



## **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**

#### **47<sup>th</sup> Meeting of the Constitutional Reform Committee (CRC)**

**Venue: Ministry of Legal and Constitutional Affairs**

**Date: August 28, 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 Outstanding Minutes
7. Matters Arising
8. Report of the Drafting Strategy Sub-Committee
9. Consideration of the Draft Bill
10. Any Other Business
11. Date and Time of Next Meeting
12. Adjournment

## **ATTENDEES:**

- Honourable Marlene Malahoo Forte, KC, JP, MP (Chairman)
- Ambassador Rocky Meade, CD, JP, PhD (Co-Chairman – Permanent Secretary, 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)
- Dr the Hon. Lloyd Barnett, OJ (National Constitutional Law Expert)
- Mr Hugh Small, KC (Consultation Counsel and Nominee of the Leader of the Parliamentary Opposition)
- Dr Elaine McCarthy (Former Chairman – Jamaica Umbrella Groups of Churches)
- Mr Sujae Boswell (Youth Advisor) *via video link*
- 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 Nadine Wilkins, Director of Legal Reform
- Mrs Cheryl Bonnick Forrest, Senior Director, Strategic Planning
- Mr Christopher Harper, Senior Constitutional Reform Officer
- Mr Makene Brown, Legal Officer
- Mr Ivan Godfrey, Legal Education Officer
- Ms Shaedane Facey, Strategic Planner
- Mr Winston Lowe, Public Relations 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 10:54am by the Chairman, the Hon. Marlene Malahoo Forte when quorum was achieved.

## **2. PRAYER**

- 2.1. Prayer was offered 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 and Dr David Henry.
- 4.2. Apologies for lateness were tendered on behalf of Ambassador Rocky Meade and Dr Elaine McCarthy.
- 4.3. Dr Spence, who was overseas, attempted to join virtually but did not succeed.

## **5. CONFIRMATION OF AGENDA**

- 5.1. The Agenda was confirmed without amendments on a motion by Senator Ransford Braham and seconded by Dr Derrick McKoy.

## **6. CONFIRMATION OF OUTSTANDING MINUTES**

- 6.1. The Minutes of the 43<sup>rd</sup> Meeting of the Constitutional Reform Committee held on Wednesday, June 26, 2024 were corrected and confirmed on a motion by Dr Lloyd Barnett and seconded by Mr Hugh Small.
- 6.2. The Minutes of the 44<sup>th</sup> Meeting of the Constitutional Reform Committee held on Wednesday, July 10, 2024 were corrected and confirmed on a motion by Dr Lloyd Barnett and Dr Derrick McKoy.

## **7. MATTERS ARISING**

- 7.1. Mr Small indicated that there were two matters arising at paragraph 9.37 of the Minutes of the 43<sup>rd</sup> Meeting and paragraph 6.34 of the Minutes of the 44<sup>th</sup> Meeting of the Committee respectively. He noted that at paragraph 9.37, Ambassador Meade suggested that Mr Robertson ask the Chairman to provide an update on the status of the discussion between the leaders of the two major political parties. He further noted that at paragraph 6.34, Dr McCarthy suggested that the Church be engaged to facilitate a meeting of the Leader of Government and the Leader of the Opposition similar to that which took place at Vale Royal. He enquired whether any progress was made on those two matters.
- 7.2. Dr McCarthy, in response, stated that she had a discussion with the Jamaica Umbrella Groups of Churches which suggested that such a meeting be expanded to include other stakeholders. Mr Small

enquired into which stakeholders, to which Dr McCarthy advised that civil society groups were suggested thereby making it a larger forum.

- 7.3. The Chairman, in her response, stated that she did not have an update for the Committee on the status of the discussion between the political leaders. Nevertheless, she committed to providing an update at a subsequent date. She then advised Members that she was in the process of updating the Prime Minister on the work of the Committee. She further stated that while a meeting to discuss the matters at hand had been requested, a formal note could also be prepared to inform the Cabinet on the progress to date.
- 7.4. Dr Barnett stated that the Committee had nothing new to report as its position largely remained the same.
- 7.5. The Chairman then enquired whether there were any other matters arising. Dr McCarthy advised Members that since the last meeting of the Committee, a number of sessions were convened with various Church groups. The Chairman asked whether a written report was prepared and Mr Small suggested that the matter be moved to any other business.
- 7.6. Dr Barnett highlighted paragraph 9.5 of the Minutes of the 43<sup>rd</sup> Meeting which made reference to a popular version of the Report of the Committee prepared by the Members of the Constitutional Reform Division and Legal Education Division for wide public dissemination. He enquired whether there were any updates on this.
- 7.7. Mr Harper advised that the preparation of the popular version of the Report was far advanced as the Division received a draft illustrated and graphically designed version which was under review. Once finalised, the document would be sent to the printers for the procurement of 3000 copies in the first instance.
- 7.8. Dr Barnett then noted paragraph 9.9 of the Minutes of the 43<sup>rd</sup> Meeting where he invited Members to recall that two groups, namely Jamaicans for Justice and the Jamaica Coalition for a Healthy Society, requested to meet with the Committee. He then asked whether there were any updates regarding such an engagement.
- 7.9. The Chairman advised that the dates previously proposed to them were not convenient and having regard to the latest exchange which took place on August 24, 2024, September 18, 2024 or later would be ideal. She then instructed the Secretariat to follow up with those two groups.

*Coffee Break*

*Nadine Wilkins arrived at 12:35pm*

## **8. REPORT OF THE DRAFTING STRATEGY SUB-COMMITTEE**

- 8.1.** The Chairman presented a draft of the **Report of the Drafting Strategy Sub-Committee** dated **August 21, 2024** appended hereto as **Annex I**.
- 8.2.** The Chairman invited discussion on whether the goal to Jamaicanise the Constitution could be achieved at this stage. She noted that at different points during meetings of the Sub-Committee, Members took different views. At one point, Members were convinced by the high symbolic nature of the approach proposed by Dr Barnett, while noting the risk to be managed. The Chairman recalled that Members of the Committee, as well as members of the public, had expressed their concerns about the levels of ignorance in the society about the Constitution. She also recalled that during the earlier stages, there were many who expressed suspicion having opined that the Committee sought to change the Constitution while forcing them to accept such changes. She noted that while the sentiment expressed was not all accurate, it nevertheless demonstrated a level of distrust and suspicion which raised doubt as to what was actually contained in the Constitution.
- 8.3.** The Chairman further stated that Members wondered whether a second or third referendum would take place. She stated that while she could not speak to the approach that would be taken by a government formed by the People's National Party, an Andrew Holness-led administration which established the Ministry of Legal and Constitutional Affairs signalled a commitment to the process of constitutional reform. She also stated that from the outset, it was recognised that the process of reform would require more than one referenda to achieve the goals being pursued. She noted that the act of Jamaicanising the Constitution would not be a one-off act but as Jamaicans were drawn into and became interested in the reform process and continued to express their views, the phases of reform would allow for a critical examination of all the provisions, with a view to reform those on which there was consensus. As such, the approach was to reform those provisions that were most difficult to change having regard to the requirement for consensus and a referendum bearing in mind the existence of strong expressions for the abolition of the Monarchy which was yet to be achieved.
- 8.4.** The Chairman then highlighted that one of the main risks to manage was whether the entire Constitution could be put to the people of Jamaica without inviting commentary on all of the provisions contained therein.
- 8.5.** Senator Braham, in commenting on the methodology proposed, stated that he agreed that the process which did not require the entire Constitution being subject to debate should be used having regard to the other areas that were to be reserved for future discussion. He opined that the process of abolishing the Monarchy did not require a repeal and reenactment of the Constitution.
- 8.6.** Senator Braham then enquired whether it was contemplated that the President's role would be deeply entrenched having regard to the status of the Monarch as deeply entrenched. He opined that while

the Office of President should not be deeply entrenched, it should nevertheless be entrenched because with the passage of time, there may be consensus that the position needed to be changed, tweaked or fixed. He then invited Members to consider the point of the status of the Office as it was not set out in the draft Report of the Drafting Strategy Sub-Committee.

- 8.7.** Senator Braham further invited Members to consider paragraph 25 of the draft Report which recommended that “once a Bill had been passed by both Houses of the Parliament, the Parliament should be required to certify that the entire process had been properly adhered to. Once the Clerk certified this, the Bill should then be transmitted to the Attorney-General’s Chambers for advice on the constitutionality of the legislation. Once such advice was received by the, the Clerk would be required to publish the Bill in the Gazette as an Act of Parliament”
- 8.8.** Senator Braham raised concern about the use of the phrase “the entire process had been properly adhered to.” Ms Wilkins explained that the “process of enactment” meant “duly passed by both Houses.”
- 8.9.** Senator Braham then opined that Members should have regard to the independence of Parliament. He noted that arguments were presented to the Court, up to recently, that the Parliament or the Acts of Parliament may be overturned not for unconstitutionality but for improper purpose. He stated that it would be interesting to see how the Court of Appeal treat such a submission. He further opined that Parliament’s remit could be interfered with by the other branch of Government if the ground on which to challenge legislation was extended. He therefore indicated his preference for the formulation presented by Ms Wilkins and suggested that such language be substituted.
- 8.10.** He then noted the recommendation for an extra parliamentary procedure which required the certification of the Attorney-General. He opined that there should be no such requirement before a Bill came into effect.
- 8.11.** The Chairman, in response, stated that the certification by the Attorney-General was in relation to the presumption of the constitutionality of the Bill. Dr Barnett, in response, stated that if the Houses of Parliament passed the Bill, it would be difficult for the Attorney-General to indicate that the Bill should not be signed noting the function of the Attorney-General to advise before the Bill was introduced in the House of Representatives. He therefore regarded this proposal as improper.
- 8.12.** Dr McKoy stated that no provision should be made for the Attorney-General to give its advice. Having regard to the supremacy of the Parliament, the recommendation should not therefore seek to invest [additional] powers in any other institution. He stated that the requirement for the Attorney-General to advise on the constitutionality of the Bill gave rise to an implicit power to veto legislation. He then invited Members to take note of the practice whereby the Clerk would indicate whether the necessary votes have been obtained in favour of the Bill in each House. The Speaker of the House

and the President of the Senate would sign to confirm same. At that stage, he explained, Parliament completed its approval of the Bill. He then opined that once that process was completed, having regard to the removal of the power of the Governor-General to assent, no one else should have any say in whether the Bill became law.

- 8.13.** Dr McKoy then opined that this approach would capture two important principles namely the supremacy of the Parliament as the supreme legal authority and the desire to remove from the process, any suggestion that the Executive or any other authority could impede the process of enacting legislation. On the second matter, he noted that such was often resolved by a constitutional convention whereby the Executive had no real effective role in preventing the passage of legislation.
- 8.14.** Professor Albert stated that it was important to maintain the continuity of these principles having regard to the transformation of the system of Government. He opined that the supremacy of the Parliament was to be maintained.
- 8.15.** Dr Barnett opined that the Attorney-General being implicitly empowered to veto legislation was inconsistent with the principle of Parliamentary supremacy. He stated that if the two Houses of Parliament passed the Bill, the only thing that was required was an indication from the Parliament that this was the Bill that was passed.
- 8.16.** Ms Wilkins invited Members to recall the existing role of the Clerk whereby the printing office would not print the Bill unless it was certified by the Clerk that all the relevant steps were adhered to. Dr Barnett stated that ordinarily, the President of the Senate signed on behalf of the Senate; the Speaker of the House signed on behalf of the House of Representatives; and the Clerk certified that both have signed before the Bill could be Gazetted.
- 8.17.** The Chairman stated that she gathered from the discussion that there was agreement among Members that the process would be complete after the Bill was duly passed by both Houses.
- 8.18.** On the matter of the proposed process for the removal of the President, Senator Braham enquired into the recommendation for a quasi-judicial tribunal rather than an ad-hoc Parliamentary Committee and whether Parliament would be bound by its findings.
- 8.19.** The Chairman, in response, stated that the process, as proposed, remained, as the role of the quasi-judicial tribunal would be to investigate and propose a recommendation as to whether the President should be removed from Office.
- 8.20.** Senator Braham indicated that from the outset, he did not support the view nor did he find it practical that a President, selected using a political process, was completely devoid of politics and was above the political fray. Furthermore, he stated that he was unable to understand why the removal of a President, selected using a political process, would require a judicial process. He therefore suggested that the original proposal for an ad-hoc Parliamentary Committee be maintained.

- 8.21.** The Chairman invited Members to recall that the process to remove the President would commence with a Parliamentary process by way of a motion that set out the full particulars on which the removal of the President was grounded. The allegations set out therein would have to be investigated. She stated that it was the investigation process to be placed outside the remit of the Parliamentary process. She then stated that the tribunal would determine whether the grounds were sufficiently made out and report back to the Parliament which would then determine whether the President should be removed.
- 8.22.** Dr Barnett opined that where a person was to be terminated for cause, that person would be entitled to due process. If there was no need for cause, it would be an entirely different matter. He further stated that he would be unable to support a process which inevitably condemned someone without the benefit of due process.
- 8.23.** Senator Braham stated that he personally would have no difficulty if the President was removed without cause by a political process.
- 8.24.** The Chairman stated that if termination were to occur in the circumstances proposed with stated grounds, it would be regarded as termination for cause and therefore require due process.
- 8.25.** Senator Braham reiterated that where there was cause, the investigation should be done by a Parliamentary Committee rather than an extra-Parliamentary Committee.
- 8.26.** The Chairman, in response, stated that she understood the point made by Senator Braham that if the process of selection was a political process then the removal should also be done using a political process. More broadly speaking, she noted that the Committee had since acknowledged that one could not compel agreement, especially in the context of a heated political environment. She then stated that there was a desire for a process that demonstrated that both sides of the political aisle consulted and views were properly taken into account. In light of this, the Chairman wondered whether there was a need to revisit any of the recommendations related to the selection or removal of the President. She also enquired into whether the process of removing of the President, as proposed, was more akin to process for the removal of an Executive President. She stated that this proposal, as suggested by some commentators, was essentially an impeachment process for the Office of President.
- 8.27.** Dr Barnett stated that such a suggestion was historically false because impeachment had nothing to do with an Executive Presidential System.

*Ambassador Meade arrived at 1:39pm*

- 8.28.** Dr McKoy enquired into the assumption that any activity of the Parliament was political. Dr Barnett, in response, stated that such an assumption came from experience. Dr McKoy then stated that the



only dispute was whether the Committee that investigated the allegations needed to be internal or external.

- 8.29. The Chairman invited Members to examine the issue as well as the practical implications of the recommendation having regard to the views shared by Dr McKoy and Senator Braham. She stated that the claim being investigated externally found favour with her despite being sympathetic to the view to keep the process strictly confined to the Parliament. She noted that when Parliament dealt with one matter, it risked preventing other matters from being dealt with. If the claim was investigated externally, there would be no risk to Parliamentary time. As such, the alternative proposal for an external tribunal was preferred. On the matter of the practical implications, she opined that the weight of the argument favoured an external investigation with the tribunal reporting back to the Parliament.

*Lunch break at 1:49pm*

*Meeting resumed at 2:27pm*

- 8.30. The Chairman stated that based on the discussions before lunch, it appeared to her that views were divided on whether the process to remove the President should include a stage that was external to the Parliament. Dr Barnett opined that a more accurate framing would be whether the process to remove the President should include a judicial or a quasi-judicial process.
- 8.31. The Chairman stated that in ensuring due process, Members should consider whether the political parliamentary process which featured an ad-hoc Parliamentary Committee would be devoid of due process.
- 8.32. Dr Barnett then suggested that the recommendation for the quasi-judicial committee to comprise three retired judges be modified to reflect three persons qualified to be judges so as to not limit the pool from which the selection would be made.
- 8.33. The Chairman then suggested that the additional member provided for in the recommendation of the Drafting Strategy Sub-Committee be an alternate to the three.
- 8.34. The Chairman then sought the perspective of Members present on whether the recommendation should be amended to reflect a quasi-judicial process.
- 8.35. Ambassador Meade opined that where the process could reduce the extent to which party political perspectives could influence the outcome, he would be inclined to offer support.
- 8.36. Dr McCarthy stated that the suggestion for an external body to investigate any claim related to the removal of the President, thereby facilitating due process before the Parliament voted, seemed favourable.
- 8.37. Dr Barnett invited Members to consider that historically Governors were appointed at pleasure and dismissed without any necessity for cause. However, in more recent times, Governors were subjected

to judicial enquiry before termination when they were being terminated on the ground of misbehaviour.

- 8.38. Mr Boswell stated that he was guided by the principle of he who appointed the President should be able to remove the President and if the process of selecting the President was a parliamentary one, then the process to remove the President should also be a parliamentary one.
- 8.39. Professor Albert stated that he had been considering the principle of mutuality whereby the body who made the decision should be involved in undoing that decision. The Chairman then stated that based on the process outlined in the recommendation, the quasi-judicial body would investigate and indicate whether the grounds were made out. Thereafter, the Parliament would make a decision on a vote whether to remove. Professor Albert enquired whether Parliament was bound by the decision of the quasi-judicial body or was able to exercise independent discretion. The Chairman advised that the Parliament would exercise its discretion through a vote noting, as a possible outcome, that the recommendation by the quasi-judicial body for removal could fall short of the required parliamentary vote. Professor Albert, in response, stated that Parliament would be vested with the ultimate decision-making power having regard to its capacity to choose whether to accept or reject the decision of the quasi-judicial body. This proposal, he opined, reinforced the principle of Parliamentary supremacy.
- 8.40. Ms Wilkins enquired whether Members considered, in the recommendation, who would be empowered to formally appoint or remove the President consequent the decision of the Parliament.
- 8.41. The Chairman noted that this query highlighted some of the gaps that were to be addressed. Additionally, she stated that if the recommendation for a confirmation process was being revisited, having regard to the proposal for an absolute majority vote, consideration should be given to whether the removal process should require a similar vote.
- 8.42. Following an expression of agreement among a majority of those Members present, the Chairman then stated that there was consensus in favour of the recommendation for a quasi-judicial body and the requirement for an absolute majority vote to remove the President from Office.**
- 8.43. The Chairman then enquired into who would appoint the members of the quasi-judicial body and by what mechanism. Dr Barnett, in response, suggested that the members would be appointed by the Speaker of the House after consultation with the President of the Senate.
- 8.44. Ms Wilkins stated that there would be no need for consultation as the Speaker of the House alone should be able to carry out such functions.
- 8.45. On the matter of who presided over the joint sitting of the House, Members stated that the Speaker of the House would be best positioned to do so.

- 8.46. Dr Barnett then stated that there was a fundamental question which was to be addressed, particularly in relation to the Order in Council. He said that while he was happy to understand that his proposed approach was accepted, he was concerned about a particular aspect of it. While he accepted the challenges associated with putting forward one composite document, the alternative being proposed for a Bill outlining amendments to the relevant provisions of the Constitution, was in his view, far more complex in its formulation.
- 8.47. Senator Braham asked Dr Barnett to summarise the options proposed for consideration. Dr Barnett, in response, stated that in one approach, a clean document containing the agreed amendments as well as retained provisions would be put to the people essentially replacing the old constitution. The other approach was to amend the Constitution section by section, replacing and inserting provisions where necessary. The latter, he opined, was a very complex and involved process. He further stated that this approach was being suggested because it would purportedly reduce the matters that would be raised during the Parliamentary debate.
- 8.48. Senator Braham enquired whether the proposal, in the complex formulation, was to repeal the Order in Council and embark upon a process of amending portions of the Schedule which contained the Constitution in order to enact the amended Schedule thereafter. Dr Barnett, in response, stated that the proposal was to amend the existing Schedule.
- 8.49. Senator Braham further enquired whether it was possible to repeal the Order in Council and save the Schedule containing the Constitution.
- 8.50. Dr McKoy suggested that the process of reform required constant dialogue with the people even after Parliament made its decision. He stated that while he was unaware of the role of the Committee at that stage, there was need for continuous engagement around the goals to be achieved. Whether the approach proposed by Dr Barnett or the Chief Parliamentary Counsel were used, someone would still be faced with dilemma of communicating how the changes proposed would affect the people, a dilemma which would not be resolved until the referendum. Dr McKoy further stated that he would defer the matter to hear from the draftsman.
- 8.51. Dr Barnett opined that the dilemma would be greater in the approach being proposed currently noting the great difficulty in examining a complex Act of Parliament that was changed substantively by amending legislation.
- 8.52. Senator Brahm enquired into the logistical issue, if any, associated with repealing the Order in Council and reenacting the Constitution. He opined that the unchanged portions of the Constitution would still have to be put to the people. He then enquired whether the entire document would have to be put to the people in the referendum regardless of the approach taken.

- 8.53. Senator Braham then stated that there was nothing which would prevent a Senator from proposing an amendment to a provision not contemplated since the Schedule of the Order in Council containing the Constitution was being amended.
- 8.54. On the matter of the retained provisions, the Chairman enquired whether they would be on the table for discussion, regardless of the approach taken.
- 8.55. Dr Barnett stated that he looked forward to the day where he could feel proud knowing that the Constitution was the product of the Jamaican people.

## **9. CONSIDERATION OF THE DRAFT BILL**

- 9.1. Matter deferred due to time constraints.

## **10. ANY OTHER BUSINESS**

- 10.1. There was no other business.

## **11. DATE AND TIME OF NEXT MEETING**

- 11.1. The Chairman advised that the next meeting of the Constitutional Reform Committee would be held on Wednesday, September 18, 2024.

## **12. ADJOURNMENT**

- 12.1. There being no other business, the meeting was terminated at 3:27pm on a motion by Senator Ransford Braham and seconded by Dr Derrick McKoy.

# **ANNEX I – DRAFT REPORT OF THE DRAFTING STRATEGY SUB-COMMITTEE**

## **REPORT OF THE DRAFTING STRATEGY SUB-COMMITTEE**

### **OVERVIEW**

1. The Drafting Strategy Sub-Committee was mandated to guide and inform the preparation and review of the Report of the Constitutional Reform Committee (CRC) and the draft Bills.
2. The sub-committee is co-chaired by the **Hon. Marlene Malahoo Forte, K.C., J.P., MP** (Chairman of the CRC) and **Dr the Hon. Lloyd Barnett** (National Constitutional Law Expert).
3. Other members of the sub-committee include:
  - i. **Dr Derrick McKoy C.D., KC.** (Attorney General of Jamaica);
  - ii. **Mr Anthony Hylton, C.D., MP** (Parliamentary Opposition - House of Representatives);
  - iii. **Dr Nadeen Spence** (Civil Society - Social and Political Commentator); and
  - iv. **Professor Richard Albert** (International Constitutional Law Expert - University of Texas at Austin)
4. The sub-committee is supported by a Secretariat comprising the following technocrats within the Ministry of Legal and Constitutional Affairs:
  - i. **Mr Wayne O Robertson** - Permanent Secretary;
  - ii. **Ms Judith Grant** - Chief Parliamentary Counsel;
  - iii. **Ms Nadine Wilkins** - Director of Legal Reform;
  - iv. **Mr Christopher Harper** - Senior Director, Constitutional Reform (Acting);
  - v. **Mr Makene Brown** - Legal Officer; and
  - vi. **Mrs Shawna-Kaye Taylor Reid** - Administrator

## **BACKGROUND**

5. The Cabinet, by **Decision 16/24** dated **20 May 2024** 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 as a Ministry Paper;
  - ii. The enactment of legislation to:
    - a. Revoke the Jamaica (Constitution) Order in Council 1962 and save the Second Schedule in which the Constitution of Jamaica is contained, to give effect to the patriation of the Constitution;
    - b. Abolish the British Monarch as the Head of State and replace with the Office of the 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 is 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.
  
6. Having regard to the aforementioned, Drafting Instructions were issued on **24 June 2024** to the Chief Parliamentary Counsel. In keeping with those instructions, the following draft Bills were thereafter transmitted to the Ministry on **22 July 2024** and **23 July 2024** respectively:
  - i. **A BILL ENTITLED AN ACT** to repeal the Jamaica (Constitution) Order in Council 1962, and to provide for the legal recognition and operation of the Constitution of Jamaica notwithstanding the repeal of that Order in Council; to

amend the Constitution of Jamaica to provide for a non-monarchical Head of State; to make other amendments in respect of certain provisions of the Constitution of Jamaica; and for connected matters; and

- ii. **A BILL ENTITLED AN ACT** to Provide for the votes of electors to be taken with respect to any amendment of the Constitution of Jamaica, required to be submitted to electors pursuant to section 49(3) of that Constitution (commonly known as a referendum)

7. Copies of the Bills were shared with Members of the Drafting Strategy Sub-Committee on **23 July 2024** to facilitate their review and feedback. In keeping with its mandate, the sub-committee convened **two (2) meetings** thereafter to examine the Bill seeking to amend the Constitution and to propose recommendations, where necessary.

## **ISSUES**

8. Having examined the Bill to revoke the Order in Council and provide for other matters, the Members of the sub-committee identified and considered the following five (5) substantive issues:
  - i. Whether the approach to repeal the Jamaica (Constitution) Order in Council, 1962 and to provide for the legal recognition and operation of the Constitution of Jamaica notwithstanding the repeal of that Order in Council would achieve the goal of *Jamaicanising* the Constitution;
  - ii. Whether the recommendation for the Prime Minister and the Leader of the Opposition to each nominate a candidate in the absence of consensus should be revisited in light of criticisms raised in the public domain;
  - iii. Having regard to the recommendation to remove the Head of State from membership in the Parliament and the power to assent to Bills, whether provision should be made for the President to play any ceremonial role in the enactment of legislation in respect of the Parliament;

- a. Where no such provision is made, whether the Constitution should explicitly set out a procedure to codify the existing practice to enact the legislation in the absence of assent; and
  - b. Whether the President can be empowered to prorogue or dissolve the Parliament on the advice of the Prime Minister without being a part of the Parliament
- iv. Whether the recommendation for an *ad hoc* Parliamentary Committee to investigate an allegation on a prescribe ground for removal should be replaced with a Quasi-Judicial Committee
  - v. Whether the entire provision to alter the Constitution set out at section 49 should remain deeply entrenched.

## **DISCUSSION**

### **Jamaicanisation of the Constitution**

- 9. In light of the diverging opinions among the members of the CRC on the methodology of implementing the recommendation to “Jamaicanise” the Constitution, the sub-committee considered the two (2) methods in depth.
- 10. The subcommittee accordingly debated the effects, benefits and risks of:
  - i. “**Repealing** and **Replacing** the Imperial Instrument (Order in Council and Constitution)”
  - ii. “**Revoking** the Order in Council and **saving** the Constitution with amendments”
- 11. On the one hand, it was thought that “repealing and replacing” would have the most far reaching and symbolic effect. This option would involve repealing the Order in Council as a whole, including the Constitution which is a schedule thereto, and reenacting the Constitution for passage in the Parliament and approved by the People.
- 12. Having regard to perspectives on the historical source of the Constitution, some members of the sub-committee thought it important to use this opportunity to have the full Constitution presented to and passed in the Parliament. Thereafter, the People would be given an opportunity to approve the Constitution as a whole thereby shedding it of its purportedly imperial origins. However, it was contended that this symbolic passage and



acceptance would subject the entire Constitution to Parliamentary debate and potential rejection as a whole as a result of the [reportedly] contentious provisions contained therein in particular the retention of the provisions in respect of appeals to the Judicial Committee of the Privy Council and other matters members of the public have asked to be amended.

13. On the other hand, the process of “revoking and saving” was viewed as the more [conventional]/[prudent] method to implement the “Jamaicanisation” of the Constitution at this time. This method would involve passing a Bill revoking the Order in Council while “decloaking” the Constitution of its imperial source. This method, as argued, viewed the Order in Council as the imperial instrument rather than the Constitution as appended thereto. Members relied on the extensive parliamentary debates in Jamaica to support the view that the Constitution itself was, for the most part, drafted in Jamaica and therefore not as imperial in nature.
14. The Bill would therefore use the referendum as an opportunity to alter the deeply entrenched provisions of the Constitution by removing the references to the monarchy from provisions which derive their authority through the prerogative of the monarchy substituting them with a Jamaican [authority]/[equivalent].
15. The sub-committee was of the view that this approach would be less fraught with contention as it would help to confine the Parliamentary debate to those provisions contained within the Bill on which there was consensus.
16. Therefore, the sub-committee, having weighed the options, **recommends revoking the Order in Council and [reforming] the Constitution. This approach would better address the political risk of putting the entire constitution before the Parliament thereby shielding it from the effect of potential misinformation and disinformation in the absence of sufficient knowledge on the constitution.**

### **Method of Appointment of the President**

17. Having regard to the recommendation for the Prime Minister and the Leader of the Opposition to each nominate a candidate to the Office of President in the absence of consensus on a single nominee, the sub-committee considered the criticisms levied against the recommendation. While recognising the importance of consensus in the

nomination process, Members were of the view that the ability to arrive at consensus cannot be mandated.

18. Nevertheless, Members recognised the importance of a consensus nominee in respect of the goals of the Office whereby the Office-holder would be a symbol of national identity, national unity, above the political fray and to act as a neutral arbiter.
19. Accordingly, Members of the sub-committee revisited the nomination process noting that the only way to resolve the issue of an absence of consensus is to provide for a process of reasonable consultation.
20. The sub-committee therefore **recommends, as an alternative, that provision should be made for a process of reasonable consultation between the Prime Minister and the Leader of the Opposition over a period not exceeding three (3) months. This proposed time frame would allow sufficient time for consultation between both Leaders. The sub-committee further considered that this process should include a period of referring back following which the Prime Minister would be empowered to notify the Parliament of the nominee by writing to the Speaker of the House and the Senate President.**
21. **Once both have been notified, the Prime Minister would table a motion seeking confirmation of the nominee before a joint sitting of both Houses of Parliament, such nominee would then be confirmed by an [absolute majority vote] taken separately for each House by secret ballot.**

### **Functions and Powers of the President**

22. The Committee recommended that the British Monarch be removed as Head of State and as part of the Parliament. Consequently, the Committee was of the view that the powers exercisable by the Governor-General be transferred to the President save as except the power to assent to Bills as set out at section 60 of the Constitution.
23. In light of this, the draft Bill to amend the Constitution proposes to repeal and replace section 60 with a new process for the enactment of bills which requires that after a Bill has been approved by both Houses of Parliament, “the certificate of the Speaker of the House and the Senate President as to the votes in respect of any Bill in the House of

Representatives and the Senate should be conclusive for all purposes and shall not be questioned in any court.”

24. Members of the sub-committee were of the view that this proposal did not sufficiently capture a process commensurate with the requirement for the Governor-General’s assent as this assent and the subsequent gazetting of the legislation signaled its coming into effect unless otherwise provided by appointed day notice.
25. Accordingly, **the sub-committee recommends that once a Bill has been passed by both Houses of the Parliament, the Clerk to the Parliament should be required to certify that the entire process has been properly adhered to. Once the Clerk certifies this, the Bill should then be transmitted to the Attorney General’s Chambers for advice on the constitutionality of the legislation. Once such advice has been received by the Clerk, the Clerk would be required to publish the Bill in the Gazette as an Act of Parliament.**
26. On the matter of the prorogation and dissolution of the Parliament, the sub-committee was of the view that the powers currently exercised by the Governor-General can be exercised by the President, even if he is not a part of the Parliament. This was on the basis that the powers provided for were exercised by the Governor-General on the advice of the Prime Minister rather than in his discretion.

### **Termination of Appointment**

27. Having recommended a number of grounds on which the President could be removed, the Committee recommended that following the tabling of a motion for removal, an *ad hoc* Parliamentary Committee drawn from members of both Houses of Parliament should be established to investigate the complaint and report on the facts to the Parliament within six (6) months after hearing witnesses and/or receiving evidence.
28. In revisiting the comments of the Leader of the Opposition critiquing the use of a Parliamentary Committee to remove the President who is not a political representative or political appointee, **the sub-committee has proposed an alternative recommendation that the adjudication of the grounds for removal should be conferred on a quasi-judicial tribunal. This is better aligned with the desirability for political neutrality and the maintenance of impartiality.**

29. **The Sub-Committee further recommends that this quasi-judicial tribunal should comprise three (3) [retired] judges and one judge (1) in reserve. This reserve judge would serve only where one of the three is incapable of performing the functions by reason of infirmity, death or other cause.**
30. After adjudication, the quasi-judicial tribunal should Report on its findings to the Parliament which will then make a decision in keeping with the recommendations made by the Committee.

#### **Amendment Procedure - Section 49**

31. Section 49(3) of the Constitution currently recognises the entirety of section 49 as deeply entrenched. Therefore, in order to amend any provision within section 49, a Bill for an Act of Parliament seeking to alter the provision must be supported by a vote of not less than two-thirds of all Members of each House and thereafter submitted to and approved by a majority of the electors qualified to vote for election of Members to the House of Representatives in a referendum.
32. The sub-committee, in considering this provision, was of the view that requiring a referendum to alter any aspect of section 49 to, for example, entrench, renumber or simplify provisions is anomalous and onerous.
33. Against the desire to alter section 49, the sub-committee acknowledged that any proposed changes to the provision should ensure that the Constitution remains protected from being easily changed.
34. Accordingly, **the sub-committee recommends that section 49(3) be altered to replace reference to “this section” at 49(3)(a) with “this subsection”; and that section 49(2) be altered to insert a reference to [Section 49 thereby making it ordinarily entrenched rather than deeply entrenched.]** This would ensure that any alteration of the different levels of entrenched provisions would require the applicable procedure to alter as prescribed by the Constitution.