



MINISTRY OF LEGAL & CONSTITUTIONAL AFFAIRS

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ANY REPLY OR SUBSEQUENT REFERENCE TO THIS COMMUNICATION SHOULD BE ADDRESSED TO THE PERMANENT SECRETARY

MINUTES

41st Meeting of the Constitutional Reform Committee (CRC)

Venue: Ministry of Legal and Constitutional Affairs

Date: May 17, 2024

Time: 10:00am

AGENDA

1. Call to Order
2. Prayer
3. National Pledge
4. Apologies for Absence/Lateness
5. Confirmation of Agenda
6. Confirmation of Minutes of Meetings
7. Response to the points raised by the Leader of the Opposition
8. Appearance of Members of the CRC at Cabinet on Monday, May 20, 2024
9. Other Business
 - a. Meeting of the Drafting Strategy and PEC Sub-Committees
 - b. Proposed Timelines
10. Date and Time of Next Meeting
11. Adjournment

ATTENDEES:

Constitutional Reform Committee

- Honourable Marlene Malahoo Forte, KC, JP, MP (Chairman)
- Ambassador Rocky Meade, CD, JP, PhD (Co-Chairman – Office of the Prime Minister)
- Dr Derrick McKoy, CD, KC (Attorney General of Jamaica)
- Senator Ransford Braham, CD, KC (Government Senator)
- Senator Donna Scott-Mottley (Parliamentary Opposition – Senate)
- Mr Anthony Hylton, CD, MP (Parliamentary Opposition – House of Representatives)
- Dr the Hon. Lloyd Barnett, OJ (National Constitutional Law Expert)
- Dr Nadeen Spence (Civil Society – Social and Political Commentator)
- Dr Elaine McCarthy (Chairman – Jamaica Umbrella Groups of Churches)
- Mr Sujae Boswell (Youth Advisor)
- Professor Richard Albert (International Constitutional Law Expert – University of Texas at Austin)

Secretariat

Ministry of Legal and Constitutional Affairs

- Mr Wayne O Robertson, JP, Permanent Secretary
- Ms Judith Grant, Chief Parliamentary Counsel
- Mr Christopher Harper, Senior Constitutional Reform Officer
- Mr Makene Brown, Legal Officer
- Ms Christal Parris-Campbell, Assistant Parliamentary Counsel

1. CALL TO ORDER

- 1.1. The meeting was called to order by the Chairman, the Honourable Marlene Malahoo Forte at 11:00am when quorum was achieved.

2. PRAYER

- 2.1. Prayer was said by Senator Ransford Braham.

3. NATIONAL PLEDGE

- 3.1. The National Pledge was recited.

4. APOLOGIES FOR ABSENCE/LATENESS

- 4.1. Apologies for absence were received from Mrs Laleta Davis Mattis, Dr David Henry, Mr Hugh Small and Senator Thomas Tavares-Finson.
- 4.2. Apologies for lateness were tendered on behalf of Dr Nadeen Spence, Dr Derrick McKoy and Mr Anthony Hylton.

5. CONFIRMATION OF AGENDA

- 5.1. The Agenda was confirmed without amendments on a motion by Senator Ransford Braham and seconded by Senator Donna Scott-Mottley.

6. CONFIRMATION OF MINUTES OF MEETINGS

- 6.1. The Confirmation of the Minutes was deferred. The Chairman advised that a special meeting of the Committee would be convened to review and confirm the outstanding Minutes. The date of that meeting would be agreed by round robin.
- 6.2. Dr Barnett, having considered the drafts shared electronically, proposed that the draft versions of the Report of the Constitutional Reform Committee considered by Members at the relevant juncture be annexed to the corresponding Minutes for completeness. Publication of these Minutes would therefore be deferred until the final Report of the Committee was made public.

7. APPEARANCE OF MEMBERS OF THE CRC AT CABINET ON MONDAY, MAY 20, 2024

- 7.1. The Chairman sought leave to take this matter before discussing the response of the Committee to the Leader of the Opposition.
- 7.2. The Chairman then invited Members to recall that it was agreed that the Members of the Committee would be present at the meeting of the Cabinet when the submission of the Report of the Committee would be considered. She stated that the time at which the Report would be considered by the Cabinet would be communicated in advance. She further advised that

the Cabinet was asked to consider and approve the tabling of the Report of the Committee as a Ministry Paper and the issuing of Drafting Instructions to the Chief Parliamentary Counsel to prepare the legislation required to establish the Republic of Jamaica and other matters. She further stated that the Cabinet would be expected to examine the recommendations proposed. She indicated that although the initial timeline had not been achieved, the proposed activities would still be pursued.

8. RESPONSE TO THE POINTS RAISED BY THE LEADER OF THE OPPOSITION

- 8.1.** Dr Barnett enquired whether the Memorandum from the Leader of the Opposition appended hereto as **Annex I** setting out his comments on the draft Report of the Constitutional Reform Committee would be presented to the Cabinet. The Chairman, in response, stated that while there was no difficulty in doing so, nothing was sent to her formally.
- 8.2.** Senator Scott-Mottley, based on her understanding, stated that the letter was sent to Mr Hylton to be shared with the Chairman and the wider Committee. The Chairman, in response, advised that a letter to the Prime Minister from the Leader of the Opposition was shared with her by the Prime Minister as he wanted to be informed of the matter regarding the Report and its availability. She noted that he would not be able to properly respond to the letter without being briefed. She then stated that the letter raised other issues of concern which were to be shared with the Chairman through the representatives of the Leader of the Opposition. Those concern have since been made available, albeit informally, to the Members of the Committee.
- 8.3.** The Chairman then suggested that Members examine the comments and determine how to proceed.
- 8.4.** The draft response to the Leader of the Opposition prepared by Dr Barnett on behalf of the Committee appended hereto and labelled **Annex II** was then discussed in detail and accepted by Members with two (2) amendments as reflected in **Annex III** appended hereto.

9. OTHER BUSINESS

9.1. MEETING OF THE DRAFTING STRATEGY AND PEC SUB-COMMITTEES

- 9.1.1.** The Chairman noted that once Cabinet granted its approval, the Report of the Committee would be released followed by a press briefing. She further advised that

the Drafting Strategy Sub-Committee would support the review of the draft Bill prepared by the Chief Parliamentary Counsel.

9.2. PROPOSED TIMELINES

9.2.1. The Chairman noted that the immediate next steps were set and that the indicative timeline previously created would be consulted.

10. DATE AND TIME OF NEXT MEETING

10.1. The Chairman advised that the date of the next meeting would be communicated to Members. She however advised that there would be a press briefing on Wednesday May 22, 2023, and that Members were expected to attend.

11. ADJOURNMENT

11.1. There being no other business, the meeting was terminated at 1:20pm on a motion by Dr Elaine McCarthy and seconded by Dr Nadeen Spence.

ANNEX I – Comments on the Draft Report from the Leader of the Opposition

Comments on the draft CRC Report

Clause in draft CRC Report	Comments
4.1.4 iii	We suggest that the content of footnote 9 is significant and should be stated here, to make it clear that the official name of Jamaica as a State is not to be changed to “the Republic of Jamaica” but is to remain as “Jamaica”?
4.3.3 and 4.3.4	<p>We do not agree with the proposed solution to a situation where the Prime Minister and the Leader of the Opposition have not agreed on the proposed President.</p> <p>Any solution which enables the President to be approved via a simple majority vote of both Houses of Parliament effectively incentivizes the PM to choose someone who he/she perceives as favouring his/her Party, as the inevitable (and, perhaps, desired) failure to achieve consensus will lead to a President acceptable to the Government for political reasons and who is not even perceived to be politically neutral.</p> <p>We do not consider this to be in the Nation’s best interests. We suggest that, until consensus is achieved, the incumbent President (or GG, if this divergence occurs at the outset of the new Republic) should remain in office; or, if the incumbent is not willing and able to remain in office until consensus is achieved, the Chief Justice should act as President until consensus is achieved.</p>
4.4.1	<p>ii - What does “permanently in Jamaica” mean? Being ordinarily resident here should suffice, even if brief trips have been made overseas on business or for pleasure.</p> <p>iv – Rather than using the criteria for disqualification for election to Parliament (i.e. a political process) in this context, it is better to set out afresh the applicable disqualifying criteria that will apply to the President.</p>
4.7.3	Is this suggesting that the President should be immune to proceedings in cases of treason, fraud and/or violence, even though civil and criminal immunity are denied in such circumstances as per 4.7.2? This appears to be incoherent.
4.9.1	<p>We do not agree with the proposal for appointing an interim President to act in a temporary vacancy.</p> <p>In Jamaica, Custodes are political appointments made by the Governor-General on the advice of the Prime Minister. They are not a suitable pool from which to appoint someone who is politically independent to act as interim President, when the Prime Minister and the Leader of the Opposition have not been able to agree on the person after consultation. Mere consultation does not require consensus.</p>

	In the absence of consensus among the Prime Minister and the Leader of the Opposition, we suggest that the Chief Justice should act as interim President until consensus is achieved.
4.10.3	<p>While we accept the need for a removal process, we have concerns about the proposed approach in which the quasi-judicial process of removing a President, who is not a political representative or political appointee, will be via a procedure within the Parliament.</p> <p>One can envisage a situation where a firm-minded President stands up for principle against a given Government on some matter of national importance, such as the declaration of a state of public emergency in dubious circumstances, and the peeved Government then invokes this parliamentary procedure to embark upon a political witch-hunt to sully the reputation and undermine the stature of the President in the debate on the motion (even though the removal process cannot proceed without the Opposition).</p> <p>For a matter like this, we favour the process to determine whether a ground for removal has been established being managed by the judiciary, as exists for other important non-political constitutional offices (e.g. a tribunal comprised of a chairman and not less than two other members from among persons who hold or have held office as a judge of a court having unlimited jurisdiction in civil and criminal matters in a member state of Caricom or a court having Jurisdiction in appeals from any such court).</p>
4.10.3.5	Our concerns in relation to 4.9.1 (see above) apply equally here.
6.1.9	<p>Apart from Jamaican citizenship, will there be a residency requirement for “membership in the Parliament”, and is this intended also to apply to the Senate?</p> <p>If so, what is the residency requirement? At least one year’s ordinary residence is the current requirement.</p> <p>Furthermore, the issue of dual citizenship has not been fully addressed in the Report. We are a nation with a large Diaspora, on whose remittances our country relies for balance of payments support, and who provide a vital social safety net for family and friends across Jamaica in the absence of adequate support from the State. We also encourage our Jamaicans abroad to actively participate in the societies where they live, to build Brand Jamaica and increase their influence on affairs there.</p> <p>Therefore, in our view as long as a Jamaican citizen meets the residency requirement and swears an oath of allegiance to Jamaica and to uphold and defend the Constitution of Jamaica, his/her dual citizenship should not preclude him/her from eligibility to sit in our Parliament, whatever wording may be on the application form for his/her other citizenship and whatever wording comprises the oath that he/she was required to swear to become a citizen of the other state.</p>
6.2.2	Given that 6.2.1 adopts the principle of the commission of a “serious criminal offence” as the yardstick of disqualification, we suggest that rather than using the length of the sentence that was imposed in the particular case (which may depend on a host of factors) as the specific criterion for disqualification, consider using the yardstick of the

	<p>offence carrying a potential term of imprisonment of at least eighteen months as the threshold for what constitutes a “serious criminal offence” for this purpose.</p>
6.3	<p>We note the Report’s position on impeachment. We disagree with this position, and believe that the Constitution ought to include this procedure for holding parliamentarians to account for egregious misconduct, a matter for which we believe there is also significant public support.</p> <p>Indeed, we have tabled a Private Member’s Bill in 2022 to amend the Constitution for this purpose (as had former PM Bruce Golding in 2010), and the introduction of an impeachment procedure in the Constitution has also been a manifesto commitment of the JLP.</p> <p>Suffice it to say that we are not convinced by the points raised in 6.3.2, as impeachment has been a successful accountability mechanism in other jurisdictions where these concerns would equally apply.</p>
6.4.4	<p>This provision is unclear.</p> <p>It seems to propose a fixed 5-year term for each Parliament, with the Prime Minister being required to call the election for a date of his/her choosing within a 3-month window commencing on the day that the 5-year term expires, “<i>in the event there is consensus between the two (2) political parties represented in Parliament</i>”.</p> <p>What exactly is the CRC recommending? This needs to be clarified.</p>
6.5.3	<p>We are of the view that any extension of the life of a Parliament beyond 5 years should only be possible if the extension is approved in the same manner as the approval of the extension of a State of Public Emergency – i.e. by a vote supported by at least 2/3 of each House of Parliament.</p> <p>We do not agree that the first extension of up to six months can be approved by a simple majority vote in the House of Representatives. This would empower the Government of the day to extend its own life beyond five years.</p>
7.1.3	<p>We do not agree with the proposal as to the composition of the Senate. It is an important safeguard to retain the Opposition having 1/3 plus 1 of the senators, which is the only buffer against the Executive completely dominating the Legislature and only applies to entrenched matters.</p> <p>We would propose a Senate of 42, of which the Prime Minister appoints 24, the Leader of the Opposition appoints 15, and the President appoints 3. The President’s 3 appointees should be persons recognized for their independence, good reputation and eminence, and the President should consult with the Prime Minister and the Leader of the Opposition before making the appointments.</p>
7.3.1	<p>What is meant by “constitutional measures”?</p> <p>Does it mean legislation to amend the Constitution?</p>

	<p>Or does it also include any matter (whether a bill, motion, resolution or otherwise) that requires at least 2/3 majority support to pass?</p> <p>Our proposal as to the composition of the Senate (see the comments on 7.1.3 above) would provide the required safeguard structurally, as is presently the case, rather than weakening the Opposition's position in the Senate and seeking to mitigate that by a special provision.</p>
9.1.3	<p>Why is this necessary to state this? Parliament already has this power.</p> <p>Any special power to be given to Parliament by the Constitution to confer privileges and make special provisions for Caricom citizens by ordinary legislation should expressly be subject to such ordinary legislation being consistent/compliant with the remainder of the Constitution.</p>
12.5	<p>This is a fundamental issue for us.</p> <p>The Leader of the Opposition has written to the Prime Minister on this issue, and once again set out the Opposition's position. We await the Prime Minister's response.</p> <p>Suffice it to say that what is proposed in 12.5 is not acceptable to the Opposition.</p>

Mark J. Golding
 Leader of the Opposition
 May 9, 2024

ANNEX II – Draft Response to the Leader of the Opposition

THE CONSTITUTIONAL REFORM COMMITTEE (CRC)

DRAFT ADDENDUM TO REPORT OF THE CONSTITUTIONAL REFORM COMMITTEE - PHASE 1

INTRODUCTION

1. The CRC has made over 50 recommendations on a variety of subjects in its initial Report. It has also expressed numerous opinions on the constitutional reform subjects. The “comments” of the Leader of the Opposition which must be regarded as expressing the views of the Shadow Cabinet and/or Parliamentary Opposition relate to 17 of these recommendations and opinions. Seven of these “comments” are in effect requests for clarification. The following are the responses of the CRC to each of these comments.

RESPONSE RE CLAUSE 4.1.4iii

2. The CRC agrees that it should be made clear that it is not being recommended that the official name of Jamaica be changed to “the Republic of Jamaica”. “Jamaica” is used and recognised internationally in the legal, political, social and cultural context as the name of our Nation and State. For clarity, the CRC states that the recommendation at 4.1.4 is that a republican form of government be established for Jamaica and agrees that it should be rephrased accordingly and the footnote deleted. This is also consistent with the CRC's recommendation at 13.2.2.

RESPONSE TO CLAUSE 4.3.3/4.3.4 – ACTING PRESIDENT

3. The CRC examined this question at great length and very carefully. Essentially, it was concluded that treating the holder of the Office of Chief Justice as the automatic solution to the problem was not prudent. It is quite possible for the vacancy to last for several months. It is undesirable that the Chief Justice should be diverted from his or her judicial functions to an executive office.

4. The selection of a person to occupy the Presidency during the unavailability or inability of the incumbent President or pending the appointment of a permanent President is a question which does not have an easy answer. The CRC does not claim to have found the

perfect solution, assuming one to exist. The employment of the Chief Justice for this purpose although a fairly common device is based on our colonial history. In most British colonies, the Governor and Chief Justice were the two highest Colonial Officers selected by the Colonial Office. For this reason, it was convenient to direct the Chief Justice to act for the Governor. In our state of sovereignty, we should be more conscious of the fact that this device offends the fundamental principle of the separation of the judicial power. It may require, for instance, the Chief Justice to sign a Bill which contravenes the Constitution or to read the Opening Speech at the commencement of Parliament which contains unconstitutional or unpopular proposals. Very importantly, there may be situations in which the Chief Justice had decided that he or she should be the presiding Judge for an upcoming trial or he or she may be engaged in a long trial at the same time that he or she is required to assume the office of President. Accordingly, the CRC adheres to the opinion that the Chief Justice should not be required to occupy the office of President even on a short term basis.

RESPONSE RE CLAUSE 4.4.1 - THE USE OF THE TERM "PERMANENTLY IN JAMAICA"

5. Normally a "permanent resident" is a person who is ordinarily resident for an indefinite time. A person may be ordinarily resident who is employed on a long term contract or conducting a business but intends to return to their original residence at the end of the required period. The CRC considered that "permanent residence" is a desirable requirement for this office which is symbolic of national identity and continuity.

RESPONSE RE CLAUSE 4.7.3 – SCOPE OF PRESIDENT'S IMMUNITY

5A. This states and literally means that immunity should not apply to any act including treason, fraud and/or violence. The CRC does not therefore consider that the statement is incoherent. In any event, it does not appear that the Leader of the Opposition disagrees that in principle such acts should not be protected by immunity.

RESPONSE RE CLAUSE 4.9.1 - TEMPORARY PRESIDENT

6. The objection to the appointment of Custodes to the temporary vacancy on a transitional or acting basis on the ground that they have been appointed by the Governor-General or eventually the President on the advice of the Prime Minister, is hardly sustainable, as the Chief Justice is appointed by the Governor-General on the recommendation of the Prime Minister after consultation with the Leader of the Opposition. The CRC is willing to recommend that in future the Custodes should be appointed by the President after

consultation with the Prime Minister and Leader of the Opposition. The CRC is of the view that with 13 Custodes to choose from it should always be possible to identify one who is competent and suitable to fill the acting appointment.

RESPONSE RE CLAUSE 4.9.2

7. The CRC had also considered that the appointment of an acting or temporary President could also be made from members of the Privy Council (President's Council). The CRC recommends that these persons be added to the pool of persons from whom the acting appointment of President can be made.

RESPONSE RE CLAUSE 4.10.3 – THE REMOVAL PROCESS FOR THE PRESIDENT

8. The CRC recommended a removal process for an incumbent President on the basis of the obvious need for such a process and the fairly widespread practice in other Commonwealth countries. However, the CRC's main focus was to ensure that the process complied with the principles of natural justice. In addition, the President is appointed by a parliamentary process. However, the CRC accepts that the alternative proposed by the Leader of the Opposition that the adjudication of the grounds for removal should be conferred on a quasi-judicial tribunal is more in keeping with the desirability for political neutrality and the maintenance of impartiality. It appears to the CRC that the concerns raised by the Leader of the Opposition in respect of having Parliamentarians conduct the adjudication process apply even more forcibly in respect of a parliamentary impeachment process.

RESPONSE RE CLAUSE 4.10.3.5 – TEMPORARY APPOINTMENT OF A PERSON TO ACT AS PRESIDENT DURING INVESTIGATION OF ALLEGATIONS OF MISCONDUCT AGAINST THE INCUMBENT PRESIDENT

9. The CRC adheres to the views expressed at paragraphs 3 and 4 above in relation to appointments to fill casual vacancies in the Office of President.

RESPONSE RE CLAUSE 6.1.9 – CONFLICTING ALLEGIANCE

10. The CRC's recommendation is based on the principle that a Member of Parliament who is sworn to bear true allegiance to Jamaica should not be compromised by having

assumed an identical obligation of allegiance to another State. From time to time issues arise in Parliament in which the interests of Jamaica conflict with the interests of other countries. A Jamaican citizen is entitled to expect that his or her representative will be true to the oath even if it involves offending a foreign State. A provision could be made that the Member should not speak or vote on any matter where such a conflict arises or is likely to arise. However, this is not a complete solution as the Jamaican citizen is entitled to demand that the parliamentary representative should actively pursue and defend the interests of the constituents.

RESPONSE RE CLAUSE 6.2.2 – DISQUALIFICATION FOR CRIMINAL CONVICTION

11. The CRC considered the option of applying the disqualification where the criminal offence in question attracts a minimum of 18 months. Although, this was regarded as indicating an offence sufficiently serious in nature to attract such a sentence and therefore to merit disqualification, the CRC considered that there was a real possibility, having regard to the wide definition of the applicable offences, for the offender to have extenuating circumstances in his or her favour and this would be reflected in the length of the sentence actually imposed. The CRC recognises that this was a somewhat liberal approach to take.

RESPONSE RE CLAUSE 6.3.1 – IMPEACHMENT

12. The CRC agrees that the Constitution should include a procedure for holding parliamentarians to account for misconduct. In a democracy, the primary mechanisms are: (1) the ballot by which the people can reject the re-election of the parliamentarian if they consider his or her conduct to be unacceptable; (2) the judicial system by which the parliamentarian can be prosecuted and convicted for criminal acts, and, as the CRC recommends, disqualified from holding parliamentary office. In the case of criminal proceedings, the offence has to be defined in precise terms and not merely described as “egregious”.

RESPONSE RE CLAUSE 6.3.2

13. The CRC can find no basis for the statement that impeachment has been a successful accountability mechanism in other democratic jurisdictions. The Leader of the Opposition's memorandum has not identified the jurisdictions referred to.

RESPONSE RE CLAUSE 6.3.3

14. The history of impeachment does not support this statement. Impeachment was introduced in England in the 14th century as a tool by which Parliament sought to make the despotic King's servants accountable. Its use was discontinued in England by the middle of the 15th century when the American Constitution was being framed. The American Constitution adopted the English practice but in England it was soon discontinued. It should be noted that in both England and America impeachment was limited to criminal offences. In the United States, after much debate, impeachable offences were defined as "treason, bribery or other high crimes and misdemeanours". See Akhil Amar, *America's Constitution* (2005), pp. 199-203, 222-224.

RESPONSE RE CLAUSE 6.3.4

15. In their book *Tyranny of the Minority* (2023) Harvard Professors Daniel Ziblatt and Steven Levitsky, in dealing with excessive or undue use of law stated "impeachment should be rare-used only when presidents egregiously or dangerously abuse their power". p. 53. This has been the case in the world's two oldest presidential democracies: the United States and Costa Rica. The United States averaged one presidential impeachment per century during its first 230 years. Never in Costa Rica's seventy-four-year democratic history has a president been removed before the end of their term. 16. Recently, we have seen how in the United States the impeachment process has been abused. While President Clinton could be condemned for immorality, there was no legal basis for his impeachment and the entire exercise was politically motivated. See Gregory Tardi, *The Law of Democratic Governing Jurisprudence* (2004), pp. 943-950. President Trump was impeached twice but acquitted on each occasion purely by a partisan vote. An attempt was made to impeach President Biden purely on "trumped up" charges and by partisan manipulation. In other countries, like Peru and Thailand, impeachment has been abused. See Ziblatt & Levitsky, *op. cit*, pp. 54-5. In the United States, at the State level, two black representatives were recently removed from office when they publicly protested the abuse of the voting rights of minorities. There are other States such as California where the impeachment process has not worked fairly. In other sections of his commentary the Leader of the Opposition has expressed distrust for entrusting functions which demand impartiality on politicians.

17. In its Report the CRC also pointed out the practical difficulties which an impeachment process will encounter. The fact is that if a proper standard is applied it cannot be said that there are many cases since Independence in which Jamaica suffered by reason of the absence of an impeachment process.

18. In respect of criminal offences, since Members of the Parliament have no immunity from criminal prosecution it is unnecessary to replace the criminal process with an impeachment process. In respect of allegations which do not amount to criminal offences, they are vague and devoid of specific definition.

RESPONSE RE CLAUSE 6.4.4

19. The present provision for the fixing of the election date by the Prime Minister is deeply entrenched. The CRC therefore considered that a recommendation for adopting a fixed election date without the consensus of the Parliamentary Parties was not feasible. If however, there was consensus that there should be a fixed election date of say five years, then the election would have to be fixed for a date within a limited period of the expiration of the five years. The five-year duration of Parliament may however be varied by a special majority vote. The CRC agrees that its Report did not make this clear.

RESPONSE RE CLAUSE 6.5.3 – EXTENSION OF LIFE OF PARLIAMENT IN CASES OF EMERGENCY

20. The CRC was of the view that an extremely devastating event on the eve of a general election could demand an appreciable amount of time to make assessments and reorganise the electoral machinery. For this reason, considerable flexibility was proposed for the first extension. The CRC adheres to its view that some flexibility should be given but is not opposed to a shorter period being fixed for the first extension.

RESPONSE RE CLAUSE 7.1.3 – COMPOSITION OF THE SENATE

21. The CRC's proposal is directed by two considerations. The first is that the constitutional safeguard which requires at least one Opposition appointee to vote in favour of certain constitutional changes should be preserved. The second is that some flexibility should be given to allow the inclusion of non-partisan, civil society persons. The Leader of the Opposition appears to support these objectives. The CRC is of the view that its recommendations achieved these objectives, but it is not opposed to the adoption of the composition proposed by the Leader of the Opposition.

RESPONSE RE CLAUSE 7.3.1 - MEASURES

22. The word "measures" is used as meaning "a legislative bill or resolution or motion". However, the CRC agrees that it would obtain greater clarity to describe it as "any bill, motion, resolution or other measure" which requires a special two-thirds majority for its passage.

RESPONSE RE CLAUSE 9.1.3 – POWER TO MODIFY CITIZENSHIP PROVISIONS

23. This recommendation is expressly included to ensure clarity in view of the substantial changes made to the constitutional provisions relating to Commonwealth citizenship. It will eventually be a drafting matter. The CRC agrees that any legislative changes should be in conformity with the Constitution but this is a general constitutional principle which, if necessary, can be explicitly dealt with in the drafting. The CRC has taken into account that an addition to the constitutional provisions runs the risk of being construed as an amendment.

RESPONSE RE CLAUSE 12.5 – THE FINAL APPELLATE COURT

24. The CRC has been extremely conscious of the importance of this subject and its potential impact on the constitutional reform process. However, it can only be solved by agreement between the Government and Opposition or in the absence of such agreement by submitting the question to the electorate. This is reflected in the CRC's recommendations. See paragraph 12.5 of its Report.

LLOYD BARNETT

May 14, 2024

MAY 16, 2024 (Revised)

ANNEX III – FINAL Response to the Comments of the Leader of the Opposition

THE CONSTITUTIONAL REFORM COMMITTEE (CRC)

RESPONSE TO THE COMMENTS OF THE LEADER OF THE OPPOSITION

INTRODUCTION

1. The CRC has made over 50 recommendations on a variety of subjects in its initial Report. It has also expressed numerous opinions on the constitutional reform subjects. The “comments” of the Leader of the Opposition which must be regarded as expressing the views of the Shadow Cabinet and/or Parliamentary Opposition relate to 17 of these recommendations and opinions. Seven of these “comments” are in effect requests for clarification. The following are the responses of the CRC to each of these comments.

RESPONSE RE CLAUSE 4.1.4iii

2. The CRC agrees that it should be made clear that it is not being recommended that the official name of Jamaica be changed to “the Republic of Jamaica”. “Jamaica” is used and recognised internationally in the legal, political, social and cultural context as the name of our Nation and State. For clarity, the CRC states that the recommendation at 4.1.4 is that a republican form of government be established for Jamaica and agrees that it should be rephrased accordingly and the footnote deleted. This is also consistent with the CRC’s recommendation at 13.2.2.

RESPONSE TO CLAUSE 4.3.3/4.3.4 – ACTING PRESIDENT

3. The CRC examined this question at great length and very carefully. Essentially, it was concluded that treating the holder of the Office of Chief Justice as the automatic solution to the problem was not prudent. It is quite possible for the vacancy to last for several months. It is undesirable that the Chief Justice should be diverted from his or her judicial functions to an executive office.

4. The selection of a person to occupy the Presidency during the unavailability or inability of the incumbent President or pending the appointment of a permanent President is a question which does not have an easy answer. The CRC does not claim to have found the perfect solution, assuming one to exist. The employment of the Chief Justice for this purpose

although a fairly common device is based on our colonial history. In most British colonies, the Governor and Chief Justice were the two highest Colonial Officers selected by the Colonial Office. For this reason, it was convenient to direct the Chief Justice to act for the Governor. In our state of sovereignty, we should be more conscious of the fact that this device offends the fundamental principle of the separation of the judicial power. It may require, for instance, the Chief Justice to sign a Bill which contravenes the Constitution or to read the Opening Speech at the commencement of Parliament which contains unconstitutional or unpopular proposals. Very importantly, there may be situations in which the Chief Justice had decided that he or she should be the presiding Judge for an upcoming trial or he or she may be engaged in a long trial at the same time that he or she is required to assume the office of President. Accordingly, the CRC adheres to the opinion that the Chief Justice should not be required to occupy the office of President even on a short term basis.

RESPONSE RE CLAUSE 4.4.1 - THE USE OF THE TERM "PERMANENTLY IN JAMAICA"

5. Normally a "permanent resident" is a person who is ordinarily resident for an indefinite time. A person may be ordinarily resident who is employed on a long term contract or conducting a business but intends to return to their original residence at the end of the required period. The CRC considered that "permanent residence" is a desirable requirement for this office which is symbolic of national identity and continuity.

RESPONSE RE CLAUSE 4.7.3 – SCOPE OF PRESIDENT'S IMMUNITY

5A. This states and literally means that immunity should not apply to any act including treason, fraud and/or violence. The CRC does not therefore consider that the statement is incoherent. In any event, it does not appear that the Leader of the Opposition disagrees that in principle such acts should not be protected by immunity.

RESPONSE RE CLAUSE 4.9.1 - TEMPORARY PRESIDENT

6. The objection to the appointment of Custodes to the temporary vacancy on a transitional or acting basis on the ground that they have been appointed by the Governor-General or eventually the President on the advice of the Prime Minister, is hardly sustainable, as the Chief Justice is appointed by the Governor-General on the recommendation of the Prime Minister after consultation with the Leader of the Opposition. The CRC is willing to recommend that in future the Custodes should be appointed by the President after consultation with the Prime Minister and Leader of the Opposition. The CRC is of the view that

with 13 Custodes to choose from it should always be possible to identify one who is competent and suitable to fill the acting appointment.

RESPONSE RE CLAUSE 4.9.2

7. The CRC had also considered that the appointment of an acting or temporary President could also be made from members of the Privy Council (President's Council). The CRC recommends that these persons be added to the pool of persons from whom the acting appointment of President can be made.

RESPONSE RE CLAUSE 4.10.3 – THE REMOVAL PROCESS FOR THE PRESIDENT

8. The CRC recommended a removal process for an incumbent President on the basis of the obvious need for such a process and the fairly widespread practice in other Commonwealth countries. However, the CRC's main focus was to ensure that the process complied with the principles of natural justice. In addition, the President is appointed by a parliamentary process. However, the CRC accepts that the alternative proposed by the Leader of the Opposition that the adjudication of the grounds for removal should be conferred on a quasi-judicial tribunal is more in keeping with the desirability for political neutrality and the maintenance of impartiality. It appears to the CRC that the concerns raised by the Leader of the Opposition in respect of having Parliamentarians conduct the adjudication process apply even more forcibly in respect of a parliamentary impeachment process.

RESPONSE RE CLAUSE 4.10.3.5 – TEMPORARY APPOINTMENT OF A PERSON TO ACT AS PRESIDENT DURING INVESTIGATION OF ALLEGATIONS OF MISCONDUCT AGAINST THE INCUMBENT PRESIDENT

9. The CRC adheres to the views expressed at paragraphs 3 and 4 above in relation to appointments to fill casual vacancies in the Office of President.

RESPONSE RE CLAUSE 6.1.9 – CONFLICTING ALLEGIANCE

10. The CRC's recommendation is based on the principle that a Member of Parliament who is sworn to bear true allegiance to Jamaica should not be compromised by having assumed an identical obligation of allegiance to another State. From time to time issues arise in Parliament in which the interests of Jamaica conflict with the interests of other countries. A Jamaican citizen is entitled to expect that his or her representative will be true to the oath

even if it involves offending a foreign State. A provision could be made that the Member should not speak or vote on any matter where such a conflict arises or is likely to arise. However, this is not a complete solution as the Jamaican citizen is entitled to demand that the parliamentary representative should actively pursue and defend the interests of the constituents.

RESPONSE RE CLAUSE 6.2.2 – DISQUALIFICATION FOR CRIMINAL CONVICTION

11. The CRC considered the option of applying the disqualification where the criminal offence in question attracts a minimum of 18 months. Although, this was regarded as indicating an offence sufficiently serious in nature to attract such a sentence and therefore to merit disqualification, the CRC considered that there was a real possibility, having regard to the wide definition of the applicable offences, for the offender to have extenuating circumstances in his or her favour and this would be reflected in the length of the sentence actually imposed. The CRC recognises that this was a somewhat liberal approach to take.

RESPONSE RE CLAUSE 6.3.1 – IMPEACHMENT

12. The CRC agrees that the Constitution should include a procedure for holding parliamentarians to account for misconduct. In a democracy, the primary mechanisms are: (1) the ballot by which the people can reject the re-election of the parliamentarian if they consider his or her conduct to be unacceptable; (2) the judicial system by which the parliamentarian can be prosecuted and convicted for criminal acts, and, as the CRC recommends, disqualified from holding parliamentary office. In the case of criminal proceedings, the offence has to be defined in precise terms and not merely described as “egregious”.

RESPONSE RE CLAUSE 6.3.2

13. The CRC can find no basis for the statement that impeachment has been a successful accountability mechanism in other democratic jurisdictions. The Leader of the Opposition's memorandum has not identified the jurisdictions referred to.

RESPONSE RE CLAUSE 6.3.3

14. The history of impeachment does not support this statement. Impeachment was introduced in England in the 14th century as a tool by which Parliament sought to make the despotic King's servants accountable. Its use was discontinued in England by the middle of

the 15th century when the American Constitution was being framed. The American Constitution adopted the English practice but in England it was soon discontinued. It should be noted that in both England and America impeachment was limited to criminal offences. In the United States, after much debate, impeachable offences were defined as "treason, bribery or other high crimes and misdemeanours". See Akhil Amar, *America's Constitution* (2005), pp. 199-203, 222-224.

RESPONSE RE CLAUSE 6.3.4

15. In their book *Tyranny of the Minority* (2023) Harvard Professors Daniel Ziblatt and Steven Levitsky, in dealing with excessive or undue use of law stated "impeachment should be rare-used only when presidents egregiously or dangerously abuse their power". p. 53. This has been the case in the world's two oldest presidential democracies: the United States and Costa Rica. The United States averaged one presidential impeachment per century during its first 230 years. Never in Costa Rica's seventy-four-year democratic history has a president been removed before the end of their term. 16. Recently, we have seen how in the United States the impeachment process has been abused. While President Clinton could be condemned for immorality, there was no legal basis for his impeachment and the entire exercise was politically motivated. See Gregory Tardi, *The Law of Democratic Governing Jurisprudence* (2004), pp. 943-950. President Trump was impeached twice but acquitted on each occasion purely by a partisan vote. An attempt was made to impeach President Biden purely on "trumped up" charges and by partisan manipulation. In other countries, like Peru and Thailand, impeachment has been abused. See Ziblatt & Levitsky, *op. cit*, pp. 54-5. In the United States, at the State level, two black representatives were recently removed from office when they publicly protested the abuse of the voting rights of minorities. There are other States such as California where the impeachment process has not worked fairly. In other sections of his commentary the Leader of the Opposition has expressed distrust for entrusting functions which demand impartiality on politicians.

17. In its Report the CRC also pointed out the practical difficulties which an impeachment process will encounter. The fact is that if a proper standard is applied it cannot be said that there are many cases since Independence in which Jamaica suffered by reason of the absence of an impeachment process.

18. In respect of criminal offences, since Members of the Parliament have no immunity from criminal prosecution it is unnecessary to replace the criminal process with an impeachment process. In respect of allegations which do not amount to criminal offences, they are vague and devoid of specific definition.

RESPONSE RE CLAUSE 6.4.4

19. The present provision for the fixing of the election date by the Prime Minister is deeply entrenched. The CRC therefore considered that a recommendation for adopting a fixed election date without the consensus of the Parliamentary Parties was not feasible. If however, there was consensus that there should be a fixed election date of say five years, then the election would have to be fixed for a date within a limited period of the expiration of the five years. The five-year duration of Parliament may however be varied by a special majority vote. The CRC agrees that its Report did not make this clear.

RESPONSE RE CLAUSE 6.5.3 – EXTENSION OF LIFE OF PARLIAMENT IN CASES OF EMERGENCY

20. The CRC was of the view that an extremely devastating event on the eve of a general election could demand an appreciable amount of time to make assessments and reorganise the electoral machinery. For this reason, considerable flexibility was proposed for the first extension. The CRC adheres to its view that some flexibility should be given but is not opposed to a shorter period being fixed for the first extension.

RESPONSE RE CLAUSE 7.1.3 – COMPOSITION OF THE SENATE

21. The CRC's proposal is directed by two considerations. The first is that the constitutional safeguard which requires at least one Opposition appointee to vote in favour of certain constitutional changes should be preserved. The second is that some flexibility should be given to allow the inclusion of non-partisan, civil society persons. The Leader of the Opposition appears to support these objectives. The CRC is of the view that its recommendations achieved these objectives **and it notes the numbers suggested by the Opposition Leader.**

RESPONSE RE CLAUSE 7.3.1 - MEASURES

22. The word "measures" is used as meaning "a legislative bill or resolution or motion". However, the CRC agrees that it would obtain greater clarity to describe it as "any bill, motion, resolution or other measure" which requires a special two-thirds majority for its passage.

RESPONSE RE CLAUSE 9.1.3 – POWER TO MODIFY CITIZENSHIP PROVISIONS

23. This recommendation is expressly included to ensure clarity in view of the substantial changes made to the constitutional provisions relating to Commonwealth citizenship. It will eventually be a drafting matter. The CRC agrees that any legislative changes should be in conformity with the Constitution but this is a general constitutional principle which, if necessary, can be explicitly dealt with in the drafting. The CRC has taken into account that an addition to the constitutional provisions runs the risk of being construed as an amendment.

RESPONSE RE CLAUSE 12.5 – THE FINAL APPELLATE COURT

24. The CRC has been extremely conscious of the importance of this subject and its potential impact on the constitutional reform process. However, it can only be solved by agreement between the Government and Opposition or in the absence of such agreement by submitting the question to the electorate. This is reflected in the CRC's recommendations. See paragraph 12.5 of its Report.

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MAY 17, 2024

*amendments noted in red