

**REPORT OF THE JOINT SELECT COMMITTEE**  
**ON ITS DELIBERATIONS ON THE BILL ENTITLED**  
**AN ACT TO AMEND THE CONSTITUTION OF JAMAICA TO**  
**PROVIDE FOR A CHARTER OF RIGHTS AND FOR CONNECTED MATTERS**

Members of the Honourable House are reminded that, on July 20, 1999, the House of Representatives, on a motion moved by the Rt. Honourable Prime Minister, passed the following resolution:

Be it resolved that in accordance with Standing Order No. 52(1) this House appoint a Special Select Committee comprised of:

Hon. K.D. Knight, Q.C., M.P.  
Hon. Easton Douglas, MP  
Miss Jennifer Edwards, MP  
Mr. Vernon Robinson, MP  
Mr. Canute Brown, MP  
Rev. Ronald Thwaites, MP  
Mr. Charles Learmond, MP  
Mr. Karl Samuda, MP  
Mr. Delroy Chuck, MP

to sit jointly with a similar committee, to be appointed by the Senate, to consider and report on the Bill shortly entitled "The Charter of Rights (Constitutional Amendment) Act.

On July 23, 1999, on a motion moved by the Leader of Government Business in the Senate, a similar resolution was passed and the following members appointed to serve on the Committee:

Senator Hon A. J. Nicholson, Q.C.  
Senator Frederick Hamaty, Q.C.  
Senator Aloun Ndombet-Assamba  
Senator Professor Trevor Munroe  
Senator Dr. Oswald Harding, Q.C.  
Senator Ryan Peralto  
Senator Dorothy Lightbourne  
Senator Brian Wallace

The Committee, which was re-appointed by the House of Representatives on July 1, 2002, with Mr. Derrick Smith added to the membership, was again re-

appointed on April 19, 2001.

The Senate re-appointed the Committee on July 14, 2000 with the omission of Senator Harding whose name was added to the membership on January 26, 2001. When the Committee was re-appointed on April 20, 2001, Senator Lightbourne was not named to its membership.

The Bill, the subject matter of the deliberations of your Committee, had been tabled in Parliament on March 31, 1999. It was meant to achieve the underlying intent and objectives of recommendations made by a Constitutional Commission in its February 1994 Final Report and approved by a Joint Select Committee on Constitutional and Electoral Reform in its Report of May 1995.

Your Committee held a total of twenty-four meetings, four during the 1999/2000 session of Parliament, four during the 2000/2001 session and sixteen during the current session of Parliament. The first meeting took place on November 11, 1999.

At its fourth meeting, on December 8, 1999, your Committee, after presentations by Dr. The Honourable Lloyd Barnett, O.J. (who had been the chairman of the Constitutional Commission) and Dr. The Honourable Kenneth Rattray, O.J., Q.C., invited both of them to deliberate upon certain matters that were germane to our discussions:

- Derogations from the fundamental rights and freedoms;
- The reasons for and the philosophical bases of the recommendations that had been made by the Constitutional Commission;
- Issues concerning the burden of proof of alleged contraventions of the rights and freedoms;
- The fundamental question as to whether the traditional approach should be adopted, in the Bill, in which the Constitutional rights and freedoms were binding only on the State, or whether such rights and freedoms should be binding also on private individuals.

They were joined, in their deliberations by Mr. Dennis Daly, Q.C., and three attorneys-at-law from the public sector and they are referred to in this Report as the **Advisory Group**. The Advisory Group presented their recommendations and suggestions to the Committee on January 17, 2001, when its meetings were resumed.

The length of time that the deliberations of the Advisory Group occupied, was, in the Committee's view, clearly overshadowed by the incisiveness of the quality suggestions made by them.

Your Committee also received written submissions from the following persons and organizations.

Mrs. Linnette Vassel, Coalition for Community Participation in Governance –

Appendix 3

Professor H. Devonish, University of the West Indies – Appendix 4

Jamaica Forum and Lesbians All-Sexuals and Gays (J. Flag) – Appendix 5

Senator Floyd Morris – Appendix 6

Westmoreland Parish Council –Appendix 7

Ethiopia Africa Black International Congress Church of Salvation – Appendix 8

Jamaicans for Justice – Appendix 9

Oral presentations were made by Professor Devonish, Jamaicans for Justice, J. Flag, Senator Floyd Morris and representatives of the Jamaica Teachers Association and the Ministry of Education.

The challenge to your Committee on the following issues required extensive research and deep consideration of the approaches adopted in other Constitutions:

- the formulation of the preambles to the Bill and to the Charter;
- broad, fundamental issues as to the format of the Charter and who should be bound by the rights and freedoms;
- the formulation of the protection against discrimination and the question whether that protection should be extended to discrimination on additional grounds;
- the formulation of various other rights and freedoms, including the rights of the child, the right to legal aid, the protection of property rights and the protection of the environment;
- issues concerning exceptions to the right to life and to the protection against inhuman or degrading punishment in relation to the death penalty;
- the question whether a right to trial by jury should be included in the Constitution;
- the substitution of a reference to periods of public emergency or of public disaster for the existing reference to periods of public emergency and the specification of the rights and freedoms which legislation can override in periods of public emergency or periods of public disaster;
- the Commission's proposal concerning international human rights instruments to which Jamaica is a party.

These matters were subject to vigorous discussions and careful consideration by the members of your Committee and it is expected that the analyses and the recommendations made in the Committee's Report will assist the members of both Houses of Parliament in their deliberations on the Bill and in its smooth passage both in the House of Representatives and in the Senate.

Two issues must be mentioned in this introduction. First, it should be noted that there are significant implications of the approach, recommended in this Report, concerning “who should be bound”. Those implications have been indicated. In the end, your Committee is strongly of the view that the constitutional rights and freedoms should bind not only the State, as in the traditional approach taken in the existing Constitution and other older Constitutions, but, in addition, as in some of the modern Constitutions such as the Constitution of South Africa, natural and juristic persons to the extent that those rights and freedoms are applicable, taking in account the nature of the right and of any duty imposed by that right.

Second, your Committee discussed, at length, the question of the inclusion in the Constitution of a right to trial by jury and the proper formulation and scope of such a right, bearing in mind, in particular, the provisions of the Gun Court Act which authorize the trial of certain firearm and related offences by judge alone in the High Court Division of the Gun Court. Your Committee had to contemplate the possible need, in the future, for national security and other cogent reasons, for trial of certain offences by judge alone.

Your Committee was unable to arrive at a consensus on a formulation of such a right to reflect its commitment, as a general rule to trial by jury and, at the same time, to provide the flexibility which would accommodate its concerns as to the needs which could, in the future, justify trial by judge alone. This Report, therefore, provides an analysis of the various factors relevant to the issue of a constitutional right to trial by jury but, in this case alone, leaves that matter for determination by Parliament, without a specific recommendation.

#### **THANKS AND COMMENDATIONS**

Your Committee wishes to express its sincere gratitude to all those persons who made written or oral presentations or participated in the discussions.

Special thanks are extended to the members of the Advisory Group, Dr. The Honourable Kenneth Rattray, O.J. Q.C. and Dr. The Honourable Lloyd Barnett, O.J., assisted by Mrs. Shirley Miller Q.C., Mr. Dennis Daly Q.C., Mr. Evan Oniss and Mrs. Marlene Lynch-Aldred for the extensive research which they undertook and the recommendations made by them.

In extending our profound gratitude to the Chief Parliamentary Counsel and staff, the staff of the Attorney General’s Chambers, the Director of Legal Reform and her staff, the Constitutional Reform Secretariat, the Clerk to the Houses and staff for their invaluable assistance, we wish to acknowledge the sterling contribution of Mrs. Shirley Miller, Q.C., Senior Consultant/Advisor in the Ministry of Justice, to all aspects of the work of your Committee, including the structure and content of this Report.

Your Committee has the honour to present its findings and recommendations.

A.J. Nicholson, Q.C.,  
Attorney General and Minister of Justice  
Chairman

## **FINDINGS & RECOMMENDATIONS OF THE REPORT**

### ***Long and Short Titles***

The Committee is of the view that the words “and Freedoms” should be inserted in the Long and Short Titles.

The Long Title would then read as follows: AN ACT to amend the Constitution of Jamaica to provide for a Charter of Rights and Freedoms and for connected matters.

The Short Title in clause 1 of the Bill would become: The Charter of Rights and Freedoms (Constitution Amendment) Act, [2001].

The Committee recommends that the Long Title and the Short Title of the Bill be each amended by the insertion of the words “and Freedoms” after the word “Rights”.

### **The Preambles to the Bill**

The preambles to the Bill entitled a Charter of Rights (Constitutional Amendment) Act should be distinguished from the preamble to the proposed new Chapter 111 containing the Charter of Rights and Freedoms. These preambles to the Bill, although they will form part of the proposed Charter of Rights (Constitutional Amendment) Act as preambles to that Act, will not be incorporated into the new Chapter 111.

The Committee agrees with the recommendation made by the Advisory Group that the preambles to the Bill should be limited to giving the historical background to the Bill while the philosophical basis now contained in those preambles would become the initial section of the new Chapter 111.

It is recommended that the two preambles to the Bill be replaced by a Preamble in the following terms:

“WHEREAS a Constitutional Commission established by Parliament recommended, after wide public consultation and due deliberation, that Chapter 111 of the Constitution of Jamaica should be replaced by a new Chapter which provides more comprehensive and effective protection for the fundamental rights and freedoms of persons in Jamaica:

AND WHEREAS the recommendations of the Constitutional Commission were endorsed by a Joint Select Committee of Parliament and by resolutions of the

House of Representatives and of the Senate:

AND WHEREAS a Joint Select Committee of both Houses gave further consideration to the recommendations and received and considered representations made by members of the public in relation thereto and made recommendations thereon:" .

NOW, THEREFORE, BE IT ENACTED.....

Clause 2 of the Bill

### **Section 13(1)**

### **The Preamble to the Charter of Rights and Freedoms**

The Committee recommends that:

(i) in accordance with the view expressed by the Advisory Group, the preamble to the Charter of Rights and Freedoms contained in the proposed new section 13 of the Constitution, be amended to include a statement to the effect that the State has an obligation to promote universal respect for, and observance of, human rights and freedoms;

(ii) in paragraph (b) of the proposed new section 13(1) of the Constitution the word "individuals" be replaced by the word "persons", and that the words "having duties to other individuals and to the communities to which they belong," be deleted; and

(iii) the word "persons" be substituted for "the individual" in the marginal note to section 13 and in the fourth and third lines from the end of section 13(1).

### **THE FORMAT OF THE CHARTER**

The Charter of Rights in the Bill follows the format of the existing Chapter 111 of the Constitution which, adopting the approach of the European Convention on Human Rights and Fundamental Freedoms, sets out the rights and freedoms which it guarantees in separate sections, each containing its own specific series of qualifying provisions.

Although this is the format adopted in most of the older Constitutions, it is now subject to criticism as one in which rights are stated but are immediately followed by a number of permitted exceptions which considerably reduce the effectiveness of the constitutional guarantee. In essence, the criticism is that where this format is adopted, rights are given with one hand and taken back with the other.

This format is also criticized as one which has the effect of imposing on the person who alleges that his right has been contravened the burden of

establishing, not only the contravention of the right, but also that that contravention is not covered by any of the permitted constitutional exceptions.

It was pointed out to the Committee that most modern Constitutions have avoided that old approach and, at the same time, have tried to arrive at a methodology that would not inhibit the power of the state to make laws for the peace, order and good government of the country. The Canadian Charter of Rights, contained in the Canadian Constitution Act 1981 and the New Zealand Bill of Rights Act 1990, for example, each includes a single qualifying provision which limits all the rights and freedoms guaranteed. In both Acts, the fundamental rights and freedoms are “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.

The approach in the South African Constitution is a variation of the Canadian and New Zealand approach. Section 36(1) is the limitation of rights provision in that Constitution. Subsection (1) provides that “the rights in the Bill of Rights may be limited only in terms of laws of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom” taking into account certain listed factors. Subsection (2) of that section then provides as follows:

Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

The Charter recommended by the Constitutional Commission, like the Canadian and New Zealand Acts, avoids the detailed statements of exceptions and limitations to the various rights and freedoms and makes a general exception to the rights and freedoms. It makes the rights and freedoms which it guarantees subject only to “laws that are reasonably required for the governance of the state in periods of peril and emergency or as may be demonstrably justified in a free and democratic society”.

In the Commission’s Charter, however, four of the fundamental rights or freedoms are specially dealt with. These are:

- (i) the protection from inhuman treatment;
- (ii) the protection of freedom of the person;
- (iii) the right to due process; and
- (iv) the protection of property rights.

It was pointed out by the Advisory Group that those four matters were specifically dealt with for the following reasons:

- (i) the protection from inhuman treatment, because of special issues relating to capital punishment;

(ii) the protection of freedom of the person and the right to due process, because of the detailed and highly developed rules relating to these two matters which are usually stated in relative detail in Constitutions; and  
(iii) the protection of property rights, because it demands special treatment in order to preserve the ability of the State to deal with social and developmental issues.

They recommended that the approach adopted in the Commission's draft, including the special treatment of the four matters mentioned above, should in general be followed in the Bill.

Concern, however, was expressed by the Advisory Group that the fundamental rights and freedoms should not be so construed as to prevent the state from passing laws or taking action for "the peace, order and good government in a free and democratic society". In order to deal with those concerns, they recommended that the guarantee of rights and freedoms should be expressed to be "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free, peaceful, orderly and democratic society"

The Committee has considered whether the words "peaceful and orderly" add anything to the concepts implicit in the expression "free and democratic". One view is that the matters imported by the words "peaceful and orderly" are already encompassed in the concept of a free and democratic society. Another view is that the inclusion of those words help to clarify the extent of the Parliamentary power to legislate for the peace, order and good government of the country. There is general agreement, however, that, as no harm would be done by the inclusion of those words in the general derogation, there is no objection to such inclusion.

The Committee also examined the Limitation of Rights provision included in the Constitution of the Republic of South Africa which refers to "an open and democratic society based on human dignity, equality and freedom". The Committee has come to the conclusion, after discussing the matter, that, despite the difference in wording between the Canadian and South African Constitutions, the approach is essentially the same and that it is unnecessary to add to the formulation recommended by including the words "based on human dignity, equality and freedom".

It is noted that, where the fundamental rights and freedoms are affected in any way by legislation, the use of the words "demonstrably justified" would have the effect of placing on the state an onus of demonstrating that that legislation was justified in a free and democratic society.

This being so, the view was expressed that the adoption of the "demonstrably justified" formula would mean that legislative practices would have to change and that every piece of legislation would need to have attached to it a human rights

impact statement.

The Committee recommends that the format of the Commission's Charter of Rights be adopted and, hence, that:-

- (i) save as regards the four matters referred to earlier, (i.e., the protection from inhuman treatment, freedom of the person, the right to due process and the protection of property rights), the fundamental rights and freedoms be set out in the proposed new section 13(2) of the Charter;
- (ii) the four matters referred to earlier, be dealt with in separate sections;
- (iii) the provisions contained in the proposed new sections 14, 16, 17, 19, 21, 22, 23 and 24 of the Charter be deleted; and
- (iv) save as is otherwise provided in the proposed new Chapter 111, the fundamental rights and freedoms set out in section 13(2) of this Chapter be made subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free, peaceful, orderly and democratic society.

### **Who will be Bound**

The Committee discussed, extensively, the question whether the constitutional protection of fundamental rights and freedoms afforded by the proposed new Chapter 111 of the Constitution should be extended to cases of infringement by private persons. The Bill, unlike the Commission's draft, does not give this extended protection.

### ***The Commission's draft states as follows:***

AND WE FURTHER DECLARE that any person whose right, freedom or entitlement here stated, has been abrogated, abridged or denied whether by action of the State or by the act of any other person or body may seek redress before a court of law.

The Report of the Joint Select Committee, in support of the Commission's approach states as follows:

The new Chapter 111 .... ensures much greater protection to the individual against abuse by the State or other persons or organizations and provides easier access to more persons and organizations to the Court to facilitate the protection and preservation of the protected rights and freedoms. It should be noted that, in the new Chapter 111, individual rights are protected not only from the State but from "any other person or body".

The new section 13(2) which the Bill would insert into the Constitution, after stating a general derogation, provides that "Parliament shall pass no law and no public authority or any essential entity shall take any action which abrogates, abridges or infringes" any of a number of listed rights. The terms "public authority" and "essential entity" are defined in the proposed new section 26.

The bodies listed at (d) of the definition of “public authority”, and the bodies which will constitute essential entities, will fall within those definitions by virtue of being so declared by a resolution of each House of Parliament.

The Advisory Group recommended that the approach taken by the Commission on this issue should be adopted. The reasons given for that recommendation were as follows:

1. The concept of human rights is based on the inherent dignity and equal and inalienable rights of all members of the human family;
2. The promotion of respect for human rights must be predicated on the creation of a culture of human rights in which it is recognized that individuals as well as the state have the responsibility to respect the human rights of all members of the society.
3. In the modern state, private persons and entities often command great resources and exercise far-reaching powers which are capable of having an adverse impact on the rights and freedoms of other persons and entities.
4. Modern development has largely involved the privatization of traditional Government activity.

They also referred to the provisions of the Bill which would permit Parliament from time to time to vary the scope of the constitutional protection by passing resolutions to specify companies or persons which are to be treated as “public authorities” or “essential entities” and expressed the view that that was undesirable.

The Advisory Group went on to state, however, that, if the approach of the Bill were to be adopted, “public authorities” should be defined in such a way that it would extend to persons or entities in respect of their performance or functions of a public nature and, in any event, should include:

- (a) a court or tribunal; and
- (b) persons or entities in respect of their performance of functions of a public nature.

For the purpose of its discussions of these issues, the attention of the Committee was directed to developments in certain other jurisdictions, and in particular to:-

- (i) Article 5, section 15 and section 8 of the Constitutions of the Republics of Namibia, Malawi, and South Africa respectively;
- (ii) Section 29 of the New Zealand Bill of Rights Act 1990 and section 6 of the U.K. Human Rights Acts 1998; and
- (iii) the Canadian Charter of Rights and Freedoms;

the terms of which are set out in Appendix 2.

The Committee noted that the traditional constitutions allow for constitutional remedies to be available against infringement of the fundamental rights and freedoms provisions by the state (“the vertical approach”). The Constitutions of the Republic of South Africa, Namibia and Malawi allow for constitutional remedies to be available against infringement of the fundamental rights and freedoms provisions by the state or a natural or juristic person (“the horizontal approach”).

The Committee examined the approach of traditional constitutions in which the rights have vertical application. The Committee’s attention was directed to the approach taken in the Canadian Charter of Rights and Freedoms, and in particular, to several Canadian cases and academic works, which discussed the issue of to whom does the Charter apply. The Canadian Supreme Court has held that the Charter does not apply to private conduct and noted that the task of regulating and advancing the cause of human rights in the private sector is therefore left to the legislative branch. The arguments supporting the notion that the Canadian Charter of Rights and Freedoms applies only to governmental activity highlighted some of the difficulties in binding private persons, which could result in the following:

1. Reopening whole areas of settled law in several domains;
2. Diminishing the freedom within which individuals can act;
3. Interfering with freedom of contract and creating havoc in the commercial life of the country;
4. Generating a great deal of litigation in a public forum unsuited to the problem and therein imposing an impossible burden on the courts;
5. Setting up an alternative tort system.

In considering these implications of the horizontal application of the fundamental rights and freedoms provisions, the Committee examined a case that was heard by the Constitutional Court of South Africa. One of the issues the court had to determine was whether the interim Constitution of the Republic of South Africa had vertical application. One of the judges opined as follows:

Direct application of the Chapter 3 rights, quite apart from the undesirable consequences already mentioned, will cast onto the Constitutional Court the formidable ultimate task of reforming the private common law of this country, a consequence which could not have been intended by the drafters. It turns the Constitution, contrary to the historical evolution of constitutional individual rights

protection, also into a code of obligations for private individuals, with no indication in the Constitution as to how clashes between rights and duties are to be resolved, or how clashing rights are to be balanced; section 33(1) was clearly not designed and is quite inappropriate for this purpose. It would also be undesirable in a broader constitutional sense, pre-empting in many cases Parliament's role of reforming the common law by ordinary legislation.

The Committee's attention was further directed to the report by the Barbados Constitution Review Commission. That Commission, after reviewing the Constitution of Barbados, decided to retain the vertical approach, but gave no reasons for this recommendation. They recommended however to pursue another option, which was to provide remedies by ordinary legislation. In their report, the limitation of the traditional approach was acknowledged:

If there is no remedy provided by statute or the common law or where such remedy is inadequate there is a gaping vacuum. There is a wrong without a remedy. This situation may be obviated by the enactment of the requisite remedial legislation to fill the gap, or by extending the application of the fundamental rights and freedoms provisions to private acts.

The Barbados Constitution Review Commission recommended that Parliament, as a matter of urgency, enact remedial legislation in all areas where the Constitution provides a remedy and redress against governmental or state action, but where no law exists to provide an appropriate or adequate remedy against private action of the same character.

The Committee was also made aware of the recent trend of courts trying to apply the rights to private citizens in traditional Constitutions that have vertical application.

The alternative approach suggested in the recommendation of the Advisory Group appears to be the approach taken in the U. K. Human Rights Act 1998, where the definition of a public authority is expanded to include a court or tribunal and "any person, certain of whose functions are functions of a public nature". In that Act, rights are enforceable against a public authority. The Committee notes that this approach would mainly address the concern regarding the privatisation of traditional governmental activity. In using the expansive definition of "public authority", the Charter would have some effect on the private sector.

In discussing the definition of "public authority" the Committee did not agree that the definition should include "a court or tribunal". The Committee feels that actions of the judiciary should not be open to challenge by way of a constitutional action. The Committee is therefore of the view that the provisions of the proposed new Chapter III should not bind the judiciary.

In considering the horizontal approach the Committee noted, in particular, the

following route taken in the Constitution of the Republic of South Africa. Section 8 of the South African Constitution provides:

(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court

(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and

(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

(4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

Section 8(2) of the Constitution of the Republic of South Africa, therefore, provides that the provisions of the Bill of Rights are applicable to legal relationships between private citizens, subject to the determination of applicability, that is, "if, and to the extent that, it (the provision) is applicable", and the suitability of the application, taking into account the nature of the duty imposed by the right.

Once the Court is satisfied that the provision is applicable to a private person, it must determine whether there is no legislation that gives effect to the right as between private persons, or the extent to which the legislation does not give effect to the right. If there is a common law rule that gives effect to the right, then the Court must apply the common law rule. If there is no legislation or common law rule giving effect to the right, the court must develop rules of common law to give effect to that right. In applying or developing a common law rule, the court may limit the right, provided that the limitation is in accordance with section 36(1). The Committee noted that this approach relies heavily on judicial interpretation and creativity in determining whether the right conferred is capable of being applied and whether it is suitable for horizontal application.

It was also brought to the attention of the Committee that, in South Africa, only certain constitutional issues (those involving the State in some way) have to be heard by the Constitutional Court. Other constitutional matters may be dealt with by the High Courts or another court of a similar status assigned by an Act of

Parliament. The Committee is of the view that whether an action is brought against an individual or the state, the procedure for seeking remedy should be the same.

In the Committee's discussions on the approach taken by South Africa, a concern was raised regarding the role of the court. In South Africa, the Court is mandated to develop rules of common law to give effect to the right where there is a gap, that is, if there is no common law rule or legislation that gives effect to the right. The Committee feels that that is the prerogative of the legislature. The Committee is of the view that the courts do not have the jurisdiction to "make law", and is therefore not in agreement with a provision that directs the court to act in a similar manner as the legislature.

The approach taken in the Constitution of Namibia regarding the role of the court was also discussed. That Constitution provides that the role of the court is not to make law but to allow the law making or executive authority to do what is necessary to remedy the situation. Article 25(1) of that Constitution provides:

(1) Save in so far as it may be authorised to do so by this Constitution, Parliament or any subordinate legislative authority shall not make any law, and the Executive and the agencies of Government shall not take any action which abolishes or abridges the fundamental rights and freedoms conferred by this chapter, and any law or action in contravention thereof shall to the extent of the contravention be invalid; provided that:

(a) a competent Court, instead of declaring such law or action to be invalid, shall have the power and the discretion in an appropriate case to allow Parliament, any subordinate legislative authority, or the Executive and the agencies of Government, as the case may be, to correct any defect in the impugned law or action within a specified period, subject to such conditions as may be specified by it. In such event and until such correction, or until the expiry of the time limit set by the Court, whichever be the shorter, such impugned law or action shall be deemed to be valid;

(b) any law which was in force immediately before the date of Independence shall remain in force until amended, repealed or declared unconstitutional, it may either set aside the law, or allow Parliament to correct any defect in such law, in which event the provisions of Paragraph (a) shall apply.

The Committee is not in agreement with this approach, and is of the view that the constitution should not expressly provide that where there is no legislation to give effect to the right, Parliament should be given time to enact legislation.

The Committee is however cognizant of the fact that even where the constitutional provision exists, there will still be a need for legislation for the particular subject area to give effect to the right. The Committee's attention was

directed to the Constitution of South Africa, where sections 9(4)(discrimination) and 32(2) (access to information) placed a duty on the legislature to enact supporting legislation within three years of the date in which the new Constitution would take effect. The Committee is not in agreement with the approach of placing, in the Constitution, a time limit within which legislation must be enacted.

In discussing another of the implications of adopting the horizontal approach, namely the increase in the workload of the constitutional court that could result, the issue of the mechanism for a citizen going to the constitutional court for redress was raised. In this regard, the Committee examined the proposed new section 25 of the Bill. The proposed new section 25(3) provides that the court may refuse to exercise its powers if it feels that adequate means of redress are available under any other law. The Committee is also recommending an amendment to the Bill to include a provision to give the Supreme Court the power to remit an application for redress under the new proposed section 25 of the Bill to the appropriate court, tribunal or authority, where the Supreme Court is satisfied that adequate means for redress are available under any other law.

The Committee also referred to the proposed new subsection (5) where there is provision for Parliament to authorise the making of provisions with respect to the practice and procedure of the court. The Committee feels that subsection (5) is an enabling provision for rules to be made regarding the procedure. A suggestion was made that rules be devised that could address the issue of a potential abuse of the procedure which could indicate that before the matter was dealt with by the full Constitutional Court, an application could be made that it would be heard by a Judge in Chambers, who would determine that question.

The Committee's attention was also directed to the formulation of new rules of the Supreme Court, which will make provision for a case management system and which would, at a very early stage, permit an evaluation on how best the case could be dealt with. The Committee is satisfied that the proposed new section 25 and any rules made thereunder will be adequate in dealing with the issue of a flood of litigation.

The Committee is committed to the principle of ensuring that the constitution encompass the widest possible deposit of rights with the most open and liberal form of justiciability for those rights. The Committee agrees that, in order to have respect for human rights, a culture of respect for human rights has to be created, and that can only take place when all persons are treated as being obliged to respect the constitutional provisions.

The Committee does not agree that an individual's right to question an action against his interest whether by another individual or by the State, should be curtailed on the ground that it would result in too much litigation or uncertainty. The Committee feels that it would be difficult to justify a distinction as to a constitutional remedy arising on the same set of facts, one which would be

available against the State and one not against the State.

The Committee is, therefore, of the view that the constitutional protection of fundamental rights and freedoms afforded in the proposed new Chapter III should be extended to cases of infringement by private persons. In taking this decision, the Committee also discussed the format this would take in the new proposed Chapter III of the Constitution, that is, whether the rights that would bind private persons should be listed.

It was brought to the Committee's attention that, although the Constitution of the Republic of South Africa had a general directive to the court to determine the rights that are to be applicable to legal relationships between private citizens, subject to certain conditions, in the case of section 9 of that Constitution (the discrimination provision), it was clearly indicated that the right was applicable to private persons. Section 9(3) and (4) of the Constitution of the Republic of South Africa provide:

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

The Committee decided against enumerating the rights that would apply horizontally.

The Committee recommends that the Bill should be amended to provide that the provisions of the proposed new Chapter III will bind:

1. The legislature, the executive, and all public authorities; and
2. A natural or juristic person, to the extent that the provisions are applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

The Committee feels that since it is recommending binding natural or juristic persons, references in the Bill to "organs of state" and "essential entity" will no longer be necessary. The Committee is also of the view that an expanded definition of the term "public authority" is not necessary. In its discussions, the Committee was not in full agreement with the definition of "public authority" and in particular, with the aspect of the definition that refers to the percentage shares held by the Government in a company. After further discussion, the Committee feels that the term "public authority" need not be defined.

The Committee recommends that the Bill should be amended to delete the definition of “public authority” and all references to the terms “organs of state” and “essential entity”.

### **Section 13(2)**

The formulation of the provision which the Bill would insert into the Constitution as section 13(2) would restrict the prohibition against contravention of the human rights listed in the subsection by the words “Save only for laws that are required for the governance of the State in periods of public emergency, or as may be demonstrably justified in a free and democratic society”.

Two issues arise in relation to those restricting words.

The first of these issues relates to the use of the phrase “periods of public emergency”. Where the Bill refers only to “periods of public emergency”, the Constitutional Commission’s draft refers to “periods of peril and disaster”. The view was expressed by the Advisory Group that the phrase “public emergency” “is apt to create national as well as international apprehension which is sometimes irrational” and, therefore, that that phrase should be confined to situations in which the problem is one of security and the phrase “public disaster”, or some similar term, should be applied to situations of natural disaster, including outbreak of pestilence and infectious disease.

The Committee shares that view. Accordingly, it will be necessary to replace the reference to “periods of public emergency”, now made in the proposed new section 13(2), with a reference to “periods of public emergency or of public disaster”. The terms “periods of public emergency” and “periods of public disaster” will, of course, have to be defined to make the necessary distinction. The Committee will make recommendations as to the appropriate definitions when dealing with the proposed new section 26, the interpretation section.

The second issue relates to the effect of the restricting words as used in the proposed new section 13(2). As pointed out by the Advisory Group, the qualifying provision, like the similar qualifying provision in the Constitutional Commission’s draft, would make it possible for legislation enacted to deal with public emergency situations to contain provisions inconsistent with any of the fundamental human rights or freedoms provisions.

Under the existing Constitution, legislation dealing with public emergency situations can only derogate from certain of the fundamental human rights or freedoms, namely, the protection from arbitrary arrest or detention now guaranteed by section 15, the protection of law (the right to due process) now guaranteed by subsections 1-6 and 8 of section 20 and the protection of freedom from discrimination now guaranteed by section 24.

The Committee agrees with the Advisory Group that the power in periods of public emergency to override, by legislation, the fundamental rights provisions, should be limited to those rights which, in view of the nature of a state of emergency, may necessarily have to be restricted and that those rights should be limited to the right to freedom of movement (section 13(2)(f), the protection from arbitrary arrest or detention, that is, the protection of freedom of the person (section 15) and the right to public hearing and publicity of trials (section 20(1) and (3)). The Committee, however, does not agree with the opinion of the Advisory Group that a person's allegiance to a hostile state or subversive political opinions could also properly be the basis for restrictions in a state of emergency.

The Committee recommends that the proposed new section 13 be amended:

(i) to ensure that the power to enact legislation, in periods of public emergency or of public disaster, to override fundamental human rights, is limited, so as to make it applicable only to certain specified fundamental rights and freedoms; and

(ii) to ensure that nothing contained in or done under the authority of any law is held to be inconsistent with or in contravention of subsection (2)(f) of section 13, section 15 or what will now become subsections (1),(2) or (3) of section 20, to the extent that the law authorizes the taking, during a period of public emergency or a period of public disaster, of measures that are reasonably justifiable for the purpose of dealing with the situation that exists during that period of public emergency or of public disaster.

#### Rights Guaranteed by Individual Sections

As indicated earlier, it is recommended that certain rights be dealt with in individual sections of the Constitution. The prohibition in the proposed new section 13(2) against the passing of any law or the taking of action which abrogates, abridges or infringes the rights listed in that subsection should therefore be extended to those individual sections.

The Committee recommends that section 13 be amended to insert a signpost pointing to the applicability of the prohibition in section 13(2) to those individual sections also.

#### **Section 13(2)**

The formulation of the provision which the Bill would insert into the Constitution as section 13(2) would restrict the prohibition against contravention of the human rights listed in the subsection by the words "Save only for laws that are required for the governance of the State in periods of public emergency, or as may be demonstrably justified in a free and democratic society".

Two issues arise in relation to those restricting words.

The first of these issues relates to the use of the phrase “periods of public emergency”. Where the Bill refers only to “periods of public emergency”, the Constitutional Commission’s draft refers to “periods of peril and disaster”. The view was expressed by the Advisory Group that the phrase “public emergency” “is apt to create national as well as international apprehension which is sometimes irrational” and, therefore, that that phrase should be confined to situations in which the problem is one of security and the phrase “public disaster”, or some similar term, should be applied to situations of natural disaster, including outbreak of pestilence and infectious disease.

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The Committee agrees with the Advisory Group that the power in periods of public emergency to override, by legislation, the fundamental rights provisions, should be limited to those rights which, in view of the nature of a state of emergency, may necessarily have to be restricted and that those rights should be

#### **Section 13(2)(a)**

#### **The right to life, liberty and security of the person**

In the Bill, the right stated in the proposed new section 13(2)(a) is “the right to life, liberty and security of the person”. The recommendation of the Advisory Group was that the formulation in the Canadian Charter, which adds the words “and the right not to be deprived thereof except in accordance with the principles of fundamental justice”, should be adopted. That recommendation had been

made on the basis of a desire by Dr. Rattray to make it clear that the right to life was not an absolute right, and that the exceptions to that right, now set out in section 14(2) of the Constitution, would remain, notwithstanding the repeal of section 14.

During the Committee's discussions, reference was made to academic works which indicate, on the basis of Canadian case law, that "the principles of fundamental justice aim to protect the integrity of the criminal justice system by recognizing not only the legitimate interests of the accused but also the interests of the accuser. They allow the courts to establish a fair balance between the interests of individuals and those of the state.

The principles of fundamental justice which are applicable to criminal justice are said to consist of "a fluid group of rules whose role is to provide the following protection to the accused: the right to the presumption of innocence, the right to a fair trial, the right to a full answer and defence, the right to silence and the protection against self-incrimination, the right to the necessity of proving intention (*mens rea*), and right to a fair sentence".

There is no clear indication, in the authorities examined, that the inclusion of the words "except in accordance with the principles of fundamental justice" would make the right to life subject to all or any of the exceptions to that right expressly set out in section 14(2) of the existing Constitution. The Committee feels, however, that such of those exceptions as ought to apply would be covered by the broad derogation to the Charter rights which has been agreed on.

The Committee noted that the Canadian Courts follow a three-step process where a violation of section 7 of the Canadian Charter of Rights and Freedoms is alleged. First, the Courts determine whether there has been an infringement of the right to life, liberty or security of the person. If there has been an infringement, the Courts determine also whether the right to fundamental justice has been violated. If so, they then determine whether the violation is justified under section 1 of the Charter.

The Committee considered this a useful and desirable procedure and is therefore of the view that the words "except in accordance with the principles of fundamental justice" should be incorporated into the proposed new section 13(2)(a).

As regards the death penalty, the Committee notes that section 14(1) of the existing Constitution expresses the right to life as the right of a person not to be "intentionally ....deprived of his life save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted". The adoption of the format recommended by the Constitutional Commission for the Charter of Rights would, however, involve the deletion of section 14 of the Constitution.

The Committee is therefore of the view that the provision now in section 14(1) should be incorporated into the provision which the Bill would insert into the Constitution as the new section 13(2)(a).

**The Committee recommends:**

- (i) that the words “except in accordance with the principles of fundamental justice” be inserted after the word “person” in the proposed new section 13(2)(a) of the Constitution; and
- (ii) that the provision now in section 14(1) of the Constitution be incorporated in the proposed new section 13(2)(a).

**Section 13(2)(b)  
Freedom of Conscience**

In the Bill, the right stated in the proposed new section 13(2)(b) is “the right to freedom of conscience, belief and observance of religious and political doctrines”.

The provision now in section 21 of the Constitution protects the freedom of conscience, but expressly states that, for the purposes of that section, freedom of conscience includes freedom of thought and freedom of religion. Various other constitutions and Bills of Rights, for example, the Canadian Constitution and the New Zealand Bill of Rights, like article 18(1) of the International Covenant on Civil and Political Rights, refer to freedom of thought, conscience and religion.

The Committee agrees with the recommendation made by the Advisory Group, that “thought,” be inserted before the word “conscience” in the proposed new section 13(2)(b) of the Constitution.

**Section 13(2)(c)  
Freedom of Expression**

The formulation in the Bill of the right to freedom of expression is the same as that recommended by the Constitutional Commission.

The Committee recommends that the formulation of the right to freedom of expression in the proposed new section 13(2)(c) of the Charter remain unchanged.

**Section 13(2)(d)**

The formulation of the right set out in the proposed new section 13(2)(d) of the Charter differs from that recommended by the Constitutional Commission, in that, in the Bill, the words “to any other person” are substituted for the words “to other persons and members of the public”.

The recommendation made by the Advisory Group in relation to the proposed new section 13(2) (d) would have the effect of inserting in that provision, as it appears in the Bill, the word “receive” before the word “seek”, and the deletion from the provision of the words “to any person”.

The Committee is in general agreement with this recommendation but would insert the word “receive” after, rather than before, the word “seek”.

The Committee recommends that the words “the right to seek, receive, distribute or disseminate information, opinions and ideas through any media;” be substituted for the provision in the proposed new section 13(2)(d) which the Bill would insert into the Constitution.

### **Section 13(2)(e) Peaceful Assembly and Association**

In the Bill, the provision proposed as section 13(2)(e) of the Constitution is “the right to freedom of peaceful association and assembly”.

Section 23 of the existing Constitution refers, however, to the “freedom of peaceful assembly and association”. Article 20 of the Universal Declaration of Human Rights, article 18 of the International Covenant on Civil and Political Rights and Article 11 of the European Convention on Human Rights, also, all refer to “peaceful assembly”.

The Committee recommends that the words “the right to freedom of peaceful assembly and association” be substituted for the words “right to peaceful association and assembly” now in (e) of the proposed new section 13(2).

### **Section 13(2)(f) Freedom of Movement**

Section 13(2)(f) guarantees to all persons the right to freedom of movement. In the absence of a definition to the contrary, the freedom of movement would include the right to enter, to remain or reside in, to move freely throughout and to leave the country.

It is noted, however, that, by definition, the freedom of movement guaranteed by the provision which the Bill would insert into the Constitution as section 16, as it is now guaranteed by the existing section 16 of the Constitution, does not include the right to leave Jamaica.

The Advisory Group pointed out that the right to leave a country is recognized by Article 13(2) of the Universal Declaration of Human Rights, Article 12(2) of the International Covenant on Civil and Political Rights and Article 22.2 of the

American Covenant on Human Rights. They point out, that, under the Canadian Constitution, that right is restricted to citizens while section 21(2) of the Constitution of South Africa and section 18(3) of the Bill of Rights Act of New Zealand give that right to everyone. They recommend that, under the Jamaican Charter of Rights, the right to freedom of movement should include the right of every person to leave Jamaica.

This Committee agrees that every person should have the right to leave Jamaica.

The question then arises, as to whether all the other rights which are included in the freedom of movement should be guaranteed to citizens and non-citizens alike, or whether certain of those rights should be limited to citizens only.

In the Committee's view, the right to enter and to remain in Jamaica should be limited to citizens, but that all persons, that is, citizens and non-citizen who are lawfully in Jamaica, should have, in addition to the right to leave Jamaica, the right to move freely throughout and to reside in any part of Jamaica.

The Advisory Group drew attention to practical problems arising from the activities of deportees and restrictions arising from the Criminal Justice Administration Act and pointed out that consideration would have to be given to those problems.

This Committee is mindful of those problems. It is felt that any restrictions on the freedom of movement of deportees required to deal with those problems should be restricted pursuant to orders made in accordance with legislative provisions.

The Committee recommends that, subject to any restrictions imposed by order of the court pursuant to legislation, the provision to guarantee the freedom of movement be formulated as:

(i) the right of every citizen to enter, remain in, move freely throughout and to reside in any part of Jamaica, and to leave Jamaica; and

(ii) the right of every person lawfully in Jamaica to move freely throughout and to reside in any part of Jamaica, and to leave Jamaica.

### **Section 13(2)(i)** **Fair and Humane Treatment**

The proposed new section 13(2)(i) which the Bill would insert in the Constitution guarantees "the right to fair and humane treatment by any public authority or any essential entity in the exercise of any function". The terms "public authority" and "essential entity" are defined in the proposed new section 26(1) of the Constitution.

The provision in the new section 13(2)(i) differs from the provision recommended by the Constitutional Commission in article 1(9) of its draft. Article 1(9) provides for the “right to fair, humane and equal treatment from any public authority in the exercise of any function”.

The change was made because it was felt that the requirement for equal treatment from any public authority was inappropriate as, in each instance, treatment would have to be adapted to the circumstances of the case. The example of inmates in correctional institutions, committed for different crimes and with varying sentences, may be cited.

The Advisory Group recommended, however, that the words “fair, humane and equitable” be substituted for the words “fair and humane” now in section 13(2)(i).

In the Committee’s view, there is not much difference, if any, between the meaning of the word “fair” and that of the word “equitable”. In fact, the word “equitable” is defined as meaning fair or just. It is felt, therefore, that questions would arise as to the added effect of the use of the word “equitable” in addition to the word “fair” and, hence, that both words could not be retained. In the end, the Committee was of the view that the word “fair” should be omitted and the word “equitable” retained.

The Committee recommends that in the proposed new section 13(2)(j) the words “equitable and humane” should replace the words “fair and humane”.

### **Section 13(2)(j)** **Freedom from Discrimination**

The right to freedom from discrimination, as formulated in the provision which the Bill would insert into the Constitution as section 13(2)(j), is as follows:

“The right to freedom from discrimination on the ground of:-

- (i) gender;
- (ii) race, place of origin, social class, colour, religion or political opinions;”.

The only differences in substance between this formulation of the right and its formulation by the Constitutional Commission are the addition to the specified non-discrimination grounds of “place of origin” and the substitution of “political opinions” for “political preference”. The Committee agrees with these changes.

A recommendation was made in a written submission by the Coalition for Community Participation in Governance, which was signed by its chairperson, Mrs. Linette Vassel, that the word “gender” as used in the proposed section 13(2)(j)(i) and in section 24(8) should be replaced by the word “sex”. The submission is attached as Appendix 3.

In the Concise Oxford Dictionary the word “gender” is defined as meaning the grammatical classification of nouns and related words, roughly corresponding to the two sexes and sexlessness. It defines the word “sex” as meaning either of the main divisions (male or female) into which things are placed on the basis of their reproductive functions and the fact of belonging to one of these.

The Committee agrees with the recommendations that the appropriate word to use in the proposed section 13(2)(j)(i) is “sex” and not “gender”. To ensure, however, that the use of the word sex is not interpreted to include “sexual orientation”, the Committee would wish that an express indication be given in section 13(2)(j) that the word “sex” is there used as meaning male or female.

The proposed section 24 is one of the sections the deletion of which is recommended in relation to the format of the Charter. The proposed section 24(8) will therefore be deleted.

### **Discrimination on the ground of language**

The question of protection from discrimination on the ground of language was raised and Professor Hubert Devonish of the Department of Language, Linguistics and Philosophy of the University of the West Indies was invited to address the Committee on the matter.

Professor Devonish presented to the Committee a paper entitled “Language Rights in the Draft Charter of Rights in the Jamaican Constitution: A Proposal”, dated 21st May, 2001 and revised 29th May, 2001, and made an oral presentation to the Committee. The paper is attached as Appendix 4.

In these presentations, it was proposed that the Constitution should guarantee freedom from discrimination on the ground of language.

Professor Devonish suggested that, for the purpose of his proposal, the reference to language should be a reference to a language used by at least 10% of the population. On this basis, he pointed out, it could be said that there were two languages in use in Jamaica: English and Jamaican. He indicated, however, that he was not proposing that Jamaican patois be made an official language in Jamaica.

Professor Devonish proposed that a small agency, modelled on the Antillean Linguistic Institute of the Netherland Antilles, be created to standardize, popularize and formalize an already existing standard system for writing Jamaican patois and to assist the Public Defender in establishing standards to be met by public agencies in terms of their ability to communicate in both Jamaican and standard English. Sign language, it was said, could be dealt with on the same basis.

An important matter for consideration by the Committee was the matter of the implications of including in the Constitution a guarantee of protection from discrimination on the ground of language and what would constitute a contravention of that guarantee.

The Professor mentioned, in his presentation to the Committee, what he regarded as a direct form of discrimination on the ground of language, namely, the less favourable treatment rendered to persons who spoke the Jamaican patois compared with the treatment of persons who spoke standard English. He illustrated this by reference to the treatment of a researcher who paid two visits to each of six financial institutions, speaking standard English on one occasion and Jamaican patois on the other, and who was treated courteously and helpfully by four of those institutions when he spoke standard English, but indifferently, rudely and in an unfriendly manner when he spoke in Jamaican patois.

Professor Devonish also mentioned, however, a less direct form of discrimination on the ground of language, namely, the use of standard English by agencies of the State in imparting information to the public although sections of the population who spoke the Jamaican patois had only a limited comprehension, approximately only 50% comprehension, of the information provided in English.

The Committee does not have much difficulty with the matter of constitutional protection against the direct form of discrimination on the ground of language mentioned by Professor Devonish.

The likelihood of various problems arising in relation to the less direct form of discrimination outlined, was however, discussed. One of the factors mentioned was the inability of those who could not speak standard English, and who spoke the Jamaican patois, to read the Jamaican patois, whatever the form used for writing it. Another issue related to the question whether all public communications would have to be made in both standard English and Jamaican patois.

The general consensus of the Committee, after discussion of the matter, is that the establishment of an agency of the type mentioned by Professor Devonish would be a pre-requisite to any constitutional guarantee of protection from discrimination on the ground of language and that such an agency should be established. Such an institution would assist in educating and enlightening people on the issue of discrimination on the ground of language so that, eventually, a guarantee of protection from such discrimination would find its place in the Constitution.

The Committee is, therefore, strongly of the view that Parliament should encourage the Department of Language, Linguistics and Philosophy of the University of the West Indies to pursue the work mentioned by Professor Devonish and to report appropriately on that work as it progresses.

## Discrimination on the grounds of sexual orientation

Another issue raised was whether the Constitution should also guarantee freedom from discrimination on the ground of sexual orientation. This issue was raised, in written presentation and by oral address to the Committee, by a group called the Jamaican Forum for Lesbians, All-Sexuals and Gays (J. Flag). The written presentation is attached as Appendix 5.

Representatives of J. Flag quoted what was said to be a statement by Professor Edwin Cameron, now a Judge of the South African Constitutional Court, at page 450 of the 1993 volume of the South African Law Times, that “sexual orientation is defined by reference to erotic attraction: in the case of heterosexuals, to members of the opposite sex; in the case of gays and lesbians, to members of the same sex”.

They argued that the Constitutional Bill of Rights and Freedoms should seek to protect the inherent human identity from abuse and that what was included in human identity were those features of a person, or characteristics, that that person was born with. Sexual orientation, they said, was one of those features or characteristics of human identity, in the sense that everyone has a sexual orientation and that that sexual orientation was largely, if not entirely, outside the individual’s control.

Homosexuality, they said, was, to the homosexual, as natural and unchangeable as heterosexuality was to the heterosexual. The balance of scientific opinion, they argued, was weighted in favour of the view that sexuality, including sexual expression, was indivisible from individual identity, and was in the same category as race, gender, or brown or blue eyes. Furthermore, they said, there was no credible evidence or convincing argument that sexual orientation could be changed.

On that basis, the representatives of J. Flag argued that sexual orientation should not form the basis of discrimination against, or abuse of, any human being and proposed that the best way to achieve this was to include, in the Constitution, provision for protection against discrimination on that ground. That proposal, they added, was consistent with current international trends. The Constitution of South Africa, it is to be noted, includes sexual orientation among the grounds on which the state and persons are prohibited from unfairly discriminating directly or indirectly against anyone.

The Committee is concerned, however, as to the effect which implementation of that proposal would have in relation to the Marriage Act and the institution of marriage and on parenting. The representatives of J. Flag had themselves conceded that the Marriage Act would be inconsistent with such a constitutional provision.

Other matters which the Committee has taken into account include the view of some of its members that the proposal by J. Flag challenges Christian society, and that, as heterosexuality is what assures the perpetuation of the human race, homosexuality could be regarded as a challenge to the existence of the human race. These views, of course, are not shared by the representatives of J. Flag.

It is important to record that the representatives of J. Flag have stated that they regard the legislation which criminalizes buggery between persons as the essence of discrimination against homosexuals, particularly in relation to its enforcement against male homosexuals, and, therefore, that if a recommendation for the repeal of that legislation in relation to consenting adults in private is as far as the Committee would be prepared to go, they would be grateful for that concession.

The Committee urges J. Flag to carry out further research as to (i) the Constitutions which guarantee protection against discrimination on the ground of sexual orientation; (ii) the laws which would be inconsistent with such a constitutional provision; (iii) scientific data as to the causes of homosexuality; and (iv) whether there has been an increase in homosexuality following on such a liberalization of the law in other countries.

The Committee is not at present disposed, however, to include in the Charter of Rights a guarantee of protection from discrimination on the ground of sexual orientation, because of the implications which this would have, in particular, its implications in relation to the institution of marriage and questions of parenting. It would, however, bring to the attention of the Government, as a matter for consideration, the issue of the repeal of the provisions of the Offences Against the Person Act in so far as it relates to the offence of buggery between consenting adults in private.

### **Discrimination on the Ground of Disability**

The Report of the Constitutional Commission did not raise any issue in relation to, or recommend, the inclusion in the Charter of Rights of a guarantee of protection against discrimination on the ground of disability. Accordingly, no provision is made in the Bill for protection against discrimination on that ground. Nor was the matter touched on by the Advisory Group.

The issue of constitutional protection against discrimination on the ground of disability was raised, however, during the deliberations of the Joint Select Committee concerning the constitutional protection against discrimination. It was stated, initially, that the reference made was to physical disability, but this was subsequently widened to include mental disability, and, finally, the term disability was used.

Reference was made, in the discussions of this issue, to a policy document published in September 2000 by the Ministry of Labour and Social Security, entitled National Policy for Persons with Disabilities. Members of the Committee were also supplied with a document entitled, “An Overview of the Policy Regarding Persons with Disabilities”.

The definition of “disability” given in that document is as follows:

In the context of health experience, a disability is any restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being.

The document points out that it is clear that, included in the concept and the definition of “disability”, is mental as well as physical disability. The paper lists a number of functional limitations which are summarized in the term “disability” and points out that such functional limitations may be permanent or transitory.

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The Professor mentioned, in his presentation to the Committee, what he regarded as a direct form of discrimination on the ground of language, namely, the less favourable treatment rendered to persons who spoke the Jamaican patois compared with the treatment of persons who spoke standard English. He illustrated this by reference to the treatment of a researcher who paid two visits to each of six financial institutions, speaking standard English on one occasion and Jamaican patois on the other, and who was treated courteously and helpfully by four of those institutions when he spoke standard English, but indifferently, rudely and in an unfriendly manner when he spoke in Jamaican patois.

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The Committee does not have much difficulty with the matter of constitutional protection against the direct form of discrimination on the ground of language mentioned by Professor Devonish.

The likelihood of various problems arising in relation to the less direct form of discrimination outlined, was however, discussed. One of the factors mentioned was the inability of those who could not speak standard English, and who spoke the Jamaican patois, to read the Jamaican patois, whatever the form used for writing it. Another issue related to the question whether all public communications would have to be made in both standard English and Jamaican patois.

The general consensus of the Committee, after discussion of the matter, is that the establishment of an agency of the type mentioned by Professor Devonish would be a pre-requisite to any constitutional guarantee of protection from discrimination on the ground of language and that such an agency should be established. Such an institution would assist in educating and enlightening people on the issue of discrimination on the ground of language so that, eventually, a guarantee of protection from such discrimination would find its place in the Constitution.

The Committee is, therefore, strongly of the view that Parliament should encourage the Department of Language, Linguistics and Philosophy of the University of the West Indies to pursue the work mentioned by Professor

Devonish and to report appropriately on that work as it progresses.

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On that basis, the representatives of J. Flag argued that sexual orientation should not form the basis of discrimination against, or abuse of, any human being and proposed that the best way to achieve this was to include, in the Constitution, provision for protection against discrimination on that ground. That proposal, they added, was consistent with current international trends. The Constitution of South Africa, it is to be noted, includes sexual orientation among the grounds on which the state and persons are prohibited from unfairly discriminating directly or indirectly against anyone.

The Committee is concerned, however, as to the effect which implementation of that proposal would have in relation to the Marriage Act and the institution of marriage and on parenting. The representatives of J. Flag had themselves conceded that the Marriage Act would be inconsistent with such a constitutional

provision.

Other matters which the Committee has taken into account include the view of some of its members that the proposal by J. Flag challenges Christian society, and that, as heterosexuality is what assures the perpetuation of the human race, homosexuality could be regarded as a challenge to the existence of the human race. These views, of course, are not shared by the representatives of J. Flag.

It is important to record that the representatives of J. Flag have stated that they regard the legislation which criminalizes buggery between persons as the essence of discrimination against homosexuals, particularly in relation to its enforcement against male homosexuals, and, therefore, that if a recommendation for the repeal of that legislation in relation to consenting adults in private is as far as the Committee would be prepared to go, they would be grateful for that concession.

The Committee urges J. Flag to carry out further research as to (i) the Constitutions which guarantee protection against discrimination on the ground of sexual orientation; (ii) the laws which would be inconsistent with such a constitutional provision; (iii) scientific data as to the causes of homosexuality; and (iv) whether there has been an increase in homosexuality following on such a liberalization of the law in other countries.

The Committee is not at present disposed, however, to include in the Charter of Rights a guarantee of protection from discrimination on the ground of sexual orientation, because of the implications which this would have, in particular, its implications in relation to the institution of marriage and questions of parenting. It would, however, bring to the attention of the Government, as a matter for consideration, the issue of the repeal of the provisions of the Offences Against the Person Act in so far as it relates to the offence of buggery between consenting adults in private.

### **Discrimination on the Ground of Disability**

The Report of the Constitutional Commission did not raise any issue in relation to, or recommend, the inclusion in the Charter of Rights of a guarantee of protection against discrimination on the ground of disability. Accordingly, no provision is made in the Bill for protection against discrimination on that ground. Nor was the matter touched on by the Advisory Group.

The issue of constitutional protection against discrimination on the ground of disability was raised, however, during the deliberations of the Joint Select Committee concerning the constitutional protection against discrimination. It was stated, initially, that the reference made was to physical disability, but this was subsequently widened to include mental disability, and, finally, the term disability was used.

Reference was made, in the discussions of this issue, to a policy document published in September 2000 by the Ministry of Labour and Social Security, entitled National Policy for Persons with Disabilities. Members of the Committee were also supplied with a document entitled, "An Overview of the Policy Regarding Persons with Disabilities".

The definition of "disability" given in that document is as follows:

In the context of health experience, a disability is any restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being.

The document points out that it is clear that, included in the concept and the definition of "disability", is mental as well as physical disability. The paper lists a number of functional limitations which are summarized in the term "disability" and points out that such functional limitations may be permanent or transitory.

The Committee was informed that the national policy for persons with disabilities was being developed with a view to the enactment of a National Disability Act.

On the invitation of the Committee, Senator Floyd Morris made written and oral presentations on behalf of the disabled, a group estimated as including approximately 250,000 individuals. The disabled, Senator Morris said, had been exposed to the greatest levels of discrimination in the Jamaican society. His written presentation is attached as Appendix 6.

Senator Morris advocated the inclusion in the Constitution of an entrenched provision to protect the disabled from discrimination and the enactment of a National Disability Act to deal with the specific issues of the disabled in Jamaica. He expressed the firm belief that there was a need for such legislation and constitutional protection in various areas, for example, in the areas of education, transportation and employment. Of the estimated 250,000 disabled in Jamaica, he said, only approximately 250 or 0.1% or less were employed.

This, he said, would be in keeping with the direction in which Jamaicans, as a society ought to go, to provide and care for the dispossessed, and will set the stage for a moving away from a welfarist notion of how we treat the disabled to a more pragmatic/developmental approach in catering to the needs of the disabled.

The Committee examined provisions in the Constitutions of South Africa, Uganda and Canada which guarantee protection against discrimination on the ground of disability. Section 9 of the South African Constitution prohibits unfair discrimination by the State or by any person, directly or indirectly on the ground, inter alia, of disability and goes on to provide that national legislation must be enacted to prevent unfair discrimination.

Section 15 of the Canadian Constitution deals with protection against discrimination on various grounds in the context of equality before and under the law and equal protection and benefit of law. It provides as follows:

15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability;

(2) Subsection (1) does not preclude any law, program or activity that has, as its object, the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Article 21 of the Constitution of Uganda protects persons from being discriminated against on the ground, inter alia, of disability.

The Committee is extremely pleased that policies are being developed, with a view to the enactment of legislation, for the protection of the disabled. It is noted that this will have implications in a number of areas as to the measures, legislative and otherwise, for example, a new building code, which would be required to support those policies.

It is, therefore, a matter of profound regret that the Committee feels unable, at this time, pending the development of these issues and the adoption of the necessary support measures, to recommend the inclusion in the Constitution, as in the Constitutions referred to, of a guarantee of protection against discrimination on the ground of disability. The Committee wishes, however, to bring to the attention of Parliament its deep concern in relation to these issues and urges vigorous action towards the development of the protective policies and the implementation of support measures in this regard.

#### **The Committee recommends:**

(i) that the grounds of discrimination specified in paragraph (j) of the proposed new section 13(2) of the Constitution remain unchanged, save for the replacement of the word “gender” in subparagraph (i) of that paragraph by the word “sex”, with an indication that that word is there used as meaning male or female.

(ii) that, as a preparatory measure, to pave the way toward the eventual inclusion in the Constitution of a guarantee of the protection against discrimination on the ground of language, an agency modelled on the Antillean Linguistic Institute of the Netherland Antilles be established to standardize, popularize and formalize the already existing standard system for writing patois, to assist the Public

Defender in establishing standards to be met by public agencies in terms of their ability to communicate in both Jamaican and standard English and to deal also with sign language.

(iii) that the Department of Language, Linguistics and Philosophy of the University of the West Indies be encouraged to pursue its work on standardization, popularization and formalization of the Jamaican patois and to report appropriately on that work as it progresses.

(iv) that the Government be invited to consider the matter of the repeal of the provisions of the Offences Against the Person Act which relate to the offence of buggery, in so far as those provisions relate, to the acts of consenting adults in private.

(v) that the Government vigorously pursue the development of policies for the protection of the disabled and the implementation of legislative and other measures in support of those protective policies.

### **Section 13(2)(I)** **Protection of Privacy**

The right to privacy, as formulated in the Bill, is “the right to protection for privacy of home and other property”.

In the Constitutional Commission’s draft, that right is formulated as “the right to respect for private and family life, privacy of the home and communication”.

The Advisory Group recommends the formulation of that right as “the right [of every person] to protection of privacy including respect for private and family life, privacy of the home and communication and against unlawful attacks on his honour and reputation”, a formulation which they state, conforms more closely to the provisions in the international instruments.

The formulation by the Advisory Group is broader than the formulation in the Constitutional Commission’s Report in that it would give full protection to the right to privacy and goes further by listing certain things which that right includes. The former formulation can be said to be one which would make it clear that the protection of a specific right to privacy is being afforded by the Constitution.

Questions arise, however, as to what would be included in the right to privacy other than the matters specifically listed as included. Some caution was urged regarding the adoption of the wider formulation of the right without a full understanding of all that would be covered by it, bearing in mind that the matter of a general tort of invasion of privacy has proved highly controversial in some jurisdictions, particularly because of its impact on the freedom of expression.

Attention is drawn to the privacy protection afforded in the existing Constitution, by section 19, which protects a person from search of his person or property and from the entry by others on his premises, and by section 22 which protects correspondence and other means of communication from interference.

Having discussed these matters, the Committee prefers the formulation by the Constitutional Commission with the addition of a provision for the protection from search of the person and a reference, not only to privacy of the home, but also of other property. It is further agreed that the reference to protection from unlawful attacks on one's honour and reputation, included in the recommendation made by the Advisory Group, should be omitted.

The Committee recommends that section 13(2)(1) guarantee the right to protection from search of the person, and respect for private and family life, privacy of the home and other property and of communication.

### **Section 13(2)(m) and (6) Rights of the Child**

The Committee has no problem with the provision which the Bill would insert into the Constitution as subparagraph (i) of section 13(2)(m). Issues arise, however, in relation to the provision in subparagraph (ii) of that provision, read with the definition of "public educational institution" in the proposed new section 13(6).

The provision in the proposed new section 13(2)(m)(ii) would guarantee the right of every child "who is a citizen between the ages of six and fifteen years to free tuition in a public educational institution, at the primary level". The term "public educational institution" is defined in the Bill as meaning an educational institution which offers primary level education and is maintained or assisted by the Government.

The Constitutional Commission had expressed the view that the right to free primary education was a socio-economic right which, at the minimum, should be accepted as a state obligation. It therefore recommended that the Constitution guarantee "the right of every child who is a citizen to free education, at least throughout the primary level".

It was recommended, however, by the Advisory Group, that provision should be made for every child who is a citizen between ages three – fifteen to be provided by the State with free tuition at the pre-primary and primary levels. This would add to the provision now in the Bill the requirement that the State provide free tuition for every child who is a citizen and is between the ages of three to six years.

The inclusion of education at the pre-primary level was on the basis of a view that the ages three to six years were critical in the development of the mind of a

child and, hence, that education at that level was essential to the success of the education system and, consequently, to the development of Jamaica.

The Committee understands the recommendation of the Advisory Group to relate to the responsibility of the Government to ensure that education is available, free of cost, to those citizens who fall within the designated age group, and not to require that education be provided free of cost by those private institutions which offer education at that level.

The Committee considered issues involving the questions whether:

- (i) the constitutional guarantee should relate (a) to certain levels of education or (b) to children falling within certain age groups;
- (ii) if the guarantee is to relate to a particular level or particular levels of education, it should relate to primary education only, should cover pre-primary education also, or should extend further to cover secondary education;
- (iii) if the guarantee is to relate to a certain age group, that age group should begin at age six or age three and should continue to age twelve or to age fifteen.

The term “public education institution” is defined in the Education Act as meaning any educational institution which is maintained by the Minister and as including any educational institution which the Minister assists in maintaining.

Under the existing provisions of the Education Act, primary education consists of full-time education generally suitable to the requirements of students who are not over the age of twelve years and includes, for the purposes of that Act, education at a pre-primary school. A pre-primary school is a school (or department of a school) which offers a course of educational training and experience for students who, at the commencement of any school year, have not attained the age of six years.

A primary school is a school (or department of a school) that offers not less than a five year course of educational training and experience for students of ages six to twelve years and a primary student is a student who, at the commencement of any school year, has not attained the age of twelve years.

There also exist, at present, schools known as all-age schools. These are schools that offer a course of educational training for students of ages six to fifteen years.

Presentations were made to the Committee by representatives of the Jamaica Teachers Association and of the Ministry of Education.

The representatives of the Jamaica Teachers Association (J.T.A.) regarded the proposed new section 13(2) (m)(ii) of the Constitution which is contained in the Bill as a provision expressing what was affordable at the present time but which

was too narrow. They had a vision of a Charter which included early health care for children from birth to three years, early mental stimulation for children aged three to six years, effective primary education for those aged six to eleven years and diverse secondary education for those over seventeen years.

This vision was based on the view of the J.T.A. that the Charter of Rights should focus on the ideal rather than what was affordable at the time of writing, and should seek to capture the resolutions of international bodies, especially those to which Jamaica was a signatory.

The J.T.A. representatives referred to Articles 28 and 29 of the International Convention on the Rights of the Child which state, inter alia, that the child has a right to education, that the state must ensure that primary education is free and compulsory, and that the state should encourage different forms of secondary education to be available to every child. They urged that the Charter should set the goal and that the Government, with the cooperation of the society, should manage the process as best as possible. Specifically, they urged that early childhood education should get the Government's full support.

The representatives of the Ministry of Education, on the other hand, suggested that the children to be covered by the constitutional guarantee should be those in the six to eleven years age group, but that it would be preferable to make no reference to age in the constitutional provision and to create, instead, a constitutional entitlement to free tuition in public educational institutions at the primary level. They explained that the suggestion was made because, although the age group six to eleven years was the normal age group for primary education, there were, in fact, many children over the normal age who were still receiving primary education.

The attention of the representatives of the Ministry of Education was directed to the fact that the provision in the Bill and the provision recommended by the Advisory Group both cover children aged up to fifteen years although they also refer to either primary education or to pre-primary and primary education. It was explained to them that this was so because of an understanding that all-age schools offer a course of education which is not secondary education for children aged six to fifteen years, and that the intention behind the provision in the Bill was that the right given by the proposed section 13(2)(m)(ii) should include, in its coverage, those children under fifteen years of age who, although not in a primary school, are receiving education which is not secondary education.

The Committee understands that there are schools known as infant schools, which are the basic school departments of primary schools which are fully funded by the government. There are, however, schools known as basic schools, which are private institutions but which may be assisted to some extent by the government. The concept which this reflects is that pre-primary education is a community responsibility in which the State assists where possible. The

recommendation made by the Advisory Group is based, however, on a concept that pre-primary education, like primary education, should be the responsibility of the State.

It appears (from statistics given to the Committee by the representatives of the J.T.A.) that the current enrolment of children at the pre-primary level is 131,000 but that the government has responsibility for only 15, 000 of them. It also appears that there are some 1,600 basic schools, which provide education at the pre-primary level, for which the government has no responsibility.

The representatives of the Ministry of Education were asked whether it was the policy of the Ministry that, as regards pre-primary education, the mix of government and private sector involvement should continue so that the government would not have the responsibility for that level of education.

The representatives of the Ministry of Education pointed out that if the Constitution were to include a provision which had the effect of giving children an entitlement to attend basic schools free of cost that would mean that the Ministry of Education would have to provide the funds which the students now pay and would also have to provide the necessary accommodation and facilities for those schools. They said that the Ministry was of the view that although it had recently increased the salary subsidy to basic school teachers, and it was possible that at some time in the future it could be able to assume full responsibility for the basic schools, it was not yet able to do so.

With reference to all-age schools, the representatives of the Ministry of Education also explained that they regarded primary education as ending at grade 6, the grade for children aged eleven to twelve years, and regarded grades 7 to 9 as offering education at the secondary level. They informed the Committee that the existing policy of the Ministry is to convert the grades 7 to 9 departments of the all-age schools to junior high schools or to remove them altogether from the all-age schools. In other words, they said, the policy now is to convert all-age schools to primary schools or to take the “tops” of those schools, i.e. the ages of twelve to fifteen, and to send them to secondary schools or convert them to departments of junior high schools.

The Committee sought assistance by looking at other Constitutions which guarantee a right of the child to education and the ways in which this was done. It was referred to the Constitutions of Zambia, Uganda, South Africa and Namibia.

The Constitution of Zambia lists in Article 112 a number of what are called directive principles of State policy, one of which is that “the State shall endeavour to provide equal and adequate educational opportunities in all fields and at all levels for all”. The Constitution goes on to make it clear that the directive principles of state policy are intended as a guide to the executive, the legislature and the judiciary but that they are not justiciable or, by themselves, legally

enforceable in any court, tribunal or administrative entity.

The Constitution of Uganda guarantees the entitlement of a child to “basic education”, a term which it does not define, and provides that basic education shall be the responsibility of the State and of the parents of the child, child being defined as a person under the age of sixteen years.

Section 29 of the Constitution of South Africa provides as follows:

- (1) Everyone has the right –
  - (a) to a basic education, including adult basic education; and
  - (b) to further education which the state must take reasonable measures to make progressively available and accessible.
- (2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account –
  - (a) equity;
  - (b) practicability; and
  - (c) the need to redress the results of past discriminatory law and practice.

Under Article 10 of the Constitution of Namibia all persons have the right to education. It makes primary education compulsory and requires the State to “provide reasonable facilities to render effective this right for every resident within Namibia, by establishing and maintaining State schools at which primary education will be provided free of charge”. Further, under the article, children are not allowed to leave school until they have completed their primary education or have attained the age of sixteen years, whichever is the sooner, save so far as may be authorised by Act of Parliament on grounds of health or other considerations pertaining to the public interest.

As regards the directive principles of State policy set out in the Constitution of Zambia, the Committee notes that the Constitutional Commission referred, in its Final Report, to a recommendation made in its first report that there should be reference in the Constitution to certain social and economic aspirations, but that these should not be included as part of the enforceable fundamental rights. No such reference was made, however, in the draft Charter contained in that Report.

Certain of the modern Constitutions, for example, the Constitution of South Africa, do indeed go beyond political rights and civil liberties and speak of such social and economic rights as the right to housing and the right to employment; and include among such rights, the right to education.

It is to be noted, however, that the philosophy behind the existing Constitution and which, to a large extent, permeates the proposed new Charter, is one which focuses on political rights and civil liberties and avoids what are regarded as social and economic rights.

During the Committee's discussions, some Committee members strongly urged that pre-primary and primary education, at the very least, should be a responsibility of the State. In support of that view it was said that the money spent by the State in carrying out such a responsibility would be justified by the fact that the existing need for remedial education at the secondary and tertiary levels would diminish, and by the fact that the education system would produce more rounded individuals who would be able to make a more meaningful contribution to national development. It was also pointed out that, if necessary, the education tax could be increased to assist in the provision of the required funding.

Another strong view, however, was that to go further, in relation to education than is done in the Bill, by imposing on the State complete responsibility for secondary education and for the pre-primary education now provided in the basic schools run by private individuals, would open up the philosophical question whether rights to such matters as housing, health and employment should not also be constitutionally guaranteed.

No cost figures were given in relation to the provision of pre-primary education. The concerns of the representatives of the Ministry of Education were, moreover, related to a complete take-over of the responsibility for the provision of pre-primary education in the basic schools which is now regarded as a community responsibility. The guarantee of tuition free of cost at the primary level is to be distinguished, however, from such a complete take-over of responsibility for basic schools.

The guarantee of tuition free of cost at the pre-primary level would not mean that the Government would have to take over the maintenance of all basic schools. Indeed, the involvement of the community in the provision of education at that level is regarded by many as desirable, provided it is properly regulated. It is the view of the Committee, although it has not been provided with any cost analysis, that Government funding to ensure that children receive tuition free of cost at the pre-primary level would not be prohibitive, and would not be beyond the financial capacity of the Government.

There was also a suggestion that the responsibility of the government for the provision of education should extend to secondary education. This matter was given serious consideration. The view which prevailed after discussion by the Committee was, however, that, notwithstanding the desirability, as an ultimate goal, of a constitutional guarantee of a right to secondary education, it would be

unwise to give such a guarantee as one intended to be legally enforceable, unless there was persuasive evidence of the capacity to fund it. Without such a capacity the guarantee would be no more than a paper guarantee and would merely lay a foundation for consideration litigation. However much one might wish to achieve such a goal it is therefore not, at this time, a practical proposition.

All members of the Committee are acutely aware of the importance of education at the pre-primary level. The Committee understands also that the provision of education at the pre-primary level is very high on the Government's list of priorities, and that policies are being developed by the Ministry of Education with regard to the assumption of responsibility for the provision of a greater level of basic school education. It does not, however regard itself as having the capacity to assume such responsibility at the present time. The Committee looks forward to the government's achievement of this goal but doubts the feasibility, at the present time, of the constitutional guarantee which would involve a government assumption of such responsibility.

It is the view, therefore, of the Committee that the constitutional guarantee of the right to education which the Bill before Parliament should give is a guarantee of a right formulated as a right of every child who is a citizen to tuition free of cost at particular levels of education, namely, the pre-primary and primary levels, in a public educational institution.

The Committee recommends that subparagraph (ii) of the proposed new section 13(2)(m) be amended to provide for the right of every child who is a citizen to tuition free of cost in a public educational institution at the pre-primary and primary levels.

### **Sections 13(2)(n) and 15**

The Committee, adopting proposals made by the Advisory Group, recommends that the words "arrested or detained" should replace the words "charged with or detained" in section 13(2)(n), and, further, that the provision in section 13(2)(n) should be deleted from section 13 and incorporated in section 15.

### **Section 13(2)(o), Protection of the Environment**

The Constitutional Commission recommended that the right of protection of the environment should be formulated as "the right to enjoy a healthy and productive environment free from the threat of injury or damage from environmental abuse and degradation of the ecological heritage". The right included in the Bill as section 13(2)(o) of the Charter, is, however, "the right, compatible with sustainable development, to enjoy a healthy and productive environment". The Committee understands the words "sustainable

development” to mean development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs.

The Committee, in agreement with the Advisory Group, is of the view that the words “compatible with sustainable development” should be inserted in the provision recommended by the Constitutional Commission. It is also of the view that that provision, as so amended, should replace the provision appearing in the Bill.

The Committee recommends that the right in the proposed section 13(2)(o) of the Charter be formulated as “the right, compatible with sustainable development, to enjoy a healthy and productive environment free from the threat of injury or damage from environmental abuse and degradation of the ecological heritage”.

### **Section 13(2)(p) The Right to Vote**

The main concern which emerged in the discussion of the formulation of the right to vote in the provision to be inserted in the Constitution as section 13(2)(p) related to the issue of the right to vote in local government elections. Questions were asked as to the reasons why the guaranteed right to vote related only to the right to vote in elections to the House of Representatives and not to the right to vote in local government elections.

The reason why this is so is that there is, at present, no provision in the Constitution for the holding of local government elections. The appropriate time to guarantee the right to vote in local government elections would be when the Constitution is being amended to include provisions relating to local government.

The only change to the provision in the proposed new section 13(2)(p) which the Committee regards as necessary is the insertion of the word “so” before the word “registered” in subparagraph (ii) of that provision.

The Committee recommends that the word “so” be inserted before the word “registered” in subparagraph (ii) of the provision which the Bill would insert in the Constitution as section 13(2)(p).

### **Section 13(2)(q) Right to a Passport**

The Committee recommends that no change be made to the provision, relating to the right to a passport, which the Bill would insert in the Constitution as section 13(2)(q).

## Section 13(2)(r)

The Committee recommends that the provision which the Bill would insert in the Constitution as section 13(2)(r) be deleted from section 13(2) and that that provision be incorporated instead in section 15 of the Constitution, but with the words “arrested or detained” substituted for the words “charged with or detained”.

### Right to Trial by Jury

The Bill, like the existing Constitution, contains no provision guaranteeing any right to trial by jury.

The draft Charter of Rights set out in the Report of the Constitutional Commission had, however, included in the provisions relating to the right to due process, the following provision:

Every person charged with a criminal offence has the following minimum rights:

.....

(g) shall, when charged on information or indictment in a Superior Court have the right to trial by jury;

As regards that provision, the Advisory Group stated as follows:

It was accepted in principle that serious criminal offences tried in the Supreme Court should be by jury trial. At present firearm offences and certain related offences specified in the Gun Court Act are tried in the High Court Division of the Gun Court by Judge alone. A question therefore arises, and will have to be determined, as to whether such trials should be retained as an exception to a right to jury trial, and, if so, whether the exception should be limited in time or subject to a specific requirement for review.

The questions for decision are, therefore, whether the Constitution should guarantee a right to jury trial; if so, in relation to what categories of offences, persons or trials should such a right be given; and whether any, and if so which, exceptions should be made to such a right.

The Committee understands that many Constitutions contain no guarantee of a right to jury trial. Such a right is guaranteed, however by the Canadian Charter of Rights and Freedoms and the Constitutions of the U.S.A. and Australia.

Section 11(f) of the Canadian Charter of Rights and Freedoms provides that any person charged with an offence has the right, "except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment".

Sections 1 and 2 of Article 111 of the Constitution of the U.S.A. contain provisions which relate to the judicial power and to trial procedure. The third paragraph of section 2 provides that "The Trial of all Crimes, except in cases of Impeachment shall be by Jury". Amendment VI of that Constitution then provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed".

Under the Australian Constitution the trial on indictment of any offence against the law of the Commonwealth is required to be a trial by jury held in the State in which the offence was committed. That requirement has been interpreted as meaning that if there is a trial on indictment it must be a trial by jury. It was recommended that that Constitution should be amended to provide for a right to trial by jury in all cases where the accused was liable to capital punishment, corporal punishment or imprisonment for two years except in cases of trial for contempt of court or the trial of defence force personnel under defence law. That recommendation has not been implemented.

In considering whether the Constitution should guarantee a right to trial by jury it must be borne in mind, despite the hallowed place which trial by jury occupies in the judicial system, that once that guarantee is given there would be no flexibility regarding the mode of trial in relation to the matters falling within the scope of the constitutional guarantee regardless of any developments in the Jamaican society even, for example, where those developments profoundly affect national security issues. This issue assumes particular significance having regard to the existing situation in relation to terrorism. It is noted that even in the United Kingdom, the cradle of our common law rights, it has been considered necessary in certain cases to mandate trial by judge alone where it was regarded as requisite for national security reasons.

The Constitutions of Canada, the U.S.A. and Australia show the various approaches taken in those jurisdictions in relation to the scope of the various constitutional right to trial by jury. In Canada the scope is determined by reference to the penalty which can be imposed for the offence. This would also be so under the recommended amendment to the jury trial provision in the Australian Constitution. In the U.S.A. the right is all-embracing in relation to criminal offences. In Australia the right applies only to trials on indictment.

The recommendations made by the Constitutional Commission would guarantee that right to persons charged on information or indictment in a Superior Court while the recommendations by the Advisory Group accept in principle that serious crimes tried in the Supreme Court should be tried by jury.

This approach would allow for the flexibility of the provision by the legislature of an option exercisable by the prosecution to elect to have an offence tried in the Resident Magistrate's Court without a jury. Such a legislative option usually carries with it, however, the imposition of a lesser penalty than that which can be imposed by the Supreme Court. It is unlikely, in any event, that this option would be made available in relation to the trial of serious offences which have such fundamental impact on national security issues that one would wish to mandate trial by judge alone.

The Committee appreciates that if a right to jury trial were to be guaranteed subject to such exceptions as may be prescribed by law, this would mean in effect that the right could be whittled away by the legislature. It is therefore of the view that this would not be a desirable method by which to achieve the flexibility it considers desirable to deal with cases which for national security or similar fundamental reasons may, at some time in the future justify trial by judge alone.

The Constitution could, of course, it self state exceptions to the right to jury trial. It is noted that the Constitution of Canada excepts offences under military law tried before a military tribunal. This exception, although relevant where the scope of the right is determined by reference to penalty, is inappropriate where the category of offences to which there is a guaranteed right to jury trial relates to offences tried in the Supreme Court. In any event the offences excepted by the Constitutions looked at are limited to impeachment cases and military offences.

The offences to which the Advisory Group drew attention as offences which the Committee should consider in relation to the issue of the scope of the right to jury trial were the firearm offences and those related offences which, at present, under the Gun Court Act are tried in the High Court Division of the Gun Court by judge alone.

The description, in the Constitution, of those offences as offences excepted from the right to trial by jury would, in itself pose a problem. It must also be appreciated that a constitutional right to the trial by jury of the offences now tried in the High Court by judge alone would result in an inundation of the Circuit Courts with a vast number of additional cases.

In any event, any specification, in the Constitution, of exceptions to the right

to jury trial would not constitute an effective method of dealing with situations which may arise in the future and which may then be regarded as offences for which it would be appropriate to mandate trial by judge alone.

The Committee, therefore, notwithstanding its awareness of the importance of jury trial in the Jamaican judicial system is deeply concerned as regards the need for the appropriate flexibility to enable trial by judge alone to be mandated where there is, in the interests of justice, a clear need for that mode of trial. It has, regrettably, not been able to identify a method which would enable it to recommend a constitutional guarantee of the right to jury trial and, at the same time to accommodate an answer to its concerns for the future.

As regards this matter, therefore, the Committee directs the attention of Parliament to the issues to be resolved in considering the question whether the Constitution should be amended to guarantee a right to jury trial but makes no recommendation on the matter.

### **Section 13(2)(g) and (k)**

In accordance with the earlier recommendation that the right to due process and the protection of property rights should be dealt with in separate sections, The Committee recommends that paragraphs (g) and (k) of section 13(2) be deleted.

### **Section 13(3)**

The matter of redress for contravention of the human rights guaranteed in the Constitution is dealt with in the proposed new section 25 of the Constitution. The provision in the proposed new section 13(3) is therefore unnecessary.

The Committee recommends that the provision which the Bill would insert in the Constitution as subsection (3) of section 13 be deleted from the section.

### **Section 13(4) and (5)**

#### **Protection against Torture or Inhuman and Degrading Punishment**

The provisions which the Bill would insert in the Constitution as subsections (4) and (5) of section 13 relate to protection from torture or inhuman or degrading punishment or other treatment.

Subsection (4) provides that no person shall be subjected to torture or inhuman or degrading punishment or other treatment. Subsection (5) then provides that nothing contained in or done under the authority of any law which provides for capital punishment shall be held to be inconsistent with or in contravention of subsection (4).

In other jurisdictions, the courts have had to decide whether capital punishment is an inhuman or degrading punishment contrary to the constitutional protection against such punishment and, if so, whether it is a permitted derogation from, or limitation of, such a protection. The conclusions of those courts have not always been the same.

In South Africa, the death sentence was, in terms, neither sanctioned nor excluded by the Constitution. It was left to the Constitutional Court to decide whether the provisions of the pre-constitutional law, making the death penalty a competent sentence for murder and other crimes, was consistent with the Human Rights Chapter of the Constitution.

In the 1995 case of *State v Makwanyane and Another*, the Constitutional Court of South Africa declared that, although capital punishment was not absolutely prohibited by public international law, capital punishment for murder, aggravated robbery, child-stealing and rape was unconstitutional as being in contravention of the provision which prohibited cruel, inhuman or degrading treatment or punishment. It also held that the law imposing capital punishment for those crimes was not a limitation on that provision which, in accordance with the South African Constitution, was reasonably justifiable in an open and democratic society based on human dignity, equality and freedom. The question of capital punishment imposed for treason was left open.

The Court of Appeal of Tanzania, on the other hand, in the 1995 case of *Mbushuu v Republic* held that, while capital punishment, including execution by hanging, was an inherently cruel, inhuman and degrading punishment and infringed the right to dignity, it was a lawful derogation from the fundamental rights which was reasonably necessary in the public interest.

The effect of section 13(5), as formulated in the Bill, would be that no form of execution of capital punishment would be inconsistent with, or a contravention of, the protection given by subsection (4) against torture or inhuman or degrading punishment or other treatment..

That provision would differ from the existing position. At present, by virtue of section 17(2), hanging, which was the lawful form of execution of the death penalty immediately prior to the coming into force of the Constitution, is now preserved from inconsistency with, or contravention of, the constitutional protection from torture or inhuman or degrading punishment or other treatment.

The formulation resulting from subsection (5) also differs from the position which would result from the implementation of the recommendation of the Constitutional Commission with regard to this matter. In the Commission's

draft there is no express provision preserving pre-existing forms or descriptions of punishment. Any form or description of punishment would therefore be subject to judicial determination as to whether it is demonstrably justified in a free and democratic society if that form or description of punishment were held to amount to inhuman or degrading punishment.

The Committee is not in favour of the recommendation of the Constitutional Commission which would leave open for judicial determination the question whether the method prescribed by law for carrying out the death penalty, as imposed pursuant to law, is inconsistent with or in contravention of the right guaranteed by section 13(4).

The Advisory Group expressed a concern that the formulation in the Bill of section 13(5) would mean that the legislature could prescribe any method of carrying out the death penalty, however inhumane. It was therefore stated that the provision in section 13(5) was undesirable.

The fact is, however, that a preservation of a method of carrying out the death penalty which is more humane than hanging would also be permitted by the formulation of section 13(5) in the Bill. The Committee is of the view that such a situation is preferable to one in which hanging is the only form of carrying out the death penalty which is preserved from inconsistency with the right guaranteed by section 13(4).

The Advisory Group also posed, for policy decision, the question whether, if it were decided to preserve capital punishment in the Constitution, provision should also be made to enable its preservation in the Constitution to be changed by the ordinary amendment procedure.

What is referred to by the Advisory Group as the “ordinary amendment procedure”, is the procedure required for the amendment of the provisions of the Constitution which are neither entrenched nor specially entrenched. That procedure simply requires the passage of the amending legislation in each House with the support of the votes of a majority of all the members of that House (i.e., not just a majority of the members sitting and voting).

A provision, included in section 13, which would preserve capital punishment from challenge as a contravention of that section, would be an entrenched provision of the Constitution. If that provision remains as an entrenched provision, its repeal or amendment would involve the procedure required for the amendment of entrenched provisions of the Constitution, that is, the observation of certain time constraints but not, if passed by both Houses of Parliament, approval on a referendum. The repeal or amendment of such a provision would therefore be a lengthy process but would not entail the expense of holding a constitutional referendum.

In order to enable such a provision to be repealed or amended by what is referred to by the Advisory Group as the ordinary amendment procedure, that is by the procedure required for provisions which are neither entrenched nor specially entrenched, section 49 of the Constitution would have to be amended to delete from subsection (2) of that section the reference in that subsection to section 13(5), thereby making the preservation provision a non-entrenched provision.

Section 49 of the Constitution is, however, a specially entrenched provision. The amendment of specially entrenched provisions of the Constitution requires not only the observation of certain time constraints but also approval, on a referendum, by a majority of the electors voting. The Committee does not regard it as necessary or desirable to go to the lengths of making the preservation provision a non-entrenched provision in view of the elaborate procedure which this would require.

The Committee considers it preferable to retain the preservation provision as an entrenched provision. If, at any time in the future, a decision is taken to repeal the entrenched provision preserving capital punishment from challenge as a contravention of section 13(4), it would then be possible to do so in accordance with the procedure required for the amendment or repeal of the entrenched provisions of the Constitution.

The Committee recommends that the provisions in subsections (4) and (5) of the proposed new section 13 of the Constitution be retained.

#### **Section 14 Right to Life**

The Committee has agreed to adopt the format recommended by the Constitutional Commission for the Charter of Rights. In accordance with that decision the proposed section 14 of the Constitution will have to be deleted.

The Committee recommends that the provision which the Bill would insert in the Constitution as section 14 be deleted.

#### **Section 15 Protection of Freedom of the Person**

Section 15 of the Constitution, which relates to the protection of the freedom of the person, is one of the four sections of the Charter of Rights and Freedoms which in the view of the Committee should be retained in the Constitution. This view accords with recommendations made by the Constitutional Commission and by the Advisory Group.

The Committee recommends that, subject to what is stated below, section 15

be retained in the Constitution.

### **Section 15(1)**

There are certain amendments which the Committee thinks should be made to the provisions which the Bill would insert into the Constitution as the new section 15(1).

The opening words of the proposed new section 15(1) limit the basis on which a person may be deprived of his liberty to reasonable grounds and in accordance with procedures established by law in the circumstances specified in that section. The Committee therefore considers it unnecessary to include the word "lawful" in paragraphs (f) and (h), and, where it appears for the first time, in (i), of subsection (1) of that section. The Committee agrees, however, with the recommendation made by the Constitutional Commission and by the Advisory Group that the word "fair" should be inserted in that subsection before the word "procedures".

The Committee discussed the question whether the permitted derogations from the protection of the freedom of the person should include deprivation of liberty on reasonable grounds in accordance with fair procedures in consequence of unfitness to plead to a criminal charge, as provided in the proposed section 15(1)(a). The circumstance set out at (a) of the provision is identical to the circumstance now set out in (a) of section 15(1) of the existing Constitution.

The question was asked whether persons who are unfit to plead should be deprived of their liberty on that basis. This question was raised in the context of cases in which persons found unfit to plead were sometimes left to languish, forgotten, in correctional institutions for long periods of time.

In considering this question, however, the Committee is mindful of the fact that persons found unfit to plead are persons charged with criminal offences, including serious offences such as murder. It is also noted that the grounds on which, and the procedure by which, the Constitution would permit a derogation from the freedom of the person on the basis of a finding of unfitness to plead, are "reasonable" grounds and "fair" procedures established by law. Moreover, the Committee is of the view that the problems relating to the lengthy incarceration of persons found unfit to plead arise, not because of the fact that the Constitution permits a deprivation of liberty on that basis, but because of irregularities and deficiencies in the manner in which the law was carried out.

The Committee is therefore of the view that section 15(1)(a) should be retained.

The Committee notes that the provision in paragraph (c) of the proposed new section 15(1) is a repetition of the provision in paragraph (b) of that subsection. The Committee is of the view that the intention was to include as paragraph (c) the provision which now appears in the Constitution as paragraph (c) of section 15(1).

There is a printer's error in the provision which the Bill would insert in the Constitution as paragraph (d) of section 15(1) where the word "or" appears instead of the word "of" between the words "fulfilment" and "any".

There is also a printer's error in the proposed new paragraph (f)(ii) of section 15(1) in that the word "committed" appears in place of the word "committing" in that provision.

The Bill, by virtue of paragraph (g) of the proposed new section 15(1), would permit the deprivation of personal liberty "in the case of a person who has not attained the age of eighteen years, for the purpose of his welfare".

At the time when the existing Constitution came into force the age of majority was twenty-one years. The provision now in section 15(1)(g) of the Constitution, which has not been amended since it came into force, therefore refers to the age of twenty-one years. The age at which a person attains his majority was, however, reduced in 1979 by the Law Reform (Age of Majority) Act, from twenty-one years to eighteen years. The change which the Bill would effect in the reference to age in section 15(1)(g) is therefore intended to reflect this change in the age of majority.

It was recommended, by the Advisory Group that a reference to the age of seventeen years should be substituted for the reference made in the Bill to the age of eighteen years. The reason given for that recommendation was that it was consistent with the Juveniles Act under which a juvenile is a person under the age of seventeen years.

The Committee was advised, however, that the age at which a person ceases to be a juvenile is now under review. In any event, the Committee is of the view that the age which should be the relevant age for the purposes of section 15(1)(g) is the age at which a person attains majority and not the age at which a person ceases to be a juvenile. The Committee's views do not accord, therefore, with the recommendation of the Advisory Group in relation to this matter.

The Committee agrees, that the power to deprive a person who has not attained the age of eighteen years of his liberty should be restricted, as is recommended by the Advisory Group, to circumstances in which the deprivation is for the purpose of that person's "care and protection" rather than for the purpose of his "welfare".

In relation, therefore, to the provision which the Bill would insert in the Constitution as the new section 15(1), the Committee recommends that :

(i) the word “lawful” be deleted where it appears in (f) and (h), and where it appears for the first time in (i), of section 15(1).

(ii) the word “fair” be inserted before the word “procedures”.

(iii) paragraph (c) be replaced by the following:

“(c) in execution of an order of the Supreme Court or of the Court of Appeal or such other court as may be prescribed by Parliament on the grounds of his contempt of any such court or of another court or tribunal; or”.

(iv) the word “of” be substituted for the word “or” where that word appears for the first time in paragraph (d).

(v) the word “committing” be substituted for the word “committed” in paragraph (f)(ii).

(vi) the words “care and protection” be substituted for the word “welfare” in paragraph (g).

(vii) the provisions which would be inserted in the Constitution as section 13(2)(n) and (r) be deleted from section 13(2) and incorporated, as amended, in section 15.

### **Section 15 (3)**

The Committee recommends that section 15(3) be amended to ensure that:

(i) an arrested or detained person is brought before an officer authorized by law or a court;

(ii) if an arrested or detained person is brought before an officer authorized by law and is not released either unconditionally or upon reasonable conditions to secure his attendance at his trial or at any stage of the proceedings , he is promptly brought before a court which may thereupon release him unconditionally or conditionally; and that

(iii) in either case, any conditions imposed are reasonable.

### **Section 15(6)**

The Committee agreed, earlier, that the references to a period of public

emergency should be replaced by a reference to a period of public emergency or a period of public disaster. The proposed new section 15(6) is one of the provisions in which this change will have to be made.

The Committee recommends that the words “or a period of public disaster” be inserted in the proposed new section 15(6) after the words “a period of public emergency”.

### **Section 15(7)**

The provision which the Bill would insert in the Constitution as the new section 15(7) relates to a “person who is unlawfully detained by virtue only of a law referred to in subsection (6)”. The reference here to “a law referred to in subsection (6)” is a reference to a law which authorizes the taking during a period of public disaster or a period of public emergency of measures reasonably justifiable for the purpose of dealing with the situation existing during that period.

This proposed new section 15(7) would replace the provision now in section 15(6) of the Constitution. The provision now in section 15(6) of the Constitution relates to a “person who is lawfully detained by virtue only of a law referred to in subsection (5)”. The reference here to “a law referred to in subsection (5)”, is a reference to a law which authorizes the taking during a period of public emergency of measures reasonably justifiable for the purpose of dealing with the situation existing during that period of public emergency.

The Committee is of the view that no distinction should be made in this provision between a person unlawfully detained and a person lawfully detained but should simply refer to a person detained by virtue only of a law referred to in subsection (6).

The Committee notes that a printer’s error appears in section 15(7) where the word “person”, as used for the last time in that subsection, should read “persons”.

The Committee recommends, in relation to the provision which the Bill would insert into the Constitution as section 15(7), that:

- (i) the word “unlawfully” be deleted from section 15(7);
- (ii) the word “person” be replaced, where it last appears in section 15(7), by the word “persons”.

### **Section 15(8)**

The provision which the Bill would include in the Constitution as section 15(8) is virtually the same as the provision now in section 15(7) of the Constitution. By virtue of this provision, an authority which orders the detention of a person is not obliged to act in accordance with the recommendation of a tribunal of review unless otherwise required by law to do so. It may well be that this provision was included in the Constitution on the basis of an assumption that the nature of emergency situations required that the question of detention should, save in extreme cases, be left to the judgment of the executive.

The Constitutional Commission, however, regarded the provision in section 15(7) of the Constitution as one which defeated the purpose for which the tribunal was created. In the Commission's draft Charter of Rights, the provision was therefore altered to state that the authority by whom the detention was ordered "shall be obliged to act in accordance with" any recommendation of the review tribunal.

The view expressed by the Advisory Group also is that recommendations made by the tribunal appointed on request by a detained person to review that person's detention should be binding on the authority which ordered the detention. The Committee shares that view.

The Committee recommends that the provision which the Bill would insert into the Constitution as section 15(8) be amended by the deletion from that provision of the words "but, unless it is otherwise provided by law, that authority shall not" and their replacement by the words "and that authority shall".

## **Sections 16 and 17**

### **Freedom of Movement and Right to Vote**

The Committee recommends that, in accordance with its earlier recommendation made in relation to the format of the Constitution, the provisions which the Bill would insert in the Constitution as sections 16 and 17 be deleted.

## **Section 18**

### **Protection of Property Rights**

Section 18 of the Constitution, which guarantees protection of property rights, is one of the sections which the Committee agrees, as recommended by the Constitutional Commission and by the Advisory Group, should be retained in the Constitution.

### **Section 18(1)**

The Commission's draft would, however, extend the protection which the

section gives against compulsory acquisition to cover compulsory transfer, diminution and extinction of property rights, an extension not included in the Bill.

The Advisory Group left the extensions proposed by the Constitutional Commission as a matter for consideration by the Committee but added that, if there was to be an extension, it should not include protection against diminution of property rights, as “diminution” would introduce an element of vagueness in the provision and might be interpreted as inhibiting the regulation of the use of property.

The Committee understands that what is usually done by the courts in interpreting and applying the compulsory acquisition provisions is to draw a distinction between action which sterilizes the use of land and action which regulates the use of land, the former being regarded as acquisition of the land and the latter not. It is important that the regulation of land use which is indispensable in any society, for example, by town planning or zoning, should not be impeded, although arguments could arise as to whether diminution of land has resulted from such measures.

For these reasons, the Committee is of the view that the constitutional protection afforded by section 18 of the Constitution should not be extended to cover the diminution of property rights. This is not to say, of course, that ordinary legislation could not be enacted to deal with such diminution in specified circumstances.

The Committee is also of the view that the addition of the words “compulsory transfer” and “extinction of property rights” to section 18 is unnecessary as those matters are already covered by the words “compulsory acquisition”.

The Committee recommends that the provision which the Bill would insert into the Constitution as section 18(1) remain unaltered.

### **Section 18(2)**

The provision which the Bill would insert into the Constitution as section 18(2) differs from the comparable provision in the Constitutional Commission’s draft in that the latter includes two provisos which are omitted from the provision in the Bill.

The first proviso in the Commission’s draft would limit the seizure or forfeiture of property as a penalty for a criminal offence to property used in the furtherance of the criminal enterprise or obtained from the proceeds or profits of the criminal enterprise.

The second proviso would limit the power of a court to order the seizure or

forfeiture of the property of a convicted person where that property is the home where the infant children of the convicted person habitually reside.

It is recognised in international conventions, and hence in the domestic law of many countries including the Drug Offences (Forfeiture of Proceeds) Act enacted in Jamaica, that there may be circumstances where the seizure or forfeiture of property is appropriate, in relation for example to drug offences, but it is not feasible to limit such seizure or forfeiture to property used in, or obtained from the proceeds or profits of the criminal enterprise. The Committee is therefore of the view that it would be imprudent to adopt the first proviso recommended by the Constitutional Commission.

As regards the second proviso, the Advisory Group, while expressing an appreciation of the Commission's concern as to the effects of the displacement of children where the home is forfeited, pointed out that there are other instances in which hardship could occur. It recommended therefore, using language borrowed from the Drug Offences (Forfeiture of Proceeds) Act, that the Constitution should vest a general discretion in the court to take into account "any hardship that may reasonably be expected to be caused to any person by the operation of the order" or "the use that is ordinarily made of the property or the intended use of the property" in considering whether to make a forfeiture order.

The Committee discussed the suitability of the inclusion in the Constitution of a provision of that nature conferring a discretion on the court to restrict the operation of a forfeiture order. It agreed to accept the recommendation that the proviso be included in section 18.

In the Committee's discussion of this recommendation questions were raised, as to whether a similar protection should not be extended to bankruptcy cases or to cases of the foreclosure of a mortgage. It is the view of the Committee, however, that it would be inappropriate to extend the recommended proviso to civil obligations such as those mentioned.

It is recommended that the proposed new section 18 be subject to a provision which would vest in the court a discretion, in considering whether to make an order for the forfeiture of property, to take into account any hardship that may reasonably be expected to be caused to any person by the operation of the order, or the use that is ordinarily made of the property or the intended use of the property.

#### **Section 18(4)**

The provision which the Bill would insert into the Constitution as section 18(4) differs from the provision now in section 18(4) of the Constitution and from the comparable provision in the Constitutional Commission's draft. The words "by

any law and in which no monies have been invested other than monies provided by Parliament or by the Legislature of the former Colony of Jamaica” which are included in the existing Constitution and in the Commission’s draft are omitted from the provision as formulated in the Bill.

As stated by the Advisory Group, the words referred to, limit the application of the exception in subsection (4) to property which is acquired in the public interest from corporations which are entirely financed by public funds. The effect of the omission of those words would therefore be that that limitation would not apply to the provision as formulated in the Bill. The Committee is of the view that that limitation ought to be applicable to the section 18(4) exception and, hence, that the omitted words should be included.

The Committee recommends that the provision which the Bill would insert in the Constitution as section 18(4) be amended by the inclusion, at the end of the provision, of the words “by any law and in which no monies have been invested other than monies provided by Parliament”.

## **Section 19**

### **Protection of Privacy**

The Committee recommends that, in accordance with the earlier recommendation made in relation to the format of the Constitution, the provision which the Bill would insert in the Constitution as section 19 be deleted.

## **Section 20**

### **Right to Due Process**

#### **Subsections (1) and (2)**

The Committee recommended, earlier, that the separate provisions should be retained in the Constitution in relation to the right to due process of law. Provisions in relation to due process are now contained in the proposed section 20 which the Bill would insert into the Constitution. The Committee is also of the view, that certain amendments should be made to those provisions.

A distinction should be drawn, as is done in section 20 of the existing Constitution, between the hearing of criminal charges and the determination of civil rights or obligations. The hearing of criminal charges should be by a court established by law. However, any court or other authority prescribed by law should be able to determine the existence or extent of civil rights or obligations. In both cases, of course, the hearing should be fair and be held within a reasonable time. Further, the court or other authority should be independent and impartial.

It would be convenient, therefore, to deal with the hearing of criminal charges in one subsection of the proposed new section 20 and with the determination of civil rights or obligations in a separate subsection so that what is stated above can be achieved.

The proposed subsection (2) of section 20, and all subsequent subsections would, of course, have to be renumbered.

The Committee recommends that the provisions which the Bill would insert in the Constitution as subsection (1) of section 20 be deleted and replaced by the following provisions as subsections (1) and (2):

(1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law;

(2) In the determination of his civil rights and obligations or of any legal proceedings which may result in a decision adverse to his interests, each person is entitled to a fair and public hearing within a reasonable time by an independent and impartial court or authority prescribed by law.

The proposed subsection (2) and all subsequent subsections should then be renumbered accordingly.

### **Subsection (3)**

The Advisory Group included a recommendation that what is now subsection (4) of section 20 of the present Constitution should be retained but with a modification relating to paragraph (c) of that provision.

It was pointed out by them that paragraph (c)(ii) now permits the making of a law to require the court to sit in private and thereby removes the discretion of the court to make that determination. The modification of paragraph (c) which was recommended by the Advisory Group was, therefore, that the discretion to exclude the public or restrict publicity should remain with the court, but that in the case of other adjudicating authorities a law could require them to exclude the public or to restrict publicity.

### **Subsection (4) of section 20 of the existing Constitution provides as follows:**

Nothing in subsection (3) of this section shall prevent any court or authority such as is mentioned in that subsection from excluding from the proceedings persons other than the parties thereto and their legal representatives:-

(a) in interlocutory civil proceedings; or

(b) in appeal proceedings under any law relating to income tax; or  
(c) to such extent as the court or other authority  
(i) may consider necessary or expedient in circumstances where publicity would prejudice the interests of justice; or  
(ii) may be empowered or required by law to do so in the interests of defence, public safety, public order, public morality, the welfare of persons under the age of twenty-one years or the protection of the private lives of persons concerned in the proceedings.

The Committee understands the recommendation of the Advisory Group to mean that the provisions now in section 20(4) of the Constitution should be adopted, but that subparagraph (c)(ii) of that provision should be so modified that no court be required to exclude from its proceedings, in any circumstances, persons other than the parties to those proceedings and their legal representatives, although the courts would have a discretion to do so for the purposes specified.

The Committee accepts that recommendation. It would, of course, be necessary, in implementing it, to replace the reference made in the provision to twenty-one years, once the age of majority, by a reference to eighteen year, the present age of majority.

The Committee recommends that the provision which the Bill would insert in the constitution as subsection (3) of section 20 (now renumbered as subsection (4) of section 20) be deleted and replaced by the provision now in section 20(4) of the Constitution, but with the subparagraph (ii) of paragraph (c) of the provision amended by the replacement of the word “twenty-one” by the word “eighteen”, and so modified that no court could be required by law, in any circumstances, to exclude from its proceedings persons other than the parties to those proceedings and their legal representatives, although courts would have a discretion to do so for the purposes specified in the provision.

#### **Subsection (4)**

The Bill would insert in the Constitution, as subsection (4) of section 20, a provision governing the presumption of innocence which is virtually the same as the provision now in section 20(5). That provision differs from the provision recommended by the Constitutional Commission in relation to the presumption of innocence. The Advisory Group recommends the adoption of the provision recommended by the Constitutional Commission.

The main difference between the two provisions is the proviso which the provision in the Bill retains but which is omitted in the Commission’s draft.

The proviso is in the following terms:

Provided that nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this subsection to the extent that the law in question imposes upon any person charged as aforesaid the burden of proving particular facts.

The Advisory Group states that “[t]his qualification of the burden of proof could permit the placing on the accused of the burden to prove facts which go beyond the usual provision which may require the accused to prove matters which are peculiarly within his own knowledge”. In other words, the Advisory Group suggests that the proviso goes too far. What it recommends, however, is the total omission of the proviso.

In its discussion of this issue the Committee was directed to the decision of the Privy Council in the case from Hong Kong of Attorney General of Hong Kong v Lee Kwong-Kut. That decision makes it clear that a degree of flexibility is normally assumed to be implicit in a provision of general application such as the provision setting out the presumption of innocence even where the proviso to the presumption of innocence is absent, and that such provisions are always subject to implied limitations so that a contravention of the provisions does not automatically follow as a consequence of a burden on some issue being placed on a defendant at a criminal trial.

The decision also makes it clear that the question of the justifiability of deviations from the strict application of the principle that the prosecution must prove the defendant’s guilt beyond reasonable doubt depends in the end upon whether it remains primarily the responsibility of the prosecution to prove the guilt of an accused to the required standard and whether the exception is reasonably imposed. What the exception cannot do, of course, is to place on the accused the burden of proving any essential element of the offence.

The Committee is of the opinion that the proviso to the proposed section 20(4) is really intended as an expression of the principles stated in the Lee Kwong-Kut case. The proviso to the provision makes clear those principles which would be implicit in the presumption of innocence. The Committee is concerned, however, that an omission of the proviso which now forms part of the presumption of innocence provision in the Constitution could be interpreted as an intention to alter those principles.

The Committee is also of the view that to limit the proviso to the imposition, upon a person charged, of the burden of proving matters peculiarly within that person’s knowledge, would be to introduce complexity and troublesomeness into the provision.

The Committee considers that the best course of action would be the retention of the provision which now appears as a proviso to the provision which the Bill

would insert into the Constitution as section 20(3).

The Committee recommends that no change be made to the provision which the Bill would insert into the Constitution as section 20(4), now to be renumbered as section 20(5), and the proviso to that section.

### **Subsection (5)**

The provision which the Bill would insert in the Constitution as subsection (5) of section 20 differs from the comparable provision in the Constitutional Commission's draft as it omits the word "minimum" which the Commission uses in relation to rights. The Committee's view is that the use of the word "minimum" is undesirable and should be omitted. This view was also expressed by the Advisory Group.

The Committee recommends the retention of the provision which the Bill would insert into the Constitution as section 20(5), now to be renumbered as section 20(6), which omits the word "minimum" in relation to rights.

### **Paragraph (c) of section 20(5) Right to Legal Aid**

The provision relating to legal aid, which the Bill would insert into the Constitution as section 20(5)(c), refers to "legal representation" where the Constitutional Commission's draft refers to "legal assistance". The Committee considers it preferable to use the words "legal representation".

The main difference between the provision as formulated in the Bill and the provision in the Commission's draft is however that, in circumstances where the person charged has not sufficient means to pay for legal representation/ assistance, the former would require that that person "be given such assistance as shall be provided by any law in force for the time being", while the latter would require that that person be given it [i.e. such assistance] "free when the interests of justice so require".

The view is expressed by the Advisory Group, that the provision in the Bill does not establish any effective standard for the grant of legal aid, and, on that basis, they recommend that the Commission's draft should be adopted.

The Committee agrees that the legal aid provision in the Bill would make the availability of legal aid for any offence dependent on the will of the legislature, with the result that there would be no effective constitutional guarantee of legal aid for any offence. In the Committee's view, the substitution of the words "as is required in the interest of justice" for the words "as shall be provided by any law in force for the time being" would cure that defect.

The Committee recommends that the provision which the Bill would insert into the Constitution as section 20(5)(c), now to be renumbered as section 20(6)(c), be amended by the substitution of the words “as is required in the interests of justice” for the words “as shall be provided by any law in force for the time being”.

#### **Paragraph (d) of section 20(5) Right to a Fair Trial**

The provision which the Bill would insert in the Constitution as paragraph (d) of section 20(5) differs from the comparable provision in the Commission’s draft as it includes the words “at his trial” after the word “examined”. The Committee regards the provision in the Bill as preferable to the provision in the Commission’s draft, a position also arrived at by the Advisory Group.

The Committee recommends that the provision which the Bill would insert in the Constitution as section 20(5)(d) be retained.

#### **Paragraph (f) of section 20(5), Protection Against Self-Incrimination**

The Committee recommends, in agreement with the Advisory Group, that the provision which the Bill would insert in the Constitution as paragraph (f) of section 20(5) be retained, subject to the insertion of the words “or admission” after the word “confession”.

#### **Paragraph (g)(ii)**

The provision which the Bill would insert in the Constitution as paragraph (g)(ii) of section 20(5) would permit the trial of an accused in his absence if he absconds during the trial. This provision is not included in the Constitutional Commission’s draft but accords with case law on the subject.

The Committee recommends that the proposed section 20(5)(g)(ii), now to be renumbered as section 20(6)(g)(ii), be retained.

#### **Subsection (8), Double Jeopardy**

The Committee regards the provision on Double Jeopardy which the Bill would insert in the Constitution as preferable to the provision in the Commission’s draft, as it is a clearer exposition of the Double Jeopardy principles. This recommendation was also made by the Advisory Group.

The Committee recommends the retention of the provision which the Bill would insert in the Constitution as section 20(8), now to be renumbered as section

20(9).

### **Subsection (9), Protection Against Retroactive Punishment**

The Committee finds acceptable the recommendations made by the Advisory Group for the expansion of the constitutional protection against retroactive punishment.

The Committee recommends the amendment of the provision which the Bill would insert in the Constitution as subsection (9), now to be renumbered as subsection (10), of section 20:

(i) To prohibit also the imposition of a penalty for any infringement, whether it amounts to a criminal or civil violation, which is more severe than the maximum penalty which might have been imposed at the time when it occurred; and

(ii) to provide that, where at the time of sentencing, provision is made by law for the imposition of a lighter penalty than that which could have been imposed at the time of the commission of the offence or violation, the offender should be able to have the benefit of the change.

Sections 21, 22, 23, and 24  
Freedom of Conscience  
Freedom of Expression  
Freedom of Peaceful Assembly and Association  
Protection from Discrimination

The Committee recommends that, in accordance with its earlier recommendation in relation to the format of the Constitution, the provisions which the Bill would insert in the Constitution as sections 21, 22, 23 and 24 be deleted.

### **Section 25 Application for Redress**

The provision which the Bill would insert in the Constitution as subsection (2) of section 25 deals with the circumstances in which a public or civic organization may bring proceedings for constitutional redress on behalf of any person entitled to do so.

This proposed new section 25(2) differs from the comparable provision in the Constitutional Commission's draft in that it imposes a requirement that the public or civic organization must have a sufficient interest to bring the proceedings for constitutional redress, while the Commission's draft leaves that question of locus standi to be determined by the Supreme Court on an

application to it for leave to bring such proceedings.

The Committee is of the view that the requirement that a public or civic organization make an application for leave to bring the proceedings for constitutional redress gives the Court sufficient control over the matter and enables it to determine whether, in the particular circumstances, it is appropriate to permit the bringing of the action by such an organization. In the Committee's view, therefore, it is unnecessary and undesirable to include in section 25(2) an express condition for the bringing of proceedings that the public or civic organization have a sufficient interest in the matter.

The Committee also agrees with the recommendations made by the Constitutional Commission and by the Advisory Group that, where an application is made to the Supreme Court for redress under section 25 and the Supreme Court is satisfied that adequate means of redress for the alleged contravention are available to the person concerned under any other law, the Supreme Court should be given the power to remit the matter to the appropriate court. An amendment of the proviso to the proposed section 25(3) would be necessary to implement those recommendations.

The Committee notes that, in the existing provision of subsection (5) of section 25 of the Constitution, the words "or may authorise the conferment thereon of such powers," are included after the word "powers". Those words are omitted from the provision which the Bill would insert in the Constitution as subsection (5) of section 25. The Committee is of the opinion that it would be useful to retain those words in the proposed new section 25(5).

The Committee makes the following recommendations for the amendment of the proposed new section 25:

1. Subsection (2) of the proposed section should be amended by the substitution of the words "Any person authorized by law, or, with the leave of the Court, a public or civic organization, may" for the words "A public or civic organization having a sufficient interest in the matter may, with the leave of the Court or any person authorized by law".
2. The proviso to subsection (3) of the proposed section should be amended to empower the Court, where it is satisfied that adequate means of redress for the alleged contravention are or have been available to the person concerned under any law, to remit the matter to the appropriate court.
3. The provision in subsection (5) of the proposed section 25 should be amended by the insertion, after the word "powers", of the words "or may authorise the conferment thereon of such powers,".

## International Human Rights Instruments

A provision included in the Constitutional Commission's draft would require the Court, in determining the meaning and effect of the provisions of Chapter 111 to take judicial notice of the international human rights instruments to which Jamaica is a party. A recommendation was also made by the Advisory Group for the adoption of that provision but that the requirement that the Court take judicial notice of those instruments be replaced by a requirement that the Court take those instruments into account.

Dr. Barnett informed the Committee that the recommendation reflected an internationally accepted principle of constitutional interpretation which ensured that the implementation of Jamaica's treaty obligations was reflected in the Court's decisions. He explained that this would mean that, if Jamaica were to become a party to a convention and the Government, through ratification of the convention, accepted the obligations which it imposed, that should be recognised by all the organs of the state.

He added, in response to questions posed by Committee members, that the requirement that the international instruments be taken into account did not mean that the terms and specific language of a convention ratified by the Government would become binding, but that the Court would give them due consideration. He argued that, as the genesis of constitutional human rights provisions was in the international human rights instruments and, as the provisions of the conventions and the constitutional provisions were akin, it was consistent with Jamaica's obligations and the creation of a modern Charter of Human Rights and Freedoms that the matter be viewed in that light.

An additional point made by Dr. Barnett, which he said was important from a Government point of view, was that the adoption of this principle would conduce to the strengthening of the symbiotic relationship between Jamaica's internal and external obligations because Jamaica, in its implementation of its fundamental rights provisions, would be taking into account its international obligations.

Dr. Rattray added that if Jamaica moved, as was now proposed, in a direction in which the statement of human rights would be descriptive rather than prescriptive, with the omission of the various limitations and exceptions, then, in the interpretation of those rights and of the derogation based on what is demonstrably justified in a free and democratic society, there could be reliance on the foundations of those rights in the international human rights instruments which contain exceptions and limitations. By way of example, he said that in order to understand what powers the state has in relation to the right to life the international human rights instruments, which have limitations and exceptions, could be looked at.

It was explained to the Committee, by way of a background to the issue, that under Jamaican law, as in most Commonwealth countries, treaties are not self-executing, so that the ratification of a treaty, without more, does not make that treaty part of the domestic law. Implementing legislation has to be enacted for that purpose.

Reference was made to a paper presented by Mr. Justice Kirby of New Zealand at a 1995 New Zealand Judges Conference and reproduced in a Commonwealth Law Bulletin, which set out the following principles of law known as the Bangalore principles, -

1. International law, whether human rights norms or otherwise, is not, as such, part of domestic law in most Commonwealth countries.
2. Such law does not become part of domestic law until Parliament so enacts or the judges, as another source of law-making, declare the norms thereby established to be part of domestic law.
3. The judges will not do so automatically simply because the norm is part of international law or is mentioned in a treaty, even one ratified by their own country.
4. But if an issue of uncertainty arises as by a lacuna or obscurity in its meaning, or ambiguity in a relevant statute, a judge may seek guidance in the general principles of international law as accepted by the community of nations.
5. From this source material the judge may ascertain and declare what the relevant rule of domestic law is. It is the action of the judge in incorporating the rule into domestic law which makes it part of domestic law.

The article therefore states as follows: "There is a growing tendency for national courts to have regard to those international norms for the purpose of deciding cases where domestic law, whether constitutional, statute or common law, is uncertain or incomplete. It is within the proper nature of the judicial process and well established judicial functions for national courts to have regard to international obligations which a country undertakes, whether or not they have been incorporated into domestic law, for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law."

The developing principle to which the article refers is not as broad in its application as the recommendation made by the Constitutional Commission and by the Advisory Group, as it applies only where there is a lacuna or ambiguity in the law. It is therefore the view of the Committee that the recommendation is too widely stated.

It is also noted that the principle, as developed by case law, has been applied by the Privy Council in a case from Jamaica. This principle is therefore a part of Jamaican law.

The Committee is of the view that one ought not to attempt to load all legal

principles into the Constitution. At the same time there is a great deal of concern over the fact that there is often an inordinate lapse of time between the ratification of a treaty by Jamaica and its incorporation into domestic law by the enactment of implementing legislation.

The Committee recommends the omission from the Constitution of any provision that the courts, in determining the meaning and effect of the provisions of Chapter 111 of the Constitution, be required to take into account international human rights instruments to which Jamaica is a party.

It directs attention, however, to the need to move speedily towards the enactment of a Ratification of Treaties Act to ensure the incorporation by Jamaica into domestic law, within a reasonable period, of obligations under treaties ratified by it.

## **Section 26**

### **Interpretation**

In accordance with the recommendation, made earlier, in relation to periods of public emergency and public disaster, it is necessary to make certain amendments, as set out below, to the provisions which the Bill would insert into the Constitution as subsections (1) and (2) of the new section 26, the new interpretation section. Amendments to the Public Emergency Act would, of course, also be required.

### **Section 26(1)**

The Committee recommends that the proposed new section 26(1) be amended to include a definition of “period of public disaster” as meaning any period during which there is in force a Proclamation by the Governor General declaring that a state of public disaster exists.

### **Section 26(2)**

The Committee recommends that the proposed new section 26(2) be amended:

(i) so that the reference to the occurrence of a period of public emergency does not include a situation arising as a result of “the occurrence of any earthquake, hurricane, flood, fire, outbreak of pestilence, outbreak of infectious disease or other calamity whether similar to the foregoing or not”;

(ii) to include as one of the situations in which a Proclamation of the Governor-General is to be effective, a situation in which it is declared that the Governor-General is satisfied that a period of public disaster has arisen as a result of the occurrence of any earthquake, hurricane, flood, fire, outbreak of pestilence, outbreak

of infectious disease or other calamity whether similar to the foregoing or not.

### **Section 26(3)**

The Committee recommends that the word “a” be inserted before the word “two-thirds” in the proposed new section 26(3)(c).

### **Section 26(4)**

The provision which the Bill would insert in the Constitution as the new section 26(4) appears to contain an error. It refers to a “resolution passed by either House for the purposes of subsection (3)(a)” and provides for the manner of its revocation. That resolution to which the proposed section 26(4) refers is, however, a resolution extending the life of a Proclamation made by the Governor-General for the purposes of section 26, and provision for the revocation of the Proclamation is already made by paragraph (c) of section 26(3).

The provision in the proposed section 26(4) is really based on the provision now in subsection (7) of section 26 of the existing Constitution. Section 26(7) of the Constitution refers to a “resolution passed by a House for the purposes of subsection (4) of this section”. Subsection (4) of section 26, as it is now worded in the Constitution, sets out at (c) the third of three situations in which, under the existing Constitution, a period of public emergency will arise, i.e., where there is in force a resolution of each House declaring that democratic institutions in Jamaica are threatened by subversion.

The provision in the proposed new section 26 which corresponds to the provision in what is now paragraph (c) of section 26(4) of the Constitution is the provision in paragraph (c) of the definition of “period of public emergency”.

The Committee recommends that the proposed new section 26(4) be amended by the substitution for the reference in that provision to subsection (3)(a) of a reference to a resolution of a House declaring that democratic institutions in Jamaica are threatened by subversion, i.e., a resolution passed by a House for the purposes of paragraph (c) of the definition, in subsection (1), of “period of public emergency”.

Your Committee recommends the changes to the Bill which are attached at appendix 1 and the attention of Parliament is also drawn to the recommendations made in the above Report which will not form a part of the Charter of Rights.

Houses of Parliament