtedly needs  
 12 to be done at some point, but I don't think we ought to  
 13 prejudge it in the constitution. I think it needs to be  
 14 properly thought through. I would suggest it's better  
 15 just to leave that out of the constitution for the time  
 16 being.  
 17 KURT TIBBETTS: Mr Chairman, I think I understand what His  
 18 Excellency is saying. I think where the difficulty lies  
 19 in practice -- and we've had similar situations in other  
 20 departments. If the Chief Justice is in charge, he is  
 21 in charge. If he is not in charge, he is not in charge.  
 22 If there are elements underneath that umbrella which  
 23 need specific delegation, then that is fine, but to  
 24 leave this out when you are defining his role -- this  
 25 has nothing to do with individuals, it's the role

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<p>1     itself -- if you leave this out when you are defining 2     his role, in our view you're not making very clear who 3     is in charge. Someone has to be in charge. 4     MCKEEVA BUSH: Mr Chairman, does the Grand Court law say 5     that the Chief Justice is head of the judiciary? 6     IAN HENDRY: No, I don't think it does. 7     MCKEEVA BUSH: It doesn't say so? 8     IAN HENDRY: No. 9     MCKEEVA BUSH: It does, I believe. Maybe I'm reading wrong. 10    ALDEN M MCLAUGHLIN: Mr Chairman, the relevant section is 11    section 46. It says: 12    "The court shall continue to be named the Grand 13    Court of the Cayman Islands and shall consist of the 14    Chief Justice and one or more other judges who shall 15    exercise all the jurisdiction of the court and who shall 16    have seniority in order to do justice in an order to be 17    determined by the Governor, the Chief Justice having 18    responsibility for and management all matters arising in 19    judicature." 20    JEFFREY JOWELL: Mr Chairman, could I suggest that before we 21    proceed with this, perhaps after the next break, we 22    consider the UK Constitutional Reform Act 2005, I have 23    the provision here, which is section 7, which sets out 24    the definition of the role of the Lord Chief Justice in 25    the UK, which is a very different situation, but it has</p> <p style="text-align: center;">Page 33</p>	<p>1     you, Jeffrey, if I could, at the lunchbreak, and we will 2     see if we could revise this formula to use some of the 3     language, which probably is sufficient, I think. 4     I mean, I think some of the language there would be very 5     helpful to work in and I hope would satisfy the Chief 6     Justice. 7     MICHAEL BRADLEY: Mr Chairman, I think it might be useful -- 8     I am advancing the Attorney General, if anything -- if 9     he couldn't give his preliminary thoughts as to whether 10    the present wording in any way would make the public 11    finance and management law as it stands at the moment 12    (inaudible). That seems to be a concern of the 13    government side, that there would have to be of 14    necessity amendments made, if I understand you 15    correctly. 16    ALDEN M MCLAUGHLIN: It's not just in relation to this 17    particular matter, but we see the fine aspects of it 18    that, as I said, they just don't work well in practice. 19    This government is looking at a possible overhaul of the 20    legislation in the next term because this is 21    problematic. Anyone you talk to within the public 22    service will tell you it's problematic. 23    KURT TIBBETTS: Just to add, and this may be helpful, this 24    is the Grand Court law section 7, subsection 1, with a 25    marginal note, "officers of the court":</p> <p style="text-align: center;">Page 35</p>
<p>1     some wording that may be helpful; I'm not sure that it 2     would be. But, for example, the Chief Justice is head 3     of the judiciary, it says here and it then says: 4     "He is responsible for representing the views of the 5     judiciary to Ministers of the Crown." 6     And it then goes on to say: 7     "He is responsible for the maintenance of the 8     appropriate arrangements within the courts." 9     A slightly different wording would be required here. 10    And then "for maintenance and appropriate arrangements 11    for the deployment of the judiciary and the allocation 12    of work within the courts". 13    So it's a slightly more extensive definition. It 14    may or may not be helpful, but before we proceed, we 15    might just get some ideas from that. 16    STUART JACK: Can I just say I don't see a problem with that 17    definition. I think it's a very helpful definition. My 18    only problem is making a change which may appear, may be 19    interpreted as saying that the Chief Justice isn't bound 20    by the other laws or rules that also apply to his staff. 21    I wouldn't make that change without, for example, 22    consulting the Civil Service Association. I think it 23    would be dangerous to do so. 24    IAN HENDRY: All right. I think what we should do is park 25    it for the time being and I'll have a little word with</p> <p style="text-align: center;">Page 34</p>	<p>1     "The chief officer, in accordance with the public 2     service management law 2007 revision, after consultation 3     with the Chief Justice, may appoint a clerk of the court 4     or bailiff, an assistant bailiff or marshal and such 5     other officers as may from time to time appear necessary 6     who, subject to this or any other law, shall perform 7     such duties as the Chief Justice may direct or as may be 8     provided by any rules." 9     That helps to define his role, and it is not that 10    I don't understand what His Excellency is saying, but 11    I just want to address the point that however we arrive 12    at the final wording, it is important that you don't 13    have a tiered system which separates itself to the 14    point, in my view, where you have a section of the 15    judiciary which operates independently, on its own, the 16    Chief Justice is overall in charge but can't give 17    direction. That's what I'm saying. 18    I think what His Excellency spoke to in some 19    instances were financial matters. 20    STUART JACK: Much more personnel ones. 21    KURT TIBBETTS: Financial and personnel. A very similar 22    situation obtains with the legislative assembly, and it 23    is a matter that if it is left as the way the 24    legislative assembly operates now, it is continual 25    conflict about the lines of authority. I'm not</p> <p style="text-align: center;">Page 36</p>

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1 necessarily even suggesting at this point in time where  
 2 those lines should be; I'm simply saying they have to be  
 3 clearly defined so that it doesn't leave room for  
 4 guesswork in the actual functions of the various  
 5 officers, because it does create conflict, no matter who  
 6 is there, and if we are conscious of it, we really  
 7 shouldn't leave it alone is all I'm saying.

8 STUART JACK: Can I comment? I agree with the Leader of  
 9 Government Business that things need to be clearly  
 10 defined, and I agree with Mr McLaughlin that the actual  
 11 public service management law needs another look at. We  
 12 have identifies all sorts of issues with it.

13 My only problem is in the constitution to be able to  
 14 pre-empt decisions or where responsibility lies without  
 15 having completely throughout it through and properly  
 16 consulted the parties, involved, including the civil  
 17 servants themselves. I'm not saying what is the right  
 18 or wrong solution. I'm just saying it's a bit too  
 19 premature to put that in the constitution.

20 MCKEEVA BUSH: We are still debating or talking about the  
 21 Chief Justice; we're not talking about two positions  
 22 now, we're talking about one. We're not talking about  
 23 the assembly.

24 IAN HENDRY: No.

25 MCKEEVA BUSH: I just use that as an example. If you're

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1 The concern, as I understand it, was that unless express  
 2 language is put in the constitution which preserves this  
 3 question of the court to admit evidence which is  
 4 obtained, albeit unlawfully, to preserve the discretion  
 5 of the court to include that or use that as evidence,  
 6 then the language as currently drafted has the potential  
 7 of expressly excluding that discretion and make the  
 8 evidence inadmissible.

9 The current law position is that even if the  
 10 evidence is obtained contrary to the rights of somebody,  
 11 in breach of some rights, the court has a discretion to  
 12 say that, if it is relevant, it can still be used in  
 13 evidence, subject to certain directions being given.  
 14 And that has always been the position. In the United  
 15 States it's different. The United States have what is  
 16 called (inaudible), which is that if the evidence is  
 17 obtained unlawfully, it cannot be used at all.

18 The English position (inaudible) is completely  
 19 different. Illegally obtained evidence can be used, if  
 20 it is relevant, subject to the court giving the relevant  
 21 directions. The Chief Justice's concern is that  
 22 language in the current draft would now exclude that  
 23 common law rule, and I have discussed it with  
 24 Professor Jowell and he confirmed that the matter has  
 25 been to the Strasbourg Court, and there is some law on

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1 talking about that, then would I refer to it, but if  
 2 not, I let it go.

3 IAN HENDRY: No. I knew this would happen. Whenever the  
 4 Chief Justices say they want their position to be set  
 5 out, it raises all manner of problems. I hoped this  
 6 would be simple, but it obviously isn't. So we'll come  
 7 back to that later, when we've had a chance to look at  
 8 some language.

9 ALDEN M MCLAUGHLIN: I thought it was fine, sir.

10 IAN HENDRY: I have a note of two other points in the CJ's  
 11 memo that you were going to come back with. One of them  
 12 was to do with the evidence law, which I still find  
 13 rather strange, and the more important one, the  
 14 substantive one really, is the question of the  
 15 composition of the judicial and legal services  
 16 commission, which you were going to do some redrafting  
 17 on. I don't know whether you've been able to do that.

18 ALDEN M MCLAUGHLIN: No, sir.

19 IAN HENDRY: So you're still working on that point. Is  
 20 there anything else to be said about his reference to  
 21 the evidence law?

22 SAMUEL BULGIN: I just had a brief discussion with  
 23 Professor Jowell this morning and we are planning to  
 24 take an in-depth look at it against the background of  
 25 some cases that he had cause to let me have a look at.

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1 it. But the issue is whether it should be left to the  
 2 interpretation or whether it should be made clear that  
 3 the common law position is to be preserved.

4 I certainly, for one, would prefer an arrangement  
 5 whereby it is made clear that the common law rule is  
 6 still the upper position rather than we have to argue  
 7 what the (inaudible).

8 There is also the relevant issue of (inaudible) the  
 9 draft constitution and the bill of rights, which I also  
 10 discussed with him this morning. It's in section 5.3 of  
 11 the bill of rights:

12 "Any person who is arrested and detained shall be  
 13 informed promptly, in a language that he or she  
 14 understands, of the reason for his or her arrest or  
 15 detention [and then those words at the end there] and  
 16 the right to remain silent."

17 Now, I discussed that with Professor Jowell this  
 18 morning and that also caused me some anxiety. It is  
 19 like the UK bill of rights, for example. It is a common  
 20 law right that no one should be allowed to  
 21 self-incriminate themselves. The current law is that,  
 22 even if a person is not cautioned, "You have the right  
 23 to remain silent", even if the person is not cautioned  
 24 when they are arrested and they say something which then  
 25 led to discovery of the stolen articles or something,

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1 the court can still allow the evidence to be tendered  
 2 and to be used.  
 3 I give you an example. If there's a robbery, the  
 4 police picks up someone who is a suspect and says, "You  
 5 are being held in suspicious a robbery and you've been  
 6 arrested on suspicion of a robbery", but the police  
 7 didn't go on to say, "You have the right to remain  
 8 silent", and the person says, "It was not me, I was  
 9 involved with tanks(?) and we hid the gun under the  
 10 house", and the police go and recover that gun, even  
 11 though he was not told he had the right to remain  
 12 silent, the fact that he told the police where the gun  
 13 was and the gun was found, that can be tendered in  
 14 evidence, used in evidence. This line here in the  
 15 constitution would prevent that fact of discovery of the  
 16 gun being led in evidence and so on. So that is what we  
 17 are trying to prevent.  
 18 IAN HENDRY: Before going on, I'm a bit confused because  
 19 there seem to be three points. Is the first one you  
 20 addressed, Sam, to do with R v Sang? Is that the point  
 21 at the foot of page 2 of the CJ's memo? In which case,  
 22 if there is a concern about it, is there a form of words  
 23 that can deal with that problem? Because I wouldn't  
 24 know where to begin. If you can give us a form of words  
 25 which would preserve the common law rule, if it's

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1 regarded as so important -- and I'm not an expert in  
 2 this field -- then we can consider it.  
 3 The second point, further up this page, page 2 of  
 4 the CJ's memo, this is where he refers to existing  
 5 provisions of the evidence law and the possibility of  
 6 them being incompatible with section -- it's the  
 7 admissibility of statements.  
 8 Here, I think what he was concerned about was  
 9 section 72E, which gives as one of the minimum rights of  
 10 everyone charged with a criminal offence "to examine or  
 11 have examined witnesses against him or her and to obtain  
 12 the attendance and examination of witnesses on his or  
 13 her behalf under the same conditions as witnesses  
 14 against him or her".  
 15 That language in 72E comes out of the European  
 16 Convention on Human Rights and the international  
 17 covenant, and is therefore in the UK Human Rights Act as  
 18 one of the minimum rights of people who are charged with  
 19 a criminal offence, and it is standard language in  
 20 overseas territory constitutional bill of rights.  
 21 -- I see no prospect whatever of changing that. I'm  
 22 not going to change it, whatever the CJ may say. This  
 23 is hallowed language and it is, under the treaties, one  
 24 of the minimum rights of people charged with a criminal  
 25 offence. If there's a problem with compatibility with

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1 the evidence law, the evidence law has to give way. I'm  
 2 still shocked that a person can be convicted on the word  
 3 of a person who is dead or abroad. I just cannot  
 4 challenge that evidence. I'm shocked. I get quite  
 5 emotional about it. But anyway, the bare fact is that  
 6 it is the treaty language and we are not going to do  
 7 anything about it.  
 8 The third point about the right to remain silent,  
 9 the right to remain silent, this is a new point you've  
 10 raised, Sam, and of course all this is saying, as  
 11 I understand it, but you may take a different view, all  
 12 this is saying is that -- this is section 5(3) on page  
 13 30 -- all this is saying is that a person arrested or  
 14 detained shall be informed promptly of the right to  
 15 remain silent. That's the beginning and end of the  
 16 obligation. It does not go on to say anything about  
 17 what inferences may be drawn by a court from the  
 18 exercise of the right to remain silent, or what evidence  
 19 may be produced in respect of the person remaining  
 20 silent. This is a very limited thing, because ...  
 21 SAMUEL BULGIN: I take the point you're making.  
 22 IAN HENDRY: I don't think it has the consequence that you  
 23 fear.  
 24 SAMUEL BULGIN: There might well be, unfortunately, because  
 25 the fact that it is expressly there in the constitution,

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1 as opposed to anywhere else, means that it is a right,  
 2 the right to remain silent, a right to remain silent,  
 3 and if you were not told of the right to remain silent  
 4 and you say anything, it will simply mean that you  
 5 cannot use it, because it is in breach of the  
 6 constitution. Unless there is some thought that an  
 7 overriding discretion is given by the court. It might  
 8 well be that at the end of the day, it goes all the way  
 9 to Strasbourg and the court might say: It was meant to  
 10 be that.  
 11 But the fact that it is there and we notice, for  
 12 example, that it is not in the Human Rights Act, it does  
 13 not appear there, and the concern is the effect of it  
 14 being in the constitution, as happens now, a person is  
 15 entitled to do that, you have a right to remain silent  
 16 and in some countries it says you have the right to an  
 17 attorney.  
 18 In the United States, they tell you first all those  
 19 things, the Miranda rights (inaudible) and nothing that  
 20 is said and nothing that is recovered as a result of  
 21 anything being said is admissible. It's wrong. The  
 22 common law system, the UK common law system is  
 23 completely different. Even if you omit it by  
 24 inadvertence or willfully tell the person that, and he  
 25 says something and articles are recovered and statements

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1 are made, the court still has the discretion to balance  
 2 that and say if the probative effect of it, prejudicial  
 3 effect, then it is admissible in the court. So to  
 4 elevate it to a constitutional right might go and have a  
 5 completely different meaning, especially if you have  
 6 (inaudible) judges.

7 IAN HENDRY: You're quite right, Sam, that it's not a treaty  
 8 requirement, the right to be told that you have a right  
 9 to remain silent, as far as I'm aware. There are other  
 10 OT constitutions where these words are not in, so  
 11 I think, to be honest, I could say that it is your  
 12 choice, you know, if you would like to keep the words at  
 13 the end of subsection 3, "and of the right to remain  
 14 silent", that's fine with us. If you don't, because it  
 15 might create evidential problems later, then that's fine  
 16 too. You could leave that for regulation by ordinary  
 17 legislation. So it's a matter of your choice, I think.

18 SHIAN O'CONNOR: Mr Chairman, if I may say, I don't  
 19 represent the Human Rights Committee here at all but  
 20 I do believe the rule of law that an individual remains  
 21 innocent until we have found him guilty. In that  
 22 regard, such an individual should have that right to be  
 23 cautioned in order to prevent him from incriminating  
 24 himself.

25 I am not too sure that I'm comfortable, as we put a

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1 modern constitution together, bereft of that right on  
 2 that individual. As things are right now, such  
 3 individuals do not have the right, if the system that we  
 4 do have allows for an admittance of evidence with a  
 5 caution or without, and I think if we move towards that  
 6 direction, we ought to be looking at putting in a  
 7 right -- given the principle that an individual is  
 8 innocent until we have found him guilty, that we ought  
 9 to include a right that that individual ought to be  
 10 cautioned and that is to protect him from incriminating  
 11 himself. I do understand the point Sam is making, but  
 12 I think as we move towards a modern constitution, we  
 13 need to look in that direction.

14 IAN HENDRY: Yes?

15 ALDEN M MCLAUGHLIN: Mr Chairman, I agree, at the risk of  
 16 getting my usual slamming about, that that is correct.  
 17 The reality is that the police service have just got to  
 18 do a better job, and be more professional in the  
 19 exercise of their responsibility. We cannot  
 20 consistently undermine fundamental principles to take  
 21 into account the fact that the police force doesn't do  
 22 its job well enough and because the prosecution doesn't  
 23 get enough convictions is not a basis for attacking  
 24 these basic rights.

25 If we are going to evolve our constitution, our

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1 system of justice into something that can stand up to  
 2 international scrutiny, we have to accept some of these  
 3 basic principles. Yesterday, against my own view,  
 4 strongly held view about the need for a constitutional  
 5 right to a jury trial, the government conceded that  
 6 particular point. I'm only one member. I think they're  
 7 wrong, but that's what was decided and I'm bound by  
 8 that. But this is fundamental, the right not to be  
 9 required to incriminate yourself, and the basic  
 10 requirement, which even the most fresh-faced and green  
 11 constable ought to understand, is before you take a  
 12 statement from someone, you tell them, "You have a right  
 13 to remain silent". That must be a constitutional  
 14 guarantee in my country. That's the view I take, and  
 15 whatever problems, evidential or otherwise, it causes  
 16 for the police or the prosecution or the Chief Justice,  
 17 they just have to get with the programme.

18 SAMUEL BULGIN: Mr Chairman, let me just say that we need to  
 19 be extremely cautious here. We cannot move from one  
 20 extreme to the other. We have a country to run, we have  
 21 a criminal justice system and we need to be careful that  
 22 in our quest to modernise our constitution, we don't  
 23 (inaudible) our justice system (inaudible). We need to  
 24 be careful about that.

25 It is for good reason why none of the independent

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1 Commonwealth countries, including the UK, that I can  
 2 think of have elevated that to a constitutional right.  
 3 In the UK, they have gone further. The UK judges are  
 4 known to direct the jury that the failure to answer a  
 5 question when it is reasonable to do so or to say  
 6 something means that the jury can draw an adverse  
 7 inference against that accused person. That is the law  
 8 in the United Kingdom. We need to be extremely careful  
 9 while we are elevating the Cayman Islands to the United  
 10 States system, when we have all the trappings that have  
 11 guaranteed fairness before the common law and it has  
 12 worked very well, the judge's discretion (inaudible) the  
 13 statement, the evidence or the objects have been  
 14 unfairly discovered or obtained, he has a right to  
 15 exclude that, and that the judges have done consistently  
 16 even through all these many attacks. So that has worked  
 17 very well and we need to be just clear if we are going  
 18 to crystallise into a constitutional right common law  
 19 rights that have worked well to guarantee fairness.  
 20 That is what the criminal justice is all about,  
 21 fairness.

22 IAN HENDRY: Thank you. I want to move on. Briefly,  
 23 Professor Jowell.

24 JEFFREY JOWELL: Very briefly, with due respect, in terms of  
 25 the present interpretation under the standards of the

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<p>1 European Convention on Human Rights, both in Strasbourg 2 and by the House of Lords, I think the concerns of the 3 Chief Justice have no foundation.</p> <p>4 The Sang case which he mentions, which gives the 5 judge discretion to balance what's called the 6 prejudicial effect on the individual defendant against 7 the probative effect of the evidence, the balance that 8 they have doesn't go down the American route at all. 9 Even that's been softened recently, in recent decisions 10 that have softened the exclusionary rule.</p> <p>11 The case that he mentioned, Sang, has recently been 12 upheld in 2000 in the case of Khan and again in the case 13 of RMP in 2001. Khan went to Europe, to Strasbourg, 14 where the provisions of section 78 of the Police and 15 Criminal Evidence Act of the United Kingdom was directly 16 looked at in terms of this very question, and held that 17 the discretionary rule still applied.</p> <p>18 So the judge can say, "Look, the constitution has 19 technically been violated but we can still balance that 20 against the probative effect of the evidence in certain 21 circumstances." So I don't think there is any danger as 22 I see it, the cases have all gone the other way, in the 23 concerns of the Chief Justice on that point. Once that 24 is established, and it seems to me that the common law 25 as well as European and Convention law are absolutely</p> <p style="text-align: center;">Page 49</p>	<p>1 new section for inclusion in part 8, coming after the 2 other two commissions, the Human Rights Commission and 3 the Commission on Standards in Public Life. As we 4 discussed at the end of yesterday, I thought it would be 5 sufficient to provide for the establishment of this 6 constitutional commission, that it would be a chairman 7 and two other members. One can discuss numbers, but a 8 fairly small commission with at least one of the members 9 being an experienced lawyer, which would be sensible if 10 one is going to have it advising and publishing papers 11 about constitutional matters.</p> <p>12 And then in 3, simply give two principal functions, 13 which, as I understood from the discussion yesterday, 14 was what was thought about. But -- and then (c) -- to 15 allow a law enacted by the legislature add to the 16 functions.</p> <p>17 Then subsection 4 is the language to make sure it's 18 an independent commission, and then subsection 5 again 19 allows the legislature by law to make further provision 20 regarding establishment and operation. That would be -- 21 it's not skeletal, but it is a basic provision that will 22 be required to establish it in the constitution.</p> <p>23 KURT TIBBETTS: Mr Chair, I believe everyone seems to be 24 fine, but I just want to ask a question to make sure. 25 If we look at the section in the October rather than the</p> <p style="text-align: center;">Page 51</p>
<p>1 firm on this point, some of the other concerns fall away 2 as well.</p> <p>3 IAN HENDRY: How good to have you back, Professor. So we 4 don't need any new wording on the R v Sang point?</p> <p>5 JEFFREY JOWELL: No, as I say, I took it to the Attorney, 6 and we discussed that before.</p> <p>7 IAN HENDRY: Can I leave you then -- because I do want to 8 move on and we must not allow the CJ's paper to hijack 9 the whole final round. I like the CJ very much, he's a 10 very nice man, but CJs do tend to do this, they put in 11 papers right at the very end and then you know you are 12 ...</p> <p>13 SAMUEL BULGIN: Are we going to have another look at the 14 right to silence point?</p> <p>15 IAN HENDRY: I'm going to leave that with you for you to 16 think about, together with any wording on the JLSC, and 17 as far as the little addition to Section 95, the first 18 thing we talked about, I'll have a word with 19 Professor Jowell at lunch and see if we can adjust the 20 wording there.</p> <p>21 So that deals with the group of issues -- I wish it 22 had dealt with it finally, but it obviously hasn't.</p> <p>23 Can we look at the text that I tried to put together 24 for a constitutional commission. This is the single 25 page that was circulated. I've suggested it would be a</p> <p style="text-align: center;">Page 50</p>	<p>1 January draft; at section 117(5), subsection 5, I just 2 want to raise a question on this because it seems fine 3 but if you look at section 117, subsection 5, and we 4 look at the provisions there, we see that in subsection 5 (b), where it says -- it reads:</p> <p>6 "A person shall not be appointed as a member of the 7 commission if he or she is not a Caymanian."</p> <p>8 And it has other provisions in there. And of course 9 there would be disqualification provisions and vacation 10 of office.</p> <p>11 My question to you, because we have several of those 12 sections in the constitution: should these matters be 13 looked at as part of this constitutional provision or 14 are we going to say we look at those as part of the 15 legislation? It's just that in the other areas of the 16 proposed constitution, it's part of the constitutional 17 provision, so I just wanted to ask that question and 18 find out what your thoughts were.</p> <p>19 IAN HENDRY: I have asked myself the same question, looking 20 at the draft text, which of course, section 117 and 116, 21 both of these come from the draft that your side 22 prepared in the first round. I think I understand why 23 it's done this way, that the Commission for Standards 24 and Public Life is by far the most detailed of these 25 provisions, and the way I understood it was that this is</p> <p style="text-align: center;">Page 52</p>

<p>1 set out in some detail with qualifications of people who 2 can be appointed to this commission, including being a 3 Caymanian and not being a member of the legislative 4 assembly, nor a public officer, nor a holder of office 5 in a political party. Because of the nature of this 6 commission, it has to be politically neutral and indeed, 7 you know, you need to put people on it who are local 8 people but also who are people who are not, as it were, 9 tainted by political or public life.</p> <p>10 KURT TIBBETTS: Which one are you speaking about? 11 IAN HENDRY: The Commission for Standards and Public Life. 12 By contrast, if you look at the Human Rights Commission 13 section, the one before it, section 116, it doesn't go 14 into any of this at all. My understanding was that this 15 is not a political body, this is a body of experts in a 16 particular field. By comparison with that, my view is 17 that this constitutional commission, as we discussed 18 yesterday, would be rather similar. It would be more 19 similar to the Human Rights Commission than to the 20 Standards in Public Life Commission.</p> <p>21 KURT TIBBETTS: So anything else can be in the legislation. 22 IAN HENDRY: Exactly. 23 KURT TIBBETTS: That's why I asked the question -- 24 IAN HENDRY: So I think we can safely leave -- as with the 25 Human Rights Commission.</p> <p style="text-align: center;">Page 53</p>	<p>1 at 118.</p> <p>2 MCKEEVA BUSH: We may call a defence lawyer on this later 3 on.</p> <p>4 IAN HENDRY: We'll slot this in at 118 and make all the 5 succeeding sections renumbered.</p> <p>6 Next point? I am glad we've achieved something. 7 Would it be useful -- I think perhaps it would -- if 8 we looked at the other piece of paper? This is a very 9 first attempt by me to give some expression to -- it's 10 the one headed "National Security Council".</p> <p>11 If I give just a few words of explanation, 12 subsection 1 is exactly as in the current section 58(1), 13 except for (d) and (e). These are new. So the 14 membership would be expanded to include (d), the Leader 15 of the Opposition:</p> <p>16 "(e) two persons representative of civil society 17 appointed by the Governor acting after consultation with 18 the Premier."</p> <p>19 If you look at this beside the existing draft of 58, 20 subsection 2 would be unchanged. That's the provision 21 which deals with Ministers, and then a new subsection 3 22 would come in:</p> <p>23 "A person appointed under subsection 1(e) [that is 24 to say the civil society representatives] may be 25 appointed for a period of up to four years and may be</p> <p style="text-align: center;">Page 55</p>
<p>1 MCKEEVA BUSH: Mr Chairman, I wanted to thank you for the 2 preparation of this, and I certainly agree with your 3 last remarks in regards to its membership.</p> <p>4 I had a question on two or three members, two with 5 the chairmen, but my colleagues are satisfied(?) with 6 that and so I don't think that I could add to it other 7 than to thank you.</p> <p>8 IAN HENDRY: Thank you.</p> <p>9 ALDEN M MCLAUGHLIN: Mr Chairman, wearing my education hat, 10 I can't help but ask if we could have a new (e), which 11 would read something like, in terms of the functions of 12 3(c), the functions of this commission, "to promote 13 understanding, awareness of the constitution and its 14 values", perhaps, something like that.</p> <p>15 IAN HENDRY: To promote? 16 ALDEN M MCLAUGHLIN: "Understanding and awareness of the 17 constitution and its values". 18 IAN HENDRY: "Of this constitution and its value"? 19 ALDEN M MCLAUGHLIN: Values. 20 IAN HENDRY: And its values. It sounds very good.</p> <p>21 MCKEEVA BUSH: We thought that (b) was doing that. We have 22 no problem with the Minister putting on his education 23 cap.</p> <p>24 IAN HENDRY: All right, we'll put that in the (c) and make 25 the existing (e), (d). Good. So we'll slot this in</p> <p style="text-align: center;">Page 54</p>	<p>1 reappointed."</p> <p>2 We have to say something somewhere about how long 3 they would be serving, but I thought four years was 4 probably appropriate because that's the normal 5 Parliamentary term. You could make an appointment for 6 less and then you could reappoint the same person if 7 they were good.</p> <p>8 Subsection 4 is the former 3, that's still under 9 discussion, that's the question of the powers of the 10 council.</p> <p>11 5 would be the former subsection 4.</p> <p>12 Subsection 5 of the existing draft would come out, 13 because that's the provision about the Leader of the 14 Opposition being entitled to attend meetings and 15 instead, and this is the sanctions provision that 16 I dreamt up:</p> <p>17 "Before assuming office, each member of the National 18 Security Council should sign an undertaking that he or 19 she will not disclose to any other person ..."</p> <p>20 Nobody's listening.</p> <p>21 SAMUEL BULGIN: Mr Chair, I just wondered, "shall sign an 22 undertaking", whether we might just want to look to see 23 whether that could be a declaration, which it might be 24 called.</p> <p>25 KURT TIBBETTS: What is that?</p> <p style="text-align: center;">Page 56</p>

14 (Pages 53 to 56)



1 IAN HENDRY: The point I was on was subsection 6 of this  
 2 draft. This is a draft sanctions provision. At the  
 3 moment it says each member would sign an undertaking and  
 4 the AG was saying it might be better to say -- it sounds  
 5 grander -- sign a declaration that he or she will not  
 6 disclose to any other person without the permission of  
 7 the Governor information acquired as a member of the  
 8 council.  
 9 KURT TIBBETTS: But even if you sign a declaration, then  
 10 what?  
 11 IAN HENDRY: Then it goes on:  
 12 "And the Governor acting in his or her discretion  
 13 may suspend or expel ..."  
 14 KURT TIBBETTS: Okay, so you are not changing the sanctions,  
 15 you are just saying that they must sign a declaration.  
 16 That's what you are saying, sir? That is what you are  
 17 suggesting?  
 18 That's fine.  
 19 IAN HENDRY: You see, the idea is that the way I envisage it  
 20 working is that there would be meetings with this  
 21 council, and rather than try to define in advance what  
 22 information is confidential and should not be disclosed,  
 23 and which information may be disclosed because it's  
 24 harmless, the Governor -- this is why I say "without the  
 25 permission of the Governor" -- the Governor would have

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1 to say, in relation to each item, or there could be some  
 2 routine, there would have to be some routine procedure  
 3 whereby so-and-so information was stated by the Governor  
 4 not to be disclosable, he would not give his permission,  
 5 and other information would not be. You could start  
 6 with a presumption that it's all disclosable unless the  
 7 Governor ... or the other way around. Because it seemed  
 8 to me, as I was thinking about this, it's impossible to  
 9 say in this constitutional provision which information  
 10 is disclosable and which is not. So I think the key is  
 11 that it has to be with the permission of the Governor.  
 12 KURT TIBBETTS: There would have to be some discretionary  
 13 clause there to allow that.  
 14 IAN HENDRY: Yes. So that was my suggestion for it, and the  
 15 other paragraphs would be the same as under the existing  
 16 text.  
 17 I don't know whether this is helpful but it was an  
 18 attempt to reflect where I thought we had reached, quite  
 19 helpfully, yesterday.  
 20 MCKEEVA BUSH: Mr Chairman, two small points, and I venture  
 21 ---in here hoping that I don't incur the wrath of  
 22 Mr McLaughlin.  
 23 But on the matter -- I see this as, and I've always  
 24 seen it as a national thing, the Governor's national  
 25 advisory council it is, not the government's, not the

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1 Premier's.  
 2 On (c), where the Governor is going to appoint  
 3 members acting only in accordance with the advice of the  
 4 Premier, I'm wondering why not with the Leader of the  
 5 Opposition, even though the Leader of the Opposition --  
 6 sorry, (e) yes. Yes, (e).  
 7 IAN HENDRY: I think that's an option. Do you mind?  
 8 ALDEN M MCLAUGHLIN: I have to admire the Leader of the  
 9 Opposition's audacity. We have moved from a position  
 10 where the opposition had no representation on the  
 11 council, there is no precedent for this anywhere that we  
 12 have been able to determine. And now, after much  
 13 consideration and reflection, we've agreed the Leader of  
 14 the Opposition should be a member. We have an old  
 15 saying in the Cayman Islands that too much pork per  
 16 tuppence, and I think that what the Leader of the  
 17 Opposition is asking for is just that. Because if we go  
 18 back -- just a minute, Mr Bush, if you don't mind.  
 19 If we go back to the original proposition, this is a  
 20 council that is dealing with matters of policy, policy  
 21 considerations. This is a remit which would normally be  
 22 solely that of the government. There is and there still  
 23 are considerable reservations on our part about how well  
 24 this can work. I believe to extend the experiment so  
 25 that this policy-making body becomes representative of

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1 the opposition -- because we're not talking about just  
 2 the views of the opposition, but also of opposition  
 3 appointees to this council -- is really pushing the  
 4 limits of what is truly an experiment, and we would have  
 5 real, real problems in taking it that far.  
 6 IAN HENDRY: What I would --  
 7 ALDEN M MCLAUGHLIN: To the point where the proposal -- we  
 8 may well have to take the proposal, the entire proposal  
 9 off the table.  
 10 IAN HENDRY: Just for clarification, in defence of my  
 11 drafting, (i)(e)is deliberately drafted, "appointed by  
 12 the Governor acting after consultation with". It's not  
 13 an obligation on the Governor to accept the advice of  
 14 the Premier, nor would there be if the words "and the  
 15 Leader of the Opposition" were added.  
 16 This is deliberate, because these two persons  
 17 representative of civil society should, as far as  
 18 possible, be the Governor's selections from a  
 19 politically neutral standpoint. The whole idea is that  
 20 there are enough politicians on there, and then these  
 21 two representatives of society. I just wanted to  
 22 clarify that in no sense were we thinking of political  
 23 nominees for these two people.  
 24 MCKEEVA BUSH: Mr Chairman, I don't think it's being too far  
 25 out because, while the other councils in the Territories

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1 might not have it, we are seeking to modernise, and I've  
 2 found a lot here that I could stand up and yell about  
 3 and up to now I haven't done it. I don't know why the  
 4 government would find this so bad that they would want  
 5 to take it off the table, especially seeing that the  
 6 majority around the table feels that it should happen.  
 7 I think that's why it happened, because the majority  
 8 felt that way. When I said the majority, not the  
 9 government; the majority around this consensus table.  
 10 Is it objective for the government to be in charge  
 11 of an advisory council, or is it for the Governor to be  
 12 informed, the best advice he can get?  
 13 I am not going to make this a "do or die" situation,  
 14 I'm only looking at how the appointments are done  
 15 throughout the various bodies we are setting up.  
 16 Mr Chairman, I am not -- as I say, I think it should  
 17 happen. I think that the Governor should consult with  
 18 the Leader of the Opposition and with the Premier.  
 19 I want to look more for their interests because  
 20 (inaudible).  
 21 I would also ask, Mr Chairman, that in (d) the words  
 22 "or designate" should go in; "the leader of the  
 23 opposition or his designate". I don't know if that  
 24 would be so bad for the government.  
 25 KURT TIBBETTS: Just to be very clear, Mr Chairman: Meaning

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1 that who attends can actually alternate. For instance,  
 2 if the Leader of the Opposition is not able to attend,  
 3 that he would be able to designate someone too, or is it  
 4 that the designate would be the appointment?  
 5 MCKEEVA BUSH: That's what a designate would mean, that if  
 6 we feel as an opposition that the leader is far too  
 7 busy, can't be there, then he can appoint a designate,  
 8 he can ask the Governor to accept that designate. If he  
 9 has to be away from the Island or can't make it because  
 10 of another personal matter, then he can send in someone  
 11 else that the Governor would accept, of course.  
 12 IAN HENDRY: Yes. Just on that point, the way it's drafted  
 13 at the moment, if you refer to the Leader of the  
 14 Opposition, there is a provision at the end of the  
 15 constitution, the effect of which is that if the Leader  
 16 of the Opposition, the substantive Leader of the  
 17 Opposition is away, the person acting as Leader of the  
 18 Opposition can take it. So the effect of that provision  
 19 is that whoever is the substantive Leader of the  
 20 Opposition at any particular time, or who is acting as  
 21 the leader of the opposition, would be covered by (d).  
 22 That might not be enough for you, because you might want  
 23 to say: Well, what I prefer is for the leader of the  
 24 opposition when away to be able to designate another of  
 25 his colleagues rather than the deputy.

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1 MCKEEVA BUSH: Yes.  
 2 IAN HENDRY: Is that what you prefer? If that is the case,  
 3 I think we have to write in, "or his or her designate",  
 4 one has to write that in. The only question I have  
 5 about that is that it would be a variable person that  
 6 might turn up at each meeting.  
 7 ALDEN M MCLAUGHLIN: Mr Chairman, I agree. Each one would  
 8 have to sign the undertaking, so it would be a little  
 9 more administration, but I don't see any objection in  
 10 principle to that. If the opposition wants to be  
 11 represented on the council, that's fine. I don't think  
 12 we would have a problem with that.  
 13 IAN HENDRY: All right. Good.  
 14 KURT TIBBETTS: Just before you move on, Mr Chairman, if you  
 15 don't mind, I just want to go back and ask one question:  
 16 "A person appointed under subsection 1 may be  
 17 appointed for a period of up to four years and may be  
 18 reappointed."  
 19 I believe I heard your logic for that and I haven't  
 20 discussed this with colleagues. I'm wondering if that  
 21 period "up to four years" is the best thing to do or we  
 22 should limit it to perhaps a two-year period and still  
 23 have the same option of reappointment. I'm just  
 24 wondering what colleagues think about that.  
 25 MCKEEVA BUSH: I think, Mr Chairman, it says "maybe", so

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1 perhaps it's leaving the option open for the Governor to  
 2 set the period. I don't think you should go beyond four  
 3 years, but I think that's the maximum and then we would  
 4 have to -- it makes sense for the Governor to make that  
 5 appointment then two years, three years, on a yearly  
 6 basis, whatever he feels.  
 7 IAN HENDRY: That was my thinking. Also, of course, it may  
 8 be that some excellent person could be appointed but  
 9 would only want to be appointed for a period less than  
 10 four years, because they have other commitments and it  
 11 would be a shame --  
 12 KURT TIBBETTS: All right, that's -- I just wanted to flesh  
 13 it out. No problem.  
 14 ROLSTON ANGLIN: It's a question of (inaudible) would be  
 15 something that would perhaps become a part (inaudible)  
 16 in what form would that take place? In other words  
 17 I presume it would have to be in writing, but not only  
 18 than that, just to say that no person can discuss  
 19 without His Excellency's permission privy to the  
 20 council. So in other words, when you have a scenario  
 21 where someone gets suspended, and the public would not  
 22 have knowledge of that.  
 23 JEFFREY JOWELL: Could I take a stab at it? I think it is a  
 24 concern under section 19 of the constitution, that's the  
 25 new provision about lawful administrative action.

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<p>1 Presumably the Governor would have to give a fair 2 hearing to a member of the council. So my view is that 3 the words in section 6, line 4, "acting in his or her 4 discretion", should probably come out, so it should 5 read: 6 "The Governor may suspend or expel from the council 7 any member who fails to sign ..." 8 And that's it. You don't need much discretion for 9 that. Either the person did or did not sign. 10 "... or who in his or her opinion breaches such an 11 undertaking." 12 That may be a matter of opinion but you would 13 probably there, under the common law and also under 14 section 19, need some kind of indication to the person 15 of the charge against them and give them an opportunity 16 to rebut it before that decision was taken. 17 IAN HENDRY: Yes. Of course, the difficulty with taking out 18 the words "acting in his or her discretion" is that 19 without those words the general rule would be that the 20 Governor exercises his power on the advice of the 21 cabinet, unless there's a reason for him ... and we 22 can't have that. This has to be an independent 23 decision. 24 I take your point that, a member who fails to sign, 25 should there be a discretion about it? One could oblige</p> <p style="text-align: center;">Page 65</p>	<p>1 easily by saying: "The Governor by directions in 2 writing", you know, actually specify the legal 3 instrument by which the suspension or expulsion is done, 4 then it is public. I think that is vital to have. 5 JEFFREY JOWELL: Just a pedantic point, and that is a person 6 who doesn't sign -- it says here: 7 "Before assuming office, each member of the National 8 Security Council shall sign an undertaking." 9 If he or she does not do so, he doesn't assume 10 office and therefore cannot be expelled or suspended. 11 So there needs to be a slight change of formulation. 12 OSBOURNE BODDEN: Yes, sir. In relation to subsection 6 and 13 the whole area of sanction in such an important body as 14 this, we speak here to suspension and expulsion, but 15 where an event someone -- even if he signs the 16 declaration, someone who in such a capacity were to 17 incur -- their actions were to result in the risk of 18 let's say loss of life or limb or cost to the country, 19 should there not be some consideration for more serious 20 sanctions that may not be clearly outlined here, but a 21 provision to that extent? 22 IAN HENDRY: I don't think that a provision like this in the 23 constitution would rule out that further sanctions could 24 be provided for by ordinary law. You know, it may be 25 that the action of disclosing information breaches</p> <p style="text-align: center;">Page 67</p>
<p>1 the Governor to suspend or expel a member who fails to 2 sign, because that is non-cooperation from the 3 beginning. Then, of course, somebody who breaches it, 4 there could be questions of the fact and they should 5 have the chance to give their view on the matter: Was 6 it an accidental disclosure, and blah blah blah? So we 7 could think of redrafting it to say: 8 "The Governor shall suspend or expel from the 9 council any member who fails to sign such a declaration 10 and then may in his or her discretion suspend or expel 11 from the council any member who breaches such a 12 declaration." 13 I accept, you know, that it can't be done in an 14 unfair way without the risk of being challenged. One 15 has to do these things properly. All we're trying to do 16 here is to get a sanction which is an effective 17 deterrent. 18 ROLSTON ANGLIN: But, Mr Chairman, the point I was asking is 19 you go through all that process internally, because the 20 very nature of that (inaudible) is such that without the 21 permission of the Governor you can't disclose any act of 22 this body anyway, does that automatically mean that 23 without his permission, someone who gets suspended, that 24 could never come to the light of day? 25 IAN HENDRY: No, that's not intended. We could fix that</p> <p style="text-align: center;">Page 66</p>	<p>1 another law, because, you know, a criminal offence might 2 have been committed. One could build on this -- this is 3 a minimum, really -- so that there is a deterrent 4 against this, otherwise you won't be on this council any 5 more, so you'd better behave, basically is what it is 6 saying. 7 I can quite see that there could be serious damage 8 that could -- I think it's quite difficult to go further 9 in this provision to try and deal with all possible 10 circumstances, but I just don't know enough about the 11 criminal law of the Cayman Islands as it exists at the 12 moment. Do you have anything protecting official 13 secrets, official information like we do here? I guess 14 you have some -- 15 SAMUEL BULGIN: Only if it is called confidential 16 relationships. 17 IAN HENDRY: -- confidential relationships law. 18 ALDEN M MCLAUGHLIN: That would not have application to 19 this, though. 20 IAN HENDRY: It would not have application to this. I think 21 it is an option; it's an option. 22 All right, what I was going to suggest -- are we on 23 for 12.30? If there's nothing else, I've found this a 24 very helpful discussion of this draft because I think it 25 takes us quite a lot closer to resolving the whole</p> <p style="text-align: center;">Page 68</p>

17 (Pages 65 to 68)

1 bundles of issues surrounding the National Security  
 2 Council, but we need to do a bit of further redrafting  
 3 on subsection 6, which we can do during the break.  
 4 Do you have another point, McKeeva?  
 5 MCKEEVA BUSH: No, just the points that I made. You're  
 6 still looking at them, right?  
 7 IAN HENDRY: The first point you made about whether a Leader  
 8 of the Opposition should be consulted by the Governor as  
 9 well as the Premier under (e), I mean that is the thing  
 10 that the first reaction of Alden was not positive, but  
 11 then I said, "Hang on, this is not a provision which  
 12 would allow the opposition or the Government to nominate  
 13 members, this is going to be the Governor's choice and  
 14 it's only a question of consultation, so I was trying to  
 15 clarify, but my understanding is that they're thinking  
 16 about it. They haven't -- he hasn't taken the whole  
 17 thing off the table yet.  
 18 MCKEEVA BUSH: Can I ask you not to allow them to take it  
 19 off the table?  
 20 IAN HENDRY: Pardon?  
 21 MCKEEVA BUSH: Can I ask you to not allow them to take it  
 22 off the table?  
 23 ALDEN M MCLAUGHLIN: My concerns are as this evolves we'll  
 24 soon get to the point where the Leader of the Opposition  
 25 will want to be the chairman.

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1 be (inaudible) at this point in time trying to get this  
 2 in, but it would be good for the (inaudible) if the  
 3 Governor consulted both, because -- I'll tell you why.  
 4 Suppose the Governor just consulted the Leader and the  
 5 Premier and the Premier just (inaudible) to his  
 6 supporters, that's why (inaudible) but all of this, for  
 7 whose advice, when that time comes that the Governor  
 8 takes that advice, who (inaudible) the best advice, or  
 9 if it's not from both sides? That's what's going to  
 10 happen, come on, let's be realistic here.  
 11 Anyway, sir, as I said, I'm not going to say that  
 12 it's going to kill the position. I am glad that the  
 13 government has come to some consensus and agreed with  
 14 some of it. But, as I said, I am only doing this for  
 15 them.  
 16 ELLIO SOLOMON: Mr Chairman, two quick comments. One being  
 17 insofar as discussions about the National Security  
 18 Council, I recall that even when it we had discussions  
 19 on the first day that in terms of the (inaudible)  
 20 support for the government in this initiative was the  
 21 fact that (inaudible) many people want to see on many  
 22 issues less politics and in particular when it came to  
 23 something as important as the (inaudible). I understood  
 24 at that time that the government was also taking that  
 25 position. I believe that when this matter was here

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1 MCKEEVA BUSH: Mr Chairman, the person leading the talks  
 2 then really doesn't know me, he's still wet behind the  
 3 ears (inaudible), and this is the Governor's purview.  
 4 Now if it was his purview, oh, yes, we would want it.  
 5 But this is the Governor's purview, and I ask you to  
 6 bear in mind that it is a consultation with, it's not an  
 7 appointment by; a consultation with, and that, as I say,  
 8 this is not -- and I say this and I say this strongly  
 9 and you can take it -- this is not the government's  
 10 constitution. This is not the government's  
 11 constitution, neither is it ours. Around this table, we  
 12 thought we were going to try to get the consensus, and  
 13 maybe we can't agree on all things, but at least four on  
 14 that side agree and four on this side agree, so that  
 15 leaves the government in a minority position.  
 16 KURT TIBBETTS: Agree with what?  
 17 ALDEN M MCLAUGHLIN: This point has never been raised  
 18 before.  
 19 MCKEEVA BUSH: Agree how this national council should be  
 20 constructed. Mr Chairman, I don't want to get into all  
 21 the various points, but I know that they agree with  
 22 some -- that it should be appointed that way, with the  
 23 Leader of the Opposition.  
 24 KURT TIBBETTS: So what else are you talking about?  
 25 MCKEEVA BUSH: (Inaudible) good at that, so if nothing can

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1 earlier and issued terms of the discussion about the  
 2 Governor's appointment (inaudible) but one of the  
 3 considerations there was not having it being viewed that  
 4 the government (inaudible) selected someone of its own  
 5 and as a result of that politicising that particular  
 6 office in terms of the consultation with the Governor.  
 7 I think something similar exists when it comes to  
 8 dealing with the police. I think every effort should be  
 9 made to ensure that not only is justice done but it's  
 10 perceived to be done, seen to be done, in that the  
 11 consultation and the appointments to the general public  
 12 is viewed as non-political, and therefore any  
 13 discussions that are made are thus representative.  
 14 I would also like to see that we get clarity, if for  
 15 nothing else by for edification, in terms of the point  
 16 raised on the issue of the confidentiality relationship  
 17 (inaudible) law. Because I note that Mr McLaughlin said  
 18 it does not apply, but I also understood there were  
 19 issues in terms of public office and, in particular,  
 20 under section 6, are police officers going to receive  
 21 some sort of (inaudible). I know that the Attorney  
 22 General stated that (inaudible).  
 23 If you could give clarity, I would greatly  
 24 appreciate it. I just want to be clear. I think that  
 25 was the government's position when we all sat on Monday

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<p>1 in terms of us reaching consensus with (inaudible) the 2 National Security Council and that should be our 3 position today in these discussions, everything should 4 be in that direction. Thanks.</p> <p>5 IAN HENDRY: Thank you. I think I am not in a position to 6 clarify the position on the Cayman legislation about 7 confidential information, but no doubt after lunch Sam 8 could say something or Michael might be able to, both of 9 whom have a wider acquaintance with the legislation than 10 I do.</p> <p>11 I think we should take a break now, but come back in 12 an hour, at 1.30, and I would like then to see if we can 13 get on to looking at some of the other points in the 14 list of ten that we looked at yesterday, because if 15 Minister Gillian Merron does come back this afternoon, 16 it would be splendid to be able to report to her that we 17 had knocked off some of these other points because we've 18 I think taken a big step forward in relation to this 19 one, the NSC, but there are others which it would be 20 good to try and solve.</p> <p>21 So that's my determination after lunch and bearing 22 in mind that we still have some parked issues to do with 23 the CJ's concerns about the position of the CJ and the 24 composition of the judicial and legal services 25 commission, which we'll have to look at at some point --</p> <p style="text-align: center;">Page 73</p>	<p>1 with future consultation, we've had a look at it and 2 I think it's fine. I don't think we have any changes to 3 propose at all.</p> <p>4 IAN HENDRY: Good. Thank you very much. As I said 5 yesterday, if we succeed at this round in a package with 6 a draft constitution, this draft letter would go with 7 it, it would be published with it as part of the overall 8 package, together with the draft entrustment letter, 9 which I'm assuming is satisfactory because no one's had 10 any problems with it.</p> <p>11 Then there's the draft letter on orders in council.</p> <p>12 ALDEN M MCLAUGHLIN: Mr Chairman, the second letter, orders 13 of council, so that everyone follows what I'm saying, 14 I'm just going to repeat the second paragraph, the 15 second numbered paragraph:</p> <p>16 "I confirm that such consultation would in most 17 circumstance represent modern practices. Accordingly the 18 Governor will whenever practicable consult with the 19 Premier or the Cabinet in advance of the exercise of Her 20 Majesty's power to legislate for the Cayman Islands."</p> <p>21 The bit that's giving us trouble is this bit: 22 "Unless in the judgment of the Governor or the 23 United Kingdom government such consultation would be 24 prejudicial to the interests of the United Kingdom." 25 It seems to us that this suggests that the mere act</p> <p style="text-align: center;">Page 75</p>
<p>1 well, we don't have to, but courtesy perhaps demands 2 that we should.</p> <p>3 We'll break for lunch and come back at 1.30.</p> <p>4 SAMUEL BULGIN: I apologise. I have a habit of not speaking 5 in the mike. What I said in response to the 6 confidential relationships, I said: Only if the 7 confidentiality law applies; only if it applies. The 8 words I used were: "Only if the confidentiality law 9 applies". I just wanted to repeat what I said. My 10 apologies for not speaking in the mike.</p> <p>11 (12.35 pm)</p> <p>12 (The luncheon adjournment)</p> <p>13 (1.30 pm)</p> <p>14 GILLIAN MERRON: Right, ladies and gentlemen, shall we 15 resume? I have during the break played around a bit 16 with the draft revision we were looking at just before 17 lunch on the National Security Council, particularly the 18 sanctions clause. I'm getting it retyped just now, but 19 we can come back to that a bit later.</p> <p>20 Can we look at some of the other things that we left 21 over from yesterday, starting with the draft letter on 22 future constitutional change and the referendum? I hope 23 that, in light of our friendly discussion yesterday 24 about it, we can put that one to bed.</p> <p>25 ALDEN M MCLAUGHLIN: Mr Chairman, the letter now dealing</p> <p style="text-align: center;">Page 74</p>	<p>1 of consultation could be prejudicial to the interests of 2 the United Kingdom. If our understanding of that is 3 correct, could you indicate to us, sir, how it is 4 perceived that merely consulting could be prejudicial to 5 the interest of the United Kingdom?</p> <p>6 IAN HENDRY: The first point to make is that your draft of 7 paragraph 2 in section 124 says:</p> <p>8 "The Governor shall whenever practical consult with 9 the Premier or the Cabinet in advance of the exercise of 10 the power under subsection 1 unless such consultation is 11 prejudicial to Her Majesty's service."</p> <p>12 So you accepted in your draft that even the act of 13 consultation might be prejudicial, which I thought was 14 very reasonable of you to accept that that could be 15 possible.</p> <p>16 KURT TIBBETTS: Mr Chairman, we are all susceptible to 17 error. Just to reinforce the point that my colleague 18 has made, Mr Chairman, what we recognise is that at some 19 point in time there may well be an occasion where the 20 actions by way of an order in council will or cannot be 21 stopped by anything we would say. But what we question 22 is, would we still not be consulted? Even if we are 23 simply told, what this is saying is that Her Majesty's 24 Government may be mindful to do something and then we 25 hear about it afterwards, which is exactly the opposite</p> <p style="text-align: center;">Page 76</p>

1 of what they have promised since the last time that  
 2 happened to us. So I said that for a light moment, but  
 3 I was very serious. And hence my colleague's point now,  
 4 because in retrospect we realise that in trying to draft  
 5 something that would be acceptable to you, we were much  
 6 too careful in our first attempt.

7 ALDEN M MCLAUGHLIN: Mr Chairman, I think perhaps that if  
 8 the clause had been unaltered and if it had been  
 9 included in the constitution, we might have simply said  
 10 "Thank you very much", but because you have made some  
 11 changes to it and because you have now proposed it as  
 12 part of the letter, we had occasion to pay a little more  
 13 attention to the precise wording and we are quite  
 14 frankly wondering if those concluding words, starting at  
 15 "unless", are really necessary at all, because if you  
 16 read the sentence as it begins:

17 "Accordingly, the Governor will whenever practicable  
 18 consult with the Premier or the cabinet in advance of  
 19 the exercise of Her Majesty's power ..."

20 So if it is determined that it is not practicable to  
 21 do so, then the Governor doesn't do so, and we need not  
 22 get into all of this business about whether the  
 23 consultation would be prejudicial to the interests of  
 24 Her Majesty's Government.

25 IAN HENDRY: Yes. I see what you're saying up to a point.

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1 Of course, "whenever practicable" is a sensible  
 2 qualification in any case, because there may be  
 3 circumstances where it's practicable to do so but not  
 4 considered politically acceptable to do so by the UK  
 5 government.

6 I freely accept that the circumstances in which that  
 7 might arise are likely to be very rare, especially in  
 8 this day and age, and, you know, with modern  
 9 communications and so forth. What we're talking about  
 10 here is not a reserved -- it's a reserved power to make  
 11 laws for the Cayman Islands. The usual thing, as you  
 12 know, is for any time this sort of power is exercised,  
 13 there is consultation.

14 KURT TIBBETTS: The usual thing?  
 15 IAN HENDRY: The usual thing. The usual thing.  
 16 KURT TIBBETTS: Nowadays?  
 17 IAN HENDRY: Yes, nowadays the usual thing. But being of a  
 18 cautious nature and looking ahead to, not the current  
 19 situation where everything is fine, there may be  
 20 circumstances where it's necessary, without delay and  
 21 without consultation, to make law for the territory  
 22 because the UK is responsible for it and the judgment  
 23 has to be that of the UK Ministers.

24 I don't want to try to speculate too much about the  
 25 sort of situation I'm thinking of, but, you know, you

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1 understood me when I said yesterday about things that  
 2 have happened in other Territories, where extreme  
 3 measures had to be taken and they had to be taken  
 4 without consultation. The UK had to take its  
 5 responsibilities and say, "They're not going to like  
 6 this, but we're going to have to do it".

7 KURT TIBBETTS: Mr Chairman, if I may, I remember vividly.  
 8 Although you spoke as generically as you possibly could,  
 9 we took the point. I think it boils down to what we  
 10 construe the word "consult" to mean and, to me,  
 11 "consult" also captures simply being told. In other  
 12 words, consult in normal circumstances would be taken to  
 13 mean: Even though I know it's my decision, I want to  
 14 talk it through with you so that you can tell me how it  
 15 affects you negatively, even though we have to make  
 16 certain -- or take certain actions, but at least we want  
 17 to hear what you're saying about how it's going to  
 18 affect you to see if there's a way to do what we have to  
 19 do to affect you less. I think that's the whole general  
 20 principle that we are working on as a relationship. But  
 21 certainly it would also mean, if you -- and I say "you"  
 22 meaning Her Majesty's Government -- have to take certain  
 23 action, even like the extreme one you referred to  
 24 yesterday as an example, wouldn't you still not tell the  
 25 jurisdiction?

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1 IAN HENDRY: The difficulty with that is I'm sure the  
 2 lawyers around the table would confirm that if the  
 3 question of a duty to consult before a court, the courts  
 4 would say "consultation" means real consultation, it  
 5 doesn't mean just telling everyone what you're going to  
 6 do. You have to give the person you're consulting, the  
 7 body you're consulting, the chance to consider what's  
 8 proposed and to express their views. It has to be a  
 9 genuine consultation.

10 KURT TIBBETTS: You mean where a court comes into this?  
 11 IAN HENDRY: Well, if this letter was sent -- this is why  
 12 we're having to be very cautious about saying anything,  
 13 and the more we discuss this, the more nervous I get and  
 14 the more my dear absent advisor, Susan, would be telling  
 15 me not to agree to anything, which is the first thing  
 16 she told me to do. Because if we send a letter like  
 17 this and we violate it and we could be taken to the  
 18 courts for breach of a legitimate expectation arising  
 19 out of this promise, this political promise given in  
 20 this letter. So this is not without legal significance,  
 21 this letter.

22 KURT TIBBETTS: You might have to pay compensation or what?  
 23 IAN HENDRY: Well --  
 24 KURT TIBBETTS: I'm not being funny. I don't know what kind  
 25 of sanctions it would be of that nature.

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1 IAN HENDRY: It's not so much a question of financial  
 2 consequences. You know, we don't want our disputes with  
 3 a territory unnecessarily to be brought before the  
 4 courts in the UK and for the British government to be  
 5 held to have broken the law. That is a bad outcome for  
 6 us.

7 ALDEN M MCLAUGHLIN: We agree, sir.

8 IAN HENDRY: The more this -- I mean, as I said yesterday, a  
 9 letter like this will be a first in relation to any  
 10 territory, and the more I hear about it, the more  
 11 collywobbles I get, and I'm wondering whether we should  
 12 just forget about it, because this is the difficulty.  
 13 Once you start writing down how things might be done in  
 14 relation to a power which is untrammelled, it's complete.  
 15 Subject to what the courts have already said about the  
 16 exercise of this power, it is not qualified in any  
 17 constitutional document or letter. So this would be a  
 18 first, and then once you start writing it down, you have  
 19 to think of the possible bad situations.

20 KURT TIBBETTS: We have heard everything you have said, sir,  
 21 and we understand very well, but, Mr Chair, I wanted to  
 22 remind you, sir, that on your instructions we were told  
 23 that we were speaking and discussing in good faith and  
 24 we simply raised the point. If you are nervous, sir,  
 25 then we didn't raise it, we didn't have this discussion,

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1 so please don't consider otherwise.

2 IAN HENDRY: No, I don't consider otherwise. We are  
 3 discussing --

4 KURT TIBBETTS: No, you started talking about all kinds of  
 5 things, and if that was your way to stop us, you have.  
 6 Thank you.

7 MCKEEVA BUSH: Except it's all on record now.

8 ALDEN M MCLAUGHLIN: Mr Chairman, there's no point in us  
 9 having a letter that means nothing, and I'm not going to  
 10 go back and tell my people that we have something which  
 11 means something when I know full well it means nothing.  
 12 If it means nothing, then don't give it to us. That's  
 13 my view. I'm not going to be dishonest about these  
 14 things with my people.

15 We would like this kind of undertaking, but when it  
 16 means something. I want to suggest some language which  
 17 you can consider. If we try:

18 "Accordingly the Governor will, unless it is  
 19 impracticable or prejudicial to the interests of the  
 20 United Kingdom, consult with the Premier or the cabinet  
 21 in advance of the exercise of Her Majesty's power..."

22 And that avoids this problem which we have either in  
 23 our own draft of the consultation, the act of  
 24 consultation itself being perceived as prejudicial.

25 IAN HENDRY: Can you say it again, please?

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1 ALDEN M MCLAUGHLIN: "Accordingly, the Governor will, unless  
 2 it is impracticable or prejudicial to the interests of  
 3 the United Kingdom, consult with the Premier or the  
 4 cabinet in advance of the exercise of Her Majesty's  
 5 power to legislate for the Cayman Islands."

6 IAN HENDRY: Can you just give us a moment? I'd like to  
 7 consult with my learned colleague. (Pause).

8 We're nearly there, with one significant addition  
 9 from our point of view. That is to change your  
 10 formulation to -- I'll read the whole sentence:  
 11 "Accordingly, the Governor will, unless it is  
 12 impracticable or the Governor is instructed by a  
 13 Secretary of State that it would be prejudicial to the  
 14 interests of the United Kingdom, consult with the  
 15 Premier or the cabinet in advance of the exercise of Her  
 16 Majesty's power to legislate for the Cayman Islands."

17 The important thing about the additional words I've  
 18 suggested, "the Governor is instructed by a Secretary of  
 19 State that it would be prejudicial", is that it places  
 20 where it should place it, the responsibility for  
 21 deciding prejudice to the interests of the United  
 22 Kingdom, that is to stay with the Secretary of State  
 23 here. I think if you could go with that --

24 ALDEN M MCLAUGHLIN: That's fine, sir.

25 IAN HENDRY: Let's do that. So what we'll do is clean this

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1 up and get it retyped and circulated again so you can  
 2 have a look at it: That would be a good outcome.

3 KURT TIBBETTS: Mr Chair, just to confirm, you don't have  
 4 any tendencies to strip anything out or anything like  
 5 that? You're not with any tendencies like that? I just  
 6 want to make sure.

7 IAN HENDRY: Not unless you change your mind.

8 ALDEN M MCLAUGHLIN: No, sir. Thank you very much. That  
 9 meets the concern we have perfectly. That's great.

10 IAN HENDRY: We are rattling along --

11 KURT TIBBETTS: I find that you are novel(?) yourself.

12 IAN HENDRY: Returning to Section 31(3), where we left it  
 13 yesterday with the revised text that I circulated, the  
 14 exercise of the Governor's functions -- this is the  
 15 text:

16 "In the exercise of his or her functions under  
 17 subsection 2, the Governor shall endeavour to promote  
 18 good governance and to act in the best interests of the  
 19 Cayman Islands so far as in his or her judgment such  
 20 interests are consistent with the interests of the  
 21 United Kingdom."

22 My understanding was that your only objection to  
 23 this text was the words "in his or her judgment" in the  
 24 third line.

25 ALDEN M MCLAUGHLIN: That's correct.

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1 IAN HENDRY: Is that still the position, having had the  
 2 benefit of Professor Jowell's arrival?  
 3 ALDEN M MCLAUGHLIN: I think he's even more concerned than  
 4 I was, sir.  
 5 IAN HENDRY: He was even more concerned that you were?  
 6 JEFFREY JOWELL: We've just lost it for a second, but we  
 7 looked at it.  
 8 ALDEN M MCLAUGHLIN: When I handed to him over breakfast he  
 9 threw it on the floor.  
 10 IAN HENDRY: That's probably because he was reaching for the  
 11 toast. Yes?  
 12 JEFFREY JOWELL: The words "in his or her judgment" seek to  
 13 make the whole issue about the interests of the United  
 14 Kingdom entirely subjective, so you could get a  
 15 particular Governor who treats the interests of the  
 16 United Kingdom extremely broadly, perhaps even  
 17 unreasonably broadly. That's the danger. Whereas if  
 18 you have simply, "so far as are consistent with the  
 19 interests of the United Kingdom", you have left things  
 20 that much more objective. You're trying to remove the  
 21 possibility of an unreasonable personal subjective  
 22 interpretation of that phrase.  
 23 It may be that in any event if the present  
 24 formulation is retained and a Governor of the future  
 25 makes an unreasonably broad interpretation of that.

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1 discussion we had just before lunch.  
 2 First of all, I have put into 58(1)(e):  
 3 "The Leader of the Opposition or his or her  
 4 designate."  
 5 I think that was accepted.  
 6 In (e), I've added at the end in square brackets,  
 7 "and the Leader of the Opposition", bearing in mind this  
 8 is still:  
 9 "Two persons representative of civil society  
 10 appointed by the Governor acting after consultation with  
 11 the Premier and the Leader of the Opposition after  
 12 consultation."  
 13 And thirdly, and this is a bit more complicated but  
 14 the changes are not very many, in subsection 6, this now  
 15 provides:  
 16 "Before assuming office each member of the National  
 17 Security Council should sign a declaration that he or  
 18 she will not disclose to any other person without the  
 19 permission of the Governor information acquired as a  
 20 member of the council and the Governor acting in his or  
 21 her discretion may by published directions in  
 22 writing ..."  
 23 That is to take up Rolston's point.  
 24 "... suspend or expel from the council any member  
 25 who breaches such a declaration."

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1 phrase, that under judicial review he might have to  
 2 produce some evidence and therefore the courts would  
 3 knock it into objective shape as they tend to do these  
 4 days, anyway, because they treat subjective discretion  
 5 very often as having to have some objective  
 6 justification. Because that is so and because it  
 7 invites an extreme interpretation, and personal and  
 8 subjective interpretation, we would submit that those  
 9 subjective words just simply be removed. It doesn't  
 10 violate the spirit of this provision, which basically  
 11 seeks to get the Governor to do a balancing test, with  
 12 the interests of the United Kingdom having primacy in  
 13 any event.  
 14 IAN HENDRY: I'm very grateful for that statement because in  
 15 substance I agree. If you confirm that you're content  
 16 with the rest of the sentence, then we can remove those  
 17 words.  
 18 ALDEN M MCLAUGHLIN: I so confirm.  
 19 IAN HENDRY: All right, then let's do that. We have another  
 20 novelty to chalk up.  
 21 There has come around, I hope, my lunchtime  
 22 revision, slight revision of draft section 58, the one  
 23 headed "National Security Council". Do you have the  
 24 revised version? I'll point out the changes that I have  
 25 made in this revised version to take account of the

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1 And I have deleted, because Jeffrey pointed out that  
 2 you don't need it, "a power to suspend or expel somebody  
 3 who fails to sign the declaration" because a person who  
 4 fails to sign does not assume office, the opening words  
 5 "before assuming office".  
 6 Somebody who fails to sign such a declaration never  
 7 gets to the starting post so it's not necessary to deal  
 8 with it.  
 9 I think that deals with all of the glitches we saw  
 10 in the previous draft.  
 11 And then, of course, there would be left over for  
 12 further consideration by the legislative assembly in due  
 13 course whether to make a new law or amend existing  
 14 legislation to deal with any further sanctions as  
 15 Osbourne raised the question that might be necessary  
 16 that that might need to be done. It may be that the  
 17 existing legislation on protection of sensitive  
 18 information is not sufficient. We don't need to say  
 19 anything more about that here.  
 20 And then I put in in 1(e), in square brackets the  
 21 words "and the Leader of the Opposition" because I think  
 22 we should discuss that a little more and, reflecting on  
 23 it over lunch, it seemed to me that from an objective  
 24 point of view, the last thing I want to do is to get  
 25 between two warring parties of the Cayman Islands, but

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1 from an objective point of view, there would be an  
 2 advantage in the Governor -- I mean, this is an  
 3 innovation, to have a body with two members of civil  
 4 society, two representatives of civil society. It would  
 5 be a very inclusive type of a body. The perception  
 6 might be, the public perception might very well be that  
 7 if the Governor were obliged then to consult the Premier  
 8 about these two members of the public, that even though  
 9 the final decision was one for the Governor to take,  
 10 these were really two government people or people  
 11 favoured by the government, whereas if the Governor had  
 12 to consult both the Premier and the Leader of the  
 13 Opposition, the public perception is perhaps more likely  
 14 to be that there would be a balance. That was my  
 15 thought.

16 ALDEN M MCLAUGHLIN: Mr Chairman, I don't want to stop you,  
 17 but I just want to say that we reflected on it over  
 18 lunch as well and came to a similar conclusion, so we  
 19 are willing to concede that point.

20 IAN HENDRY: Good. That's a good outcome, I think. Are you  
 21 happy, McKeeva?

22 MCKEEVA BUSH: Some of us had a productive lunch, got enough  
 23 pork for our shilling at least.

24 STUART JACK: Can I just clarify one point -- I think it is  
 25 all right but I just wanted to be absolutely certain --

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1 which is the use of the words "publish directions in  
 2 writing"? I'm just trying to think through in my own  
 3 mind the sort of scenario that might arise and one  
 4 possible scenario is that there is some, a bad example,  
 5 some information being leaked, getting into the media,  
 6 you suspect it might be a particular member who has done  
 7 it or you may have some information or an allegation,  
 8 but obviously in the interests of natural justice, you  
 9 want to hear their side of the story before you take any  
 10 final decision. That person is overseas at the time.  
 11 You might wish, as Chair, to direct the Commissioner of  
 12 Police, for example, not to send that person any  
 13 information, but you're not going to take any final  
 14 action to do anything about that person until they  
 15 return. So effectively you are suspending them but you  
 16 are not actually reaching a final judgment and you don't  
 17 want to publish the fact because it may be when they  
 18 come back they have a perfectly legitimate explanation,  
 19 they have got the person who has done it, and you don't  
 20 want to tarnish their reputation by publishing the fact  
 21 that they were being suspended prematurely. It's just a  
 22 question about whether you want to be obliged to publish  
 23 at the point at which you effectively suspend somebody.  
 24 Because by directing the Commissioner of Police not to  
 25 share information, you are suspending them. But maybe

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1 that's not a problem.

2 IAN HENDRY: It raises a broader question, because it's only  
 3 the decision to suspend or expel a member that must be  
 4 contained in published directions in writing. It is  
 5 only the decision. But --

6 STUART JACK: Can I just explain what my question is. That  
 7 suspension is something you might want to do while  
 8 investigating whether they have actually breached their  
 9 obligation or not.

10 IAN HENDRY: That's a wider question. This drafting does  
 11 not allow for that. The way this is drafted at the  
 12 moment, but there is a question whether this is  
 13 sufficient, that there must be in the judgment of the  
 14 Governor a breach of the declaration before the Governor  
 15 can suspend or expel a member. That's the way it's  
 16 written at the moment -- do you agree? -- I think  
 17 without any doubt. If one wanted to go a step further  
 18 and to provide for a power to suspend while a suspected  
 19 breach is investigated, I think that would have to be  
 20 written in. I don't know what you think.

21 ALDEN M MCLAUGHLIN: I think sir, that the Governor has  
 22 raised a valid point, because if we leave it the way it  
 23 is, what is likely to happen in practice, I think, is  
 24 that the Governor would be most reluctant to suspend  
 25 unless he is absolutely positive that there is a breach,

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1 and that is likely to leave the situation where the  
 2 suspected party is still allowed to participate in the  
 3 proceedings and likely to perpetrate further breaches  
 4 and so forth.

5 So I think the Governor's point is right, that we  
 6 need to make some sort of provision for an investigation  
 7 to go on, or indeed a suspension to be made without  
 8 necessarily it being public. I think we're probably  
 9 happy to develop a section or a provision which vests in  
 10 the Governor a certain amount of discretion without it  
 11 being so fixed.

12 There's another problem, which the Speaker has just  
 13 raised with me, which is what happens in relation to an  
 14 expelled member who continues to divulge information  
 15 which he or she learned during their time as a member,  
 16 because that could have serious ramifications as well?  
 17 And if they are expelled they have already gone.

18 IAN HENDRY: That's a question that Osbourne raised before  
 19 lunch effectively, I think, that there may need to be  
 20 further sanctions, depending on the amount of damage  
 21 that is done. My answer was, and I think it still is,  
 22 that any other sanctions over and above exclusion from  
 23 the council itself can be provided for in ordinary  
 24 legislation.

25 I would have thought it was a sort of generic

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<p>1 question, actually: Does your statute book make 2 sufficient provision to protect confidential 3 information? Not just confidential information held by 4 banks, financial institutions, but by other members of 5 the public, persons sitting on public bodies. I don't 6 think we can answer all these questions in the 7 constitution itself, but it does raise that wider issue. 8 As far as the Governor's point is concerned, we can 9 at the next break try our hands at writing a few more 10 words to something along the lines of, "if the Governor 11 has good reason to suspect that they may be in breach of 12 the declaration, he may suspend a member while the 13 suspected breach is being investigated", or something 14 like that, "and any such investigation shall be 15 concluded as speedily as possible", so that it's not 16 abused to keep a person suspended for month after month 17 after month, something along those lines, which I think 18 would deal with that problem. Does that sound all 19 right, Governor? 20 STUART JACK: Yes, it sounds right to me. 21 JEFFREY JOWELL: Can I suggest that it may be that 22 suspension is not necessary and one should just mention 23 expulsion, because, as I recall the law on judicial 24 review on this, there are some offices where suspension 25 pending investigation, of course, or expulsion would not</p> <p style="text-align: center;">Page 93</p>	<p>1 allow~...", so that the post becomes vacant and another 2 person is ... 3 We're taking account of all these points. We'll 4 refine that provision further. 5 I think what would be a good idea now, because we've 6 done so well, is to have a little break, because in the 7 break I would like to try and do something on the 8 position of the CJ and helpfully Jeffrey has lent me his 9 copy of the UK Constitutional Reform Act. We'll also 10 try and do a bit of rewriting of this thing we've just 11 been discussing, and there's also come in, I see, a 12 letter from the – there's a CMA paper, but there's a 13 letter from the Civil Service Association, which I'd 14 like to read. 15 Can we have a sort of 20 minute break? I think 16 we're doing splendidly well, but we do need to take a 17 break to do a bit of work. All right? Thank you. 18 (2.25 pm) 19 (A short break) 20 (3.00 pm) 21 IAN HENDRY: Ladies and gentlemen, I'm sorry it took a 22 longer break than we thought, but we needed to do a bit 23 of writing. I hope it will prove productive. 24 We have taken the opportunity, in view of the 25 Minister's preoccupation at the House of Commons, to</p> <p style="text-align: center;">Page 95</p>
<p>1 require natural justice because it could act quickly to 2 plug the leak, and there are some offices where they're 3 not, where it would be a breach of (inaudible). 4 In addition, there's another point here, which is 5 that it could also be possibly under rules of statutory 6 interpretation, the exclusio unis rule, et cetera, that 7 if you specify a sanction here it would exclude the 8 possibility of any other sanction, depending on how it's 9 interpreted. I think we need to be a little careful 10 here. I would think it's probably right to write in, 11 "in addition to any other sanction that may be provided 12 by legislation", probably just saying that "you may 13 expel any member who breaches such a declaration". 14 That's all we might need. I'm not sure that it may be 15 necessary to mention suspension, which is implied during 16 the process of an investigation into an expulsion. It 17 becomes a bit complicated. 18 IAN HENDRY: That's very helpful. I think we have plenty of 19 material there to develop it further in the next break 20 and come and have another look at it. But we're going 21 well. I think the best way to tease out this thing is 22 by talking about it and doing successive drafts. 23 Michael made a good point to me just now that when 24 we redraft it, we might say, instead of "expel from the 25 council", "revoke membership of that person to</p> <p style="text-align: center;">Page 94</p>	<p>1 advise her that we don't think she needs to come back 2 this afternoon, and she will be very pleased, I know, 3 with the progress that has been made without her, but 4 I'm not proposing this afternoon to touch on the bill of 5 rights, which she will want to hear herself, the 6 submissions and arguments, tomorrow morning. Nor do 7 I propose to touch on the question of the powers of the 8 National Security Council, which, as you know from the 9 start (inaudible), we've spoken about this morning. Nor 10 will I come back to the question of consultation about 11 the appointment of Governor, which you addressed to her 12 this morning, and which she wants to think about 13 overnight. 14 So on the basis that everything else she is content 15 for us to try and make headway with, we should try and 16 do that in the remaining time this afternoon. 17 KURT TIBBETTS: Just quickly, sir, when you speak to the 18 National Security Council, that includes what was 19 proposed earlier this morning about the police services 20 commission? 21 IAN HENDRY: No. We can have a look at that because that's 22 a new idea. 23 KURT TIBBETTS: Okay. 24 IAN HENDRY: The first thing is some rather rapid redrafting 25 of the section 58 paper, which I hope we all have.</p> <p style="text-align: center;">Page 96</p>

<p>1 There should be another piece of paper headed, "National 2 Security Council" with, in subsection 1E, the square 3 brackets removed from around the words "and the Leader 4 of the Opposition" and then in 6 some redrafting to take 5 account of the points that were made just before the 6 break. And the changes are really in the second part, 7 fourth line: 8 "And without prejudice to any other penalties that 9 may be imposed by any other law, the Governor, acting in 10 his or her discretion, may by published direction in 11 writing exclude from the activities of the council ..." 12 I'll come back to that phrase in a moment. 13 "... or revoke the membership of the council of any 14 member who breaches such a declaration." 15 We changed the words from "suspend or expel". 16 Instead of "suspend", we put "exclude from the 17 activities of the council" and instead of "expel", we 18 put "revoke from membership of the council". We put 19 "revoke the membership of" so that it is clear that a 20 person whose membership has been revoked is no longer a 21 member and another person can be appointed to the 22 council in place of that person, whereas if you just 23 said "expel", it leaves the question in the air what the 24 status is. 25 Also, Jeffrey raised the question about whether it</p> <p style="text-align: center;">Page 97</p>	<p>1 could work. All right? 2 Another paper which you should just have got is 3 headed, "Composition of the Grand Court". Do you have 4 that one too? This is an attempt to work in some 5 language which, as Jeffrey suggested this morning, is 6 inspired partly by Grand Court law of the Cayman Islands 7 and partly by the Constitutional Reform Act of the UK. 8 It starts out by saying: 9 "The Chief Justice shall be head of the ...(reading 10 to the words)... Chief Justice shall have responsibility 11 for and management of all matters arising in the 12 judicature." 13 That's the language in the Grand Court law. Then it 14 goes on: 15 "Including responsibility (and this picks up 16 language from the Constitutional Reform Act) for 17 representing the views of the judiciary to the 18 government and the members of assembly, for the 19 maintenance of appropriate arrangements of the welfare, 20 training and guidance of the judiciary within available 21 resources and, C, for maintenance and appropriate 22 arrangements for the deployment of the judiciary and 23 their allocation of work within courts." 24 I hope that the Chief Justice will feel satisfied 25 that these special provisions have been inserted</p> <p style="text-align: center;">Page 99</p>
<p>1 would be appropriate to provide for the suspension as a 2 penalty. It occurred to us that it may be sensible to 3 have that option in relation to the three ex officio 4 members, that would be done by the Attorney General and 5 the Commissioner of Police, because if they are -- if 6 their membership is revoked, what do you do? There is 7 no other person, these three people are members by 8 virtue of their office. 9 So the punishment for them is going to be more 10 likely, I don't see any alternative, that as far as 11 activities in the council is concerned, they can be 12 excluded. There may be other penalties, of course, that 13 can be applied to them as public officers for breach of 14 confidentiality and there may be criminal penalties in 15 addition. So that's the explanation of that rather more 16 complicated wording. 17 Then in 7, we come to the Governor's point about 18 suspension pending an investigation: 19 "Where the Governor has good reason to believe 20 ...(reading to the words)... pursuant to subsection 6, 21 the Governor acting in his or her discretion may suspend 22 from the activities of the council that member while the 23 question of the breach is being investigated and any 24 such investigation shall be concluded expeditiously." 25 So I hope we're nudging closer to a regime that</p> <p style="text-align: center;">Page 98</p>	<p>1 relating to his office. I don't know whether you have 2 any views on this? 3 ALDEN M MCLAUGHLIN: Maybe we can try it out over the course 4 of the evening. I really would like his acceptance, if 5 not approval of whatever we do in this regard. 6 STUART JACK: Can I just say, Mr Chairman, I think it's only 7 fair that an attempt should be made to seek his views on 8 the language. 9 IAN HENDRY: I would only say this. I hope that we are on 10 course to finish by 3.30 tomorrow. If he has any views, 11 he'd better get them to us prontissimo. Is there a way 12 of getting it out to him during the working day in 13 Cayman now? 14 ALDEN M MCLAUGHLIN: Mr Chairman, we'd ask the Governor 15 and/or the Attorney General to get it to him. 16 NEW SPEAKER: Or the secretariat. 17 SAMUEL BULGIN: Or the secretariat can email to him. 18 MCKEEVA BUSH: If we hope to finish by 3.30 tomorrow -- 19 (Overspeaking) 20 IAN HENDRY: Just to make clear, what I said was I hoped 21 that we are on course to finish by 3.30 tomorrow when 22 the Minister will have to leave us. But the progress 23 we've made this afternoon on some of the other points -- 24 and I know we're not finished yet, but I am still 25 hopeful that we'll leave her a minimum of points to</p> <p style="text-align: center;">Page 100</p>

25 (Pages 97 to 100)

1 resolve personally tomorrow. No more than three,  
 2 I hope.  
 3 MCKEEVA BUSH: And she will be here from the morning?  
 4 IAN HENDRY: She'll be here for an hour and a quarter then  
 5 she has to go away for a bit and then she'll be here for  
 6 a couple of hours after lunch tomorrow.  
 7 I was going to say, if you could get this text out  
 8 to the CJ this afternoon --  
 9 KURT TIBBETTS: Mr Chairman, the secretariat is quite  
 10 willing to do so.  
 11 IAN HENDRY: And ask him to reply.  
 12 KURT TIBBETTS: I think we might want some assistance. Does  
 13 the secretariat know the email address? Okay, that's  
 14 fine. They'll take care of it.  
 15 IAN HENDRY: If they could ask him to respond as soon as be  
 16 possibly can today, Cayman Islands timing today.  
 17 KURT TIBBETTS: Mr Chair, just quickly, I think this is for  
 18 the benefit of all of us, you had said that if we needed  
 19 Friday for any tidying up, that's what we should do.  
 20 I believe that that some members have made arrangements  
 21 to travel on Friday, so I'm simply suggesting that we  
 22 press on as far as we can get, and if tomorrow evening  
 23 there is anything that needs to be done -- because what  
 24 I wouldn't like to happen is for anything at all, if at  
 25 all possible, to be left hanging, so I just wanted to

1 Service Association has persuaded me it would be a bad  
 2 idea, and if you're asking me to withdraw it, I'm very  
 3 happy to do that. I mean, I think the end result would  
 4 be that the text would be as it is in the present  
 5 constitution, and nothing -- no extra language. I must  
 6 say, I was persuaded by their point that even the words  
 7 I suggested to add yesterday do not appear in any other  
 8 constitution.  
 9 KURT TIBBETTS: Mr Chair, you freely admitted yesterday that  
 10 you did that in a hurry to try to get a better result,  
 11 so I'm sure you have no problems to withdraw.  
 12 IAN HENDRY: No, I have no problem withdrawing that. So  
 13 that one is settled.  
 14 KURT TIBBETTS: Mr Chair, sir, believe me, I'm not going to  
 15 belabour this, but I want my head to be clear. When we  
 16 say that one is settled, we are saying that there will  
 17 be no constitutional provision as regards any  
 18 qualifications or disqualifications for the  
 19 civil servants and what obtains(?) in the 1972  
 20 constitution is what will continue to prevail?  
 21 IAN HENDRY: Correct.  
 22 KURT TIBBETTS: Thank you, sir.  
 23 IAN HENDRY: Correct. And the question of dealing with  
 24 regulating the transition, the sort of thing that I put  
 25 down on paper, I think is generally accepted, it needs

1 bring that to your attention. You'd prefer that, right?  
 2 That's why I brought it up.  
 3 MCKEEVA BUSH: I think the government should stop talking  
 4 and let us get on with business.  
 5 KURT TIBBETTS: Mr Chairman, forget I just brought that up.  
 6 If they need to, they can bring it up on their own  
 7 because I'm supposed to stop talking.  
 8 IAN HENDRY: No, we should certainly make every effort to  
 9 conclude at 3.30 without any tidying up. If there's any  
 10 tidying up of a drafting nature, you could leave it to  
 11 me and Jeffrey or whoever, I'm sure we could take care  
 12 of it, without --  
 13 KURT TIBBETTS: Once we all agree on the concept and  
 14 principle.  
 15 IAN HENDRY: Yes.  
 16 KURT TIBBETTS: That's fine.  
 17 IAN HENDRY: What are we going to do about the section 62,  
 18 the position of public officers?  
 19 MCKEEVA BUSH: I think you should withdraw this.  
 20 IAN HENDRY: Sorry?  
 21 MCKEEVA BUSH: I think you should withdraw it.  
 22 IAN HENDRY: We think we should withdraw it?  
 23 MCKEEVA BUSH: We think you should withdraw it.  
 24 IAN HENDRY: I put it on the table in an attempt to be  
 25 helpful. The letter from the President of the Civil

1 to be dealt with not in the constitution but in  
 2 legislation or contractual terms as applicable to people  
 3 in that situation. That's generally agreed.  
 4 MCKEEVA BUSH: Mr Chairman, the last thing that we would  
 5 want to happen is that anyone is giving an impression  
 6 that the Civil Service of the Cayman Islands is corrupt  
 7 in any way or shape or form. Notwithstanding the last  
 8 (inaudible) earlier on, we had one, who has been left  
 9 behind on this trip, we do not believe, and we have said  
 10 that, that the vast majority of civil servants would do  
 11 that, and therefore we are in sympathy with what they  
 12 have said.  
 13 Neither would I want anyone to believe that there  
 14 was any documentation that sought to disenfranchise  
 15 anything, because I don't think that that's the correct  
 16 wording either, because what(?) would we stop from  
 17 running if they want to run for elected office, it would  
 18 put a wrong(?) timeframe for them but we certainly would  
 19 not want at the end of the day for anyone to say that  
 20 this happened because the vast majority of civil  
 21 servants was corrupt in any way, shape or form. The  
 22 Cayman Islands has prided itself that we have had clean  
 23 Civil Service over the years and we can say that still.  
 24 Notwithstanding the Clifford(?) actions and those that  
 25 (inaudible) the media.

<p>1 So in removing what you have proposed, we do not 2 have a problem with it, but that the management council 3 has agreed that there should be parameters set out in 4 the legislation and contracts. When I say "contracts", 5 employment contracts. 6 IAN HENDRY: Yes. That was my understanding, too, that they 7 accept that some regulation is necessary but are very 8 opposed to anything being said in the constitution about 9 it, so I hope we've reached a satisfactory conclusion on 10 that point. Alden, did you want to add anything? 11 ALDEN M MCLAUGHLIN: Not on that point. I have another 12 point to make. 13 IAN HENDRY: We've finished that point then. 14 ALDEN M MCLAUGHLIN: We've had subsequent discussions with 15 the Attorney General in relation to the point raised 16 this morning about the right to silence, and with the 17 happy intervention of Professor Jowell, we have 18 concluded that the issue for the Attorney General was 19 not the right to silence but the requirement that that 20 person be told that they have this right. So by 21 reformulating what is section 5, subsection 3 of the 22 bill of rights, which is on page 13 of the most recent 23 draft, we can, I think, satisfy our desire as the 24 government to ensure that there is a constitutional 25 right to silence, while meeting the evidential concern</p> <p style="text-align: center;">Page 105</p>	<p>1 duty to provide information, whereas if the right is 2 there anyway, it implies that, as I understand it. 3 SAMUEL BULGIN: That's correct. 4 IAN HENDRY: Michael has a comment. 5 MICHAEL BRADLEY: This item is both a strengthening and a 6 weakening, because previously there was a constitutional 7 obligation to inform the person of their right to remain 8 silent. This new proposal gives them the right to 9 remain silent but doesn't tell them that they have that 10 right, so what is the use of constitutionally putting in 11 a right and preventing the person being informed of 12 that? 13 JEFFREY JOWELL: There are many rights in this constitution, 14 but not one of them requires a person necessarily to be 15 informed about them, so I think it fits with all that. 16 There's the right to legal assistance, there's the right 17 to know the case against you, there's the right to a 18 fair trial by an independent judiciary, and so on, but 19 none of those rights are framed such that anybody in 20 particular has to be informed about those rights. So it 21 doesn't fit precisely with all the other rights, in fact 22 every single one of them in the constitution. That's 23 the only reason. Perhaps the Attorney has some problems 24 with that and might elaborate, but that's what I saw as 25 the problem. It doesn't in any way dilute the right, it</p> <p style="text-align: center;">Page 107</p>
<p>1 of the Attorney General. 2 With your permission, sir, I have reformulated 3 subsection 3 that you're proposing. 4 IAN HENDRY: All right, please do so. 5 ALDEN M MCLAUGHLIN: "Any person who is arrested or detained 6 has the right to remain silent and shall be informed 7 promptly, in a language that he or she understands, the 8 reason for his or her arrest or detention." 9 SARA COLLINS: Mr Chair, through you, could I ask the 10 Minister to repeat that, please? 11 ALDEN M MCLAUGHLIN: "Any person who is arrested or detained 12 has the right to remain silent and shall be informed 13 promptly, in a language that he or she understands, of 14 the reason for his or her arrest or detention." 15 IAN HENDRY: As I understand it, what this is doing is 16 strengthening the constitutional right to remain silent 17 by stating it as a right rather than merely being 18 informed -- the duty to be informed that there is a 19 right to silence. Is that it? 20 JEFFREY JOWELL: It's really codifying an existing civil 21 liberty. As with so many of the rights that are now in 22 the constitution, not many of them are exactly new, it 23 simply codifies a number of principles. But in this 24 case, as I understand it, the Attorney's concern was the 25 information aspect of it which didn't seem to fit their</p> <p style="text-align: center;">Page 106</p>	<p>1 expresses it perhaps even clearer. 2 SARA COLLINS: Mr Chair, it seems that I might have missed 3 some of the debate and earlier discussion on this. If 4 there is a rationale for the proposed change, I 5 understand that comes from some concerns expressed by 6 the Attorney General. I don't want to keep us, but 7 could those concerns be explained to me succinctly 8 because this is a point that I think the committee 9 should weigh in on as well? 10 IAN HENDRY: No. Sam, if you wouldn't mind, I think it's 11 fair enough to reiterate. 12 SAMUEL BULGIN: I'll try. It has to do the constitution 13 obligation to inform someone of their right to remain 14 silent as opposed to you have the right to remain 15 silent. From a purely criminal justice standpoint, the 16 United States have a system where you have the 17 (inaudible) anything and everything that happens is 18 inadmissible in court, irrespective of probative 19 relevance. The English system is totally different. 20 The English system gives a discretion to the judge to 21 exclude (inaudible) where it was obtained unfairly or by 22 a breach of a right but the probative value outweighs 23 the prejudicial value of it. That's the English system. 24 By putting in the constitution that there is a 25 constitutional right to be informed that you have a</p> <p style="text-align: center;">Page 108</p>

<p>1 right to silence, it simply means that if the police, 2 for example, arrest someone for a serious crime and 3 omitted, either through negligence or deliberately to 4 inform the person that he has this right to remain 5 silent, and the person says something which then led to 6 the recovery of stolen goods, a stash of firearms or 7 something, it simply means that none of that is 8 admissible and so on that technicality, the person must 9 walk. That's what the (inaudible).</p> <p>10 What happens there is that even with this language 11 now the courts still retain that discretion our law 12 (inaudible).</p> <p>13 NEW SPEAKER: So you're trying to preserve the judicial 14 discretion, which I think is an approach which many are 15 advocating for the United States as well. There's a 16 debate. I understand the rationale. I have to reserve 17 the committee's position on this just to study it in 18 some greater detail, but thank you for the explanation.</p> <p>19 ALDEN M MCLAUGHLIN: I think we're almost there, sir. It 20 sounds as though we're almost there.</p> <p>21 IAN HENDRY: We're almost there. According to my list -- 22 I have no objection to further thought being given to 23 this point. It is quite an important point and 24 Pastor Shian spoke about it as well this morning. 25 As I said, this question of writing in a right to</p> <p style="text-align: center;">Page 109</p>	<p>1 member, that there is one member of the public bar and 2 one member of the private bar and two lay persons making 3 up the councillors. That the council will have 4 responsibility for a range of things, including the 5 judicial appointments, the appointments of the Attorney 6 General, the DPP and other similar offices, that it will 7 have the responsibility for discipline in relation to 8 members under its purview, including the ability to 9 resolve itself into a tribunal when serious allegations 10 or complaints are made, and then to advise the Governor 11 if there is a basis for believing(?) that the conduct of 12 that alleged in relation to a person under (inaudible) 13 could result in the removal from office. This is 14 particularly so in relation to judges who the Governor 15 would then be required to further monitor(?) to the 16 Privy Council.</p> <p>17 So that's our thinking, which doesn't depart very 18 far from the draft that we have now. (Inaudible) the 19 necessary expense (inaudible) to this document and let 20 you have something.</p> <p>21 MCKEEVA BUSH: I was going to ask a matter of how someone is 22 dealt with. I thought you said something would resolve 23 itself into a tribunal. If that could be explained, 24 because I need clarity on it, because I'm thinking: How 25 do you do that?</p> <p style="text-align: center;">Page 111</p>
<p>1 silence is above the UK bottom line. The UK bottom line 2 means it's not required by any treaty as far as I know. 3 Some OT constitutions have this written in, some don't, 4 and some describe it -- I think the ones that do, I have 5 to double-check, have it in as in the original draft, so 6 it was a right to be informed, an obligation to inform a 7 person of the right to remain silent, rather than a 8 substantive right to remain silent, but I think we're 9 quite relaxed about which side you come down on. It is 10 more a matter for your judgment.</p> <p>11 So there's that point to come back to.</p> <p>12 There is the text upon the CJ which the CJ is going 13 to be consulted about. There is further thought being 14 given on your side about the composition of the Judicial 15 and Legal Services Commission in light of the arguments 16 made by the Chief Justice. As far as I know, that's 17 work still in progress, yes?</p> <p>18 ALDEN M MCLAUGHLIN: Yes, sir. We have come to a view about 19 the constitution of the council, but I think that there 20 may be some other things that we need to look at. But 21 I can just say for the benefit, I spoke to the Attorney 22 about this one (inaudible)). Our proposal now will be 23 that the chairman of the council, the Judicial and Legal 24 Services Council, is the Chief Justice and that the 25 President of the Court of Appeal is the other judicial</p> <p style="text-align: center;">Page 110</p>	<p>1 IAN HENDRY: Yes. I had a similar question, that the way 2 it's drafted at the moment, after the discussion we had 3 at the second round, was that instead of provision for a 4 separate tribunal to be established to look into the 5 question of removal of a Grand Court judge or a Court of 6 Appeal judge, that the question of examining in the 7 first instance that question would simply be referred to 8 the commission. One could therefore use the commission 9 instead of the tribunal, thereby saving the expense and 10 difficulty of finding people to sit on a tribunal and 11 paying them and all that sort of thing.</p> <p>12 This is what we discussed in the second round in 13 Grand Cayman. So I was slightly concerned when you said 14 "provision for it to resolve itself into a tribunal" 15 because I thought that would mean there would have to be 16 lots of complicating drafting to take account of that 17 and is it necessary to do that?</p> <p>18 The other question I just wanted to ask myself was, 19 just for clarity, when you say the two non-judicial but 20 legally qualified members would be one member of the 21 public Bar and one member of the private Bar, this is 22 completely different from the draft at the moment: Two 23 members legally qualified but not practising law in the 24 Cayman Islands. This, I assume, would be -- one 25 practising member of the public Bar. By that you mean</p> <p style="text-align: center;">Page 112</p>

<p>1 lawyers employed by the government, the government legal 2 service, and one from the private sector? Is that the 3 idea? 4 ALDEN M MCLAUGHLIN: Yes, sir. 5 IAN HENDRY: But both actually practising? 6 ALDEN M MCLAUGHLIN: Yes, sir. The Chief Justice pointed 7 out that much of what we were seeking to achieve would 8 not be achieved by what we were proposing, simply 9 because of the realities of Cayman and that there are 10 very few experienced lawyers who are actually sitting 11 around retiring in Cayman Islands who would be available 12 for this appointment, and a way to balance the concern 13 of bias, perhaps is the word, or a lack of balance, some 14 of the concerns that the Attorney General raised in 15 round two, would be to ensure that there was equal 16 representation from both the public and private Bar. 17 And obviously if one of the Attorney's staff members is 18 being brought up on charges in relation to this -- 19 I think you understand what I mean -- then obviously he 20 would -- if he's an individual appointed -- if the 21 Attorney General is (inaudible) appointed, he would need 22 to recuse himself. Possibly that would be the case in 23 relation to the Chief Justice as well, if it's one of 24 his judges. 25 IAN HENDRY: Yes.</p> <p style="text-align: center;">Page 113</p>	<p>1 may have come from him, based on complaints that have 2 been put to the Chief Justice. 3 The Chief recognised this, I think, in the 4 memorandum that he's written as well, that it could 5 be -- it would be inappropriate in those sort of 6 circumstances for him to be actually involved in the 7 disciplinary hearing itself. 8 IAN HENDRY: All right. I am coming to Sam in a minute. 9 STUART JACK: I have a couple of questions and concerns 10 about this. What is being proposed is that there will 11 only be two people on this commission who have judicial 12 experience -- there can be others with legal experience 13 but not judicial experience -- which would be the Chief 14 Justice and the President of the Court of Appeal. If 15 you have a situation, as has just been described, 16 whereby this body is taking disciplinary action or 17 considering disciplinary action against a judge, or 18 indeed any of the people that this body is responsible 19 for, and particularly if they form themselves into a 20 tribunal that is to advise the Governor on whether to 21 refer the matter to the Privy Council, almost certainly 22 you would have the Chief Justice having to recuse 23 himself because he would have been the manager of, if 24 you like in lay terms, the manager of the judge who is 25 the subject of that inquiry.</p> <p style="text-align: center;">Page 115</p>
<p>1 ALDEN M MCLAUGHLIN: So we're trying to create the right 2 sort of balance with the right sort of numbers on this 3 council, so that when the council sits -- perhaps I used 4 the wrong language -- when the council sits as a 5 tribunal, as opposed to a council making appointments 6 and so forth, then you have the right people there and 7 there would be no basis for one to charge that there is 8 bias on the part of the council because the Chief 9 Justice would have recused himself when it is 10 appropriate to do so, and the Attorney General, and so 11 on and so forth. 12 IAN HENDRY: So in this situation, just looking at the 13 draft, section 106(5) is crucial: 14 "No member of the Judicial and Legal Services 15 Commission shall participate in any proceedings of the 16 commission which affect him or her personally." 17 Do you think that might need some adjustment? 18 ALDEN M MCLAUGHLIN: Yes. I think the proposition actually 19 goes further than that, because I think it will be very 20 difficult for a member of -- if it is one of the members 21 of the judiciary who reports to the Chief Justice, for 22 the Chief Justice to be able to sit as chairman of the 23 tribunal which is looking into whether or not this 24 individual ought to be removed from office, because of 25 obviously information that he has, some of the concerns</p> <p style="text-align: center;">Page 114</p>	<p>1 So you would actually have the matter being dealt 2 with by only one person with judicial experience, and 3 that person being the President of the Court of Appeal, 4 who also will have had some although not direct 5 (inaudible) responsibility for, say, a Grand Court judge 6 or a magistrate, he may well have had some contact with 7 that person professionally. I'm wondering whether, if 8 that's the way you want to go, there should be a 9 provision that when it comes to disciplinary matters 10 that there should be a second person who has experience 11 of high judicial office brought in from outside to 12 provide a degree of balance. One might argue that that 13 ought to be the case also with appointments, otherwise 14 the whole thing gets rather too cosy in a small 15 jurisdiction. 16 IAN HENDRY: I must say -- I want to come to Sam in a 17 moment -- but the same point occurred to me about 18 leaving the commission short handed if one or more of 19 the judicial members had to recuse themselves. I was 20 almost on the point of saying that where in the second 21 round we thought of composing the commission in the way 22 it's drafted now, I felt more comfortable about 23 substituting the commission for a tribunal because there 24 might or might not be one of the Cayman judges on it, 25 but equally there might well be outsiders on it.</p> <p style="text-align: center;">Page 116</p>

1 You've probably thought of all this already, but one  
 2 could either, if the commission is reconstituted in the  
 3 way you suggest, one can either revert to the tribunal  
 4 system which was there before, in the draft before, and  
 5 is in your current constitution, you know, an  
 6 independent tribunal separate from the commission, or  
 7 one could make a provision requiring there to be a  
 8 substitute judicial member or members, if one or both of  
 9 the judicial members, the CJ and the President of the  
 10 Court of Appeal both recuse themselves or have to  
 11 because of section 106(5). I think either of those  
 12 would deal with the problem the Governor raised, which  
 13 I think is a good point. You've probably thought of  
 14 that already.

15 ALDEN M MCLAUGHLIN: We have thought of a number of possible  
 16 ways to deal with this. None seemed to be completely  
 17 satisfactory.

18 I think the Chief Justice reminded us of the present  
 19 situation in which we find ourselves in Cayman perhaps  
 20 has caused us to think too much really about the cost  
 21 implications and the (inaudible) various responses that  
 22 we have. But the Chief's point was these things won't  
 23 happen very often, but it may well be that we need to  
 24 think again on the subject of the Tribunal.

25 What we don't want to do is to create a Judicial and

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1 Legal Services Commission which requires us to import  
 2 people for it to function in its day-to-day operations,  
 3 because that is both an insult to the jurisdiction and  
 4 the ability of the people in the jurisdiction and also  
 5 very costly and unnecessary.

6 But we must find a way to get around this situation  
 7 assuming we have a stand-alone tribunal. The present  
 8 situation that we have -- and the Governor can speak to  
 9 this better than I can, but we need to appoint three  
 10 judges from overseas at a huge cost, who then find it  
 11 necessary themselves to hire top drawer solicitors in  
 12 London, who then find it necessary to hire senior  
 13 counsel to advise them, so the Cayman Islands government  
 14 winds up paying three -- I don't know how many  
 15 solicitors that are on the case -- plus the QCs. We're  
 16 talking about, by the time the process is over,  
 17 potentially millions of dollars to deal with the  
 18 question of whether or not a judge should be removed.

19 This is only the first step, because after they've  
 20 come up with their finding, it has to be referred to the  
 21 Privy Council. It's hugely expensive and cumbersome,  
 22 and so our efforts are really focused on trying to find  
 23 a way to avoid that, or as much of that as we possibly  
 24 can.

25 MCKEEVA BUSH: I was trying to find out -- we have a paper,

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1 a note from Professor Jowell and it speaks to that  
 2 matter, and I'm going back to the matter of the Chief  
 3 Justice and I think it is the head of the appeals court,  
 4 whichever one it is sitting on the Legal Services  
 5 Commission, and he made a note that, having regard to  
 6 what the Chief Justice said, we ought to think again  
 7 about making the Chief Justice and the President  
 8 members, but there are problems either way. I just want  
 9 to find out what he sees are the problems by making them  
 10 members of the commission.

11 The other question I have is -- we've gone past  
 12 it? -- I still want clarity on it though, who sets  
 13 things like salaries and all that. I probably missed it  
 14 here if it's in this commission, but I'd like to know  
 15 that.

16 JEFFREY JOWELL: I just raised, sort of for internal  
 17 consumption, the problems that were raised last time  
 18 about the problems of having the Chief Justice and the  
 19 President of the Court of Appeal on this are the ones  
 20 that the Attorney raised earlier, particularly in  
 21 respect of judicial appointments, namely that they are  
 22 people who appear before them constantly and yet are  
 23 dependent on them perhaps for their promotion or  
 24 elevation to the judiciary. So that is the problem.

25 It may be overcome -- I just put this out as a

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1 technical suggestion, it may not be acceptable  
 2 politically -- by accepting what the Minister proposed  
 3 earlier in terms of certainly having the Chief Justice  
 4 and the President of the Court of Appeal as members,  
 5 I think that's certainly possible and probably  
 6 preferable, but in addition we might want to keep the  
 7 existing 105(1)A with a chairman from among -- in other  
 8 words, two people from among persons who hold or have  
 9 held high judicial office as well. This would give you  
 10 then four judges, two practitioners and two lay people,  
 11 eight in all. That would give sufficient experience and  
 12 sufficient people power for a tribunal exercise and so  
 13 on. Also it would avert the problem of conflict of  
 14 interest in a small jurisdiction. So that may be a way  
 15 of just getting around it; have the Chief Justice on it  
 16 and the President of the Court of Appeal plus these two  
 17 other people who have held high judicial office and the  
 18 practitioners and the lay people.

19 MCKEEVA BUSH: I don't know that the Chief Justice -- if  
 20 you're recommending the Chief Justice to be the  
 21 chairman, I don't know if that ought to be. I'm not  
 22 saying that he shouldn't be a member.

23 ALDEN M MCLAUGHLIN: I'm not particularly fussed about that.  
 24 That's what they would like to see.

25 KURT TIBBETTS: That's what you just suggested.

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1 JEFFREY JOWELL: That is what I was suggesting, that one of  
 2 the other judges with judicial experience be the  
 3 chairman, a former judge becomes the chairman, which  
 4 makes it a little more objective. In the United  
 5 Kingdom, one of the lay people is the chairman.  
 6 ALDEN M McLAUGHLIN: The problem with that is that we're  
 7 short of retired judges at home, too.  
 8 IAN HENDRY: No, no, I think if one follows Jeffrey's  
 9 suggestion, it's going to be almost inevitable that you  
 10 have to find retired judges from the region, who  
 11 obviously don't need to be paid a salary. He raised  
 12 this question too. Because a commission like this does  
 13 not meet every day. It may need to meet quite  
 14 frequently, but I'm sure that the people who sit on it  
 15 could be paid on a per diem basis for the days they  
 16 actually have to meet and do work.  
 17 Even with Jeffrey's suggestion, I think that would  
 18 help to solve some of the problems that the Governor has  
 19 raised, because if the CJ and/or the President of the  
 20 Court of Appeal had to drop out because of a question  
 21 too close to home, you still have two judicial members  
 22 there. That would still be cheaper than setting up a  
 23 special tribunal with all the experience you've had  
 24 recently. I'm in no doubt about that, I'd have thought,  
 25 because you have the guys who will be paid on a regular

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1 per diem basis for the work they do.  
 2 I just wanted to see -- Sam's been patient and  
 3 asking to talk for some time. I just wanted to be sure  
 4 that he is content because he raised some very relevant  
 5 questions last time. Sam? Only if you want to.  
 6 SAMUEL BULGIN: I'm not so sure whether the concept will  
 7 still work. The concern has to do with the practical  
 8 working of the commission itself, bearing in mind that  
 9 we have a very transient jurisdiction and most of our  
 10 people who -- certainly in my chambers, for example, are  
 11 on contract and from time to time we have need, urgent  
 12 need, for that matter, to appoint somebody at short  
 13 notice as counsel for a couple of months or acting  
 14 magistrate, acting judge of the Grand Court, and so on.  
 15 I'm just concerned to make sure that the logistics  
 16 of it is thought of carefully, so that you don't have a  
 17 chairman who lives abroad, for example, and you have to  
 18 find a way to get him or her in terms of having to  
 19 employ someone very urgently. All of those things need  
 20 to be factored into how the appointment is done.  
 21 Is it envisaged that the commission would have a  
 22 local secretariat in the Cayman Islands but the staff  
 23 full-time also? So these are matters that you need to  
 24 take into account in terms of the composition of it.  
 25 MICHAEL BRADLEY: Sorry, Mr Chairman, I probably won't be

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1 helping this discussion, but as one of Sam's  
 2 predecessors, there is a difficulty, as I see it, in the  
 3 proposed composition of the Judicial and Legal Services  
 4 Commission, especially in a small community.  
 5 I appreciate the Minister is trying to minimise  
 6 expense to make it workable and composed of people  
 7 within the Cayman Islands, but perhaps I'm interpreting  
 8 it wrong but the present composition proposed of four  
 9 people, you might be in the position where the Chief  
 10 Justice is a member of this Judicial and Legal Services  
 11 Commission, he recuses himself because he's a candidate  
 12 for the post of a justice of the Court of Appeal, he  
 13 doesn't get it. Why does he not get it? Because the  
 14 other members, with whom he has to sit afterwards,  
 15 have decided that he's not the appropriate person.  
 16 The other complication I thought of is that you're  
 17 proposing a person be a member who is from the public  
 18 Bar. I think it's a lovely situation if a member in the  
 19 public Bar is able to have a say in the determination of  
 20 who his own boss will be.  
 21 IAN HENDRY: Can I just go to the Governor?  
 22 STUART JACK: I want to agree raise a point but before doing  
 23 that, I want to agree with everybody. I want to agree  
 24 with Alden McLaughlin that we want to reduce the costs  
 25 as far as possible in the tribunal. It has caused me as

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1 much trouble as anybody else having to have three High  
 2 Court judges, but I also agree with the practical points  
 3 which the Attorney General has raised and I'm tempted by  
 4 the suggestion that Professor Jowell has made.  
 5 Let's just think what's involved, because I do see  
 6 this, I have to sign all these warrants and swear all  
 7 these people in. We have the appointment of people like  
 8 the Attorney and Grand Court judges which happen  
 9 occasionally. They do not happen every year and  
 10 certainly not every month. We have the appointment of  
 11 temporary or acting judges, which we do pretty well  
 12 every month, and then we have the question of any  
 13 hearings related to discipline and potentially a  
 14 tribunal, if this body is also going to serve as the  
 15 basis of the tribunal. Those things hopefully happen  
 16 very rarely, and indeed would have happened very rarely  
 17 and do happen very rarely.  
 18 So the issue which arises with summoning this group  
 19 actually on a frequent basis is a question of temporary  
 20 or acting judges, and I don't see why there shouldn't be  
 21 for the purposes of those people a practice whereby  
 22 there only has to be a subcommittee of this body, a  
 23 quorum of this body, or it could even be done  
 24 electronically, it doesn't necessarily mean a physical  
 25 hearing in the Cayman Islands, whereas the appointment

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<p>1 of a full-time office-holder or any kind of serious 2 disciplinary matter, such as a tribunal, people 3 physically have to gather to conduct those rare events. 4 So I don't think we should get too worried about the 5 costs of it. 6 The problem I see with the present proposal and the 7 attraction I see in what Professor Jowell is saying is 8 that the thing doesn't become too cosy -- or let me use 9 the word incestuous -- which it could easily become in a 10 small jurisdiction. I think it's of interest to the 11 jurisdiction that there is at least one person who has 12 held high judicial office from outside the jurisdiction 13 who is involved in those major activities, namely 14 appointing full-time office-holders and dealing with 15 disciplinary matters, and two would be even better. 16 IAN HENDRY: Section 105(7) of the draft deliberately 17 enables meetings by teleconference. We put that in at 18 an early stage to take account of the need for frequent 19 appointments of acting judges and I think we'd keep 20 that. 21 And then just working up the page to 105(5), at the 22 moment it provides: 23 "Any decision of the commission shall require the 24 concurrence of not less than four members of the 25 committee."</p> <p style="text-align: center;">Page 125</p>	<p>1 possibility that the CJ will come back with further 2 comments about this other text. 3 KURT TIBBETTS: By the way, Mr Chair, just so you know, he 4 has received it. He was in chambers but I am certain 5 he'll be turning his hand to it ASAP and responding 6 ASAP. 7 IAN HENDRY: With any luck, it will be a thumbs up. 8 Unless there's anything else, we should say on that 9 subject now -- Alden, please. 10 ALDEN M MCLAUGHLIN: I just wanted everyone to bear some 11 precedents in mind when they go away to think about 12 this. I have been thinking myself along the lines of a 13 quorum so that we could have the commission go through 14 the routine matters on a regular basis without having to 15 bring in the foreign members, if that was a road down 16 which we went. I don't have any difficulty with that. 17 But the concern about the cosiness of this, I think 18 that that only really truly arises in a situation where 19 the commission needs to constitute itself into a 20 tribunal. It certainly doesn't seem to have been the 21 overriding concern in relation to the establishment of 22 similar commissions in the other Overseas Territories, 23 the BVI, TCI and Gibraltar. I don't know what the 24 population of Gibraltar is but the other two have 25 populations significantly smaller than the population of</p> <p style="text-align: center;">Page 127</p>
<p>1 Four out of six, so I just point that out. If 2 you're doing some redrafting, I think you'd need to look 3 at that because if you go to seven or eight, you may 4 need to raise that a bit, to five or something like 5 that. 6 That does not exclude, however, a quorum, which the 7 Governor was hinting at or suggesting for certain types 8 of decision which the commission could decide for itself 9 by regulating its own procedure under subsection 7, 10 provided that the rule as stated as to how many must be 11 in favour of the decision fits that. So you could have, 12 you know, five out of eight or five out of seven, but 13 the quorum is still five, in which case everybody has to 14 agree. 15 Anyway, those are just some thoughts. 16 I think, in view of the limited time available, and 17 I was looking at tomorrow's programme, I mean this is an 18 important matter to get right, but clearly we're not 19 going to be able to look at a revised text this 20 afternoon. You need to go and do some more work. We do 21 have some time scheduled in between 11.00 and 12.15 when 22 we could return to this topic with a text to look at. I 23 hope, having had a little bit of a debate now, we may 24 not need very much time on it but we need to factor it, 25 we need to plan for it and we need to plan for the</p> <p style="text-align: center;">Page 126</p>	<p>1 the Cayman Islands. In the case of the BVI, their 2 Judicial and Legal Services Commission has the Chief 3 Justice as chairman, one judge of the Court of Appeal or 4 the High Court, the chairman of the Public Service 5 Commission and two other members appointed by the 6 Governor on the advice of the leader of the opposition 7 or the Premier. 8 In the case of Gibraltar, it has the chairman, the 9 President of the Court of Appeal, the Chief Justice 10 (inaudible) magistrate, two members appointed by the 11 Governor acting in accordance with advice of the Chief 12 Minister and two appointed by the Governor acting on his 13 own discretion. 14 And in the case of TCI, there is a chairman 15 appointed by the Governor, two other members appointed 16 by the Governor acting after consultation with the 17 Premier and the leader of the opposition from among 18 persons who hold or have held high judicial office. 19 So what I'm saying is that the creature we're trying 20 to develop for Cayman is not without precedent and 21 I wouldn't want us to become too paranoid about cosiness 22 in the jurisdiction because it's not as close as some of 23 the others which have similar bodies. 24 IAN HENDRY: I think that is true. The only comment I'd add 25 to that is that in none of those other cases would the</p> <p style="text-align: center;">Page 128</p>

<p>1 commission act as a tribunal for the removal of a senior 2 judge. They all have separate tribunals. But it may be 3 that we can adopt a sort of expanded commission as 4 suggested by Jeffrey Jowell but require a specific 5 provision requiring the CJ and the President – or the 6 CJ not to take part when the question of the removal of 7 one of the Grand Court judges is under discussion, 8 I mean, you know, he has no choice, he has to leave it 9 to them. He can give them his views voluntarily, of 10 course he can, but he doesn't take part in the decision. 11 Likewise, the President of the Court of Appeal for a 12 Court of Appeal judge, you actually rule them out, 13 because otherwise they're sitting in judgment of their 14 own colleagues and that is too close.</p> <p>15 KURT TIBBETTS: I just want to implore, because there are 16 several lawyers in the room, I would just implore for us 17 to find a way out of this, because what it is now is not 18 only unsatisfactory but is blasphemous because the one 19 time I know of this tribunal having to be held, it 20 hasn't convened yet and the members who are appointed 21 have legal counsel and it hasn't convened yet and the 22 government has had to pay a bill in excess of half a 23 million dollars for the legal counsel to the tribunal.</p> <p>24 IAN HENDRY: I know. You have my deepest sympathies. These 25 things in the great sweep of history happen very rarely.</p> <p style="text-align: center;">Page 129</p>	<p>1 made, are you prepared to see that one disappear down 2 the chute as well?</p> <p>3 KURT TIBBETTS: Mr Chair, we've done very well with the 4 National Security Council and we've accommodated the 5 requests. I don't know how strongly the opposition feel 6 about the time limits of the Premier. I reported 7 yesterday morning truthfully what my own experiences 8 were during the consultation periods and I'm not trying 9 to lay it on to the opposition, but I don't want to --</p> <p>10 MCKEEVA BUSH: Don't go there.</p> <p>11 KURT TIBBETTS: We have to go there, gentlemen, because we 12 have to find out what's the position. I'm simply asking 13 if you are fixed on the position that there should be no 14 time limits. That's what I'm asking.</p> <p>15 MCKEEVA BUSH: Mr Chairman, once more the government, with 16 all its power and all the treasure at their disposal, 17 the public – they came back and said the public wanted 18 this. They have held that position quite a long time. 19 Well, I leave it up to the government. For us as a 20 party, we didn't have one red cent to find out any more 21 than we found out. I can't help you any more than that.</p> <p>22 KURT TIBBETTS: I take it then, Mr Chair, that the term 23 limit will remain in the constitution.</p> <p>24 MCKEEVA BUSH: Oh, yes, what term will we have revealed?</p> <p>25 IAN HENDRY: I'm slightly confused at the moment. I have</p> <p style="text-align: center;">Page 131</p>
<p>1 They've happened very rarely and you've been extremely 2 unlucky in the Cayman Islands to have --</p> <p>3 KURT TIBBETTS: Once is too much.</p> <p>4 IAN HENDRY: I know. And there's been one in Gibraltar in 5 recent times. Throughout my entire career in the 6 Foreign Office of 30-odd years until the one in 7 Gibraltar, there was never a tribunal. It was always a 8 sword of Damocles but it never happened. You have my 9 deepest sympathies, it's very unlucky.</p> <p>10 KURT TIBBETTS: Hurricanes were once every 20 years one time 11 too.</p> <p>12 IAN HENDRY: If we can leave it like this, that if you can 13 do some work on some revised wording without, I hope, it 14 being necessary to revise the wording in a radical way, 15 the minimum necessary to put down something closer to 16 where we have arrived at in the light of this 17 discussion.</p> <p>18 KURT TIBBETTS: With respect, we want it right.</p> <p>19 IAN HENDRY: Yes, and then we'll have a look at it tomorrow 20 morning. If you can get it to us first thing to have a 21 look at, that would be good. So that's on that point.</p> <p>22 We'll wait and see what the CJ says about the other 23 text.</p> <p>24 What is the position as regards time limits for the 25 Premier? In the light of all the great progress we've</p> <p style="text-align: center;">Page 130</p>	<p>1 always understood that there is no doubt that your 2 party, Kurt, wants the provision of time limits for 3 Premiers in in your government modernisation proposals 4 document, and the position of McKeeva's party is 5 radically opposed to such a provision. We, the poor old 6 UK, have sat here between this vice feeling the pressure 7 on our foreheads and hoping and wishing that you guys 8 will come to some agreement about it. If you don't, we 9 shall have to ask our Minister to arbitrate, which she 10 will do if we ask her to do it, I am sure she will, but 11 it won't be a very happy thing for her to have to do.</p> <p>12 ALDEN M MCLAUGHLIN: Mr Chairman, there is a certain amount 13 of gamesmanship going on. What the government is trying 14 to ascertain from the opposition, is their position 15 still the same, that they would like the term limits 16 provision gone? Yes or no?</p> <p>17 MCKEEVA BUSH: Mr Chairman, I think what the Minister needs 18 to do is sincerely ask himself whether their position is 19 the same or are they playing Brer Rabbit?</p> <p>20 KURT TIBBETTS: Mr Chairman, may I respond to that by saying 21 I am playing no games.</p> <p>22 MCKEEVA BUSH: That's all you play.</p> <p>23 KURT TIBBETTS: As regards the specific matter, Mr Chairman, 24 I am saying on behalf of the government that the 25 position of having term limits, which is the maximum of</p> <p style="text-align: center;">Page 132</p>

1 two consecutive terms for the Premier is a  
 2 constitutional provision which we believe should be in  
 3 the new constitution, not only based on looking at all  
 4 the variables but also with the clear understanding that  
 5 that is something that the people of the country would  
 6 like to see in their new constitution. That is our  
 7 position. I don't know what their position is at  
 8 present.

9 ELLIO SOLOMON: Mr Chairman, I recall yesterday the  
 10 discussion taking place between yourselves and the  
 11 government was one where the UK was in the position at  
 12 that point in time that (inaudible) I don't know if  
 13 discussion continues from there.

14 IAN HENDRY: I think we said we were neutral, that it is  
 15 unusual provision from our point of view because we  
 16 don't have anything like this. I do recall, although of  
 17 course it's open to anybody to change their minds at any  
 18 time, that at the second round the government very  
 19 nearly conceded this, in fact tied it to section  
 20 62(1)(b) which we've now settled in a satisfactory  
 21 manner. 62(1)(b) is the public officers, senior public  
 22 officers being disqualified for election for a year, but  
 23 you made the connection back in the second round.

24 KURT TIBBETTS: Mr Chairman, it is still a desire for us to  
 25 know exactly what the opposition's position is. We have

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1 stated our position and the answer that the leader of  
 2 the opposition gave doesn't clearly indicate to us what  
 3 that position is. So we just would like to know what  
 4 their position is.

5 MCKEEVA BUSH: Mr Chairman, I hope we don't hold it back any  
 6 longer. We've given our position. We said what we had  
 7 to say. You say you wanted it, what do you want us to  
 8 do?

9 ALDEN M MCLAUGHLIN: Then we have it.

10 MCKEEVA BUSH: If you want it, you want it, but we are  
 11 saying that.

12 ALDEN M MCLAUGHLIN: If there's no objection to it  
 13 remaining, Mr Chairman, then let it remain.

14 IAN HENDRY: Eddie, please.

15 EDUARDO THOMPSON: Mr Chairman, for what it's worth, the  
 16 Chamber's membership also endorses the position of the  
 17 government.

18 IAN HENDRY: What I'm going to do now, I know that according  
 19 to my list there is one more thing we should look at,  
 20 and in fairness to Alden's mentioning a possible police  
 21 appointments commission this morning, I'll come back to  
 22 that. But because we've been rushing around so much, we  
 23 haven't had a chance to think about that, so I think we  
 24 should have a break in order to allow us to get our  
 25 heads round that. You can continue thinking about this

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1 other point -- well, you won't be thinking about it, I  
 2 know.

3 ALDEN M MCLAUGHLIN: What point is that, sir?

4 IAN HENDRY: And then we'll come back in 15 or 20 minutes  
 5 and talk a little bit about the method of appointing  
 6 police officers. I'm not drawing any conclusions about  
 7 the term limits of the Premier for the moment because  
 8 I'm still in a bit of a state of confusion about that,  
 9 to be perfectly honest.

10 (4.17 pm)

11 (A short break)

12 (4.50 pm)

13 GILLIAN MERRON: Ladies and gentlemen, thank you for your  
 14 patience and indulgence in allowing us to catch up with  
 15 ourselves. I'm sure you used the time profitably to  
 16 think over the right to silence, or sat silently  
 17 pondering what a crazy situation this all is.

18 I just wanted to say, because we shall have to,  
 19 first thing in the morning, brief our Minister about how  
 20 things have gone. I am confident that we can please her  
 21 immensely by saying that we have resolved quite a number  
 22 of issues. I will say to her as regards the disputed  
 23 issue of term limits for Premier, that at the end of the  
 24 day here the preponderance of opinion seemed to be that  
 25 the provision should remain in the text and there was no

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1 strong opposition expressed to it. But it may be people  
 2 will say more about it tomorrow, I don't know. That's  
 3 what I propose to tell her.

4 ALDEN M MCLAUGHLIN: That's fair enough.

5 IAN HENDRY: As far as the other small points, I think we'll  
 6 tell her that there is still a little bit of work we  
 7 need to do, I hope not having to trouble her with it, on  
 8 the Judicial and Legal Service Commission, the position  
 9 of the Chief Justice, but it's unlikely that we will  
 10 need to take up her time with that.

11 Then there is the point of the suggestion that you  
 12 made this morning about the Police Service Commission,  
 13 and perhaps you could say what you had in mind and we'll  
 14 have a bit of a discussion about it now.

15 ALDEN M MCLAUGHLIN: Thank you, Mr Chairman. Like I said  
 16 earlier this morning, reflecting on some of the concerns  
 17 that have been expressed about the concept of a National  
 18 Security Council and its various functions and the  
 19 perceived potential for it to be seen as influencing  
 20 police appointments and discipline, and involvement in  
 21 operational issues and so forth, we have looked at what  
 22 they have done in the British Virgin Islands, which has  
 23 national security council with all the bells and  
 24 whistles. That is a national security council that  
 25 actually takes the decisions and does not simply advise

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<p>1 the Governor in relation to matters affecting internal 2 security.</p> <p>3 And there, in addition to the national security 4 council, they have established a police service 5 commission, which has the power to make appointments of 6 officers in the police force and to remove and exercise 7 disciplinary controls of the persons holding or acting 8 such offices, and the commission is made up five 9 members, two appointed by the Governor acting at his 10 discretion, one appointed by the Governor acting 11 according to the advice of the Premier and one appointed 12 by the Governor acting on the advice of the leader of 13 the opposition and one appointed by the Governor acting 14 after consultation with the police welfare association.</p> <p>15 So with some notable deletions, we would recommend 16 that we adopt something very similar -- that we adopt 17 this, with some notable changes to the powers provision, 18 which is Section 97 for those who are looking at the 19 British Virgin Islands constitution.</p> <p>20 This would ensure that all issues relating to the 21 police establishment, appointment, discipline and 22 removal are not vested in anyone with any political 23 office but vested in a commission which has the ability 24 to deal with all of these various matters. And the 25 Governor would normally act in accordance with that</p> <p style="text-align: center;">Page 137</p>	<p>1 SAMUEL BULGIN: To the extent that my memory can assist me, 2 the draft police revised police bill contemplates the 3 setting up of a police complaints authority, a public 4 authority, which is staffed by civilian members of the 5 public, to which complaints would be made and who would 6 have the power to investigate, someone witnesses their 7 investigations, and then make recommendations as to what 8 sanctions should be applied.</p> <p>9 In respect of disciplinary matters, the 10 recommendations will be made to the Commissioner of 11 Police and in respect of criminal matters, the file will 12 be handed over to the (inaudible) in his chambers for 13 criminal prosecutions.</p> <p>14 It is not dissimilar to what happens in the UK in 15 terms of this public confidence body, so that will take 16 the right and the responsibility of investigating police 17 officers' conduct out of the police hands and put it in 18 a completely public body, an independent body, so to 19 speak. What I don't recall is how the body will be 20 appointed, but I'm fairly certain that it's made up of 21 similar (inaudible).</p> <p>22 MCKEEVA BUSH: Mr Chairman, we've haven't had time to study 23 it but just a glance at it, we would want first of all 24 to remove section 2 and 7.</p> <p>25 KURT TIBBETTS: Agreed, sir.</p> <p style="text-align: center;">Page 139</p>
<p>1 advice unless he determined that that advice would 2 prejudice Her Majesty's service, which is purely 3 standard language.</p> <p>4 So I only had a very brief word with Rolston and a 5 very brief word with the Attorney General this morning, 6 so I don't know if either have had the opportunity to 7 consider the matter further or anyone else for that 8 matter. I know it is fresh and it is late but I think 9 it's useful for us to consider.</p> <p>10 KURT TIBBETTS: Mr Chair, just to add the point, because in 11 earlier discussions there was the thought expressed at 12 some point in time, I believe, regarding police 13 complaints and the fact that what obtains now is an 14 unsatisfactory situation. And I believe the opposition 15 had thought about some kind of ombudsman's role with 16 regards to complaints, et cetera. This police service 17 commission that is being recommended here would not 18 capture all of that, but in discussions with the 19 honourable Attorney General, he pointed out that there 20 is going to be a provision in the new police law that is 21 being drafted as we speak, so I would just ask him to 22 quickly explain how that is going to work via that 23 legislation so that we can have a big picture look at 24 what we're talking about.</p> <p>25 IAN HENDRY: Sam?</p> <p style="text-align: center;">Page 138</p>	<p>1 MCKEEVA BUSH: And 96(b) and (c) so that we can't have 2 anyone pointing their fingers saying that we have 3 political interference appointing members to it.</p> <p>4 The one thing that, as I said, we keep hearing is 5 that people are worried about that, and I worry about 6 that kind of development on a small island, when you get 7 that kind of control by politicians and people feel that 8 they are committed just because the politician has some 9 say in making an appointment and they would know this 10 and they will use it.</p> <p>11 So we would change the (b) and (c), and whether you 12 call it a police service commission or ombudsman, that's 13 going to complement it. Then we wouldn't have much 14 problem with it unless someone can show us where it 15 would be problematic. But I still wouldn't -- I would 16 not be able to say at this point. I would rather take 17 it overnight and spend some time on it rather than make 18 a huge mistake.</p> <p>19 ROLSTON ANGLIN: Mr Chairman, just, and I know some of this 20 is repetitious from September, but our concerns on this 21 point would be very similar to the concerns we expressed 22 back then as relates to how we were looking to move 23 forward on the national security council at that 24 particular point in time.</p> <p>25 Take, for example, 96(1)(b) and (c). This opens</p> <p style="text-align: center;">Page 140</p>

35 (Pages 137 to 140)

<p>1 itself in a small community to the very real 2 possibility, especially as it relates to discipline, we 3 all know from our community work unless we have blinders 4 on. When those sorts of things happen, and officers are 5 disciplined, for example, disciplinary action, the first 6 thing he or his family is going to do is run to the 7 politicians. In our view, once you have a commission 8 like this, where two members are being appointed on our 9 advice, so they become the appointee of the Premier and 10 the leader of the opposition, the public will see that 11 as their appointment and will come and try to lobby for 12 influence by the politicians to then exert their 13 influence over their appointees. That's just as simple 14 as how the system works and how people will react and 15 behave. Any person that denies that are denying what 16 holds in the Cayman Islands.</p> <p>17 We think that perhaps those two could be replaced by 18 members of the community that are beyond what most 19 people would see as influenced by politics, people like 20 justices of the peace, et cetera.</p> <p>21 I'm not quite sure why we would argue that if we 22 have the commission that is there and I would presume 23 that we want this commission to be independent, why it 24 is that we are so overly concerned as to whether or not 25 our fingers are in the pie. I don't get that.</p> <p style="text-align: center;">Page 141</p>	<p>1 give their advice to the Governor, most of whom have no 2 real connection or historical connection to the Cayman 3 Islands. That's the way traditionally it has worked. 4 So I think we'd be wasting a lot of time and energy if 5 we wind up with a commission where the only person who 6 makes the appointments is the Governor. We would be 7 right back almost where we started from. You might as 8 well leave the Governor alone to do it now.</p> <p>9 MCKEEVA BUSH: No, I don't agree with that. As I said, 10 I want to take this home and look at it. But I don't 11 agree with the Minister and we believe that if you're 12 going to do something like this, that some other people 13 would be able to make a contribution and are advising 14 the Governor. The Governor has his civil servants, the 15 who are going to be Caymanian, and he's going to talk to 16 him and get advice, a new Governor will, until he learns 17 certain ropes, and certainly we can make further 18 clarifications here.</p> <p>19 But I am concerned, and Rolston, I've said it and 20 Rolston repeated it, that we have to be careful in our 21 small community because that we don't get slammed with 22 what happens in other territories. I don't like this 23 idea that we have to take everything that other 24 territories have done or do. They are a whole lot worse 25 off than us, some of them, and I say that with no</p> <p style="text-align: center;">Page 143</p>
<p>1 I really, really don't get it, especially given the fact 2 that we are small and we know how people operate within 3 the community. They look to the politicians at every 4 point that they believe they can get assistance or 5 deserve assistance. So I can see those types of things 6 starting to creep in that I don't believe would be good 7 for the community and good for us.</p> <p>8 ALDEN M MCLAUGHLIN: Mr Chairman, that point is not without 9 some merit, but this practice is -- I mean what we're 10 proposing is what's done in other jurisdictions, some 11 much smaller than ours. The question that I have -- I'm 12 not fixated on the Premier or the leader of the 13 opposition making the recommendations, but somebody has 14 to advise the Governor. You get a new Governor, who 15 knows absolutely nothing about the jurisdiction which 16 he's been set to govern. He has, as they all do, to 17 look to someone to advise him, or someones to advise him 18 in relation to these matters.</p> <p>19 He's going to take somebody's advice. I'd much 20 rather that advice was the advice of the leaders of the 21 opposition and the government, who have at least had the 22 benefit of having been elected and therefore the 23 confidence of the people. Otherwise we run the real 24 danger, I've been around this system long enough to 25 understand, where an interknit circle of people are who</p> <p style="text-align: center;">Page 142</p>	<p>1 disrespect for our colleagues in the other territories. 2 We have made it thus far and what we built up in our 3 country, we built because we have been different, have 4 done things differently. And I'm still not convinced 5 that all these commissions that we're going to have now, 6 you have one meeting every Monday morning and all these 7 other institutions, so-called, that we're putting into 8 place can make the Cayman Islands a better place to 9 live.</p> <p>10 Certainly what we've had now, while it might need 11 tweaking, has kept us for 40 years and we'd better be 12 understanding that that's what we should be building 13 for, 40 to 50 years.</p> <p>14 Like we say, we will take it and have a further look 15 at it, but where we stand, we are not going to support 16 this paper as is.</p> <p>17 KURT TIBBETTS: Mr Chair, it seems to me then that we can 18 agree in principle on a police service commission. The 19 way the members are appointed is something we can turn 20 our minds to and see if we can come up with a 21 satisfactory manner, because I think from what I've 22 heard that there are questions about any political 23 attachments whatsoever by way of any advice from either 24 side of the political arena to the Governor, but also 25 the thought has been expressed by my colleague that</p> <p style="text-align: center;">Page 144</p>

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1 while that has its merits, then there also is the  
 2 question: should it be left to the Governor on his or  
 3 her own to make the appointments? So maybe we should  
 4 attempt to think seriously as to what other mechanism  
 5 could be put in place with regards those appointments,  
 6 and then I think we will agree on the other matters, and  
 7 perhaps we will try to get around that as quickly as we  
 8 can by tomorrow, and that may well take care of it.

9 IAN HENDRY: All right. First of all, this has come up very  
 10 late in the day and you've been kind enough to  
 11 acknowledge that. I mean late in the day in the whole  
 12 process, and so it's taken us by surprise, but I want to  
 13 be absolutely clear what you're proposing, so if you  
 14 could bear with me and I'll try and draw that out.

15 You would propose, as I understand it, the  
 16 constitution providing for a police service commission  
 17 of maybe five people or maybe less than five people, and  
 18 there is a question about the extent to which the  
 19 Premier and/or the leader of the opposition would have a  
 20 say in the appointment of any of those members, but  
 21 McKeeva has raised a serious doubt, and Rolston too,  
 22 about two members of such a commission being appointed  
 23 on the advice of the Premier and the leader of  
 24 opposition, in other words they are those people's  
 25 nominees.

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1 As far as the remit of any such commission is  
 2 concerned, I think you've made clear that, I am looking  
 3 at the BVI precedent of Section 97 of their  
 4 constitution, you would not ask for subsection 2, which  
 5 is the subsection which brings in the national security  
 6 council having a say with regard to appointments of a  
 7 rank superior to chief inspector, so you would not see  
 8 any role for the national security council in any of  
 9 these appointments.

10 Thirdly, there is the question of the Commissioner  
 11 of Police, and the draft as it stands on page 74,  
 12 section 109, leaves to the Governor and only the  
 13 Governor the appointment of the Commissioner of Police.  
 14 He's one of the posts which are specially reserved for  
 15 the Governor. That's the draft at the moment.

16 What is not clear to me is if you're suggesting any  
 17 change to that point. I'm wanting to be absolutely  
 18 clear, because Section 97 of the BVI constitution makes  
 19 no distinction. It talks about officers in the police  
 20 force. So within the potential remit of their police  
 21 service commission are officers in the police force from  
 22 top to bottom, every single one of them, except that  
 23 under subsection 5 there is the power for the Governor  
 24 to make regulations delegating to any member of a  
 25 commission or --

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1 KURT TIBBETTS: Which section is this, sir?  
 2 IAN HENDRY: This is in the BVI draft, 97(5), the long one.  
 3 As I understand it and recall it from when we put it  
 4 together, this would enable the Governor by regulation  
 5 as published in the Gazette to delegate to a member of  
 6 the commission or a public officer subject to conditions  
 7 as prescribed any of the powers of the Governor under  
 8 this section.

9 Then there's a little last two lines which allow a  
 10 power delegated to be exercised by the person to whom  
 11 it's been delegated without reference to the police  
 12 service commission.

13 I think the result of that -- it's rather complex,  
 14 but I think the result of this scheme is that there  
 15 could be delegated to senior officers in the police  
 16 force power to make appointments, discipline and remove  
 17 junior police officers without reference to the  
 18 commission. There is flexibility there to have a  
 19 delegation scheme cascading down, rather as you have for  
 20 the public service appointments under your law as I  
 21 understand it in the Cayman Islands. I'm not talking  
 22 about the police. I'm talking about the Civil Service.

23 So if I've understood it correctly, you would want  
 24 to write into the constitution now a scheme which would  
 25 establish a police service commission, the composition

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1 of which is yet to be decided, but it would be  
 2 independent and it would have a remit across the board  
 3 in the police force; query whether it would include or  
 4 should include in your view the Commissioner of Police,  
 5 as amongst the offices to which the police service  
 6 commission could advise, but with a scheme whereby there  
 7 can be delegation down so that the police service  
 8 commission itself would not necessarily have to look at  
 9 the appointment of every PC, however junior.

10 One final question, this is very important: is it  
 11 wise for us to be taking a decision on this sort of  
 12 thing on the hoof at the last minute in these  
 13 discussions, constitutional discussions, without any  
 14 reference to the Police Federation and other interested  
 15 parties back in the territory? This would be quite a  
 16 change.

17 An alternative way of going about this, which  
 18 I don't necessarily criticise as a scheme, obviously,  
 19 but an alternative way of going about this is to deal  
 20 with police appointments and so forth by ordinary law  
 21 rather than having something prescribed in the  
 22 constitution which cannot easily be changed.

23 I was just looking at section 109 of the draft on  
 24 page 74, and the way it's worded at the moment does not  
 25 seem to me to allow for a police service commission

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1 because the police officers are within the definition of  
 2 public officers. Police officers are public officers as  
 3 defined. So police appointments, discipline and removal  
 4 of police officers are within the scope of section 109.  
 5 But at the moment, as drafted, it allows -- well, the  
 6 basic power is in the hands of the Governor, but it  
 7 allows delegation by regulations or by a law enacted by  
 8 the legislature for delegation down to other public  
 9 officers.

10 It allows the cascading bit down to senior police  
 11 officers to deal with the junior police officers, and so  
 12 on and so forth, but what it does not in its terms allow  
 13 for is the establishment of a police service commission  
 14 to advise on any police appointments. That could be  
 15 fixed quite easily if one thought it was preferable to  
 16 go down the route of dealing with this in the fullness  
 17 of time and after further mature consideration and  
 18 consultation with people locally to do something like  
 19 this by local legislation. I'm just saying that it's a  
 20 thing that needs careful thought.

21 KURT TIBBETTS: Yes.

22 ALDEN M MCLAUGHLIN: Mr Chairman, that's very sage advice  
 23 and if we make the necessary amendment here, that will  
 24 permit that to happen, then we can take the time and  
 25 consider the matter further with proper consideration.

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1 IAN HENDRY: All right. Shall I try overnight to think of a  
 2 paragraph in section 109 that would remove the block to  
 3 the possibility of setting up a commission by local  
 4 legislation in the fullness of time? The advantage  
 5 being that one isn't -- what worries me and my  
 6 colleagues is that here we are trying to decide  
 7 something for the future and none of the stakeholders  
 8 have had a chance to be consulted about it and we don't  
 9 want to get it wrong or to create a hostage to fortune  
 10 in the draft constitution which will be published and  
 11 people might be very surprised and say, "This is the  
 12 first we've heard of this idea and it has suddenly  
 13 popped into the text". It might be more trouble than  
 14 it's worth.

15 Overnight I'll try and look at a paragraph and we  
 16 can add that to things to look at in the break in the  
 17 morning.

18 Just one point I'd like to try and clarify for our  
 19 benefit in briefing our Minister, I think I'm clear  
 20 that -- turning back to section 58 -- I'm clear that we  
 21 have done good work today in amending section 58 in the  
 22 way we have. We have not touched what is at present  
 23 subsection 3, the key provision about powers, but your  
 24 position -- I want to be absolutely clear of this --  
 25 your position is that the national security council

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1 should be able to have its advice to the Governor on  
 2 matters relating to internal security with the exception  
 3 of operational staffing matters binding on the Governor,  
 4 except where the Governor considers that would be  
 5 prejudicial to the interests of Her Majesty's ... it is  
 6 the BVI formula, whether in respect of the Cayman  
 7 Islands or the UK?

8 ALDEN M MCLAUGHLIN: Yes.

9 IAN HENDRY: Is that exactly what your proposition is? You  
 10 would be content if she were to agree to that, just so  
 11 that we can be absolutely clear?

12 ALDEN M MCLAUGHLIN: That was our proposal, is our proposal,  
 13 based on the BVI 58, subsection 3, I think it is. Of  
 14 course, if you can improve upon it, we wouldn't argue  
 15 about that.

16 IAN HENDRY: All right. That's understood. That's very  
 17 helpful of you to clarify that.

18 I think, unless Michael or Helen have anything to  
 19 add, we're in pretty good shape. My tally -- I will  
 20 come to you in a moment, Pastor. My tally is that we  
 21 need to come back to the Minister on the bill of rights  
 22 in the morning. She will want to hear from as many of  
 23 you as would like to speak on the matter. We have this  
 24 point about the powers of the NSC to resolve, which will  
 25 need her decision and the question of consultation on

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1 the Governor, on the appointment of the Governor.  
 2 In the morning when she has to leave us between  
 3 opening and then coming back close to lunch, we can come  
 4 back to the text, which I hope your side, with  
 5 Professor Jowell's help, will come up with on the JLSC.  
 6 We might, I hope, have heard from the CJ in a  
 7 positive sense on the draft provision about that, and we  
 8 need to come back to the point I said I would look at in  
 9 relation to the police and the right to silence we will  
 10 need to knock off. And, as I said earlier, we'll have  
 11 to tell her that there's still perhaps something of a  
 12 doubt about the term limits provision. I'm still trying  
 13 to figure out what precisely the position is on that.

14 Sorry, Shane?

15 SHIAN O'CONNOR: That's all right, Mr Chair. I don't know  
 16 how, as we are doing the fine-tuning we are back on  
 17 section 58. I remember this morning, due to the lobby  
 18 from the opposition, we included "or his or her  
 19 designate" which allows him in his absence to send  
 20 somebody there if it is necessary. I was wondering if  
 21 that should also be for the Premier. If we do not  
 22 include that there that would have perhaps, on the  
 23 reading of the constitution would not allow the Premier  
 24 to do the same.

25 IAN HENDRY: I think, as I said earlier, a reference to the

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<p>1 Premier by virtue of the provision at the end of the 2 constitution, which says in effect a reference to an 3 office by the name of that office includes the person 4 for the time being acting in that office. If the 5 Premier were not available, this reference to the 6 Premier includes the deputy Premier or whoever is acting 7 as Premier for the time being.</p> <p>8 So if that would be satisfactory, one doesn't need 9 to add anything else. If, on the other hand, the 10 Premier was to be given power to designate somebody 11 other than whoever's acting in the office of Premier, 12 then one would need to write something in "or his or her 13 designate" or something like that. But I wonder whether 14 that's necessary given that under (c), there would 15 anyway be two other ministers.</p> <p>16 SHIAN O'CONNOR: That should be okay.</p> <p>17 IAN HENDRY: Yes, I think it should be okay.</p> <p>18 MCKEEVA BUSH: Mr Chairman, one of the areas that we had 19 asked about was that code for the Auditor General, and I 20 don't know if that was then needed or it was answered. 21 I thought I had a record of it but I did not make a note 22 of it.</p> <p>23 But we had asked that something be looked at that 24 would give him sort of guidance, keep him straight, and 25 as I said, I don't know if that was percolated higher up</p> <p style="text-align: center;">Page 153</p>	<p>1 giving you your constitutional commission, which we all 2 applauded --</p> <p>3 MCKEEVA BUSH: No, I'm very much appreciative that you've 4 seen the value in what we said and what we put forward, 5 but the senate is part and parcel of our position paper.</p> <p>6 IAN HENDRY: All right. Kurt?</p> <p>7 KURT TIBBETTS: Mr Chair, I just want for everyone's 8 benefit -- it might not be necessary, but perhaps you 9 will remind us about tomorrow, format, time, and that 10 kind of thing.</p> <p>11 IAN HENDRY: All right. Having consulted and subject to 12 correction by Helen, I think the position is that we 13 expect the Minister to arrive at 9.30. She has been 14 asked if she will take part in a group photograph first 15 thing. Where would that be, outside on the stairs?</p> <p>16 HELEN NELLTHORP: On the stairs.</p> <p>17 IAN HENDRY: Anybody who would like to be in the photograph, 18 make sure they're there at 9.30 and it would probably be 19 at the foot of the stairs rather than outside the 20 building, I imagine. Then we'll come up and start on 21 the bill of rights discussion -- and we might need to 22 take her aside for five minutes to tell her where things 23 have got to. But don't be alarmed, because the way 24 things have gone today, I think that if we don't 25 complete in the time she's here in the morning, the</p> <p style="text-align: center;">Page 155</p>
<p>1 or whether we got an answer on it at all.</p> <p>2 IAN HENDRY: No, I remember the discussion. I thought we 3 then did that section 114(5), right at the foot of page 4 76. It says specifically that "the functions of the 5 Auditor General and the accountability of that post and 6 the audit office shall be further prescribed by law".</p> <p>7 This was a clear signal. It was an obligation 8 actually to fill out in more detail by law --</p> <p>9 MCKEEVA BUSH: Actually in law you are saying --</p> <p>10 IAN HENDRY: Yes.</p> <p>11 MCKEEVA BUSH: If the government wants to find out any more 12 our position, we can tell them that our position for the 13 senate is still part of our position paper. So maybe he 14 wants to sleep on that too.</p> <p>15 IAN HENDRY: Well, I had thought, I think quite justifiably, 16 that either the senate had gone to sleep because it 17 hasn't been mentioned for a very long time, but then 18 I thought yesterday that your proposal for a 19 constitutional commission took the place of the idea of 20 the senate, and that's what I thought, the senate is 21 coming alive but under another name.</p> <p>22 MCKEEVA BUSH: The constitutional commission is just for 23 other things. The senate is a different thing, a 24 different body than the commission.</p> <p>25 IAN HENDRY: I thought we'd all done you a huge favour by</p> <p style="text-align: center;">Page 154</p>	<p>1 exchange of views on the bill of rights, there will be 2 time either over lunch at 12.30, but then afterwards, 3 because she is booked in for two hours so we can, if 4 necessary, carry on during that period. We'll need to 5 leave time to negotiate the other two points, but that 6 would certainly be -- if we need some more time in the 7 afternoon to carry on talking about the bill of rights, 8 I think it would be right to do so.</p> <p>9 And then in the interim, between -- she will have to 10 go, I think, at 10.45 for other engagements. We'll 11 carry on as we are now with the outstanding things that 12 I mentioned just now. She will come back, host the 13 lunch at 12.30, which is in this building somewhere, I'm 14 not sure where, but we'll find out -- it's the state 15 dining room? All right. Wherever that is. We'll find 16 it. As I said, she'll then, I hope, be here for a good 17 two hours to wind it up.</p> <p>18 ELLIO SOLOMON: Mr Chairman, before we close, I trust 19 I don't have to repeat it, what I mentioned yesterday, 20 but I will if I have to, but I raised the issue of there 21 will be reference also to Caymanian in the constitution 22 as opposed to referring to the immigration law. 23 I acknowledge the fact that the government doesn't want 24 to consider that. I think my colleague actually raised 25 the issue in terms of asking to put in the constitution,</p> <p style="text-align: center;">Page 156</p>

<p>1 perhaps putting a small line appending it to (inaudible)</p> <p>2 to further legislation that allows some degree of</p> <p>3 (inaudible) to take place. I was wondering if we could</p> <p>4 get some resolution on that.</p> <p>5 IAN HENDRY: My understanding of where we left it was that</p> <p>6 we have raised the question but there are complications</p> <p>7 about setting out a full definition of Caymanian in the</p> <p>8 constitution, principally arising out of the complexity</p> <p>9 of it and the fact that under the current law it is</p> <p>10 defined over two pages with several references to other</p> <p>11 laws and therefore it's not an easy thing to translate</p> <p>12 wholesale into the constitution.</p> <p>13 I think where we ended was that the better</p> <p>14 solution -- and my recollection is that at least Rolston</p> <p>15 was of the view, having been closely involved in all</p> <p>16 this complex matter, too, that it would be best to do a</p> <p>17 reference to say Caymanian has the meaning ascribed to</p> <p>18 it in the laws currently in force in the Cayman Islands.</p> <p>19 It might be per to say "in the laws" rather than "in the</p> <p>20 immigration laws" because in the future it may be</p> <p>21 contained in some other law, so even though it is -- you</p> <p>22 know, to find that definition for the time being one</p> <p>23 would have to look somewhere else, I think in practical</p> <p>24 terms it's probably the best thing to do. That was the</p> <p>25 way I left it.</p> <p style="text-align: center;">Page 157</p>	<p>1 co-operation today.</p> <p>2 (5.35 pm)</p> <p>3 (The hearing adjourned until 9.30 am the following morning)</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p style="text-align: center;">Page 159</p>
<p>1 Now, of course, if you dislike that outcome, that's</p> <p>2 your privilege, but I really don't think it's something</p> <p>3 that can be easily fixed. All of the definitions of</p> <p>4 status, whether they be British nationality -- British</p> <p>5 nationality, as you may very well know, to find out who</p> <p>6 is a British national, you have to look at several</p> <p>7 pages, many, many pages, to find out whether you fall</p> <p>8 within any of the categories. Definitions of belongers,</p> <p>9 to use a generic term in Overseas Territories, are</p> <p>10 habitually quite long. It is true that some territories</p> <p>11 have definitions in their constitutions where they are a</p> <p>12 manageable definition, but for some reason, no doubt for</p> <p>13 historical reasons, the definition in Cayman Islands is</p> <p>14 exceptionally complex and not something that's easily</p> <p>15 understood, translatable into the constitution and</p> <p>16 understood -- as somebody said yesterday -- without a</p> <p>17 lawyer beside you to explain it. I think it's just one</p> <p>18 of the facts of life we have to live with.</p> <p>19 ELLIO SOLOMON: If I could say in closing I hear your</p> <p>20 position and I suppose, taking the line you have taken</p> <p>21 (inaudible) get an impression of whether they take the</p> <p>22 same position as you do or otherwise.</p> <p>23 KURT TIBBETTS: Are we finished?</p> <p>24 IAN HENDRY: Yes. We'll see each other at 9.30 looking our</p> <p>25 best for the photograph. Thank you for your work and</p> <p style="text-align: center;">Page 158</p>	

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<p>1 Thursday, 5 February 2009 2 (9.30 am) 3 (Proceedings delayed) 4 GILLIAN MERRON: Good morning, everybody. Could we start 5 with Pastor Ebanks saying a prayer? I'm told that we're 6 very lucky because we have three gentleman, one for each 7 day, and therefore the talks have to end today. 8 (Prayer) 9 GILLIAN MERRON: Thank you for that. Could I welcome Sara 10 from the Human Rights Commission. You're very welcome, 11 we're delighted you've joined us. 12 SARA COLLINS: Thank you. 13 GILLIAN MERRON: We're going to have a discussion today I've 14 been looking forward to on the bill of rights. If 15 I could explain, anyone who has listened to the news, 16 you'll know that the Foreign Secretary is making a 17 statement in the House today, so my plan is I'll be with 18 you until 10.45 and I will sit in the opening comments 19 of the Foreign Secretary and the opposition and then 20 I will leave them to it and come back to join you for 21 lunch. So please start without me, but I am coming back 22 for it, so do leave me something. It depends on 23 obviously Parliamentary business. Hopefully the 24 statement will start a little earlier so I'll be here 25 for lunch and some further discussions, then I need to</p> <p style="text-align: center;">Page 1</p>	<p>1 GILLIAN MERRON: It's being worked on. Can you shout in the 2 meantime? 3 ALDEN M MCLAUGHLIN: I'll start at the beginning again. 4 Good morning. As I said, we're delighted to be here and 5 we are so happy that you could join us for these very 6 important discussions. It has been a torturous path to 7 get here. We started the constitutional review process 8 in the Cayman Islands in 2001. Some of us around this 9 table have been engaged from day one in that process. 10 We got to a point where we thought we might have a 11 constitution, a draft constitution which could be 12 agreed. That didn't transpire. The process was halted, 13 there was a change in government, my government renewed 14 the discussions and after a tremendous amount of 15 consultation, local debate and dialogue, we have finally 16 got to this point. 17 I think around the table there is general agreement 18 on most things now. I believe there are three or four 19 outstanding points, but the big point on which there is 20 still fundamental divergence of views between the Human 21 Rights Committee and the rest of the Cayman delegation 22 is some -- I think there are principally two provisions 23 in the proposed bill of rights. 24 The bill of rights has easily been the most 25 controversial issue for the Cayman Islands, and absent</p> <p style="text-align: center;">Page 3</p>
<p>1 return because we have a debate this afternoon on 2 Afghanistan and Pakistan. Again, I just need to be 3 there for the opening statements, which take a little 4 bit longer, and I hope you'll accommodate the 5 Parliamentary business for me today. We've tried to 6 manage it so I can spend as much time with you as 7 possible. 8 The most important thing is if I could welcome you 9 back for the third day and, as Pastor Ebanks said, 10 I hope we can come to some -- not just fruitful talks 11 but good conclusions. I know you made progress 12 yesterday and thank you for that all of you. 13 Perhaps I can just open up the discussion on the 14 bill of rights and invite anybody who'd like to make any 15 comments so that I can understand your position better. 16 I was about to say don't be shy, but you're not. 17 ALDEN M MCLAUGHLIN: Good morning. It's a pleasure to be 18 here. It's wonderful that you could be here for this 19 very, very important discussion. I think you know as 20 well as everyone around this table what a torturous path 21 this has been to get here -- 22 SARA COLLINS: I hesitate to interrupt but I cannot hear. 23 I'm wondering if the microphone -- 24 GILLIAN MERRON: I think it's on but it is a bit quiet. 25 ALDEN M MCLAUGHLIN: Is that better?</p> <p style="text-align: center;">Page 2</p>	<p>1 that issue, we probably would have had a new 2 constitution many years ago. Cayman Islands people have 3 always viewed this issue of human rights in a -- perhaps 4 not unique but different way than most people in the 5 world because -- we have an echo. 6 GILLIAN MERRON: That's to endorse what you're saying. 7 ALDEN M MCLAUGHLIN: Because the Cayman Islands has, as a 8 settled territory, always held very dear the Christian 9 values and precepts as the underpinning our society and 10 societal values and the observance by her people of what 11 has transpired in many other parts of the world in the 12 name of human rights advances has caused them to have 13 great concern about the advent of a bill of rights in 14 the Cayman Islands constitution and what that would mean 15 to the values and sort of moral base of the country if 16 we introduced a constitutional bill of rights. 17 So we have had to work extraordinarily hard to get 18 our people to understand the benefit and the purpose of 19 human rights. We have had to work very hard also as a 20 group, and I want to give tribute to everyone around 21 this table and some other groups who are not here and to 22 the foreign commonwealth office and the team led by 23 Mr Hendry, who have been very sensitive to the 24 Cayman Islands' views and our determination that nothing 25 we do undermines the societal values and principles</p> <p style="text-align: center;">Page 4</p>

1 (Pages 1 to 4)



<p>1 which are held by our people.</p> <p>2 There's another practical reason too. If we don't</p> <p>3 wind up with a document which the local people can</p> <p>4 support, we won't get the constitution through, so we</p> <p>5 are all very, very conscious of the need to ensure that</p> <p>6 the vast majority of the people of the Cayman Islands</p> <p>7 can support whatever it is that is agreed around this</p> <p>8 table today.</p> <p>9 The Human Rights Committee, a committee which I have</p> <p>10 the highest regard for -- in fact I was its chairman for</p> <p>11 a while during this term -- and whose value and whose</p> <p>12 purpose I have the highest of respect and the government</p> <p>13 has the highest of respect for, give a very different</p> <p>14 view about what the bill of rights should actually</p> <p>15 achieve. I certainly understand their idealism and</p> <p>16 their desire for a bill of rights which provides for</p> <p>17 everything and for everyone and which promotes a society</p> <p>18 in which there is no discrimination and in which there</p> <p>19 are many important rights constitutionally guaranteed.</p> <p>20 That, I believe, is the ideal situation and one which</p> <p>21 I believe we should all aspire to, things like the right</p> <p>22 to housing, the right to health care and a full range of</p> <p>23 third-generation rights which are not provided for in</p> <p>24 the draft that we have prepared. But there are</p> <p>25 realities which we all have to face, not just the</p> <p style="text-align: center;">Page 5</p>	<p>1 principles generally and standards, but also that it</p> <p>2 meets the international treaty obligations of the United</p> <p>3 Kingdom so that the United Kingdom does not run the risk</p> <p>4 of being embarrassed or worse, that one of its</p> <p>5 territories has a constitutionally guaranteed bill of</p> <p>6 rights which somehow falls below the minimum standard.</p> <p>7 So that's where we are.</p> <p>8 GILLIAN MERRON: Thank you, that's very helpful. Thank you</p> <p>9 for your way of expressing it, as well. How would like</p> <p>10 to --</p> <p>11 MCKEEVA BUSH: Minister, the position of the opposition is</p> <p>12 that we support the bill of rights. We would have</p> <p>13 rather appreciated it in a bill form, a bill of rights,</p> <p>14 in a law. That didn't seem to work out for whatever</p> <p>15 reason. In following the lead of the church, we'll not</p> <p>16 support anything that goes against our morals and</p> <p>17 Christian values that the Islands have benefited from.</p> <p>18 If for some reason the United Kingdom cannot accept</p> <p>19 what we have so far agreed upon, then I certainly would</p> <p>20 like to hear why and, as clear as possible, what would</p> <p>21 be the result at the end of the day of the UK not</p> <p>22 accepting our position as far as the constitution is</p> <p>23 concerned.</p> <p>24 I stop there, ma'am. Thank you kindly.</p> <p>25 GILLIAN MERRON: Thank you for that.</p> <p style="text-align: center;">Page 7</p>
<p>1 economic ones but also the overriding principle which</p> <p>2 has guided us is that whatever we agree to must do two</p> <p>3 things. At a minimum, it must ensure that the</p> <p>4 United Kingdom's international obligations and treaty</p> <p>5 obligations are met, that is the minimum standard, but</p> <p>6 also that whatever we agree is something which can get</p> <p>7 the support of the majority of people in the Cayman</p> <p>8 Islands.</p> <p>9 So this has been a great battle, a great struggle</p> <p>10 that we have gone through for all these years are but in</p> <p>11 particular over the course of the last 18 months or so,</p> <p>12 to strike that balance and to get it just right. We</p> <p>13 believe we have just about achieved that, and all of the</p> <p>14 NGOs around the table are very capable of speaking for</p> <p>15 themselves and I'm sure they will. The opposition have</p> <p>16 indicated that their lot lies with what the churches are</p> <p>17 prepared to accept and to agree to.</p> <p>18 So, today, I think, the two things that we have to</p> <p>19 try to achieve, if at all possible, is to hopefully</p> <p>20 reach a point where the Human Rights Committee can find</p> <p>21 it possible -- I won't say enthusiastically endorse, but</p> <p>22 find it possible to support the bill of rights which the</p> <p>23 rest of us have agreed and to satisfy you, ma'am, that</p> <p>24 what is being proposed is reasonable, is fair, is</p> <p>25 equitable and is in keeping with the United Kingdom's</p> <p style="text-align: center;">Page 6</p>	<p>1 ALDEN EBANKS: Madam Chair, first of all let me again</p> <p>2 express our sincere appreciation to you, ma'am, and also</p> <p>3 the very capable members of your negotiating team.</p> <p>4 I was privileged to be invited to be here in 2002 but</p> <p>5 unfortunately due to tragedy was unable to be a part of</p> <p>6 the meetings, but I so much appreciate the respect that</p> <p>7 has been shown us, in spite of our uniqueness in terms</p> <p>8 of some of the positions that we have held. We truly</p> <p>9 appreciate not only your team but indeed all the team</p> <p>10 members here for the way in which we have been able to</p> <p>11 work together, as Mr McLaughlin has articulated, under</p> <p>12 very difficult circumstances at times to come to a point</p> <p>13 where we believe we now have a draft document that we</p> <p>14 are prepared to support and we believe that there are</p> <p>15 many people in our community, not just the churches in</p> <p>16 our community but the community as a whole that are</p> <p>17 looking for a signal not just from the government and</p> <p>18 the opposition, but also from ourselves having been</p> <p>19 invited to be a part of this discussion as to whether we</p> <p>20 sign on to what has transpired here.</p> <p>21 I can say very clearly that we have had to change</p> <p>22 our position in relationship to a number of issues that</p> <p>23 we would have liked to have seen. Mr Bush articulated</p> <p>24 very clearly earlier on that we advocated for a similar</p> <p>25 position to the UK in having a bill of rights that was</p> <p style="text-align: center;">Page 8</p>

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1 enshrined in a separate law. We were told that that was  
 2 not possible, but we did not quit on the process because  
 3 we couldn't get what we thought we wanted, and so we  
 4 stayed engaged in the process to try and see how then we  
 5 could work within the circumstances that allowed the UK  
 6 to meet its international obligations and to be able to  
 7 sign off on the constitution with the bill of rights  
 8 that had been negotiated in the Cayman Islands.

9 We believe that at this point in time, and maybe I'm  
 10 wrong in this, but we believe and have understood all  
 11 along that the primary concern of the UK is its ability  
 12 to meet its international obligations under the  
 13 charters(?), and therefore, while, as Mr Hendry has  
 14 articulated on a number of occasions, this may be  
 15 a unique or a novel bill of rights, we believe that the  
 16 primary objective and concern of Her Majesty's  
 17 government, if we understand it, would be achieved by  
 18 this novel bill of rights that has been negotiated.

19 Let me just say a few other words. To follow up on  
 20 what Mr McLaughlin said earlier, the Cayman Islands, as  
 21 in any jurisdiction, has some unique traditional  
 22 cultural values that are extremely important to us and  
 23 that we have sought to protect over the years, but even  
 24 in the absence of a bill of rights, while everyone  
 25 around this table may not agree with me, even in the

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1 absence of a bill of rights, I believe it would be fair  
 2 to say that the Cayman Islands as a whole has always  
 3 respected the equality of all humanity, the dignity of  
 4 all human beings and I don't believe that we would have  
 5 attracted the diversity of people to the Cayman Islands  
 6 that we have and the numbers of people to the  
 7 Cayman Islands that we have if we had been trampling on  
 8 their rights. Are we perfect? By no means. Is there  
 9 room for improvement? Yes, there is. And we also, as  
 10 Mr Bush said a few moments ago, and contrary to popular  
 11 opinion as an association, as a church, do support a  
 12 bill of rights for the Cayman Islands. Having said  
 13 that, we've looked at the White Paper for the  
 14 Partnership for Prosperity in 1999 as the foundation  
 15 upon which we have made a contribution to this process.  
 16 We, in spite of what some people may think, are not  
 17 political creatures in the sense of being politicians,  
 18 but in another sense, our care, concern and obligation  
 19 to the community, I suppose we could be considered  
 20 political creatures from that perspective.

21 When we looked at the White Paper on Partnership for  
 22 Progress and Prosperity, and we saw the promises and  
 23 aspirations that were made by Her Majesty's government  
 24 in seeking to craft new constitutions for the Cayman  
 25 Islands, we took that very seriously. We accepted the

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1 ground rules and the parameters that were set, and  
 2 therefore we have repeatedly, for instance, quoted a  
 3 statement by one of your predecessors,  
 4 Baroness Scotland, where she said:  
 5 "We're not trying to impress a standard model of  
 6 human interaction and behaviour on everyone in the  
 7 Territories. We are not all preaching the merits of any  
 8 particular lifestyle. We are well aware of the  
 9 differences of culture, religious observance and  
 10 societal values that exist."  
 11 And then she further stated:  
 12 "Indeed, the diversity between the Territories and  
 13 between them and the UK is one of the strengths of the  
 14 partnership."  
 15 We took that as a signal that while we wanted to  
 16 comply with the obligations of the United Kingdom in  
 17 relationships to human rights, based on our research --  
 18 and we've been involved in this process for ten years,  
 19 nine years at least now, and we have remained engaged  
 20 throughout this period of time, and I believe it's fair  
 21 to say have done considerable research, not only on what  
 22 is taking place in places like Canada and Australia and  
 23 the United Kingdom, but other parts of the EU as well.  
 24 As Mr McLaughlin has said, some of the things we have  
 25 found have afforded us quite a bit of concern.

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1 This is a unique document, I think, as everyone  
 2 around here would admit, but we want to say that we are  
 3 again very pleased and proud of the respect that has  
 4 been shown to all of us throughout these negotiations,  
 5 in spite of our uniqueness, and we believe that we have  
 6 reached a place, as the document now stands, where not  
 7 only can we endorse it and support it as churches, but  
 8 that we would be in a position to assure the schools,  
 9 the churches, the community at large that while it may  
 10 not be all that many of us would aspire it to be, it is  
 11 a document that meets the UK's international obligations  
 12 and that we can support and will encourage our people to  
 13 support.

14 With the greatest of respect, I will say that  
 15 I think most people around this table will acknowledge  
 16 that without that support, this process is going to be  
 17 dead in the water. That is, in some ways, a frightful  
 18 position to be in, because we do not want to be seen to  
 19 be unfair, unreasonable or manipulative in this whole  
 20 process. We want to be seen as making a positive  
 21 contribution to it and therefore we're proud to do that  
 22 and, as I said, made a number of concessions in regard  
 23 having to change our own position and do additional  
 24 research.

25 Having said that, ma'am, I will simply say that your

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1 team, again, and I think the entire Cayman Islands  
 2 delegation has done an excellent job. Let me say, in  
 3 spite of the differences that exist between us and the  
 4 Human Rights Committee on a number of issues, again on a  
 5 personal level, we have the highest regard and respect  
 6 for each other and continue to dialogue on a personal  
 7 level and basis on this, and we can assure you that that  
 8 will continue, ma'am.

9 So thank you very much. I'm sorry to have taken so  
 10 much time, but I hope that gives us an overall  
 11 perspective of what has transpired.

12 GILLIAN MERRON: It does. That's the purpose of the  
 13 discussion, so we have the time to hear and understand  
 14 all views. Sara?

15 SARA COLLINS: Thank you very much, Minister. Thank you for  
 16 your warm welcome and I'd like to reiterate that the  
 17 Human Rights Committee is grateful for its inclusion in  
 18 these talks with you. It's important for us to  
 19 participate.

20 I'd like to start with a plea for equal time for a  
 21 woman, since Pastor Ebanks pointed out that he took a  
 22 long time --

23 GILLIAN MERRON: We're not going to have any trouble there.

24 SARA COLLINS: I'd like to take some time to provide you  
 25 with a summary of the Human Rights Committee's position.

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1 We have prepared a position paper which I hope will be  
 2 brought to your attention, Minister, that sets out in  
 3 greater detail the fundamental concerns which we have  
 4 with the compromise which is proposed in relation to  
 5 section 16.

6 The committee's position is simple. Any effective  
 7 constitution and any effective bill of rights should  
 8 have, at its heart, certain fundamental assumptions, and  
 9 one of those, which I believe is incontrovertible, and  
 10 which history and universal practices will show is  
 11 incontrovertible, is the principle that all people are  
 12 equal and all people merit and deserve equal treatment  
 13 before the law.

14 The original section 16 conferred a freestanding  
 15 right -- actually I should put it more accurately: it  
 16 imposed a free-standing obligation on our government not  
 17 to discriminate full stop. The proposed section 16,  
 18 the, if I can call it the government's amendment,  
 19 suggests that the non-discrimination obligation should  
 20 be limited so that it piggybacks only on those rights  
 21 which are set out in the constitution and not, if I may  
 22 by way of example, in relation to any of the very  
 23 important third-generational rights as they were  
 24 described by the Minister, so it leaves entirely open  
 25 and outside of the framework of the section 16

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1 protection very important things in relation to social  
 2 and economic development and welfare in the Cayman  
 3 Islands, such as employment, healthcare, housing and  
 4 those other very serious aspects of people's daily  
 5 lives.

6 I think we've accepted and we want to pay credit to  
 7 those involved in the process for struggling to get us  
 8 to the point where we have a non-discrimination right  
 9 which is of some utility but not of statute utility.

10 The question, as we see it, is: is limited equality or  
 11 limited freedom from discrimination better than entire  
 12 freedom from discrimination or absolute equality? Our  
 13 answer to that question is no. That is why, with the  
 14 greatest of regret and with respect to all involved in  
 15 the process, we cannot and will not support a compromise  
 16 on something so fundamental.

17 It's helpful also to consider the background to this  
 18 process, because we also have made compromises, and we  
 19 made these compromises designed specifically to address,  
 20 we hoped, the concerns of the churches associations,  
 21 which were to ensure that no right to marry would be  
 22 conferred on gays and lesbians and to ensure that no  
 23 rights would be applied horizontally. For those  
 24 reasons, those matters are dealt with specifically and  
 25 comprehensively in the constitution. Those concerns

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1 have been addressed. They do not remain and there is  
 2 therefore no remaining concern to which anyone can point  
 3 which suggests that this further compromise is necessary  
 4 or reasonable. In fact, really, what we're left with  
 5 once we've taken out the possibility for direct  
 6 enforcement by the courts, which we've conceded, the  
 7 possibility for horizontal application, which we've had  
 8 to concede and the concession of stripping away of  
 9 rights for gays and lesbians, which we will not concede  
 10 but have to the certain limited extent in relation to  
 11 the right to marry, we have a situation where we have  
 12 not much more than we have by virtue of the right to  
 13 petition individually to the European Court of Human  
 14 Rights in any event and the Human Rights Committee's  
 15 objective is to advocate for the best possible  
 16 protection of rights and for the constitution to give us  
 17 something new and useful and a very powerful weapon  
 18 which will be used in the struggles of those who are  
 19 disenfranchised and discriminated against.

20 Why the need for compromise? This is my  
 21 understanding of it. The Minister for Education  
 22 educated(?) very eloquently and succinctly in the second  
 23 round and has done so again today the fact that the  
 24 Ministers Association and the Seventh Day Adventists  
 25 would not accept sexual orientation as one of the

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1 specified grounds for discrimination. In fact, sexual  
 2 orientation is still apparently one of the grounds that  
 3 dare not speak its name, because even in this new  
 4 limited section 16, nobody has accepted our plea to  
 5 include sexual orientation as a specified ground in its  
 6 own right. Rather, we have the vague language relating  
 7 to "or other status".

8 The Human Rights Committee's position has been and  
 9 continues to be that it is fundamentally wrong to single  
 10 out any one group for omission from a non-discrimination  
 11 clause unless there is a clear and reasonable  
 12 justification for doing so, and there is not.

13 In any event, the compromise is motivated by the  
 14 desire in order to appease or to satisfy the English  
 15 government's treaty obligations to keep the open-ended  
 16 grounds by including the words "or other status" but,  
 17 and this is important, to limit the obligation so we can  
 18 only have open-ended grounds if we have a limited  
 19 obligation. We want a freestanding right and we say  
 20 there's no good reason why we shouldn't have it.  
 21 There's no good reason why the state should be able to,  
 22 without any constitutional safeguards, arbitrarily and  
 23 unjustifiably discriminate between its citizens or  
 24 residents in its dealings with them.

25 We're left here not with a freestanding guarantee

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1 that people will not be discriminated against, nor with  
 2 the foundation for positive equality in our  
 3 constitution, which we submit is of fundamental  
 4 importance.

5 It is said against us in the CMA's position paper  
 6 and I think by others that the UK is in the same boat,  
 7 so if it's good enough for you, why isn't it good enough  
 8 for us? I respectfully disagree. The UK is not in the  
 9 same boat. Although the UK does not have a written  
 10 constitution, you have what I would describe as a very  
 11 admirable package of anti-discrimination legislation.  
 12 That, it seems to me, is part of the legal culture here.  
 13 It's something we have been advocating for in the Cayman  
 14 Islands and our pleas have fallen on deaf ears. It's  
 15 taken us more than 10 years even to consider enacting  
 16 legislation preventing the discrimination of women. We  
 17 have no equal pay legislation and we have no sexual  
 18 orientation regulations, civil partnership act,  
 19 disability discrimination legislation, no commission for  
 20 equality. So United Kingdom citizens are already  
 21 protected by this full package of legislation and for  
 22 your own reasons, which I can understand, your  
 23 government has decided not to sign on to the protocol,  
 24 but I submit that doesn't actually have the same drastic  
 25 practical impact on the daily lives of citizens who

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1 already benefit from that legislation.

2 I dare to guess that should the UK engage in the  
 3 process of developing its own written constitution,  
 4 including a freestanding right not to be discriminated  
 5 against on these grounds would simply be a matter of  
 6 reflecting what your Parliament has already decided in  
 7 several respects is a fundamental aspect of a modern  
 8 democratic society, and just bringing into it all of  
 9 those legislative provisions from which you already  
 10 benefit.

11 What is the state of our national law on culture in  
 12 relation to human rights? I've set that out in the  
 13 paper. Unfortunately, and though I'm happy to be here  
 14 to speak in this process, the Human Rights Committee is  
 15 hardly ever taken seriously when we speak in a public  
 16 forum in the Cayman Islands. We're told that the Cayman  
 17 predominant and prevailing culture will not allow it,  
 18 that rights are not acceptable, that people are afraid  
 19 of rights, that Christian values will not allow us to  
 20 tolerate rights, but we will continue to speak out, even  
 21 if we are in the minority position.

22 We're missing legislation and therefore we consider  
 23 that setting up a constitutional framework which  
 24 requires the government to be guided by these principles  
 25 in its legislative activity and its dealings with its

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1 citizens will go a long way towards rectifying those  
 2 serious problems.

3 It is also said, I think, that both governments  
 4 would be complying with treaty obligations. Well, I've  
 5 set out in the position paper a number of very important  
 6 treaty obligations, including the fundamental obligation  
 7 included in the international covenant on civil and  
 8 political rights, and I would submit that in fact all of  
 9 those treaty obligations require us to introduce into  
 10 national law, including the highest law in the land,  
 11 provisions which mirror the idea that people should be  
 12 treated equally and that there should be  
 13 non-discrimination in relation to civil, political,  
 14 social and economic spheres of life.

15 I wish to say, because I know I'm speaking strongly  
 16 against positions which are held by almost everyone else  
 17 around the table, that I agree with the view that  
 18 personally I have the highest amount of respect for the  
 19 leaders of our government, of the opposition and the  
 20 leaders of the churches, but I have felt that it was  
 21 very important for someone here to be recorded as saying  
 22 that we want equality, we want the constitution not to  
 23 reflect our sometimes difficult and troubled reality but  
 24 the future, the ideal future to which we should aspire,  
 25 to give us some guidance as to how we should treat each

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<p>1 other in our daily lives but more importantly how the 2 government should treat us.</p> <p>3 It's also said against me that the churches speak 4 for the majority of the people in the Cayman Islands. I 5 don't know whether that's true and I have not seen 6 empirical evidence to that effect. Perhaps they speak 7 for the majority of people in their congregations but 8 the Human Rights Committee has received communications 9 and petitions from many people who do not share the 10 churches' view on this. I've included, because it is 11 important, the petitions we have received from concerned 12 gays and lesbians which shows that there are some very 13 serious and fundamental problems affecting not just that 14 disenfranchised group in the Cayman Islands.</p> <p>15 The motivation for narrowing section 16 is 16 because -- if I'm wrong about this I'd like to be 17 corrected -- it is perceived as unacceptable to our 18 culture to confer a freestanding right on gays and 19 lesbians, full stop, nothing more. No objection was 20 taken to conferring it on any of the other vulnerable 21 groups listed in section 16.2. If that is the case, 22 I do not accept that motivation. It is not a compelling 23 or reasonable motivation. In the 21st century, we 24 should recognise all people as equal and we should not 25 be spurred into compromise because we cannot accept that</p> <p style="text-align: center;">Page 21</p>	<p>1 international treaties and conventions and on the other 2 hand satisfy the people of the Cayman Islands.</p> <p>3 We understand the concerns of the Human Rights 4 Committee, but I can assure you, when examined in detail 5 there are not much foundation to the claims being made. 6 One, the allegation that there are some folks in this 7 society who would benefit and others who have been 8 denied is unfounded. The application of this section 16 9 as now is, when examined by all the legal minds around 10 the table, seem comfortable. I'm not convinced that the 11 legal mind of Mr Hendry and the legal mind of Professor 12 Jeffrey Jowell and all the other legal men who have 13 examined this document would have escaped the fact that 14 it is discriminatory. We all seem to have agreed that 15 the application of this section is equal among all 16 people in the Cayman Islands.</p> <p>17 SARA COLLINS: I hesitate to interrupt, but I accept that 18 the amended article 16 is not discriminatory. It 19 applies equally to all the people set out there and that 20 wasn't my point.</p> <p>21 GILLIAN MERRON: I accept that.</p> <p>22 SHIAN O'CONNOR: Perhaps, Madam speaker, Ms Collins may wish 23 to restate her point after ...</p> <p>24 GILLIAN MERRON: You carry on. I will ask for any further 25 contributions.</p> <p style="text-align: center;">Page 23</p>
<p>1 gays and lesbians will acquire these rights.</p> <p>2 I think that I have summarised what I have attempted 3 to explain in greater detail in my paper and I thank you 4 for your attention.</p> <p>5 GILLIAN MERRON: Thank you. Of course, I have seen your 6 paper and you can be assured that you are heard. In 7 discussions, as you know, that's the whole purpose of us 8 all gathering here, that we do find a way forward. 9 I just want to assure you how well heard and how well 10 made your contribution is. Thank you.</p> <p>11 SARA COLLINS: Thank you.</p> <p>12 GILLIAN MERRON: Who else would like to have a word?</p> <p>13 SHIAN O'CONNOR: Thank you very much, Madam Chair. We would 14 like also to thank you and your incredible team from the 15 FCO.</p> <p>16 GILLIAN MERRON: You're making them very happy and I'm happy 17 you're making them very happy.</p> <p>18 SHIAN O'CONNOR: They worked so hard, long and hard, and 19 quite impressive in that Minister McLaughlin hit the 20 note, the sensitivity that they have exercised as they 21 relate to us in the Cayman Islands. Of course, we are 22 unique and there are a number of values and traditions 23 that are held dearly in that nation, and it is to that 24 extent why the struggle to put together a document that 25 will, on one hand, meet the UK's obligation to its</p> <p style="text-align: center;">Page 22</p>	<p>1 SHIAN O'CONNOR: The point I was about to make here is that 2 the motivation for a section is irrelevant. What is 3 important is its application, it's whether or not we're 4 denying anybody any right from this section, and if we 5 agree that there's no denial of any one particular 6 section of society, then I think this is a document we 7 can all move on.</p> <p>8 Point 2. In our leading up to the talks, both 9 opposition and government have had a number of community 10 meetings as they communicate with the members of the 11 society. The largest of ever such meeting was held by 12 the church, by the Seventh Day Adventist church. Over 13 500 persons turned up, which was unprecedented, and the 14 greatest of interest lies here in the bill of rights. 15 It is an irrefutable fact that the church speaks on 16 behalf of the large majority of the people in the Cayman 17 Islands. It is to that extent why we are part of the 18 discussion here, because it is very important that we 19 are able to represent the churches' view. Be well 20 assured that because of the impact of the church, a 21 constitution that is not satisfactory to the members of 22 the church will have difficulty when it comes to the 23 vote in May 20, and it is to that extent why it is 24 necessary for to us come to that agreement.</p> <p>25 We have made several concessions in an effort with</p> <p style="text-align: center;">Page 24</p>

6 (Pages 21 to 24)

1 Madam Chair to ensure that we meet the UK's obligation,  
 2 and at the same time the people of our culture is  
 3 satisfied, and we have arrived at a compromise position  
 4 that we all have agreed that can achieve those two  
 5 goals. We are satisfied that both your team and the  
 6 government and the opposition have all agreed that this  
 7 is a document that we can now take home, and it is that  
 8 extent, after long process of compromise, gives and  
 9 take, we finally reach a stage where we feel that we  
 10 have a constitution that both sides can be happy.

11 GILLIAN MERRON: Thank you. Is there anyone else who hasn't  
 12 spoken who would like to speak? Jeffrey?

13 JEFFREY JOWELL: Thank you very much. I didn't want to  
 14 speak if there are others among the NGOs who would like  
 15 to speak, but my role, as you know, is very much  
 16 confined to constitutional advisor, and in that respect  
 17 I can assure you, Minister, that the bill of rights here  
 18 is equal to and in fact goes beyond the Human Rights  
 19 Act 1998 in the United Kingdom, fulfils treaty  
 20 obligations which were very, very carefully scrutinised,  
 21 particularly scrutinised, and also, very importantly, in  
 22 no way modifies the existing common law, the law of  
 23 judicial review and human rights and human liberty which  
 24 exists in the Cayman Islands, which in itself ensures a  
 25 great deal of respect for equality and freedom and so

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1 on.

2 In addition, and we must look at the bill of rights  
 3 as a whole, there are additional rights here that don't  
 4 even appear in the UK Human Rights Act and in the  
 5 constitutions of a number of countries such as the right  
 6 to lawful administration, constitutionalising the right  
 7 to fairness, rationality, proportionality and so on in  
 8 judicial review. There are environmental rights here,  
 9 there are children's rights and rights to education  
 10 which go beyond anything that we have in this country.  
 11 There are no socio-economic rights, it's absolutely  
 12 true. Insofar as they're an aspiration that is shared  
 13 by many people here, it was felt that the time is not  
 14 right there, as it is not considered right here, to  
 15 introduce those rights because they invite judges to  
 16 meddle in the allocation of scarce resources, so it was  
 17 a prudent exercise on that front.

18 On the points that Ms Collins has put forward in  
 19 relation to equality, let me devote the rest of this  
 20 contribution to that issue. One can peel away previous  
 21 drafts and say they have been compromised, and there  
 22 have been compromises. There have also been compromises  
 23 on all sides here. The previous draft, if we are going  
 24 to peel away those drafts, listed the grounds of  
 25 prohibited discrimination -- grounds, incidentally,

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1 which stay in here, that are longer than the grounds  
 2 that are provided in article 14 of the European  
 3 Convention of Human Rights. The list here under section  
 4 16 include mental and physical disability, for example,  
 5 which is not found in article 14.

6 It was accepted in the recent compromise that "other  
 7 status" would also be included in this draft, so it goes  
 8 further than was originally foreseen. It does,  
 9 however -- that is, looking at the section 16 --  
 10 piggyback on the other rights in the bill of rights as  
 11 is the situation in this country. We accept article 14  
 12 of the European convention, which piggybacks on other  
 13 rights. But it has to be seen also in the context of  
 14 the general spirit of this whole constitution, which is  
 15 expressed in the preamble:

16 "A caring community based on mutual respect for all  
 17 individuals and their basic human rights, a country  
 18 committed to the democratic values of human dignity,  
 19 equality and freedom."

20 Then in article 1 of the bill of rights, once again  
 21 it recognises and affirms the democratic values of human  
 22 dignity, quality and freedom.

23 The preambles may not have direct effect but they  
 24 inform the reading of the whole constitution, infuse its  
 25 values and resolve any ambiguities. So they do count.

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1 Minister, the United Kingdom government has itself  
 2 never accepted a freestanding right to discrimination.  
 3 It has accepted only article 14, which provides that the  
 4 enjoyment of rights and freedoms set out in this  
 5 convention shall be secured without discrimination on  
 6 the list of grounds. As I say, that list of grounds is  
 7 not as extensive as the grounds set out in this Cayman  
 8 Islands draft constitution.

9 The United Kingdom has not accepted protocol 12 of  
 10 the convention, article 1, which provides a more general  
 11 prohibition of discrimination, but even that provision,  
 12 which the UK has not seen fit to accept, doesn't provide  
 13 precisely the freestanding ground of discrimination that  
 14 Sara Collins is advocated. It states:

15 "The enjoyment of any right set forth by law shall  
 16 be secured without discrimination on any grounds such as  
 17 sex, race, colour and so on."

18 So that again is very similar to provision article  
 19 26 of the International Covenant of Civil and Political  
 20 Rights, which provides that each person should be equal  
 21 before the law. There are many provisions in this bill  
 22 of rights that do require equal provision before the law  
 23 or equal access to the law, and one should also mention  
 24 there that the common law applies. One of the  
 25 fundamentals of the common law, the notion of the rule

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<p>1 of law is that everybody should have access to the law 2 and be considered equal before the law. It certainly 3 wouldn't be possible under this constitution, as has 4 perhaps been suggested, to forbid gays or lesbians or 5 transsexuals access to the court of law in the Cayman 6 Islands. That would be quite contrary to the full 7 spirit of the common law and nothing in the constitution 8 can speak to that, does speak to that or allow that. It 9 has never been so.</p> <p>10 One other point should perhaps be mentioned, and 11 that is that this draft also contains under the 12 institutions supporting democracy section, 116, a Human 13 Rights Commission. One of the purposes of that 14 commission, considered the primary purpose under 116.2, 15 is to promote an understanding and observance of human 16 rights in the Cayman Islands.</p> <p>17 All these should be seen together -- the section 16, 18 the preamble, the section 1 recognising the values of 19 human dignity, equality and freedom -- as providing a 20 number of specific protections, certainly as many 21 protections in terms of preparing for the Human Rights 22 Act here, that are provided here, plus more and through 23 the Human Rights Commission, trying to establish and 24 enhance a culture of human rights in the Cayman Islands. 25 That seems to be the point.</p> <p style="text-align: center;">Page 29</p>	<p>1 a few specific questions.</p> <p>2 Is the learned Professor or any of the other learned 3 constitutional experts around the table comfortable that 4 some of the issues which have been raised on a practical 5 level, for example the concerns of the gays and 6 lesbians, about their inability to live family lives 7 with their partners and the concerns of women about 8 their inability to have equal pay and non-discrimination 9 legislation passed, that those concerns could be 10 advanced through the existing constitutional framework 11 if the amended section 16 is left in place? I have in 12 particular in mind, in relation to gays and lesbians, 13 the right to privacy and family life and how that would 14 tie in with section 16, but I'd also like to have an 15 answer in relation to the position of women and of 16 children.</p> <p>17 GILLIAN MERRON: Can anybody help me with that one? 18 JEFFREY JOWELL: It just seems absolute clear that article 19 16 provides for equal treatment or non-discrimination in 20 respect of the rights under this part of this 21 constitution. There is another section which provides 22 the right to privacy and although sexual orientation is 23 not listed in the grounds, "other status" is, and it may 24 be for the courts in the future to interpret it. I 25 don't think there's any particular situation here, but:</p> <p style="text-align: center;">Page 31</p>
<p>1 Thank you very much.</p> <p>2 GILLIAN MERRON: Thank you. Is there anybody else who would 3 like to make a contribution?</p> <p>4 ALDEN EBANKS: Madam Chair, for the record, yesterday we had 5 circulated a written letter that was really in response 6 to a submission made by the HRC. Just for the record, 7 we realise that on page 2, if anyone has that, there was 8 just an error there in our case to do this. The second 9 paragraph from the bottom, if you have that, we state: 10 "The fact is that there is no disparity or 11 equity..." 12 After "or" it should be "lack of equity". 13 So thank you very much.</p> <p>14 GILLIAN MERRON: Sara?</p> <p>15 SARA COLLINS: Thank you, Minister. I did see this. May 16 I exercise a right of reply?</p> <p>17 GILLIAN MERRON: Yes, of course.</p> <p>18 SARA COLLINS: The learned Professor seeks to cast us, 19 I think, onto the murky waters of the common law in 20 which we will continue to wage the struggles we have 21 waged for equality and non-discrimination. I have 22 sailed those waters and I must say they're not always 23 free from storm and tempest, but nonetheless, what 24 I would like to understand, if the Human Rights 25 Committee is being asked to compromise, is the answer to</p> <p style="text-align: center;">Page 30</p>	<p>1 certainly protections for blatant discrimination against 2 anybody of any status is open to interpretation in terms 3 of the rights provided under this constitution. In 4 addition, it is always open to legislation to do what 5 has been done here and in other countries and to some 6 extent has been provided for in the Cayman Islands, 7 It's not entirely devoid of anti-discrimination law, and 8 there is, of course, in common law, to quote the words 9 of Lord Hoffman in the House of Lords recently, the 10 notion of equal treatment is a fundamental axiom of 11 rational behaviour. Rational behaviour is specifically 12 endorsed in section 19 of this constitution as one of 13 the grounds for judicial review.</p> <p>14 So this constitution doesn't, in any way, (a) 15 discriminate against the groups that have been 16 mentioned, women or others, and in no way stops the 17 clock in terms of development of a human rights culture 18 or legislation in the future. It in no way contravenes 19 the existing common law which provides, under concepts 20 such as rule of law which contains a great chunk of 21 equality under that, that everybody should be equally 22 treated, have equal access to the courts and other 23 provisions and facilities. They exist now. Anybody 24 discriminated on the grounds now -- I defer, of course, 25 to Sara Collins's experience, but certainly in this</p> <p style="text-align: center;">Page 32</p>

1 country and on the basis of the Privy Council -- the  
 2 indication I mentioned was in the Privy Council -- would  
 3 be subject to the normal protections of the common law  
 4 and the rule of law. It by no means can be said that  
 5 blatant discrimination against any of those groups could  
 6 be now or in the future, as a result of this  
 7 constitution, in any way curtailed.

8 GILLIAN MERRON: Thank you to that. I thank you all for the  
 9 way in which you've approached the conversation.  
 10 I think we all have found it extremely useful and I feel  
 11 everyone had the opportunity to air their views honestly  
 12 and openly and in the right spirit. We will return to  
 13 these later and obviously I'll use the time I'm away  
 14 from you to think about the points that have been said.  
 15 Can I say, I appreciate the credit you've all given to  
 16 the team. They don't always get the credit they  
 17 deserve. But you are right, all of you, and you're also  
 18 right that these are not just sensitive but very  
 19 important matters, and that's why they deserve the time  
 20 and the space that they have been given. With that,  
 21 I want to thank you for that, invite you to have coffee,  
 22 I'm sure you will talk about this over coffee, and then  
 23 Ian will continue to chair in my absence until I return  
 24 at lunchtime to meet you. I really want to sincerely  
 25 thank you for the way in which you've dealt with what I

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1 know is a very difficult, as I say, but I emphasise  
 2 important issue that we must resolve to move forward.  
 3 Thank you very much.

4 (10.45 am)  
 5 (A short break)  
 6 (11.15 am)

7 IAN HENDRY: Ladies and gentlemen, thank you for coming back  
 8 so promptly. We have two or three things to look at.  
 9 The first thing I've received is --

10 KURT TIBBETTS: Just before you go any further, just so that  
 11 we can know, with regards to all of the issues reserved  
 12 for the Minister, that is this afternoon?

13 IAN HENDRY: Yes.

14 KURT TIBBETTS: Just wanted to make sure. That's fine.

15 IAN HENDRY: What I would like to do after lunch is take a  
 16 few minutes with her, my team with her privately, so  
 17 I hope you will be indulgent, because we'll need to talk  
 18 through with her the issues.

19 KURT TIBBETTS: We are in your land and we are in your  
 20 hands.

21 IAN HENDRY: We'll try and do it as expeditiously as  
 22 possible, but she wants to consider a package.  
 23 These things we're going to discuss now I hope we  
 24 can resolve ourselves without having to trouble her.  
 25 The first thing is we've had the piece of paper from the

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1 Chief Justice and I think that the suggestions he's made  
 2 are designed to make reference to the role of the AG and  
 3 the President of the Court of Appeal. I think that  
 4 they're acceptable, as far as we're concerned. It's up  
 5 to you, also.

6 ALDEN M MCLAUGHLIN: Yes, sir. The Professor and I have had  
 7 a chance to look at these and we think they're fine.

8 IAN HENDRY: Good. So subject to the next topic, I hope we  
 9 have a happy CJ. The next topic is: have you done some  
 10 drafting on Judicial and Legal Commission that we could  
 11 try and have a look at now and try and resolve some of  
 12 the points we were discussing late yesterday afternoon?

13 ALDEN M MCLAUGHLIN: Yes, sir, we have, although we're  
 14 trying to improve upon it and the changes are being  
 15 typed at this moment, because there is another topic  
 16 that we could deal with. In another five minutes or so,  
 17 we should be able to pass copies around.

18 IAN HENDRY: All right, that's fine. I look forward to  
 19 seeing that.

20 The other thing that I said we would look at from  
 21 our side was section 109. This was in the context of  
 22 the possibility of there being a role for a Police  
 23 Service Commission or a body of that sort. I first  
 24 thought, and said late yesterday afternoon, that there  
 25 may be some inhibition in section 109 to such a body

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1 being provided for in the legislation.

2 Right, the AG is all ears. I thought about this  
 3 some more and consulted with my colleagues and we  
 4 concluded in the end that nothing more needed to be said  
 5 about section 109. Section 109.3 is the one. It says:  
 6 "Subject to subsection 4, a law enacted by the  
 7 legislature may provide for the powers vested in the  
 8 Governor by subsection 1 to be exercised by a public  
 9 officer subordinate to the Governor and may enable the  
 10 Governor to delegate those powers to such public  
 11 officers in his or her discretion."

12 These are the powers -- sorry, do you want to --

13 KURT TIBBETTS: Just to quickly ask you in what you're going  
 14 to say now, is it that you would be saying that such a  
 15 commission -- that the members of that commission would  
 16 be considered public officers?

17 IAN HENDRY: No, not necessarily, no. What had concerned me  
 18 originally was that section 109.3 allows for the law,  
 19 such as your public service management law, to employ  
 20 for a cascading system of delegation, depending on the  
 21 seniority of the office concerned, down through the  
 22 Civil Service. By analogy with the police service, and  
 23 the police officers are public officers for the purposes  
 24 of the constitution, an ordinary law, police law or  
 25 whatever you call it, could make provision, compatibly

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<p>1 with this draft constitution, for such a cascading 2 system and -- this is the important point -- could 3 provide for the decision makers, whether they be the 4 Governor or police officers down below, the Commissioner 5 of Police or other senior officers below that level, to 6 be advised, assisted, recommended by an independent body 7 such as a Police Service Commission. The same applies, 8 on this drafting, in relation to Civil Service 9 appointments and so forth. It does not rule out that 10 the decision makers can be advised and assisted by 11 independent bodies.</p> <p>12 So the conclusion I reached was that there was no 13 need to change anything in section 109. It's not 14 necessary and to put something in about police officers 15 or officers in the police service would be, (a), 16 unnecessary, and (b), could create an argument that such 17 a thing could not be done in relation to other parts of 18 the public service. So much the best thing would be to 19 say there is no inhibition to conclude, which I think is 20 correct -- there is no inhibition in this draft 21 constitution on an ordinary law passed by the 22 legislature of the Cayman Islands to establish a Police 23 Service Commission or whatever you like to call it, to 24 have a role, which will be defined in the law, in the 25 appointment of police officers.</p> <p style="text-align: center;">Page 37</p>	<p>1 composed and how the members of them have security of 2 tenure may not be removed, et cetera, misbehaviour or 3 whatever, and a clear statement that they are not 4 subject to the directional control of any person. That 5 gives them constitutional independence. That was its 6 reason and that is the traditional reason for having an 7 OT constitution provision about a commission.</p> <p>8 You have something similar as regards your 9 Commission for Standards in Public Life, for example, 10 and the Human Rights Commission and the New 11 Constitutional Commission we have discussed are going to 12 write in. It does not mean to say that all the 13 commissions or other types of independent bodies that 14 may be created necessarily have to be in the 15 constitution. Of course they don't. You can pass laws 16 which set up bodies doing all sorts of things. Your 17 freedom of information law has an independent 18 information commissioner who is referred to glancingly 19 once in this draft, but to go and find what the 20 independence of that office and all the rules 21 surrounding it, you have to go to the freedom of 22 information law.</p> <p>23 So our conclusion was that we don't need to do 24 anything to deal with this.</p> <p>25 KURT TIBBETTS: Allow for the law to be done.</p> <p style="text-align: center;">Page 39</p>
<p>1 KURT TIBBETTS: My colleague will speak. Mr Chairman, my 2 colleague is going to speak, but I immediately would 3 have to ask the question: it is in the BVI constitution 4 as a constitutional provision?</p> <p>5 IAN HENDRY: Yes.</p> <p>6 KURT TIBBETTS: So ...?</p> <p>7 IAN HENDRY: The whole system is different in the BVI. In 8 the BVI, there is a Public Service Commission to provide 9 advice on the appointments of civil servants, basically. 10 There is a Teaching Service Commission for the teaching 11 service. There is a Judicial and Legal Service 12 Commission for legal officers and magistrates, and there 13 is a Police Service Commission. You may say this is a 14 very heavyweight approach but it's a completely 15 different approach from that which exists for the Cayman 16 Islands. All of these were written into the 17 constitution because the BVI Constitutional Review 18 Commission advised that that is what they wanted from 19 day one, from a year or more, two years before we even 20 sat down to discuss it with them. That's what they 21 wanted to have.</p> <p>22 The purpose of putting it into the constitution was 23 to make clear that they would be independent 24 commissions. That's the main reason why they were in 25 the constitution, that the rules for how they're</p> <p style="text-align: center;">Page 38</p>	<p>1 IAN HENDRY: No. You can leave it, you can take this 2 forward. As I recommended yesterday, rather than try 3 and write something in today on the hoof, without any 4 consultation with the relevant stakeholders, I think is 5 the modern jargon, it would be much better to take this 6 away and think it through and discuss it, consult, and 7 then, if you want to proceed with this sort of idea, 8 take it in slower time in ordinary legislation.</p> <p>9 ALDEN M MCLAUGHLIN: Mr Chairman, as I said yesterday, 10 I think that is very good advice. I just have two 11 points. One is I think your analysis of section 109 is 12 correct. The potential difficulty I see with not making 13 some amendment to it is that it would mean that the 14 Police Service Commission would not be able to appoint 15 the Commissioner of Police.</p> <p>16 IAN HENDRY: Yes. That is absolutely right. Go on.</p> <p>17 ALDEN M MCLAUGHLIN: And shall I say, if you search up and 18 down Cayman Islands and randomly ask people, anyone you 19 find, they will say to you that the biggest issue we 20 have had is the Commissioner of Police. We've now had 21 three in just over a year. So I think that if we were 22 asked which police officer do we think or which office 23 in the police service we think would most benefit from a 24 sort of broader perspective in choosing, most people in 25 Cayman Islands would say the Commissioner of Police.</p> <p style="text-align: center;">Page 40</p>

10 (Pages 37 to 40)

<p>1 The rank and file are okay, by and large.  2 I'll let the opposition speak for themselves, but  3 I think they're going to agree with me that we would not  4 want a constitutional bar to the commission being able  5 to appoint the Commissioner of Police. That's my first  6 point.  7 The second point is that I think, while not strictly  8 necessary, that it would be useful if there was a  9 provision in here which said that a law may make  10 provision for the establishment of a commission to deal  11 with police matters, however we frame that, so that  12 there is -- much like the freedom of information  13 commissioner, it's something of a passing reference to  14 it, but it points the reader to the possibility of the  15 creation of such a commission, because in time to come,  16 when we may all very well be gone from the scene and  17 no one remembers this particular discussion, the  18 questions may arise as to whether or not, given the  19 construct of the constitution, whether it is possible to  20 do this. I think it would be useful as a guide post in  21 the future if there was an express provision  22 contemplating the possibility of the creation of such a  23 commission.  24 MCKEEVA BUSH: Mr Chairman, if we have that provision, what  25 is going to be the expectation of members from the</p> <p style="text-align: center;">Page 41</p>	<p>1 Governor's ability in the police matters? If you put it  2 in the constitution, when would it come into play? What  3 future are you talking about? Immediately you get it,  4 or ten years down the road? I mean, what would give  5 rise to it?  6 ALDEN M MCLAUGHLIN: Mr Chairman, it would become two  7 things. One, a policy decision by the government,  8 whoever the government is at that time, and essentially  9 agreement by the UK that this is the way to go.  10 IAN HENDRY: Unless Rolston wants to add anything?  11 ROLSTON ANGLIN: Mr Chairman, just to say two things I want  12 to be sure are addressed. I think you explained, to use  13 your phrase, this cascading delegative effect that our  14 new public service management the law contemplated,  15 which is underpinned by the constitution. My reading of  16 Section 3, I cannot see how any future class of  17 legislators could read this in any other way than to say  18 that once the Governor is in agreement, there can be  19 delegation and so that by law enacted by the legislature  20 for the appointment of any and all public officers.  21 I just cannot see that. I am not going to be in  22 agreement to meet any one at this point in time. This  23 one may be relevant because of the circumstances in  24 which we live. I think everyone around the table has  25 heard me say consistently I do not subscribe to dealing</p> <p style="text-align: center;">Page 43</p>
<p>1 general public and even from the police service? What  2 would we be getting and how is that going to affect the  3 Governor's powers over the police service?  4 Notwithstanding what some people might feel, I think  5 if you check across Cayman, they do not want elected  6 members there in that realm. This is a lot of reticence  7 on it. I thought the government had withdrawn it  8 yesterday, in fact. I wrote on it "withdrawn by  9 government". Amazing. But I am wary of it.  10 ALDEN M MCLAUGHLIN: Mr Chairman, I just want to make it  11 clear, for the Leader of the Opposition, I'm not  12 proposing that we write anything into the constitution  13 setting up a Police Service Commission at all. I'm just  14 trying to do two things. One, make sure there's no  15 constitutional bar for that to happen in the future, and  16 secondly, a suggestion that there's an express provision  17 which says that it is possible to do so. That's all.  18 MCKEEVA BUSH: But that's where the question comes in. As  19 I asked it, what is going to be -- I'll repeat that  20 since the Minister raised it again. What is going to be  21 the expectation of the police service? One, those who  22 are disgruntled(?) and others, what is going to be the  23 expectation of members of the government for that to  24 happen? What will people want in there? As I said,  25 what would we be getting? How is it going to affect the</p> <p style="text-align: center;">Page 42</p>	<p>1 with what is the popular issue of the day. What if all  2 the teachers went on strike tomorrow? Do we then need  3 to ensure that we have the language there that we can  4 put a Teachers Commission because that became relevant  5 because of the circumstances? I don't see the police or  6 policing as so important that we need to expressly mean  7 that, because we can create, under this cascading  8 system, by the constitution, any law to be enacted by  9 the legislature. I think that's quite clear under  10 subsection 3. If we're going to then deal with both  11 what is left, reserved to the Governor in subsection 4,  12 which covers Financial Secretary, the Commissioner of  13 Police, the Auditor General, the Information Services  14 Commissioner, the Police Commissioner and any other  15 office to which subsection 2 of 106 applies, which goes  16 back to the Judicial and Legal Services Commission,  17 I and the opposition have made it very, very clear that  18 we regard those particular posts to be the posts that,  19 at this point in the constitutional and political  20 development of the country, we feel we ought to leave as  21 is for the time being. Whatever the future holds,  22 whatever the people that come and replace us decide,  23 that's their business, but we have selected these few  24 for a specific reason, and because there is some  25 clamouring now because we have had some hiccups as it</p> <p style="text-align: center;">Page 44</p>

<p>1 relates to the commissioner of police, so -- there's 2 people that aren't necessarily happy with how the 3 Auditor General, for example, does his work in his 4 office and it's under reports et cetera. Should it be 5 that the PSC has a voice in the appointing the Auditor 6 General? I believe that we pick these hallmark 7 positions that we believe should have added underpinning 8 of independence, we leave them as is and we let future 9 legislators deal with the circumstances as they see fit. 10 I see 109 as giving the Cayman Islands the 11 modernisation what that was contemplated when we passed 12 the public service and management law. 13 IAN HENDRY: Thank you. I want to be very clear about this. 14 I can be absolutely confident that there is no prospect 15 whatsoever of the UK side agreeing that a Police Service 16 Commission would be given power, would be allowed to be 17 given power either in the constitution or in ordinary 18 law, to make the appointments. Even the BVI, the text 19 that we looked at yesterday, provides for advice by the 20 Police Service Commission, which is in general binding 21 on the Governor but the Governor has the power to 22 overrule that advice. So in no place is a Police 23 Service Commission given the decision-making power. 24 Secondly, I can assure you there is no prospect 25 whatsoever of the UK agreeing to anybody appointing the</p> <p style="text-align: center;">Page 45</p>	<p>1 In fact, we gave you the exact text, with one very 2 important subsection deleted, so it has never been our 3 proposal that this should be an executive authority with 4 ultimate decision-making power. What we were pressing 5 for was a BVI-like creature. I would not want anyone to 6 leave these discussions under the misapprehension that 7 we were looking for something else. 8 My proposal this morning was in two parts. One, 9 I wanted to ensure that in the appointment of the 10 Commissioner of Police, that the Governor was guided by 11 the same sort of advice from the same body as is the 12 case or as would be the case in relation to other police 13 officers, and my concern then, as is my concern now, is 14 whether or not the provision presently in section 109 15 would prevent the Governor from being advised in 16 relation to the appointment of the commissioner. 17 My second proposal -- I'm not going to try to swim 18 against the tide. If Rolston says the opposition will 19 not support any reference to a potential Police Service 20 Commission in the constitution, so be it. It's not do 21 or die. But I'm still concerned that we do not 22 unintentionally leave in a constitutional bar which 23 would prevent that, what I believe everybody around the 24 table and everybody in the Cayman Islands would like to 25 leave open, because quite frankly, I don't see the</p> <p style="text-align: center;">Page 47</p>
<p>1 Commissioner of Police other than the Governor. These 2 are bottom lines. You must take my word for it. If 3 you're going to press for any alternative arrangement, 4 this is a big, big issue and we'll have to -- it could 5 derail us, I would think. My advice, my strong advice 6 to you, which I give you honestly: leave it be. Leave 7 this text it is. It will allow, as Rolston says -- 8 I entirely agree with him, and I think, Alden, you 9 accept that as a legal matter it will be possible for 10 ordinary legislation, police law, to prescribe an role 11 for an independent body, if that's the route you choose 12 to go down, but not a decisive role. That is a thing 13 that can be worked out in calmer times and in 14 consultation with the police unions and senior police 15 officers and all other stakeholders. Take my word for 16 it, if you press for changing 109.4 as it relates to the 17 police commissioner, commissioner of police, or if you 18 press for a new provision which would allow a Police 19 Service Commission to be executive, to be the decision 20 maker, we're in a whole new stratospheric situation and 21 you know, I think we're so close to arriving at a good 22 package, and this one would certainly knock us off 23 kilter. And you won't win, I'm afraid, on this one. 24 ALDEN M MCLAUGHLIN: Mr Chairman, I think you misunderstand 25 me. The proposal which we made was the BVI proposal.</p> <p style="text-align: center;">Page 46</p>	<p>1 situation of the management of the police improving 2 until we get to a point where there is more policy 3 direction possible by a broader range of individuals who 4 bring their various experiences and abilities to the 5 decision-making process. That's all I'm trying to get 6 to. 7 IAN HENDRY: All right. Thank you for the clarification. 8 I'm grateful to you for saying that. I think, however, 9 that what is clear in section 109 is that the decision 10 makers on the public service appointments, be they Civil 11 Service or police, are either the Governor or other 12 public officers to whom the power has been delegated. 13 That's a key principle which everyone accepts. What it 14 does not say, but equally does not exclude, is that a 15 law can be enacted by the legislature to provide a role 16 for other persons or other bodies to advise the decision 17 makers on these appointments, including the offices 18 referred to in subsection 4, the sacred cows, as 19 I sometimes think of them. In all of these cases, a law 20 can make provision for the decision maker to be advised 21 and nothing in this section prevents that. What it does 22 prevent is that a law could be passed to give the 23 decision-making power to somebody else, to some other 24 body. That it does prevent and that is deliberate and 25 that's our bottom line. I tried to be as clear as</p> <p style="text-align: center;">Page 48</p>

12 (Pages 45 to 48)

1 I possibly can.  
 2 With that, and I hear everything you say and what  
 3 the opposition have said as well, and I think the best  
 4 thing to do, as I said earlier, is to leave this be.  
 5 Don't go there, is my strong advice, and then we take  
 6 some time, because we're going to need some time to look  
 7 at the Judicial and Legal Service Commission where we  
 8 have some difficult things to try to sort out. McKeeva?  
 9 MCKEEVA BUSH: Quickly, Mr Chairman, the Minister has raised  
 10 a strong position about policy direction.  
 11 He said that the police service will not get better  
 12 unless there is policy direction. I think that's what  
 13 he said. But from whom is he saying that this policy  
 14 direction must come from?  
 15 IAN HENDRY: I didn't hear him say that.  
 16 MCKEEVA BUSH: That's what he said about policy direction.  
 17 ALDEN M MCLAUGHLIN: Mr Chairman, I was referring to the  
 18 Governor being able to get advice and guidance and  
 19 direction in relation to policy regarding the  
 20 appointment, the management and so forth of the police  
 21 constabulary generally. This wouldn't come -- for the  
 22 benefit of my friend, the Leader of the Opposition --  
 23 from elected members, which is his main concern. The  
 24 commission would not be made up of anyone who held  
 25 elected office. As I said, the model which we were

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1 contemplating, which is not necessarily the one we would  
 2 wind up with, is the BVI model. There are no elected  
 3 people on that commission at all. I hope that that  
 4 allays his fears.  
 5 MCKEEVA BUSH: But, Mr Chairman, these matters --  
 6 ALDEN M MCLAUGHLIN: It's not happening anyhow so ...  
 7 MCKEEVA BUSH: No, I think I need to reply to what he said,  
 8 because these matters were debated in the Cayman Islands  
 9 very strongly, and my contention is that the cabinet is  
 10 able to give the Governor that kind of advice, as it  
 11 stands. As usual, as you're going to have it in anyway,  
 12 the Governor is not bound to take their advice where he  
 13 sees that it will infringe on some area here. But that  
 14 should be happening now, and the truth is the government  
 15 has not been able to convince me that they have been  
 16 doing this and it has been rejected. They have not been  
 17 able to, and that is the problem the government has with  
 18 this area. They can do it. Furthermore, hopefully on  
 19 the National Security Council there will be some  
 20 opportunity to do even more of it, but right now the  
 21 position is that the leader of government is able to  
 22 meet with the Governor now on matters. If it's not  
 23 being done, then they can say that and why, but as it  
 24 stands it was a rule from the days of executive councils  
 25 in 1992, and may well before that and up until I entered

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1 in 1992 and since then, even when we had a cabinet, the  
 2 Governor talked to us about his appointment on the  
 3 Commissioner of Police.  
 4 IAN HENDRY: Thank you. I think we must move on and try and  
 5 look at the -- if there's a text now --  
 6 ALDEN M MCLAUGHLIN: I take your advice on that, sir.  
 7 IAN HENDRY: Thank you. If it's not quite ready --  
 8 ALDEN M MCLAUGHLIN: We're just about there, sir.  
 9 IAN HENDRY: There's one other point that's rattling away in  
 10 the back of my head. It's the right to silence, a very  
 11 great right. As I said yesterday, we are neutral about  
 12 referring to this in the constitution. I wonder whether  
 13 you've reached any further conclusions about it, because  
 14 this is a very straightforward in-or-out provision, the  
 15 words "the right to silence". Do you remember the right  
 16 to silence?  
 17 ALDEN M MCLAUGHLIN: Yes, sir. We put forward the position  
 18 which we were happy with and the AG agreed with.  
 19 I think Sara had a reservation. She wanted to consider  
 20 it further.  
 21 IAN HENDRY: Thank you for reminding me. Sorry.  
 22 SARA COLLINS: Can I just clarify, were the proposed  
 23 amendments put on the table yesterday? Because if that  
 24 is the case, then in relation to such a fundamental and  
 25 wide-ranging debate, I'm not sure that we have time to

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1 do it justice. What I can say is that I consulted with  
 2 the Human Rights Committee overnight. It will come as  
 3 no surprise to many around the table that the Human  
 4 Rights Committee has pretty strong concerns about  
 5 including a right to silence and then removing any  
 6 obligation to inform a suspect about that right. We  
 7 have also been made aware of a paper which was prepared  
 8 on this subject by the Criminal Defence Bar Association,  
 9 which made some very strong points. I am not an expert  
 10 and what I would like to do is produce that paper for  
 11 consideration, but the committee's position at the  
 12 moment is that the original draft should remain. If  
 13 there is to be a right to silence, there should be a  
 14 corresponding obligation to inform them of that right.  
 15 I am hoping that with their consent the Criminal Defence  
 16 Bar Association's paper will be available for  
 17 legislation hopefully before the conclusion of today's  
 18 proceedings.  
 19 JEFFREY JOWELL: I think the main objection of the attorney  
 20 to the conclusion of the present formulation, the one  
 21 which requires information was that if the information  
 22 wasn't provided the evidence could then be excluded, but  
 23 on the basis of, I think, his acceptance of the fact  
 24 that under the present law and foreseeable future law on  
 25 this issue the matter would not, in any event, be

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<p>1 excluded, it would be a matter of discretion for the 2 court. Would he still hold the same view? 3 SAMUEL BULGIN: My passion about this is nothing less than 4 that of the Criminal Defence Bar. 5 The Criminal Defence Bar has a particular 6 constituent. The Attorney General's portfolio and 7 constituents is the entire country, the entire criminal 8 justice system. That's my position about that. It has 9 nothing to do with my personal view. My concern is that 10 you don't have a system where the criminal justice 11 system is brought to a halt because of that and then 12 people start saying to government, "What are you doing 13 about it?" and the government's response is, "We have to 14 go back to UK and get that provision amended." I just 15 need to put that and be clear. It is not in the UK 16 constitution for good reasons, as a matter of fact. 17 I mention that in the UK it goes further. Under PACE, 18 in the UK, where a person has been cautioned and makes 19 no comment, a judge in the UK has a right to direct a 20 jury to say that you can draw an adverse inference 21 against that person as a result of his silence. That is 22 a fundamental issue. We're not even asking for that. 23 We don't have that in our legislation. What we are 24 doing is moving towards the United States (inaudible), 25 where if the person has not been told of their Miranda</p> <p style="text-align: center;">Page 53</p>	<p>1 restricted view of an omission to inform the person of 2 their rights. If you read all the judgments, they are 3 not saying that that could never have been the thinking 4 of the framers of the constitution that a person was 5 going to walk in circumstances where there is the most 6 glaring evidence but the police have, for whatever 7 reason, either forgot or omitted to mention to the 8 person simply this incantation: "You have the right to 9 remain silent." 10 ALDEN M MCLAUGHLIN: Mr Chairman, if I can just give you the 11 considered view of the government. After quite a bit of 12 consideration, our concern was that the right to silence 13 ought to be constitutionally guaranteed. The provision 14 has or the amendment as proposed will give that 15 constitutional guarantee. In relation to the 16 constitutional right to be informed that you have the 17 right to silence, we have to, I believe, accept the 18 Attorney General's advice on this matter because he is 19 at the forefront of this -- the cold face of dealing 20 with this all of the time. While we are not 21 unsympathetic to the view of the HRC, we believe that 22 the most important bit is the constitutional right to 23 silence. If trying to elevate that or to extend that to 24 the right to inform is going to create all sorts of 25 evidential issues, I cannot say that I know for certain</p> <p style="text-align: center;">Page 55</p>
<p>1 rights, everything that happens thereafter is 2 inadmissible and the person walks on a technicality, 3 even where there is clear evidence of guilt but simply 4 because there's an omission, either by inadvertence or 5 otherwise, to say to him, "You have a right to remain 6 silent." Everybody knows that they have a right to 7 remain silent. 8 My fundamental concern is assisting. I don't have 9 any personal views on it and it is really a matter of 10 policy for government, but I would like certainly my 11 position to be noted in the record for what it's worth. 12 SARA COLLINS: I think everyone who watches television knows 13 that they have a right to remain silent, but we also 14 know that when under situations of extreme stress and 15 pressure, including police interrogation, much of what 16 we know, including our own names, flies out of our 17 heads, and so there are very valuable reasons why the 18 Criminal Defence Bar Association has addressed these 19 issues in the paper. What I would ask is that in order 20 for there to be full consideration of the pros and cons 21 that we receive that paper and consider it before taking 22 the proposals further. 23 SAMUEL BULGIN: It has become so fundamental that even the 24 United States is clawing back from that position as we 25 speak. They have recognised the danger of having such a</p> <p style="text-align: center;">Page 54</p>	<p>1 that that's the case. This is not my area of expertise 2 either, and I think we have to accept the Attorney 3 General's concerns and advice on this matter and err on 4 the side of caution. We don't think it fundamentally 5 undermines the civil rights of anyone in the 6 jurisdiction, and as long as we preserve the 7 constitutional right -- not preserve, because this for 8 the first time in the Cayman Islands there will be a 9 constitutional right to silence, and so we think on 10 balance that that is the way to go. 11 IAN HENDRY: Thank you. The only comment I was going to 12 make, and this is a general comment about the bill of 13 rights, assuming it is accepted and there is a new 14 constitution containing the bill of rights with a 15 delaying clause that it doesn't take effect for -- I 16 can't remember now whether it was two or three years. 17 Three years. 18 SARA COLLINS: Have we finished on the right to silence? 19 IAN HENDRY: No, I'm just making a general point that one of 20 the purposes of that hiatus period is for people at the 21 sharp end, police, immigration officers, people dealing 22 in an official capacity with members of the public, can 23 be trained properly, judges, civil servants, prison 24 officers, in the way that they need to behave in 25 relation to ensuring that the bill of rights is complied</p> <p style="text-align: center;">Page 56</p>

1 with. We went through all this in our country before  
 2 the Human Rights Act came into force. Even the judges  
 3 had to be specially trained for this, let alone the  
 4 sharp-end officials. It just went through my mind when  
 5 Sam was expressing his concerns -- Sam was expressing  
 6 his concerns that one of the things which I hope, I'm  
 7 sure will be done, is that officers of the police  
 8 service will get appropriate training about the  
 9 importance of complying with all of these provisions,  
 10 quite apart from -- if there is a constitutional right  
 11 to silence written in even in the way you would prefer  
 12 it to be written, then it seems to me that it follows  
 13 that the police and the judges and everybody should have  
 14 that drawn to their attention, that there is a  
 15 constitutional right to silence.

16 Now, whether the law goes on -- the law, not the  
 17 constitution -- to require in the caution given to a  
 18 person arrested that they must be informed of their  
 19 rights, that's another matter, but it seems to me --  
 20 this is just my own personal view -- that a right to  
 21 silence is not a full right unless people's attention is  
 22 drawn to it, although as Jeffrey said quite rightly  
 23 yesterday, for most of the rights in this bill of rights  
 24 there is no obligation for people to be informed about  
 25 them. But I'm sure one of the functions the Human

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1 Rights Commission will carry out is to educate the  
 2 people about these rights.

3 Anyway, I think we must leave it there. If the  
 4 paper that Sara refers to comes in, we can have a look  
 5 at it, but within the constraints of time, but I think  
 6 we must use the few minutes we have available to look at  
 7 the draft text on the Judicial and Legal Service  
 8 Commission, which is very important to get right.  
 9 Pastor Shian?

10 SHIAN O'CONNOR: I was just saying, as my position was  
 11 yesterday, this is very important for us as well and we  
 12 do support the position of the HRC on this one, that  
 13 it's a fundamental right and needs to be enshrined in  
 14 the constitution. I was wondering the same thing,  
 15 whether or not we could strike a compromise and have the  
 16 other section to be informed within the local  
 17 legislation.

18 There is yet one more point that I am not too sure I  
 19 am clear on, coming back to the AG's point. The fact  
 20 that if the constitution were to uphold the right to be  
 21 informed, the right to remain silent and the right to be  
 22 informed, does that in itself mean that evidence that  
 23 was solicited in contravention to that right would be  
 24 disqualified? Is that the reading? Because I'm sure  
 25 the Miranda right in the States does explain that that

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1 (inaudible) will not be (inaudible) but in this case is  
 2 that implied that it could not be accepted?

3 SAMUEL BULGIN: That prima facie is not admissible. You  
 4 see, the question is, Mr Chair, just from a purely  
 5 practitioner's standpoint, each time a person is  
 6 arrested and he says something, and I mentioned  
 7 yesterday that what he said led to the recovery of  
 8 something, all that person needs to go to court and say,  
 9 irrespective of what the police said to him, "I wasn't  
 10 told I had the right to remain silent." Now, it is  
 11 going to be his word against the police's word, and that  
 12 is going to occasion what we call a voir dire, a trial  
 13 within a trial, for the judge to determine whether in  
 14 fact he was told, irrespective of whether he was told or  
 15 not. That occasions the trial and that is a preliminary  
 16 point that can go all the way to the Privy Council and  
 17 come back before the substantive trial starts because  
 18 the person is insisting that, "You did not mention to me  
 19 I had the right to remain silent", and the police are  
 20 going to say, "We told you that." That in itself  
 21 becomes an issue and if at the end of the day the judge  
 22 says, "I find in the balance of probability, I have some  
 23 doubt as to whether he was told or not", then everything  
 24 that happens after that juncture is inadmissible,  
 25 irrespective of whether everything is clearly shown that

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1 he committed this murder or he robbed this man. Every  
 2 damn thing -- sorry, everything after that goes,  
 3 jettisoned. And that's what will happen.

4 I just draw your attention to the fact here that  
 5 this draft constitution says that he has a right to an  
 6 attorney but it does not go on to say that you have a  
 7 right to be informed that you have a right to an  
 8 attorney. This language here doesn't say that. I say  
 9 the right to an attorney is far more fundamental but  
 10 this draft doesn't put an obligation on the police to  
 11 tell that you, but to put an obligation on the police to  
 12 tell you that have you the right to remain silent -- I  
 13 think we have lost the plot somewhere.

14 SARA COLLINS: This is an important issue which has led to  
 15 considerable and lengthy debate in this country and  
 16 others. It's not something that's resolved within ten  
 17 minutes and I would urge upon us not to have a one-sided  
 18 debate on it. I think it warrants more particular  
 19 attention.

20 The other point is that as far as I'm aware there's  
 21 no code -- I'm not a criminal lawyer, but there is no  
 22 code for how the police deal with their investigations  
 23 and suspects and I suspect that if there were a code and  
 24 if they had a paper from which they should read on all  
 25 of these occasions, that this practice of inadvertently

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1 forgetting to tell people they're entitled to a lawyer  
 2 and not to say anything until their lawyer is there  
 3 would be a non-issue. Nobody is suggesting that we  
 4 should lose evidence which is valuable because of some  
 5 simple mistake, but why don't we correct the possibility  
 6 for making the simple mistake, rather than taking away  
 7 rights which are pretty important and valuable in  
 8 relation to preventing injustices which will happen when  
 9 people are subject to police pressure and are not told  
 10 about their rights in advance?

11 SAMUEL BULGIN: No, I think you're missing the point. We're  
 12 not taking away any rights. They have not been taken  
 13 away.

14 SARA COLLINS: Sorry, amending these rights.

15 SAMUEL BULGIN: In the constitution there is the practice  
 16 where the police caution you when you're arrested and he  
 17 says to you, "You are a charged for so-and-so, you have  
 18 the right to remain silent, whatever you say may be  
 19 taken down in writing and given in evidence against  
 20 you." That will remain. That is not being taken away.  
 21 What we are simply saying is that if you put this in the  
 22 constitution as opposed to in an ordinary piece of  
 23 legislation, then prima facie the judge is bound by the  
 24 language of the constitution and if he finds or he has  
 25 some doubt as to whether he was told or not, he has no

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1 discretion. He has to chuck the evidence, plain and  
 2 simple. In the United Kingdom, they have the wisdom,  
 3 they saw the wisdom in that and they didn't put it in  
 4 the Human Rights Act; they put it in PACE, which is the  
 5 Police and Evidence Law, which gives the judge the  
 6 discretion --

7 SARA COLLINS: Are we going to get PACE?

8 SAMUEL BULGIN: We'll get there.

9 IAN HENDRY: All right, we have to move on. Thank you very  
 10 much.

11 There are a few pieces of paper -- this is very  
 12 exciting. We could be near the end of the trail of the  
 13 Judicial and Legal Service Commission.

14 Shall we look at the draft section 105 first? We  
 15 have about 22 minutes before we have to break.

16 ALDEN M MCLAUGHLIN: Yes, sir. Just a construct process of  
 17 amendment. There is an omission -- before you comment  
 18 on it, sir, just make sure you have our present draft.  
 19 Section 105, subsection 1.A, it should say, "The Chief  
 20 Justice, who shall be chairman -- ex officio who shall  
 21 be chairman", and we're not entirely happy with  
 22 subsection 7, simply because I don't think we -- I think  
 23 it's called a commissions of inquiry law anyhow. We  
 24 don't have that with us and I don't know quite how it  
 25 works.

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1 IAN HENDRY: Just for the interests of brevity, I wondered  
 2 about that as well. I wondered whether these words were  
 3 necessary, bearing in mind that that the other  
 4 provisions relating to removal of judges of the  
 5 Grand Court and the Court of Appeal simply provide that  
 6 the Governor must refer to the commission, not to a  
 7 tribunal but refer to the commission the question of  
 8 possible removal of the senior judges. I've never  
 9 really understood why it's necessary to go on to say the  
 10 commission may turn itself into a tribunal. Why do you  
 11 have to say that? Why can't it just be the commission?

12 Also, those provisions refer to the commissions of  
 13 inquiry law as applying to the commission when it is  
 14 doing those things. Do you know what I mean?

15 ALDEN M MCLAUGHLIN: Yes, I follow that.

16 STUART JACK: If you look at section 6.4 of the existing  
 17 draft, that is not at all provided for already.

18 IAN HENDRY: Yes. That's my point. Then if you look at  
 19 96.5 -- 96.4 requires the Governor to refer the matter  
 20 to the commission. This is the question of removing any  
 21 Grand Court judge, 96.4. Then 96.5 says:  
 22 "The commissions of inquiry law, as enforced  
 23 ... (reading to the words)... shall apply to the  
 24 commission when it's doing this thing."  
 25 So all this is taken care of.

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1 ALDEN M MCLAUGHLIN: Good. We can delete that then. We  
 2 were never quite happy with it.

3 IAN HENDRY: We will delete that. Shall I just give you the  
 4 points that occurred to us or did you have anything  
 5 else?

6 ALDEN M MCLAUGHLIN: That's it.

7 IAN HENDRY: The ones that occurred to us, which my friend  
 8 Michael will feel very strongly about but I agree with  
 9 him, is that the reference to "in a Commonwealth  
 10 country" we should insert "or Ireland". When we have it  
 11 in a definition of high judicial office it's  
 12 "Commonwealth country or Ireland" because Ireland is not  
 13 a member of the Commonwealth.

14 ALDEN M MCLAUGHLIN: Island?

15 IAN HENDRY: Ireland.

16 ALDEN M MCLAUGHLIN: I thought you said "island", sir. A  
 17 Commonwealth island.

18 IAN HENDRY: If you don't object, we will write in "or  
 19 Ireland".

20 ALDEN M MCLAUGHLIN: That submission is made without any  
 21 bias.

22 (Overspeaking)

23 IAN HENDRY: Think how many great judges and former judges  
 24 you would lose if Ireland was not referred to.

25 ALDEN M MCLAUGHLIN: Pushes at an open door, sir.

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16 (Pages 61 to 64)

1 IAN HENDRY: Then, in little D, we assume that what you mean  
2 is two lawyers practising in the Cayman Islands? Or do  
3 you not mean that?  
4 ALDEN M MCLAUGHLIN: Yes, we did mean Cayman Islands, sir.  
5 IAN HENDRY: Shall we say "two lawyers practising in the  
6 Cayman Islands, one in government service and one in  
7 private practice ..."  
8 Then, is the reference -- I thought it was, but is  
9 the reference to "consultation with representatives of  
10 legal provisional organisations in the Cayman Islands",  
11 is that good enough to capture a sensible advice to the  
12 Governor about government legal service lawyers? I'm  
13 looking at Sam.  
14 ALDEN M MCLAUGHLIN: We have wondered about that as well,  
15 but weren't quite sure how --  
16 SAMUEL BULGIN: We're not members of any of the professional  
17 bodies.  
18 ALDEN M MCLAUGHLIN: I know they're not members, but the  
19 question is whether the people advising know enough  
20 about the abilities and so forth and so on.  
21 IAN HENDRY: Of course, there's nothing to prevent the  
22 Governor seeking the view of the Attorney General of the  
23 day on the people on his staff, but if there's any  
24 doubt, one could write in "appointed by Governor acting  
25 after consultation with representatives of legal

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1 professional organisations in the Cayman Islands and the  
2 Attorney General."  
3 ALDEN M MCLAUGHLIN: The only reservation we had about  
4 putting that in is that it might be desirable to have  
5 the Attorney General himself appointed there and then  
6 he'd be advising on his own appointment, so we weren't  
7 quite sure how to express that. We don't have an  
8 objection in principle to that.  
9 MICHAEL BRADLEY: It's just the AG should have some say,  
10 whether formal or informal.  
11 ALDEN M MCLAUGHLIN: Jeffrey's just suggested that we could  
12 write something like "and, where appropriate, the  
13 Attorney General".  
14 IAN HENDRY: All right. "And, where appropriate, the  
15 Attorney General." That's good.  
16 ELLIO SOLOMON: I'm just curious in terms of the "two  
17 practising lawyers", I was wondering if the reason has  
18 been given for the way it is being defined as just "two  
19 practising lawyers". Whether you put yourself in the  
20 position where someone may have a tremendous degree of  
21 experience in the private practice and has just resigned  
22 (inaudible). I think there's even been arguments made  
23 before in terms of the situation as to how it exists now  
24 with respect to licensing of lawyers, for example, by  
25 way of legal advisor commissions and so on.

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1 KURT TIBBETTS: That's in (e). We get the choice there.  
2 ALDEN M MCLAUGHLIN: I think, sir --  
3 MCKEEVA BUSH: His point was wider than that. It's from the  
4 Governor's appointment.  
5 ALDEN M MCLAUGHLIN: There is value in what Ellio's just  
6 said. The difficulty we are having is that -- and this  
7 is as a result of talking to the Chief Justice and some  
8 other people, part of the value that practising lawyer  
9 brings to this tribunal is their knowledge of how things  
10 actually work now. That would be fine if, as in Ellio's  
11 example, the lawyer has just retired, but if the lawyer  
12 has retired 15 or 20 years ago, he or she no longer --  
13 I can tell you, after eight years out of the profession,  
14 as I've now been, I really don't know what obtains(?)  
15 over there. So it doesn't take that long before you  
16 lose currency and we weren't quite sure how to express  
17 that. The desire is to ensure that the tribunal is  
18 informed by the views and perceptions of people who are  
19 actually intimately involved in the practice of law in  
20 the jurisdiction at the relevant time.  
21 I hear his point, but we weren't quite sure how to  
22 deal with all those eventualities.  
23 ELLIO SOLOMON: Mr Chairman, for what it's worth, it's not  
24 my area of expertise, but I will voice this nevertheless  
25 and I don't have any information to substantiate it, but

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1 (inaudible) perhaps the constitution -- the flexibility  
2 be there to allow someone who has the expertise but is  
3 not practising, and I would stress that I'm also very  
4 (inaudible) in that part of the function of the Judicial  
5 and Legal Service Commission in terms of reviewing cases  
6 and things that have come before the courts and so on,  
7 one of the conflicts I've heard -- may I stress I have  
8 heard this -- is that even lawyers who are practising at  
9 the end of the day by way of having to submit themselves  
10 through the Legal Advisory Commission and so on and  
11 through the Attorney General and the Chief Justice  
12 themselves is somewhat dependent on them in terms of  
13 being allowed to continue to practice. I think it's for  
14 nothing else other than perception, and there are  
15 persons who are more experienced than I, but the very  
16 fact that someone who is practising and somewhat  
17 dependent in one way or another on the Chief Justice and  
18 so on to guarantee or to determine whether they would be  
19 allowed to practice or not, may have an influence as  
20 well. I don't know. These are just things I've heard,  
21 I have no confirmation.  
22 SARA COLLINS: I think there is merit in what Ellio is  
23 saying and I wonder if the legal representation  
24 shouldn't be reserved to the heads of the professional  
25 organisations from time to time, so the President of the

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17 (Pages 65 to 68)



1 Law Society and the President of the Camanian Bar  
 2 Association, in order to meet that point?  
 3 KURT TIBBETTS: One has to be in the government service.  
 4 ALDEN M MCLAUGHLIN: That was the first draft.  
 5 SARA COLLINS: Oh, one has to be in the government service?  
 6 But the one in private practice --  
 7 SAMUEL BULGIN: In law, people don't use the word  
 8 "practising attorney", we just use the word "attorney".  
 9 KURT TIBBETTS: So even if you retire, you're an attorney?  
 10 SAMUEL BULGIN: And that usually is construed to mean -- I'm  
 11 sorry, I'm just saying in law people don't use the word  
 12 "practising attorney", we use the word "attorney". That  
 13 is all encompassing. And in respect of the one in  
 14 government service and one in private practice appointed  
 15 by the Governor, I think all you need to do is tweak  
 16 that language to say, in respect of the latter, "after  
 17 consultation with representatives of the legal  
 18 professional organisation".  
 19 IAN HENDRY: Would it help to say "two lawyers qualified to  
 20 practice in the Cayman Islands"?  
 21 MICHAEL BRADLEY: I have a technical objection there. My  
 22 memory of the legal practitioners law is that if you  
 23 cease to hold a practising certificate for two years  
 24 that you're struck off the Roll of Attorneys.  
 25 ALDEN M MCLAUGHLIN: Yes, but the holding of a practising

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1 certificate is not contingent upon your actually  
 2 practising, because when you take risky jobs such as  
 3 I have, you ensure that you keep your practising  
 4 certificate so that when you get turfed out, you can  
 5 still go and practice law.  
 6 MICHAEL BRADLEY: What I'm saying is, if you hadn't, you  
 7 would no longer be an attorney.  
 8 ALDEN M MCLAUGHLIN: I'm still an attorney.  
 9 MICHAEL BRADLEY: But if you hadn't --  
 10 ALDEN M MCLAUGHLIN: Correct.  
 11 SAMUEL BULGIN: Once an attorney, always an attorney. The  
 12 only distinction is whether they are practising or not.  
 13 So even if you don't pay your practising fees, you still  
 14 remain an attorney except that you are not an attorney  
 15 on the roll, you can't practice but you still remain an  
 16 attorney.  
 17 KURT TIBBETTS: But their suggestion would cover what you  
 18 say and what everybody has to say: "two lawyers  
 19 qualified to practice". Even if they are retired, they  
 20 are still qualified to practice, which would cover what  
 21 you're saying.  
 22 IAN HENDRY: Okay, we'll go with that.  
 23 Then very briefly because --  
 24 STUART JACK: Sorry, Mr Chairman, just one other thing that  
 25 I thought of. C does not actually say who appoints those

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1 two other people who have had experience of high  
 2 judicial office.  
 3 IAN HENDRY: Very good point. I think they would be  
 4 appointed by the Governor. The Governor in his  
 5 discretion would have to choose these. Thank you,  
 6 Governor. "Two persons appointed by the Governor."  
 7 ALDEN M MCLAUGHLIN: In relation to E, I think this is one  
 8 of Ellic's points, perhaps we should take out the  
 9 "practising", "neither of whom shall be a practising  
 10 lawyer", and take out the word "practising", to ensure  
 11 that it's lay people that are there. Can I suggest that  
 12 we use the language of our jurisdiction, which is  
 13 "attorneys-as-law" as opposed to "lawyers".  
 14 IAN HENDRY: Instead of "lawyers"?  
 15 ALDEN M MCLAUGHLIN: Yes.  
 16 IAN HENDRY: Does that cover everything? All right. There  
 17 are other sections which refer to lawyers, but you're  
 18 saying we should be consistent throughout and say  
 19 "attorneys-at-law". Do that have hyphens?  
 20 ALDEN M MCLAUGHLIN: Yes.  
 21 IAN HENDRY: It's very important to know. I don't want to  
 22 be sitting at my computer worrying about whether it has  
 23 hyphens.  
 24 ROLSTON ANGLIN: Mr Chairman, can I just ask it's just a  
 25 minor point, but I'm not sure if it would have relevance

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1 down the road. On several of these they end by saying  
 2 "a teleconference". Do we need to insert something  
 3 saying "or such technology"? I mean, just because  
 4 technology changes and moves on to video conference -- I  
 5 don't know what tomorrow's technology is going to be.  
 6 IAN HENDRY: "Or other electronic means of communication?"  
 7 STUART JACK: Sorry, but (inaudible) so maybe reference to  
 8 teleconference should be in -- whatever it was, 19.  
 9 IAN HENDRY: No, the only words we've taken out of 7 are the  
 10 words in bold type.  
 11 Very briefly because we have to go downstairs,  
 12 106 --  
 13 STUART JACK: Mr Chairman, I have a point about 106. Does  
 14 there need to be another subsection before the sentence  
 15 that basically recuses the Chief Justice when this body  
 16 is appointing the President of the Court of Appeal so  
 17 certainly no contentions that the President of the Court  
 18 of Appeal is not appointed by the Chief Justice.  
 19 If this body is going to appoint the Chief Justice  
 20 and the President of the Court of Appeal as well as the  
 21 members of those courts, shouldn't there be something  
 22 which excludes them from that particular appointment,  
 23 handling that particular function just as they're  
 24 excluded in 6 from dealing with serious allegations?  
 25 ALDEN M MCLAUGHLIN: Mr Chairman, we've thought about this.

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1 The Chief Justice wouldn't be appointing the President  
2 of the Court of Appeal or vice versa, it would be the  
3 commission who makes the appointments. We believe that  
4 in the appointment of the President of the Court of  
5 Appeal, the views of the Chief Justice would be very  
6 important, and vice versa, and hence the reason we've  
7 left it in. It's not a singular appointment, it's not  
8 something that the Chief Justice can do by himself.  
9 There will be seven other members of the commission who  
10 have a view as well. So that's what we think about it.

11 **STUART JACK:** I can only relay the opinion of the  
12 now-retired but long-serving President of the Court of  
13 Appeal, and his view was that the Chief Justice should  
14 have no say on the appointment of any member of the  
15 Court of Appeal because of the potential conflict  
16 involved in the appeal court considering the judgments  
17 of the members of their own courts. But I'm not a  
18 lawyer, I don't know (inaudible), I just relay that  
19 view.

20 **IAN HENDRY:** It sounds to me as if this is one of those  
21 judicial humorous moments. But I can see the point in  
22 principle, but I think the answer that the CJ would be  
23 one of eight is quite comforting, actually. He can't  
24 have a determining voice.

25 Very briefly, because we have to go downstairs -- of

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1 course we can come back and continue this discussion  
2 later --

3 **SAMUEL BULGIN:** Just one more amendment to 106. I think  
4 that the language reads "his or her misbehaviour  
5 inability(?)". I think the constitution speaks to a  
6 misbehaviour ability".

7 **IAN HENDRY:** I was going to say I think that the idea of the  
8 new subsection 6 reflects what we discussed yesterday.  
9 I think the drafting just needs a bit of tweaking. It  
10 would probably be sensible to cross-refer to the two  
11 sections, 96.4 and the equivalent, then it's clear what  
12 we're talking about.

13 **MCKEEVA BUSH:** I don't want to prolong this, but the need to  
14 set up a Judicial and Legal Services Commission has  
15 arisen in the country now. We feel that's the best way  
16 to go. The Chief Justice and the president of the Court  
17 of Appeal, the two highest courts, if we are setting  
18 this up to govern all judicial matters, he's the head of  
19 judicial matters. Why are we including them in this  
20 body? We think that they should be above it and out of  
21 the fray, because that's all it is. Debate. Why,  
22 I mean, is it that you have to put them in there?  
23 I thought that you would want the Chief Justice to be  
24 seen to be above all of these things, and even though  
25 they will have to remove themselves in certain

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1 instances, yes, they are members, and the last thing you  
2 want in such a small community is people, you know,  
3 being able to point their fingers and -- I think that's  
4 why we set this up in the first place, so we wouldn't  
5 have that.

6 I just can't see the reasoning behind it because  
7 I thought we were setting it up -- and that's how it was  
8 in the first instance. I was satisfied it was a great  
9 thing to do in the country, but you don't want the Chief  
10 Justice and now all these little things. God, you have  
11 enough to do in managing the courts, all of them.

12 **STUART JACK:** I know we're in a rush but just two points to  
13 get this right. On the appointment of the Chief Justice  
14 and the President of the Court of Appeal in particular,  
15 theoretically, under the provisions drafted in 105, you  
16 could have a situation where one of those most senior  
17 legal judicial officers was appointed by a quorum that  
18 would contain only one person with judicial experience,  
19 which would be the Chief Justice in the case of the  
20 president of the Court of Appeal or vice versa.

21 Shouldn't it be that when we're choosing the most senior  
22 judges, there should be at least two judges involved in  
23 that decision?

24 **ALDEN M MCLAUGHLIN:** I think that's sensible. We hadn't  
25 considered that.

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1 **STUART JACK:** One other point. (inaudible) constitutes  
2 itself a tribunal, the word "tribunal" is (inaudible) in  
3 the text.

4 **ALDEN M MCLAUGHLIN:** It needs to come out.

5 **STUART JACK:** That's come out already?

6 **IAN HENDRY:** What I was going to suggest, we may have time  
7 this afternoon to come back and tidy this up, but even  
8 if we don't, I can talk to Jeffrey about tidying up the  
9 drafting, but I think the principles are clear.

10 McKeeva's question is a fundamental question. There  
11 comes a time when one has to choose if you're going to  
12 have such a body. In some places the Chief Justice is  
13 on the body and in other places the Chief Justice is  
14 not. There are arguments both ways. Actually, I think  
15 my own personal view is that rather than having a Chief  
16 Justice who, as you put it, McKeeva, is sort of above  
17 all this, it's actually better for the Chief Justice to  
18 be getting down and getting his hands dirty with it in  
19 all these things and not being -- you know, a commission  
20 of this size, of eight persons, the Chief Justice will  
21 be just one of them, in a way it is a control on any one  
22 individual's power and influence and therefore it's a  
23 good thing. I think it's an advantage that the CJ would  
24 be involved.

25 Anyway, we must break now because we have to have

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19 (Pages 73 to 76)

1 lunch and come back at 1.30, except that, as I said  
 2 earlier, to allow our team to meet with the Minister for  
 3 15 or 20 minutes.  
 4 MCKEEVA BUSH: When you come back to discuss this, I think  
 5 we need to look more seriously at the inclusion and at  
 6 him being the chairman of this also. I mean, I just  
 7 can't see why -- we have no case, certainly that has  
 8 been made to me, as to why he needs to be. I think that  
 9 no matter who we are in the Islands or anywhere else,  
 10 needs to be subjected to these sort of things. I know  
 11 you're making provision for where there is some  
 12 challenge to their functions and misbehaviour that they  
 13 are not there, but I just find it -- if you are looking  
 14 forward to all these as a modernisation, because he is  
 15 there, he shouldn't be chairman of this and perhaps I  
 16 don't know why he is on it. Okay.  
 17 (12.40 pm)  
 18 (The luncheon adjournment)  
 19 (1.30 pm)  
 20 (Proceedings delayed)  
 21 (2.06 pm)  
 22 GILLIAN MERRON: If we could start on our final session of  
 23 talks, and if I could set out a few things particularly  
 24 in relation to the areas that we've all discussed and  
 25 then throw it open for any comments, but my first point

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1 which I see as not an end -- it might be the end of this  
 2 process, but it's very much a beginning, and I will very  
 3 much look forward to the referendum and I hope the work  
 4 that can go on after that.  
 5 First of all, in light of the overall package that  
 6 we have agreed, I can find acceptance for the proposed  
 7 bill of rights. It is an important first step, and  
 8 I emphasise first step, in the enhancement of human  
 9 rights protection in the Cayman Islands. It's not a  
 10 matter of any one view winning or losing, and that  
 11 I would ask you to support me in. I think it's a matter  
 12 of taking people with us and protecting and promoting  
 13 rights, and I hope and expect that it will actively  
 14 raise awareness and strengthen respect for human rights  
 15 in the Islands in accordance with international treaty  
 16 obligations for which the UK is responsible, and  
 17 accordingly the UK government and, just as importantly  
 18 the Cayman Islands government, has to continue to be  
 19 vigilant to ensure compliance in respect of human  
 20 rights. In this respect, I want to encourage you to  
 21 make much more rapid progress on the local legislation  
 22 needed to deal with these obligations and particularly  
 23 those relating to children and to women. Kurt and Alden  
 24 will remember that we discussed this at the last  
 25 Overseas Territories consultative council in respect of

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1 is to thank you, as I open the final session of talks,  
 2 for what is the good spirit I found when I came in, a  
 3 good spirit which I hope I will take out with me. It's  
 4 a spirit in which everyone has participated in  
 5 negotiations which are important, challenging and I hope  
 6 will take us forward.  
 7 In order to try and find some common ground, I would  
 8 say that everybody involved has been willing to  
 9 compromise. I hope what I'm going to suggest now can  
 10 allow us to do -- as I said to Kurt what never takes  
 11 very long is just to say, "Yes". I'll give it a go.  
 12 As you know, I've listened carefully to your views  
 13 and had the chance to reflect on them and discuss them  
 14 with officials, and obviously in listening to your views  
 15 I also have to be mindful of the UK's relationship and  
 16 partnership with the Overseas Territories, which is very  
 17 important, and also the need that we have that I know  
 18 you all acknowledged to meet our international  
 19 obligations, so I'm grateful to you all for the work you  
 20 did to reduce the list of outstanding items. It was  
 21 more than 10 and it got down to three, which was the  
 22 bill of rights, the National Security Council and the  
 23 appointment of Governor. I'm going to set out my final  
 24 position of each of the three items, which will form,  
 25 I hope, part of the final package. It's a final package

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1 the deadlines for action on the convention on the  
 2 elimination of discrimination against women and on the  
 3 International Labour Organisation convention against the  
 4 worst forms of child labour. I expect the Cayman  
 5 Islands to make progress on implementing legislation  
 6 before the OTCC meeting which we have at the end of 2009  
 7 and I, of course, can confirm that we stand ready to  
 8 assist, should you require that.  
 9 If I can move on to the National Security Council,  
 10 I understand that we have all agreed on the powers and  
 11 the remit of the council, and the vital point is that  
 12 the operational independence of the Royal Cayman Islands  
 13 Police Force should not be compromised. Accordingly,  
 14 the words, and I quote "with the exception of operation  
 15 of and staffing matters" must remain. If this and the  
 16 overall composition of the council is accepted, I could  
 17 accept that the Governor, as in the BVI constitution,  
 18 would be bound by the council's advice except where he  
 19 or she considered that giving effect to that advice  
 20 would adversely affect Her Majesty's interests, whether  
 21 in respect of the UK or in respect of the Cayman  
 22 Islands. We are, at the moment, circulating a copy of  
 23 our final proposal of the wording of this section, which  
 24 is one that I'm able to accept.  
 25 Finally, if I can turn to the issue of consultation

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<p>1 on the appointment of the Governor, as I said yesterday, 2 I do fully understand and sympathise with your wish to 3 have a greater say in the selection and appointment of 4 Governors to the Cayman Islands and I also know that you 5 appreciate it isn't easy to strike the balance between 6 the Governor's responsibility to the territory and to 7 the UK ministers. I know that you appreciate that we 8 have to preserve the position that Governors are 9 selected by UK ministers for appointment by her majesty. 10 I want to endorse the policy introduced by 11 Baroness Amos in 2002, and as we discussed yesterday, 12 I wrote to Kurt in November inviting you to suggest the 13 skills and expertise that a Governor of the Cayman 14 Islands should possess. The appointment process is now 15 well under way, and so any response in the next week 16 would be extremely beneficial and helpful to us. 17 Following the discussions yesterday and careful 18 consideration, I am not prepared to write anything into 19 the constitution on this matter. No constitution of any 20 of the Overseas Territories provides for consultation on 21 the appointment of a Governor, and I do not feel it is 22 right or proper, nor am I willing to make an exception 23 here. 24 I hope that that is helpful in setting out where 25 I feel we can end up. I'd like to open the floor now to</p> <p style="text-align: center;">Page 81</p>	<p>1 one last look around the table. No? No further 2 comments? 3 I'm going to seek advice from Mr Hendry. 4 IAN HENDRY: Well, I think the best thing to do is we have a 5 little bit more business to do on some technical matters 6 we don't need to trouble you with, but perhaps I could 7 just take a minute to say or to recall where we will go 8 next, at least in the next week or so. 9 As before, I will undertake to make all the changes 10 to the draft that we have agreed and send out clean text 11 as soon as I can early next week. It will then be in 12 your hands, together with the draft letters we discussed 13 and agreed. It will then be in your hands to publish as 14 soon as you want to so that the people can read it and 15 have more than three months before the referendum 16 scheduled for 20 May. As I say, I'll do my best to get 17 it out, I hope at the latest by Tuesday or Wednesday, 18 and I hope that timetable would be satisfactory for you. 19 KURT TIBBETTS: Madam Chair, I think perhaps others may have 20 been waiting to hear if there were any other matters we 21 needed to go through. I understand what Mr Hendry has 22 said regarding any tidying up that might be needed, so 23 I think now that everybody appreciates that for all 24 purposes and intentions you think that this meeting is 25 really at an end, let me say, on behalf of the</p> <p style="text-align: center;">Page 83</p>
<p>1 you for any final views on the package I've set out and 2 I hope that we can lead that to agreement on the draft 3 constitution for the Cayman Islands. 4 Would anyone like to make any comments? 5 SARA COLLINS: Thank you very much. Just so that the 6 position is clear, and I think it has to be, the Human 7 Rights Committee's position remains as set out in the 8 paper and we will campaign against the bill of rights on 9 the basis set out in that paper. I just want to make 10 that clear so there is no misunderstanding. 11 GILLIAN MERRON: That will be a matter for you. I hope that 12 if we agree the paper today, the draft constitution, 13 I hope that everybody will consider what the best way 14 forward is in respect of Cayman Islanders. 15 SARA COLLINS: Yes, it's just that I have -- 16 GILLIAN MERRON: The point is absolutely on record, Sara. 17 SARA COLLINS: The point has been made that we've agreed 18 things before which we haven't so I want to make it 19 clear. 20 GILLIAN MERRON: Thank you. And it's on the record. 21 ALDEN M MCLAUGHLIN: Minister, I just want to say, if I can, 22 because I'm almost overcome, actually, this has been a 23 long, long struggle and I just want to say thanks, 24 I think we're finally there. 25 GILLIAN MERRON: Good. Thank you very much. I'll just take</p> <p style="text-align: center;">Page 82</p>	<p>1 government to you, and forgive me, but especially to the 2 team, not leaving you out -- 3 GILLIAN MERRON: No, you should thank the team. 4 KURT TIBBETTS: We certainly appreciate all the efforts. As 5 my colleague Minister McLaughlin has said, this has been 6 a very long journey and I do accept that we're not at 7 the end of it, but certainly all of the main issues that 8 we, in many instances struggled with, not only within 9 ourselves but also understanding full well our jobs as 10 representatives of the people and doing everything 11 possible on our part to ensure that a final document 12 reflected by and large the wishes and aspirations and 13 hopes and dreams of the vast majority of the people of 14 the Cayman Islands, I believe it is fair to say that 15 given all of the elements that we have to deal with in 16 arriving at a final document, that this, as I envisaged, 17 based on the discussions and what you have just said, 18 reflects just that, and I want to say thanks on behalf 19 of the government. 20 MCKEEVA BUSH: Minister, issues have been ventilated and 21 certainly the opposition want to thank Mr Hendry and the 22 team. It's not a modernised constitution as I would 23 have preferred. I still think that there are far too 24 many things here that will not really help the Islands 25 as much as we would like it to, as I think it can.</p> <p style="text-align: center;">Page 84</p>

21 (Pages 81 to 84)

<p>1 Nevertheless, we are the loyal opposition, and certainly 2 we have had our chance, at great cost to ourselves, to 3 ventilate the issues. We will need to see how and what 4 is put before the people as a referendum, and that will 5 be the crux of the matter because there is much that 6 needs to be explained to the public. That's more a 7 local matter than a UK matter, and we are eager to see 8 what the government will do in that regard. 9 We thank you very much for your kind courtesies, and 10 again thank Mr Hendry and the team. 11 GILLIAN MERRON: Thank you. 12 EDUARDO THOMPSON: Madam Chair, at the risk of taking a 13 little longer, I would like to take the opportunity on 14 behalf of the chamber of commerce of the Cayman Islands 15 to thank you yourself and your wonderful staff. Our 16 position has been placed in black and white on the 17 record. I sat here quietly as my associates have put 18 their position forward. We've been relatively happy 19 with what we've seen and thank you for allowing us to 20 take part and assist. Thank you. 21 GILLIAN MERRON: Quiet is sometimes underestimated. 22 Anybody else wish to make a point? 23 NICHOLAS SYKES: I'd like to give the thanks of all us 24 pastors -- I believe I can speak for all -- for enabling 25 the voice of the church to be represented at these</p> <p style="text-align: center;">Page 85</p>	<p>1 constitution, I say that objectively, and a lot of the 2 credit for that is due to you persuading us that we need 3 to have a more enlightened view of the governance of the 4 Cayman Islands and you succeeded in doing that. So 5 thank you very much and all the very best with 6 explaining it to the people. I will help if you'd like, 7 but perhaps you don't need me. 8 GILLIAN MERRON: If I'm allowed to have the last word before 9 I return to Parliament, I think 1972 does suggest that 10 2009 is the right time to start again. It's quite a 11 long time ago. I actually think we're on the edge of 12 something very exciting. As I said in my closing 13 comments just now, for me this is work in progress, this 14 is not the end, this is actually the start. It's very 15 exciting as you move toward the referendum, explaining 16 things such as this is not easy, and I think it's 17 absolutely vital that the people of the Cayman Islands 18 understand what's being put to them so they can make a 19 fully informed decision because that's the essence of 20 democracy. 21 I also said and I reiterate that the job of the 22 constitution is to take people with us, not to beat them 23 over the head in any way, and this is how it's going to 24 move us forward. You'll have a lot of work to do in 25 explanation. I hope the people of the Cayman Islands</p> <p style="text-align: center;">Page 87</p>
<p>1 talks, we believe not only the church as such but those 2 for whom the church is important in the Cayman Islands, 3 and we do appreciate the opportunity for being a part of 4 this procedure. 5 GILLIAN MERRON: You're welcome. 6 SARA COLLINS: Minister, a final word from me. I would like 7 to thank you for listening to me so graciously and 8 attentively. The outcome wasn't what we wanted, but the 9 process has been conducted with respect to our views. 10 Thank you for that. 11 GILLIAN MERRON: Ian? 12 IAN HENDRY: I would like to thank you, Minister. Very 13 briefly, could I respond to the words of thanks to 14 myself and the team? It's very gratifying to hear those 15 words. I'd like to reciprocate by thanking you all, all 16 of you who have taken part in now the three rounds of 17 negotiations, sometimes difficult, sometimes tricky, but 18 always, I'm glad to say, good humoured and constructive. 19 My own personal view, having done this business with 20 other territories, is that the draft constitution we 21 have reached on which the people will have their say, 22 quite rightly, is a fine, modernised constitution for 23 the territory, with enormous advantages and leaps 24 forward over the creaking, ancient constitution of 1972. 25 I've used this word before -- it is an enlightened</p> <p style="text-align: center;">Page 86</p>	<p>1 will welcome it and I hope it will be a successful 2 referendum and then we can move forward, because it is 3 just one step. 4 I would like to thank all of you again and I would 5 like to thank my team because I know what they do. 6 They're a bit modest, to be honest, but I said they're 7 allowed a cup of tea when they go back to the office, 8 and five minutes. 9 KURT TIBBETTS: I was asked anonymously for you to check on 10 their salary. 11 GILLIAN MERRON: Yes, well done. They're worth their weight 12 in gold, so you can't pay that. 13 KURT TIBBETTS: I tried. 14 GILLIAN MERRON: But of course you can always try. 15 Seriously, they are an exceptional group of officials 16 and I'm delighted that ... 17 (Applause) 18 I think we can all be proud of what we've achieved. 19 I believe there is a bit of tidying up to do, and if 20 you'll excuse me, I will be leaving but it's been a 21 great pleasure either to meet you for the first time or 22 to see you again. I'm very excited about what this 23 means for the Cayman Islands and I'm very glad to be a 24 part of it, so my thanks and good wishes for your return 25 home and my regards to your communities and your friends</p> <p style="text-align: center;">Page 88</p>

22 (Pages 85 to 88)

<p>1 and families. Thank you.</p> <p>2 IAN HENDRY: We'll have a break for ten minutes.</p> <p>3 (2.30 pm)</p> <p>4 (A short break)</p> <p>5 (2.45 pm)</p> <p>6 IAN HENDRY: Ladies and gentlemen, I have learnt some very</p> <p>7 important information, and if I've got it right, it is</p> <p>8 the birthday today of Orrett and Rolston. Before doing</p> <p>9 anything else, I find it difficult to think of two nicer</p> <p>10 people whose birthday it is, and I'd like to wish them</p> <p>11 happy birthday on behalf of us all.</p> <p>12 (Applause and singing)</p> <p>13 IAN HENDRY: We have to settle the Judicial and Legal</p> <p>14 Service Commission. I think we were almost there, but</p> <p>15 just before lunch McKeever asked if we could come back to</p> <p>16 this, and indeed we must do that.</p> <p>17 My recollection, although Jeffrey knows more about</p> <p>18 it than I, is that the equivalent body in the UK is not</p> <p>19 chaired by a judge, and one option might be to</p> <p>20 reorganise this so that one of the two members listed in</p> <p>21 1051E, one of the two lay members, might be appointed to</p> <p>22 chair this commission. I think it would have to be a</p> <p>23 matter for the Governor to choose which one and make the</p> <p>24 appointment. I don't expect the current Chief Justice</p> <p>25 will be happy about this, but you can blame me. I've</p> <p style="text-align: center;">Page 89</p>	<p>1 it was felt it was best to give it to a lay person.</p> <p>2 Obviously she's very able, Baroness Prashar, and has</p> <p>3 chaired other committees in the past. She's a very good</p> <p>4 chairperson, but the fact that she's a layman I think</p> <p>5 has brought qualities to justice that the people in</p> <p>6 general can understand.</p> <p>7 That was the idea in doing it, apart from also not</p> <p>8 having any particular lawyer in charge, problems of</p> <p>9 hierarchy, problems of conflict of interest and so on.</p> <p>10 They're just one member of the committee.</p> <p>11 IAN HENDRY: I think another reason -- sorry to interject,</p> <p>12 and perhaps the CJ would appreciate this, is that</p> <p>13 specific provision is made, rightly, for the Chief</p> <p>14 Justice to recuse himself in certain circumstances and</p> <p>15 therefore it's better, I think, to have as chair</p> <p>16 somebody who is unlikely to have to recuse themselves or</p> <p>17 absent themselves from any of the business of the</p> <p>18 commission.</p> <p>19 ALDEN M MCLAUGHLIN: Mr Chairman, there's one point now in</p> <p>20 this new construct that we've thought about. If the</p> <p>21 chairman is one of the lay people, then perhaps we</p> <p>22 should not have those two members appointed in</p> <p>23 accordance with the advice of the Premier and the Leader</p> <p>24 of the Opposition, for obvious reasons. I know these</p> <p>25 are concerns which the Leader of the Opposition has</p> <p style="text-align: center;">Page 91</p>
<p>1 known him a long time and I like him very much, so you</p> <p>2 can blame me and I'll take it on my shoulders for making</p> <p>3 the proposal. But if it would help some of McKeever's</p> <p>4 hesitations about this, that might be a suitable way</p> <p>5 forward. It would mean a little bit of redrafting, but</p> <p>6 I don't think that's difficult at all. It's the</p> <p>7 principle of the matter. I had thought that one of the</p> <p>8 other two judicial members listed in (c) might be chair,</p> <p>9 but they're likely to be non-resident and therefore it</p> <p>10 could be practically difficult.</p> <p>11 So since we have a good precedent in the UK for a</p> <p>12 non-lawyer to chair such a body, why not let's follow</p> <p>13 that here? That would have the result that the eminent</p> <p>14 judicial members and the eminent attorney members would</p> <p>15 be members but none of them would have the influence of</p> <p>16 holding the chair.</p> <p>17 How does that sound from your point of view?</p> <p>18 JEFFREY JOWELL: Could I just say that in the United Kingdom</p> <p>19 the lay person does chair the Judicial Appointments</p> <p>20 Commission. It has a great advantage in the sense that</p> <p>21 one of their roles is to try and apply standards which</p> <p>22 the public in general can understand. There's always a</p> <p>23 danger that lawyers play lawyers's games and speak legal</p> <p>24 language and get stuck in a bit of a rut and don't</p> <p>25 consider wider social values. This was the reason why</p> <p style="text-align: center;">Page 90</p>	<p>1 advocated before. Perhaps we could reformulate that to</p> <p>2 say "two members appointed by the Governor acting after</p> <p>3 consultation with the Leader of the Opposition and the</p> <p>4 Premier", so that it's not their suggestion, but he</p> <p>5 would perhaps wish to have a word with the Premier and</p> <p>6 Leader of the Opposition to say, "I'm thinking about</p> <p>7 appointing so-and-so, what do you think?" and then we</p> <p>8 take the real political influence out of who the</p> <p>9 chairman is.</p> <p>10 IAN HENDRY: Yes. And in consequence, one would delete "who</p> <p>11 will each nominate one member".</p> <p>12 ALDEN M MCLAUGHLIN: Right.</p> <p>13 IAN HENDRY: I think that's a good move, actually.</p> <p>14 MCKEEVA BUSH: Mr Chairman, I'll go back to the beginning.</p> <p>15 We are a small community and a lot goes with that.</p> <p>16 We're trying to modernise the governance. We have</p> <p>17 reached some places with it, not all that I would like</p> <p>18 to see, but we have reached some places with it.</p> <p>19 I can't understand -- we have made several commissions,</p> <p>20 we keep saying where politicians who are elected by the</p> <p>21 people shouldn't be involved, and the Minister of</p> <p>22 Education just pointed out one that I took objection to.</p> <p>23 I see no difference with judges and other such people.</p> <p>24 They carry more influence than politicians, and they</p> <p>25 have much more to give away(?), much more at stake at</p> <p style="text-align: center;">Page 92</p>

23 (Pages 89 to 92)

<p>1 times than what politicians have. I just don't see the 2 need to have these people on here. I just don't see it. 3 Never mind what is done in the rest of the Commonwealth. 4 It's a whole different ball game in other places, in 5 fact whole different judiciaries when you compare them. 6 I, with no disrespect to anyone, do not believe we 7 should have people on this who are going to be subject 8 to -- and I feel strong about that because this is -- of 9 all of them that we appointed, this is one of the more 10 serious ones, the most powerful body, I believe, that we 11 will have. Taking it out of the hands of the Governor, 12 that we'd accept. I just don't see why we don't leave 13 it -- there may be other changes but as far as 14 membership is concerned -- the way we had it before.</p> <p>15 I've seen the Chief Justice make his argument, I've 16 read that. But it doesn't convince me that any Chief 17 Justice -- and I was reminded, not that I wasn't keeping 18 it in the back of my mind, but I was reminded that this 19 is 50 years since Cayman had its own constitution, not 20 since the 1972, of course, but since the 1959, first 21 written constitution as such, and so we were working for 22 many years, and while we're here congratulating 23 ourselves about the mileage we have made and the 24 distance we've come, what are we doing by this? What 25 are we? We can't write these documents to appease any</p> <p style="text-align: center;">Page 93</p>	<p>1 doing this? I don't want to speak just about the Cayman 2 Islands. I just want to talk about other countries that 3 have done this, including the United Kingdom, South 4 Africa and some of the Overseas Territories. The first 5 reason is to take the appointment, discipline and -- 6 sorry, of the judiciary out of the hands of politicians 7 because that offends the notion of a separation of 8 power. In Russia in the bad old days, and probably even 9 back again today, politicians would always appoint 10 people who would be friendly to them, they were blatant 11 about it and they would be in touch with them on the 12 telephone and all sorts. That doesn't go on here, but 13 justice must be seen to be done. That's the separation.</p> <p>14 The other thing is to provide a good balance of 15 expertise so that when you're appointing people you can 16 apply both values but also some knowledge of what these 17 people are like, how things operate in the court. And 18 for that reason, for the second reason, senior judges 19 have always been put on these commissions, on every 20 single one of them. They haven't always pre-dominated, 21 but at least they've been there, because they're the 22 people, as the attorney put yesterday, who really know 23 what goes on in those courts, what qualities are needed, 24 probably better than anyone else. So you certainly 25 need, I think, a judge -- all countries have decided</p> <p style="text-align: center;">Page 95</p>
<p>1 one person, no matter how nice we want to be, how many 2 friends we have and who they support or don't support. 3 But this Judicial and Legal Services Commission should 4 be far above all of that, and the Chief Justice should 5 be above this. He shouldn't want to be on this, to my 6 thinking, and no one has convinced me why. No one has 7 convinced me why. If he has have information to give 8 that cannot be heard otherwise by the commission, then 9 he can give that information to the commission via the 10 chairman.</p> <p>11 They can always have a consultation, as I guess they 12 would. But this here is one that he has to be 13 accountable to, and there is the new area clause where 14 they will excuse themselves if they are challenged in 15 some shape or form. It shouldn't have to be that way, 16 and there is no need to be that way.</p> <p>17 All I'm saying, sir, perhaps 50 years from today, 18 when you and me are not here, they will stand up and 19 say, "Perhaps they were wise words." But I don't think 20 it does anything for our constitution to be having this 21 sort of commission with people on it that it's supposed 22 to cap(?), no matter how good we may think we are.</p> <p>23 I stop there, sir.</p> <p>24 JEFFREY JOWELL: Could I just say: what is the purpose, the 25 Leader of the Opposition asks quite rightly, of our</p> <p style="text-align: center;">Page 94</p>	<p>1 that you need some kind of judicial representation on 2 this commission.</p> <p>3 The question is: should it be the Chief Justice or 4 another judge? Again, in most cases -- in South Africa 5 it's the Chief Justice, in the UK it's four very, very 6 senior judges of the Court of Appeal but not the Chief 7 Justice -- you always have the judicial representation 8 so that there is a balance. The practitioners, the 9 laymen and the judiciary. That's the constitution of 10 virtually every judicial appointments commission all 11 over the world.</p> <p>12 MCKEEVA BUSH: Mr Chairman, I think the Professor probably 13 answered some of -- as I say, I feel like the Chief 14 Justice shouldn't be part of it. Not only (inaudible) 15 whatever happens, and there are a lot of precedents that 16 we can pick, but -- and I understand that the separation 17 of powers in Cayman, we didn't have this because 18 politicians didn't have any such power. It does not 19 stand with us, and thank God it don't. Not even our 20 appointments should be on the commission. And that's 21 why, if we remember the last constitution and the very 22 first law thought that it should rest with the Governor. 23 We want to graduate out of that now and do something 24 else.</p> <p>25 But the part that I think bears only to me, as far</p> <p style="text-align: center;">Page 96</p>

24 (Pages 93 to 96)

<p>1 as I'm concerned, justice must be seen to be done.  2 I said before we took the break that the President  3 of the Court of Appeal, I would have no objection to  4 that extent, since you feel that you have to have one,  5 but the Chief Justice, no. If we go this route, if you  6 don't -- if you can't agree with me, the least that  7 could be done is for a separate tribunal to deal with  8 wrongdoing of any kind or allegations. Because how do  9 you expect the Chief Justice or any judge to sit on such  10 a commission in such a small place? The Minister of  11 Education was the one talking about how things are done.  12 ALDEN M MCLAUGHLIN: Sorry, Mr Chairman, I don't want to  13 interrupt the leader, but I just want him to understand  14 that the proposal is that neither the Chief Justice nor  15 the President of the Court of Appeal would sit on the  16 tribunal.  17 MCKEEVA BUSH: I know that, I know that, but the people that  18 sit on that tribunal are the people that they sit with  19 in council on every matter to do with the judiciary and  20 the Minister of Education was the one talking about how  21 things are done in Cayman. In other words -- I use  22 words that he didn't use -- they become friends and  23 things are done at the cocktail table and so on. That's  24 what he was saying. Small island, sir, it's a small  25 island. We are not like the UK with 60 million people,</p> <p style="text-align: center;">Page 97</p>	<p>1 please not let it get to where we revert to status quo,  2 because that -- no, no, I'm not saying anybody's saying  3 that. I'm not trying to say anybody's saying that, but  4 all I'm saying is we must look forward from now because  5 that does not work even for five seconds of the day, and  6 it is proven.  7 MCKEEVA BUSH: Mr Chairman, I don't know why the leader of  8 government business would even go there, because the  9 fact is we have something that is different before us  10 that we made me feel there needs to be some  11 modernisation in the process. We may not want to stay  12 where we are. We believe there may be something better  13 and take the load off the Governor and take him away  14 from the blame, but I don't believe the answer is -- and  15 as I said, we might like the Chief Justice we have now,  16 but no one knows what we will get.  17 IAN HENDRY: The point is well taken and accepted that we  18 are moving ahead to a different system, and the one  19 remaining question, although I have a small detail about  20 which I'm waiting to touch on, is whether the Chief  21 Justice ex officio, whoever it may be, should be on this  22 body.  23 While we're thinking about that, perhaps I could  24 just mention my small detail. We need to solve it. In  25 (d), it now says:</p> <p style="text-align: center;">Page 99</p>
<p>1 nor South Africa, and I do not believe that such an  2 important commission -- while he's a very important  3 person, I think he needs to be above it and he needs to  4 be subject to it. That's what we should be  5 strengthening.  6 So of course they would have his input because they  7 would consult with him because it's to do with the  8 judiciary. Whatever Turks and Caicos, which I don't  9 think is any example for us, nor the BVI, which I don't  10 think is any example for us, whatever they want,  11 whatever they do, is their business. Cayman is where  12 I grew up and what I know.  13 KURT TIBBETTS: Mr Chairman, I don't think that it is so  14 much that we are at odds as much as simply trying to  15 find an answer that is satisfactory. I want to lay a  16 benchmark and ask us please to look from there forward.  17 I can tell you -- not that I like to drag him in but  18 I can also tell you that our present Governor can also  19 tell you and everybody else that what obtains now is  20 totally unsatisfactory, just my experience, and not  21 about looking at that experience to simply change but to  22 accept that what obtains is unsatisfactory for all  23 concerned, but especially for the country.  24 I'm not saying with what I'm saying now that I have  25 an answer that will satisfy all of us. I am asking us</p> <p style="text-align: center;">Page 98</p>	<p>1 "Two attorneys-at-law qualified to practice in the  2 Cayman Islands, one in government service and one in  3 private practice ..."  4 That doesn't work any more because we're saying  5 people who are qualified to practice. I suppose the way  6 of fixing that would be to say "one with experience in  7 government service and one with experience in private  8 practice". Would that do? Because we're getting --  9 it's Elbio's question of not ruling out somebody who is  10 not actually practising for the time being. If we solve  11 that one with "one with experience in government service  12 and one with experience in private practice", then at  13 least you have a balance of attorneys-at-law from the  14 private sector and the public sector.  15 As far as the Chief Justice on the commission is  16 concerned, I find it very difficult because I can see  17 there are arguments in both directions. We've faced the  18 same question with other territories and some have  19 chosen one way and some have chosen a different way.  20 KURT TIBBETTS: Do you feel you're imposing by simply  21 telling us what your view is and why?  22 IAN HENDRY: I will if you want me to.  23 KURT TIBBETTS: Yes. We know where we are without it so it  24 can't make it any worse.  25 IAN HENDRY: I think I was just going to say first, before</p> <p style="text-align: center;">Page 100</p>

25 (Pages 97 to 100)



<p>1 I do that, whether -- because it is you that is going to 2 have to live with it, and I don't know whether Alden and 3 Jeffrey in the course of their confabulations just now 4 have come up with any other idea.</p> <p>5 I think my personal view is that if you have the 6 President of the Court of Appeal on the commission, two 7 other judicial members who do not currently hold such 8 office in the Cayman Islands, that is probably enough 9 for a judicial presence.</p> <p>10 The other point is that, although I said this 11 morning I saw no harm in the Chief Justice being on and 12 having to get his hands dirty rather than sitting in an 13 ivory tower apart from all this, I think actually the 14 Chief Justice could find his or her task more difficult 15 by being in such a body. I do take McKeeva's point that 16 there is nothing to prevent the views of a Chief Justice 17 being fed into this body. It would be astonishing if 18 they weren't. No Chief Justice would be so pure as to 19 say, "I'm not going to say anything." Of course they'll 20 put their views in and they're free to do that.</p> <p>21 I think if I was to make a judgment of Solomon, 22 I would take the CJ out of this body and the attorney 23 will be very cross with me, but as I say, my shoulders 24 are broad enough so I accept that.</p> <p>25 ALDEN M MCLAUGHLIN: Mr Chairman, I value your views and</p> <p style="text-align: center;">Page 101</p>	<p>1 there will be a Camanian who will be that. But you 2 can't hold that argument because you have two persons 3 who hold or have held high judicial office in a 4 Commonwealth country but do not currently hold such 5 office in the Cayman Islands. Are they going to be from 6 Cayman or outside of Cayman?</p> <p>7 ALDEN M MCLAUGHLIN: For the foreseeable future, they are 8 more likely than not to come from somewhere else simply 9 because the pool on which we can draw in Cayman of 10 former judges is very, very small. That's just the 11 reality of Cayman.</p> <p>12 MCKEEVA BUSH: Yes. When we were sitting to make up the 13 board of the Cayman Islands monetary authority, the 14 position was put forward, a new board, who were to be 15 independent of government and an independent body. The 16 names that they should have to give it the semblance of 17 independence that internationally it needed to look 18 like, that we should appoint some people from overseas 19 and the truth is, while some of us didn't agree, it 20 worked well. We got good advice, I think.</p> <p>21 So I don't know for how long the Islands is going to 22 have dependent situations like that, but I don't see 23 that the President of the Court of Appeal could not sit 24 on it as member. I'm not saying he must be chairman, 25 I'm not saying that he shouldn't be, but I don't believe</p> <p style="text-align: center;">Page 103</p>
<p>1 judgment greatly, but I don't think that that proposal 2 can work in Cayman Islands for two reasons. One, we 3 have an itinerate Court of Appeal, so the President of 4 the Court of Appeal is in Cayman Islands maximum eight 5 weeks for the year. He or she generally has little 6 appreciation of what obtains in the operations 7 administration and otherwise of the court system. 8 I tell you that as one who worked as deputy clerk of the 9 court for three years and spent 20 years in the bar.</p> <p>10 So what would happen if we put the President of the 11 Court of Appeal as the sole Cayman Islands judicial rep 12 is that, generally speaking, an informed view of what 13 was transpiring in judicial circles would not be brought 14 to the table.</p> <p>15 Then there are the inevitable tensions that are 16 going to be created when you have the President of the 17 Court of Appeal on there but you've left the man who 18 actually has to run the ship off of it. We must not 19 underestimate how that is going to affect the 20 administration of justice.</p> <p>21 MCKEEVA BUSH: Mr Chairman, it may be so that the 22 president -- and I make no special --</p> <p>23 IAN HENDRY: Sorry.</p> <p>24 MCKEEVA BUSH: I make no special appeal for the President of 25 the Court of Appeal. I hope one of these days that</p> <p style="text-align: center;">Page 102</p>	<p>1 that the Chief Justice should -- I go back to that 2 point.</p> <p>3 IAN HENDRY: I understand you --</p> <p>4 ALDEN M MCLAUGHLIN: We are under some pressure.</p> <p>5 IAN HENDRY: I think this is too important to try and rush. 6 We should take time out to think about it and let you go 7 to your appointment at Her Majesty's Treasury and we 8 will suspend our discussions on this. You have two 9 meetings. How long?</p> <p>10 ALDEN M MCLAUGHLIN: I don't expect we'll be finished much 11 before 7, sir.</p> <p>12 IAN HENDRY: Oh, before ??</p> <p>13 ALDEN M MCLAUGHLIN: If this meeting gets moved forward, 14 which is what is being asked for, then perhaps 6.15 or 15 thereabouts. But we have two 45-minute meetings, so 16 getting in and out and so forth.</p> <p>17 IAN HENDRY: You have to go pretty soon, any minute?</p> <p>18 ALDEN M MCLAUGHLIN: Yes, sir.</p> <p>19 KURT TIBBETTS: How many more points do we have to discuss?</p> <p>20 IAN HENDRY: I don't think we do.</p> <p>21 KURT TIBBETTS: Are we good with everything else?</p> <p>22 IAN HENDRY: For the sake of good order, let me tell you 23 that, unless beaten over the head with a mallet, in the 24 next draft, the right to silence will be inscribed in 25 the way that you proposed and that the Attorney General</p> <p style="text-align: center;">Page 104</p>

26 (Pages 101 to 104)

<p>1 advised would be the safest course. That is what 2 I propose to do. The other thing which was left in a 3 state of confusion is the question of term limits. My 4 conclusion on that was that there seemed to be no 5 objection to that provision remaining in the text, so it 6 will remain in the text. There is no other issue that 7 I'm aware of except the question of whether the Chief 8 Justice sits on the Judicial and Legal Service 9 Commission, as far as I'm aware. I hope nobody's going 10 to give me a surprise.</p> <p>11 MCKEEVA BUSH: Do we have much more to say on it? I can't 12 say much more unless somebody raises something new.</p> <p>13 ALDEN M MCLAUGHLIN: Mr Chairman, the Leader of the 14 Opposition is saying he thinks we should finish this 15 point and go. Obviously with the benefit of reflection, 16 I'm not ruling out the possibility that someone will 17 come up with something else, any other way to constitute 18 this commission. But I doubt seriously whether there 19 are many other options in relation to this. The policy 20 issue is whether the Chief Justice should be on or not. 21 We have toyed with the possibility of perhaps one of the 22 (inaudible) judges being on instead, but I think those 23 of us who know how these things work -- I know that the 24 Attorney General is being carefully very silent about 25 all this -- he turns his head now. But that will create</p> <p style="text-align: center;">Page 105</p>	<p>1 (c) the words at the end "but do not currently hold such 2 office in the Cayman Islands" are also deleted, it 3 leaves open the possibility that one of the two could be 4 the Chief Justice. Could be. The second of them could 5 be another judge of the Court of Appeal or of the Grand 6 Court.</p> <p>7 ALDEN M MCLAUGHLIN: Mr Chairman, doesn't that just allow in 8 the back door what we're trying to avoid stating?</p> <p>9 IAN HENDRY: No. Well, the advantage of it is flexibility. 10 At the moment, it's quite an inflexible regime. It is 11 two ex officio irrespective of what they may be like, 12 how hard-working they are, et cetera, et cetera, and two 13 who must come from outside. It's quite inflexible. 14 Whereas if you had the president and two persons who 15 hold or have held -- had judicial office in a 16 Commonwealth council or Ireland, full stop, there is 17 more flexibility amongst those two to have a wholly 18 local all three judicial men being locally, or a 19 mixture. It's the only immediate halfway house I can 20 think of.</p> <p>21 ALDEN M MCLAUGHLIN: But, Mr Chairman, that then puts us 22 back where we were in the first place with the abiding 23 concerns about who will be involved in the tribunal, 24 because we don't want a Chief Justice or the President 25 of the Court of Appeal sitting in a tribunal dealing</p> <p style="text-align: center;">Page 107</p>
<p>1 a dynamic within the small judiciary which we have which 2 we can do without. It seems to me quite simple. Either 3 we have the Chief Justice on or we lose both the 4 President of the Court of Appeal and the Chief Justice 5 and then we have no local judicial representation on 6 there, which I just don't think is viable. I think it's 7 going to seriously undermine both the credibility and 8 viability of this new institution.</p> <p>9 MCKEEVA BUSH: Mr Chairman, I still believe that I don't see 10 why we're taking off the President of the Court of 11 Appeal. I think it's a good choice. I hope it would 12 not have the kind of conflicts that can be created or 13 come into play with the Chief Justice, and I certainly 14 don't have any qualms about supporting the Court of 15 Appeal judge, because he will come back to Cayman for a 16 meeting and we know more than what other people have to 17 do. Certainly if you look at the qualities we have now, 18 we certainly have a very high calibre person, a 19 knowledgeable person in the President of the Court of 20 Appeal. I'm not saying we'll not get better, but --</p> <p>21 IAN HENDRY: I mean, the only compromise I can think of 22 immediately -- sorry, McKeeva.</p> <p>23 MCKEEVA BUSH: No, I finished.</p> <p>24 IAN HENDRY: I'm trying to be helpful.</p> <p>25 On this text, if the Chief Justice was deleted but</p> <p style="text-align: center;">Page 106</p>	<p>1 with disciplinary issues. So we have to preserve the 2 ability, I believe, to have two from outside the active 3 judiciary.</p> <p>4 IAN HENDRY: Yes, I take your point.</p> <p>5 MICHAEL BRADLEY: I'm deeply concerned that this thread is 6 going to unravel so much that we will be faced with the 7 situation of having to go back to the Minister.</p> <p>8 I haven't been asked, but I just volunteer my own 9 opinion, and I agree with Ian that the Chief Justice in 10 a small community, as we are in the Cayman Islands, 11 should not be on it. You say there's a large bar, and 12 there is, but the bar that practices in front of the 13 courts is perhaps a quarter of that of the lawyers in 14 the Cayman Islands, and I can see practical difficulties 15 arising, as in the past, if there are personal conflicts 16 that exist there. I feel the Chief Justice should be in 17 this ivory tower and not involved with what can be 18 controversial or contentious situations. This is my 19 personal view and I haven't consulted with Ian about it.</p> <p>20 MCKEEVA BUSH: I think that what the chairman is saying and 21 what Mr Bradley said makes some sense. That could be 22 left open. I don't like to leave things open, but -- 23 yeah.</p> <p>24 ALDEN M MCLAUGHLIN: So, Mr Chairman, are we saying then 25 that between us the compromise could be that we keep all</p> <p style="text-align: center;">Page 108</p>

<p>1 of the other provisions, we have two persons appointed  2 who hold or have held judicial office but are not  3 currently doing so in the Cayman Islands, the President  4 of the Court of Appeal and one other justice or one  5 other person who holds high judicial office in the  6 Cayman Islands?  7 MICHAEL BRADLEY: Holds or is qualified to hold.  8 ALDEN M MCLAUGHLIN: Holds or is qualified to hold.  9 IAN HENDRY: Sorry, to hold high judicial office in the  10 Cayman Islands.  11 ALDEN M MCLAUGHLIN: In the Cayman Islands. That doesn't  12 quite meet what I think is a real important  13 consideration, which is that whoever -- by one means or  14 another, the persons who sit on this commission ought to  15 have real, active, current understanding of the issues  16 that are contained within the local judiciary. That is  17 the fundamental problem.  18 So I am relenting on the person on the Chief Justice  19 necessarily being named, but I do believe that it could  20 happen and that the local judiciary must be represented  21 on this commission, otherwise it's going to have no  22 respect, get no co-operation, and it may have authority  23 but you try exercising authority without co-operation.  24 We all have, and we know where we get to.  25 MICHAEL BRADLEY: Well, if you can reluctantly go back and</p> <p style="text-align: center;">Page 109</p>	
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<p>1 say that this is this possibility, I think leaving that  2 flexibility could solve the problem at the moment and we  3 can go ahead with it, the constitution. In the long  4 run, if things don't work, you can always do a minor  5 one-line amendment of the constitution.  6 IAN HENDRY: I'm very conscious that you don't want to be  7 late for your appointments. If you would trust us to,  8 with the help of Jeffrey, just try and get that down on  9 paper, I'm sure he'll tell you later on.  10 KURT TIBBETTS: If you are satisfied that everything else is  11 in order, sir?  12 IAN HENDRY: I am.  13 KURT TIBBETTS: And we can leave you to it?  14 IAN HENDRY: You can leave us to it. There are enough of  15 your colleagues around to see that there's no hanky  16 panky.  17 KURT TIBBETTS: That was not what I meant. I was not  18 thinking that. But if you would like to play with  19 words, so can I, sir. Thanks again. We've said it in  20 long words and I say shortly once more. Thank you.  21 IAN HENDRY: Thank you, too. Those who are happy to stay  22 behind and try and see off this last point, that would  23 be good. It's just a matter of drafting now.  24 (3.30 pm)  25 (The hearing concluded)</p> <p style="text-align: center;">Page 110</p>	
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