



MINISTRY OF LEGAL & CONSTITUTIONAL AFFAIRS

*c/o 1 DEVON ROAD, KINGSTON 10 & 61 CONSTANT SPRING ROAD, KINGSTON 10
JAMAICA*

Telephone Nos.: (876) 927-9941-3, 929-8880-5 & 927-4101-3 (Minister & Permanent Secretary)
(876) 906-4923-31 (Legal Reform Department & Law Revision Secretariat)
(876) 906-1717 (Office of the Parliamentary Counsel)

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

MINUTES

46th Meeting of the Constitutional Reform Committee (CRC)

Venue: Ministry of Legal and Constitutional Affairs

Date: July 31, 2024

Time: 11:00am

AGENDA

1. Call to Order
2. Prayer
3. National Pledge
4. Apologies for Absence/Lateness
5. Confirmation of Agenda
6. Confirmation of Outstanding Minutes of CRC Meetings
7. Matters Arising
8. Report from the Drafting Strategy Sub-Committee
 - a. Jamaicanisation of the Constitution
 - b. **Issues** raised by the Leader of the Opposition
9. Public Education and Engagement
10. Any Other Business
11. Date and Time of Next Meeting
12. Adjournment

ATTENDEES:

- Honourable Marlene Malahoo Forte, KC, JP, MP (Chairman)
- Dr Derrick McKoy, CD, KC (Attorney General of Jamaica) *via video link*
- Senator Ransford Braham, CD, KC (Government Senator)
- Dr the Hon Lloyd Barnett, OJ (National Constitutional Law Expert)
- Mr Hugh Small, KC (Consultant Counsel and Nominee of the Leader of the Parliamentary Opposition)
- Dr David Henry (Wider Society – Faith-based)
- Dr Nadeen Spence (Civil Society – Social and Political Commentator)
- Mr Sujae Boswell (Youth Advisor)
- Professor Richard Albert (International Constitutional Law Expert – University of Texas at Austin) *via video link*

Secretariat

Ministry of Legal and Constitutional Affairs

- Mr Wayne O Robertson, JP, Permanent Secretary
- Ms Judith Grant, Chief Parliamentary Counsel *via video link*
- Mr Christopher Harper, Senior Constitutional Reform Officer
- Ms Nastacia McFarlane, Director, Corporate Communication and Public Relations
- Ms Cheryl Bonnick Forrest, Senior Director, Strategic Planning
- Mr Makene Brown, Legal Officer
- Mr Ivan Godfrey, Legal Education Officer
- Mrs Shawna-Kaye Taylor Reid, Administrative Assistant (Actg.)
- Ms Cedri-Ann Brown, Legal Intern

1. CALL TO ORDER

- 1.1.** The meeting was called to order at 11:20am by the Chairman, the Hon. Marlene Malahoo Forte at 11:20am when quorum was achieved.

2. PRAYER

- 2.1.** Prayer was led by Dr David Henry.

3. NATIONAL PLEDGE

- 3.1. The National Pledge was recited.

4. APOLOGIES FOR ABSENCE/LATENESS

- 4.1. Apologies for absence were received from Senator Donna Scott-Mottley and Dr Elaine McCarthy.
- 4.2. Apologies for lateness were tendered on behalf of Mrs Laleta Davis Mattis and Mr Wayne O Robertson.

5. CONFIRMATION OF AGENDA

- 5.1. Agenda item number 8 was amended by changing the word “issued” to “issues”.
- 5.2. The amended Agenda was confirmed on a motion by Dr David Henry and seconded by Dr Nadeen Spence.

6. CONFIRMATION OF OUTSTANDING MINUTES OF CRC MEETINGS

- 6.1. The Minutes of the 42nd Meeting of the Constitutional Reform Committee held on June 7, 2024 were corrected and confirmed on a motion by Dr Nadeen Spence and seconded by Dr Lloyd Barnett.

7. MATTERS ARISING

- 7.1. The Charman stated that there was a matter arising from paragraph 6.16 of the Minutes of the 42nd meeting of the Constitutional Reform Committee. Referencing Mr Small’s statement of uncertainty *whether the Minutes adequately reflected the discussions which took place, particularly in relation to recommendations around the Senate that were once in the Report but subsequently removed*, the Chairman reminded Members that the Minutes went through a process of correction for accuracy and confirmation. She also reminded Members that at no time were Minutes published without being confirmed in the meeting. She then informed Members that at a meeting held at the University of the West Indies, a member of the public informed her that a Committee Member found the Minutes to be inaccurate. She invited Members to recall that Minutes were not verbatim records of the

meeting and did not capture every exchange made on a particular subject matter. The Committee also went through a process to correct and confirm them.

7.2. Dr Barnett opined that too much time was spent discussing matters which did not advance the work of the Committee. In relation to the composition of the Senate, he highlighted paragraph 6.23 of the Minutes of the 42nd Meeting whereby Dr Spence explained what happened in relation to the recommendation on the composition of the Senate. He stated that the matter was settled and urged Members to focus more on those critical matters of national importance that were raised.

7.3. The Chairman then deferred any matter that arose from other Minutes to address the other substantive matters for discussion.

8. REPORT OF THE DRAFTING STRATEGY SUB-COMMITTEE

8.1. JAMAICANISATION OF THE CONSTITUTION

8.1.1. Dr Barnett stated that there was need for clarity around whether the Cabinet Decision accepted all the recommendations set out in the Report of the Committee as it would inform its work, particularly that of the Drafting Strategy Sub-Committee. It appeared to him that there was some dispute or uncertainty around the Cabinet Decision, especially having regard to the Report from the Chairman that Cabinet had accepted all the recommendations of the Committee.

8.1.2. The Chairman, in providing additional context, stated that the Sub-Committee had been examining the methodology to achieve the goal of Jamaicanising the Constitution. She noted that there were different views on the matter which raised, among other things, concerns related to the Terms of Reference, the specific recommendation of the Committee on how to Jamaicanise the Constitution and the reported decision of the Cabinet. Noting that the work would not commence with a rewrite of the Constitution or an alteration of all of its provisions in the first phase, she opined that there was some confusion on what would emerge after the Constitution was enacted by the Parliament and approved by the People. She made reference to Dr Barnett's position that such a process would yield a new instrument. She then invited Members to recall that during the process of finalising the Report, Members were settled on the use of the words *reformed constitution* as opposed to *new constitution*. However, emerging at the level of the sub-committee, was the

view that the better approach to achieve the goal of Jamaicanising was to put the full 1962 constitutional document, as amended, to give effect to the recommendations of the Committee to the Parliament and the People. She stated that the issue was discussed at length and it was suggested that the entire constitutional document be put before the Parliament and People of Jamaica. She then enquired of Dr Barnett whether her overview accurately summarised what was discussed.

- 8.1.3.** While Dr Barnett responded favourably, he invited Members to consider that the Committee, at paragraph 3.1.3 of the Report, recommended that the *constitutional reform programme should begin with the Jamaicanisation of Jamaica's Constitution by repealing and replacing the present imperial instrument with a Jamaican instrument made by the Parliament and approved by the People of Jamaica, in Jamaica*. He explained that he was of the impression that that recommendation was approved by the Cabinet.
- 8.1.4.** He then referenced a letter dated July 22, 2024, written by the Chief Parliamentary Counsel (CPC), which caused him great concern as it stated that the approach proposed by the Committee was not consistent with the Cabinet Decision.
- 8.1.5.** The Chairman, in response, stated that the issue related to terminology and how the decision was recorded as at one stage, a reference to the imperial instrument was a reference to the Order in Council. Since the intention was to sever the Constitution from the Order in Council, the word *saved* was used. She noted that when such terminology was used, the CPC took a particular approach which accounted for the difference in interpretation of the Decision.
- 8.1.6.** Mr Boswell enquired whether the production of a new document would be consistent with the phasing of the reform programme.
- 8.1.7.** The Chairman, in response, stated that there were risks to be managed as not every provision was being revised at once. She then invited Members to recall that a brand-new constitution would emerge at the end of phase III following the fulsome review/examination of all the provisions. Nevertheless, she stated that Dr Barnett provided clarity in stating that once the goal of Jamaicanising the Constitution was being pursued, Jamaica would emerge with a new constitutional instrument. This,

she said, would need further clarification across public education and engagement efforts.

8.1.8. Dr Barnett opined that it would be easier to say that the Constitution would no longer be a British instrument but a Jamaican one. Even if the methodology pursued was a cumbersome amendment legislation, he stated there was still a need to explain the changes being proposed. He further opined that it was easier to convey the concept of a Jamaican instrument that gave effect to a republican form of Government among other changes rather than re-enacting a schedule to the Order in Council with changes.

8.1.9. The Chairman, in response, stated that there were still a number of risks to be managed. While there was no dispute around the goal of Jamaicanising the Constitution, there was still some uncertainty about the path to be taken to achieve it. She then asked the CPC to opine on the matter.

8.1.10. The CPC enquired whether a decision was taken at the Drafting Strategy Sub-Committee to repeal and replace the Order in Council substituting it with a new constitution. The Chairman, in response, stated that what emerged from the meeting of the sub-committee was that the entire instrument should be put to the Parliament and People of Jamaica as amended.

8.1.11. The CPC stated that she would need clear instructions to repeal and replace the Order in Council supported by a Cabinet Decision to give effect to such an approach. The Chairman explained that Cabinet was not of the view that the entire instrument would be put to the people despite having agreed to pursue the goal of Jamaicanising the Constitution. She noted that there were a number of political risks which were to be discussed.

8.1.12. Mr Small enquired whether the Cabinet Decision could be shared with the Committee. The Chairman stated that she only had a section of the Decision and recalled that it was read at the last meeting. She then invited Members to recall that Cabinet gave approval for:

- I.** The tabling in Parliament of the Report of the Constitutional Reform Committee on the Transition to the Republic of Jamaica and other matters on Tuesday, 21 May 2024 as a Ministry Paper;

- II.** The enactment of legislation to:
 - a.** Revoke the Jamaica (Constitution) Order in Council, 1962 and save the Second Schedule (The Constitution of Jamaica) to effect the patriation of the Constitution;
 - b.** Abolish the British Monarch as the Head of State and replace that with the Office of President for the Republic of Jamaica;
 - c.** Retain the Parliamentary Cabinet System;
 - d.** Amend other related deeply entrenched provisions of the Constitution for which a referendum was required to amend;
 - e.** Amend the Jamaica Independence Act, 1962;
 - f.** Amend any other associated legislation that may require consequential amendment.
- III.** The enactment of a Referendum Law to prescribe the procedure to obtain the approval of the electors qualified to vote for the election of members of the House of Representatives; and
- IV.** The issuing of drafting instructions to the Chief Parliamentary Counsel to prepare the legislation required to establish the Republic of Jamaica and other matters.

8.1.13. Senator Braham stated that he was trying to understand the practical differences between the two paths to achieve the goal of Jamaicanising the Constitution currently on the table. He noted the possibility of passing the amendments to the Constitution which would result in a change to the Constitution itself. Alternatively, the entire Constitution would be typed over with a view to enact the new parts and re-enact the old parts in one composite document.

8.1.14. Dr Barnett opined that if the first approach was done, the law revision process would fix it subsequently through an administrative arrangement. The second approach would allow for the instrument to be approved by the Parliament and the people of Jamaica.

8.1.15. Senator Braham stated that while he appreciated that approach, there was merit in Mr Boswell's concerns as the suggested approach had mental incongruities and optics which needed to be dealt with. He opined that if there were other aspects of

the constitution to be reconciled at a later date, and the Parliament approved what was to be addressed, such an approach may not be favourably received by the Parliament and the people of Jamaica.

8.1.16. Dr Spence, having regard to Senator Braham's assessment, opined that there were two different issues being considered simultaneously. In relation to the reformation of the Constitution, she noted Dr Barnett's concern about the means by which the constitutional instrument came into being to be a separate matter. She then stated that irrespective of the amount of work required, the goal of Jamaicanising the Constitution was an important one.

8.1.17. Mr Boswell stated that goal of Jamaicanising the Constitution could be achieved at the end of a process, having explored all phases of the reform work programme.

8.1.18. Dr Barnett stated that one critical feature of the new Constitution was a Jamaican president. He opined that when constitutions were reformed, unless there was some revolutionary change, they largely remained the same. He noted that Trinidad, which gained independence in the same year as Jamaica, revised their Constitution twice, published very extensive Reports on constitutional reform and ensured that their Constitution was a Trinidadian instrument.

8.1.19. The Chairman stated that while she understood the point, the goal of Jamaicanising of the Constitution was more than having the Constitution passed by the Parliament and approved by the People. She stated that people were not attached to the process and that there was still a lot to be achieved in the first phase of the reform programme.

8.1.20. Mr Small recalled that in a presentation at the University of the West Indies, former Prime Minister Bruce Golding spoke with emphatic clarity about the need for constitutional change to be a national endeavour. He stated that his desire to see the Cabinet Decision was to enable him to ascertain the extent to which it recognised constitutional reform as a national endeavour rather than the policy of the government which exercised a majority in the Parliament. He opined that constitutional-making, of the kind being pursued, could not be founded on the policy of the government.

- 8.1.21.** Dr Barnett stated that there was a difference in terminology between the Cabinet Decision and the recommendation of the Committee on the topic of Jamaicanisation. This, he opined, created room for doubt and differences in opinion. He stated that clarification was therefore essential.
- 8.1.22.** The Chairman opined that this was a learning moment for everyone. She invited Members to consider that Government was organised in a particular way. Subject matters were assigned and policy was formulated by way of a process and approved by the Cabinet as the chief instrument of policy. She stated that the work began with due consideration of the Opposition and the people of Jamaica. The understanding was formulated based on broad agreement in the society on the matter of the transition from a Constitutional Monarchy to a Republic. [She advised that Government was administered noting that laws were not made from a public space but rather informed by the public.] She noted that the UK Order in Council was no longer acceptable and tenable and that the policy included having a constitution passed and approved by the people.
- 8.1.23.** Dr Spence stated that in a democracy, the policy of the government was legitimate because government occupied a seat of power. She, however, opined that the matter of the transformation of the Constitution was another issue.
- 8.1.24.** Dr Barnett stated that constitutional reform should not be treated as a government policy or the implementation of one.
- 8.1.25.** Senator Braham invited Members to revisit the language of the Cabinet Decision, particularly the section which stated that the Cabinet approved the enactment of legislation to *revoke the Jamaica (Constitution) Order in Council, 1962 and save the Second Schedule (The Constitution of Jamaica) to effect the patriation of the Constitution*. Dr Barnett, in response, stated that there was a contradiction in that statement which needed clarification.
- 8.1.26.** The Chairman stated that it was not unusual to repeal instruments and save aspects of it. She further stated that any clarity that was required, was for the purpose of preparing the relevant drafting instructions. She then noted that the decision taken was to have the terminology in the submission clarified and revised to reflect the

revocation of the Order in Council and the re-enactment of the Constitution with the changes pursued.

8.2. ISSUES RAISED BY THE LEADER OF THE OPPOSITION

- 8.2.1. The Chairman noted that the meeting was at a disadvantage as neither of the two representatives of the Parliamentary Opposition was present.
- 8.2.2. Dr Barnett stated that he was uncertain whether the physical delivery of the memorandum outlining the response of the CRC to Mr Hylton was the appropriate method.
- 8.2.3. The Chairman, in response, stated that it was delivered in that way having regard to how it was received.
- 8.2.4. Mr Small enquired whether it was possible to break for lunch in order to speak to Mr Hylton. The Chairman agreed and tasked Mr Small with engaging him.

Lunch Break at 2:01pm

Meeting resumed at 2:35pm

9. PUBLIC EDUCATION AND ENGAGEMENT

- 9.1. The Chairman invited Dr Barnett to propose a response to the concerns raised in the public domain about the type of president recommended by the Committee.
- 9.2. Dr Barnett stated that a Non-Executive President would preserve stability and enable the establishment of a just and equitable society. He noted that the experiences worldwide demonstrated that the executive presidential system often resulted in dictatorial, corrupt and unfair governments. He further noted that even in countries with long histories of democracies, notably the United States of America, there had been evidence of instability and unjust and corrupt governments. He further stated that in many comparative assessments of the history of countries throughout the world, the countries with parliamentary cabinet systems were well positioned to preserve human rights and achieve democratic stability and economic welfare relative to those with executive presidential systems. He also stated that it was wrong to regard the parliamentary system as purely one that was handed down to Jamaica by the British. Many countries that were not a part of

the Commonwealth had adopted a parliamentary cabinet system and could not therefore be said to have inherited one.

- 9.3.** On the issue of executive presidents and their tendency to lapse into dictatorships, Dr Barnett stated that this system emphasised the pre-eminence of one person who, having been elected, operated on the basis of his own preferences and who was not a part of a team similarly to a Prime Minister who was a part of a team consisting members of an elected house under the parliamentary system.
- 9.4.** Dr Barnett stated that it would have been difficult to argue five years ago, but having regard to what was happening in Venezuela and the United States of America, such was no longer the case.
- 9.5.** Mr Boswell opined that while there was no perfect political system, many Jamaicans looked to the United States as a shining example. He stated that there was a general position held among the people that a directly elected person was more accountable.
- 9.6.** Dr Spence, in echoing the sentiment conveyed by Mr Boswell, stated that many favoured an executive Presidential system because it allowed for greater accountability. As the Committee continued to justify the desired form of President, she noted that it was important to address other issues, especially those which were conflated with the type of President proposed for the Republic of Jamaica.
- 9.7.** Mr Small stated that while he agreed with what had been said, he did not think that there was anyone in the Committee who advocated for an executive President. He opined that in the current political environment, there was an issue which had not been addressed which caused people to feel that they had no direct influence over where executive power was most concentrated, i.e. in the post of the Prime Minister. He further opined that the Prime Minister in Jamaica, was more powerful in many respects than many executive Presidents. The Prime Minister of Jamaica, both by specific provisions in the Constitution and by the way in which Jamaica's political system worked, exercised more power than many heads of government and heads of state in different parts of the world.
- 9.8.** The Chairman enquired whether members of the public were using the call for an executive President as a proxy for something in relation to the office of the Prime Minister.
- 9.9.** On the matter of corruption, Dr Barnett stated that numerous indices would indicate that corruption was higher in presidential systems because of the levels of individualism. He

opined that it would be prudent to point out the deficiencies in an executive presidential system.

- 9.10.** The Chairman sought clarity on the aspects which made the Prime Minister more powerful in the context of Jamaica. Mr Small said that, though not particular to Jamaica, the Prime Minister chose the election date and had the power to take decisions that determine the life of the Parliament. The Chairman, in response, stated that because of their lack of uniqueness to Jamaica, they would not be good examples. Mr Small stated that it is what Jamaican people were exposed to from living a lifetime of experiences. He further stated that on the question of the appointment of the Chief Justice, the final word laid with the Prime Minister, an approach applicable to several other high offices of the State. He noted that those decisions were occasionally laced with controversy.
- 9.11.** The Chairman stated that one aspect of Jamaica's political culture that many persons took issue with was the inability to vote for their Prime Minister separately from their Member of Parliament. Dr Barnett invited Members to recall a presentation made to the Committee where the presenter stated that he would not vote on a particular occasion because while he wanted a certain person for Prime Minister, he did not want that particular candidate to be his constituency representative. Dr Barnett opined that such was an example where personal preferences rose above the best interests of the country. He stated that the Committee should be prepared to respond to similar concerns.
- 9.12.** Dr McKoy opined that Members needed to be careful not to confuse the powers that could be given to a Prime Minister with the powers that must be exercised by the Prime Minister under a Parliamentary Cabinet System. On the matter of the influence of the Prime Minister in appointing the Chief Justice, Dr McKoy advised that the requirement for the Prime Minister to consult before he advised was a means of controlling the power so exercisable. He stated that in Trinidad the formulation put the power in the Head of State to consult both the Prime Minister and the Leader of the Opposition. Accordingly, Dr McKoy urged Members to exercise care when discussing the Parliamentary Cabinet System as there were varying degrees of powers exercisable by the Prime Minister.
- 9.13.** The Chairman stated that the views expressed would inform the formulation of a one-page document for circulation. She expressed disappointment with the generalisations and lack of accuracy among those who were learned in the public domain which

demonstrated the level of difficulty being experienced in pursuing the reform work. She noted that views were not often grounded in data nor anything verified.

10. ANY OTHER BUSINESS

10.1.Dr Spence enquired whether any consideration was given to phase II having regard to the focus of some entities.

10.2.The Chairman responded that there was a quandary because much of what was to be achieved had loose ends and the focus was now on tying them.

10.3.Dr Barnett stated that while there was agreement to focus on those matters related to the abolition of the Monarchy, the Jamaicanisation of the Constitution, and any other matters on which consensus could be achieved within the initial period, the Committee was not excluded from considering any other matter that may be raised from time to time. He opined that openness allowed for discussions to take place faithfully and that the Committee should not seek to shut out any views.

11. DATE AND TIME OF NEXT MEETING

11.1.The Chairman advised that the date and time would be agreed and communicated noting mid-August to be desirable.

12. ADJOURNMENT

12.1.There being no other business, the meeting was terminated at 3:34pm on a motion by Senator Ransford Braham and seconded by Mr Hugh Small.