

RESPONSE TO COMMENTS ON THE WHITE PAPER

The Ministry of Education, Human Resources and Culture of the Cayman Island's Government published a White Paper entitled "Proposal for Establishing New Employment Relations in the Cayman Islands" in December 2001. The public was invited to respond to the recommendations contained therein and given until the end of June 2002 to make written submissions of opinions, observations and/or objections. As of July 2002, the Ministry has received responses from a number of employer representatives and organisations representing employers, and only one response from a former employee. It has received no responses from current employees.

The single individual responding as an employee is an expatriate, who was forced out of his job and has returned to his home country. His basic issue was the denial of his human rights during his brief employment in the Cayman Islands. The question of why employees, either individually or as a group, did not respond to this document is of interest to the Ministry, and warrants further consideration.

As a result of the responses to the White Paper being limited, for the most part, to employers, this document, being intended to address those responses, will be limited to the stated concerns of that group.

A primary goal of the Ministry, in its effort to understand and define the state of employment relations in Cayman and to review the current employment laws, was to establish a tripartite system in which this undertaking would be fairly analysed in light of the competing interests. To facilitate that goal, the Ministry identified a group of individuals that are representative of government, employers and employees, and requested their participation in this process. Prior to the publication of the White Paper, the newly-created Employment Forum met and considered each proposal. The contents of the document were exhaustively studied, discussed and re-written to reflect the consensus of opinions of that group.

It is worthy of note that the most lengthy of the responses to the published White Paper received by the Ministry were either prepared by or influenced by a number of employer representatives on the

Employment Forum. The Ministry will consider that fact in relation to the weight that should be given to the comments provided by those participants.

The following issues were raised in opposition to the White paper by the responding employers' groups:

- ◆ **The ILO and Non-Metropolitan Territory status of the Cayman Islands under the United Kingdom's Membership;**
- ◆ **The economic impact of the proposed legislative changes;**
- ◆ **The re-introduction of Workers' Compensation protection for employees in Cayman;**
- ◆ **The "adequacy" of the current Labour Law;**
- ◆ **The proposed changes to the Pensions Law and Regulations;**
- ◆ **The necessity for and advisability of providing protections in the Trade Union Law for freedom of association and collective bargaining;**
- ◆ **The necessity for and advisability of restricting the issuance of Trade and Business Licenses to only those businesses that are in compliance with the requirements of the Employment Legislation package; and**
- ◆ **The advisability of sharing information amongst governmental departments and agencies regarding a business' compliance with legislative standards for its operations.**

The International Labour Organisation (ILO) and Non-Metropolitan Status

It is clear from the responses to the White Paper that an explanation and differentiation of the phrases "Membership in the ILO" and "Non-Metropolitan Territory Status under the Membership of the UK" must be made prior to the discussion of the issues raised regarding this subject. An Overseas Territory, a Commonwealth Territory, or simply a possession or protectorate of another Country, can never be a "member" of the ILO unless it declares its independence from the country responsible for it and presents itself to the ILO for membership. The only status a Territory or Protectorate of a Member

Country can have in relation to the ILO is that of Non-Metropolitan Territory under the auspices of its Member.

Substantively, questions were raised regarding the necessity and/or advisability of the Cayman Islands becoming a Non-Metropolitan Territory of the ILO under the auspices of the membership of the UK. In order to address those questions, some background information, made available only a few weeks ago, is necessary:

From April through June of this year, mutual research and dialogue was undertaken by the Chief Legal Counsel for the UK Foreign Commonwealth Office and the Deputy Legal Counsel for the ILO, Geneva. The basis for this research and dialogue was the lack of reporting by either the Cayman Islands or the Turks and Caicos Islands on ILO conventions ratified by the UK. Each Member Country is required to report to the ILO, annually (and each time a new convention is ratified) on the status of the conventions ratified by that Member, as applied to each of its Territories. In regard to the responsibility of the UK to report to the ILO concerning the ratification of conventions in the Territories, the Cayman Islands and the Turks and Caicos Islands had apparently “slipped through the cracks.”

The Cayman Islands Government, and specifically the Ministry responsible for Labour, was already in the process of making enquiries regarding its status in relation to international conventions. That was being done in an attempt to alleviate some of the employment-related conflicts affecting our workforce and their employers and, thus, our economy.

The determination was made by the Counsel for the UK-FCO that the Cayman Islands and the Turks and Caicos Islands had actually come under the auspices of the UK's membership in the ILO in the period from 1958 through 1962, on/or following Jamaica's independence. That determination was confirmed by the Deputy Counsel for the ILO in Geneva. Further, it was decided that since neither the Cayman Islands nor the Turks and Caicos Islands had been responsible for the lack of recognition, neither country would be required to “back report” on all the conventions ratified by our

Member (the UK) throughout the years following Jamaica's declaration of independence.

As a consequence of that determination, it is clear that any questions regarding the necessity or advisability of the Cayman Islands becoming a Non-Metropolitan Territory under the Membership of the UK in the ILO are, indeed, moot.

The responsibility of the UK in relation to the status of the Cayman Islands, at this point, is to notify the Director General of the ILO of its intention to officially declare the Cayman Islands for Non-Metropolitan status under its Membership.

The next step to follow is an agreement between the UK and the Government of the Cayman Islands as to which conventions are the most reasonable for Cayman to ratify. There is an expectation of ratification of at least the Core Conventions, referring to those assuring human rights protections.

By agreement with its Member, a Non-Metropolitan Territory may opt either for ratification of a particular convention, or for modification of the convention based on its self-governing powers in relation to the subject-matter of the convention, or for postponement of consideration if local conditions prevail which are inconsistent with ratification at that time. Furthermore, although modified by agreement with its Member and the concurrence of the ILO, the spirit of the convention must be promoted, protected and realised in the Territory modifying it. Concurrently, the UK must report on the efforts made in the Territory to promote, protect and realise the convention, whether by legislative, administrative or other means, whether ratified by that Territory or not.

The obligation of the Cayman Islands is to report on an annual basis to the UK regarding its efforts to ratify, promote, protect and/or realise the conventions within its territorial bounds. The preferred and usual method of complying with international standards as set out in the conventions is through legislative changes embodying at least the minimum standards required by the convention under consideration.

That is what the Ministry has attempted to do in its presentation of the proposals for legislative changes in employment-related laws.

The Economic Impact of the Proposed Changes

The most-argued aspect of the proposed legislative package as set forth by the responding employer groups, other than opposition to specific changes in the laws themselves, was the economic impact of the implementation of the package. The Ministry agrees that the proposed changes will involve costs and that initially those costs will be borne, for the most part, by employers. The Ministry wishes to emphasise again that the changes are to be put in place over time and by a process that will assist rather than burden businesses and business owners. Compliance with international standards will not happen overnight, and a period of several years may be necessary to implement all of the standards mentioned in the proposal.

The Ministry continues to ask that the public consider the costs not only to individual employers, but also to the entire Country, of failure to implement international employment standards: Forty-plus years ago the Cayman Islands had no running water and no electricity. Its men went to sea and sent money home to their women and children. During that short period of time, Cayman was discovered as a prime offshore financial centre, and quickly became the fifth largest banking centre in the world. Its tourism potential grew along with the financial opportunities found here. Initially, those two service industries were available for development and promotion, and because people from around the globe wanted the services offered, a market was established. Cayman quickly realised one of the highest per-capita incomes in the world because it had “services to sell” and a “market for its services.”

For years the economy thrived. The country did not have to update its legislation and, in fact, most legislative updating was not substantive. It was not necessary to actively market our services because the world knew of the services that were being offered, and wanted to take advantage of them. We were able to attract our own “market”.

Today, due to OECD legislation brought about by larger countries' demands that the financial market be equalised, one of the

services Cayman was known for providing – that of “tax-haven” – has been virtually eliminated. Some financial institutions have moved away, terminating employees in the process. Since Caymanians often opted to enter banking careers right out of high school, two things have happened: there is a reduction in the services we can market to the rest of the world and there is, for the first time in many years, unemployment amongst Caymanians.

Tourism is an area that Cayman still does well in, but is it enough? That industry may not be able to maintain a competitive edge in the face of increasingly high prices. While there may be as many as seven cruise ships a day in the port, cruise ship passengers only spend an average of \$66.71 CI/\$79.42 US dollars a day on shore, inclusive of those who purchase jewelry or participate in water sports. (Statistics collected by Price, Waterhouse, Coopers). Is it reasonable to think that cruise ship passengers will purchase food on shore when they can eat free on board? Is it reasonable to expect tourists to spend more for libations on shore than they do on board?

For those who fly into Cayman, hotels and restaurants are costly, and those costs are often exacerbated by the addition of a gratuity or service charge on top of the base price. The additional percentage does not assure that the service will be good or even mediocre. Tourists remember when service is not good and may consider going to other countries to find more value for their money.

Gratuities charged by service employers, and the distribution of those gratuities among service employees and others, has been the most far-reaching and disconcerting issue that the former Cayman Islands Labour Department and Ministry of Labour has had to face, and it is one of the substantive issues that the Ministry is attempting to address in its proposed legislation.

The Ministry is confident that establishing a decent minimum wage and allowing gratuities to be given by those receiving good service to those providing the good service based upon the level of service received, rather than as a mandatory up-charge, will encourage employees to provide more and better service in order to earn a “tip”.

Moreover, it will serve to lower the costs to tourists, thus encouraging return visits.

At this point, even though the economy is sluggish, actions, not reactions, to re-attract tourism must be considered. Reactionary management is not the way to create long-term security. It takes planning and looking for solutions by weighing the problems encountered. It will require analysing what has changed and what went wrong, and setting about to put it right. Employers have the right and the obligation to look at the bottom line, but they must not allow that to blind them when it comes to the future of their businesses or the prosperity of the country.

One large employers' organisation responding to the White Paper stated: "Instead of increasing costs and bureaucracy, government should be taking every step to encourage business and investment to our shores...marketing the Cayman Islands as business friendly." The Ministry agrees and asks support in its effort to take these steps. By establishing international labour standards such as minimum wage, gratuities earned by good service, pension security, workers' compensation benefit provisions, adequate health insurance, and job security regardless of one's country of origin, this Country will be headed toward more secure economic times.

The Re-introduction of Workers' Compensation Legislation

The largest of the employers' groups responding commented on the "error" made throughout the White Paper by the use of the phrase "Workers' Compensation" rather than the original 1964 language, "Workmen's Compensation." That concern probably speaks for itself. All language now used in legislation is to be gender neutral, a change implemented about twenty years ago. Clearly, our legislation, as well as our understanding of workers' compensation, is outdated.

One issue presented as problematic for the employer groups was the idea that Workers' Compensation legislation was intended to provide only for the poorest of workers when it was adopted in 1964. The Ministry is at a loss to understand how that interpretation could be well-founded when the poorest of the workers were, in fact, excluded

from the protections offered by that Law. Domestic workers and agricultural workers on farms of less than 25 acres were excluded from even the minimal protections of that Law.

Another comment received stated, “The big companies already provide Workmen’s Compensation, but the little companies, which are the majority in Cayman, can’t afford it.” The statement continued with, “We don’t have an industrial society so people aren’t really at risk.” These statements are inconsistent. The larger companies do provide Workers’ Compensation protection already, and most are either financial institutions or hotel chains, not industrial in nature. Indeed, it is not necessary for a business to be industrially-based in order to need Workers’ Compensation protection for its employees. Such protection is generally-accepted by most large businesses as an aspect of doing business, and not even viewed as an additional benefit to employees.

Of significance to Cayman (and probably the respondent’s point) is that most of this country’s businesses are small and the costs of providing Workers’ Compensation insurance would be prohibitive, especially in light of the current condition of the economy. The Ministry is willing to give employers time to implement this requirement. It has established the Small Business Advisory Office as a part of the Employment Services Centre. That Office will be able to assist small business owners to determine whether their best method of compliance is to acquire insurance coverage or to simply assume the responsibility themselves for injuries to their employees. It will also assist in the scheduling of this legislation’s introduction into smaller businesses as the economy recovers. That will allow small employers time to prepare and plan ahead. The Ministry is prepared to allow small business owners that are not yet able to purchase an insurance policy to instead become bonded against any losses due to work-related injuries. For example, an established small business with non-liquid assets and low cash flow would hypothetically be able to secure such a bond, using its business assets as collateral, at less expense than an insurance premium.

The primary significance of the Workers’ Compensation provision for employees is the expectation of making workplaces safer. Employers should be motivated to become more aware of what their

employees are doing and whether they are, in fact, following the safety rules set out by the employer.

Of major concern to the Ministry, is protection of the poorest and least able to compete in our society. We are firm in our commitment that domestics, gardeners, and agricultural workers on farms of less than 25 acres must be included in the protections afforded the more privileged in our society. These individuals perform jobs that Caymanians do not want, as a rule, and they serve our countrymen well. The prevention of a Welfare State is of foremost concern to this Ministry.

One employers' group responded that the Workers' Compensation provision would increase litigation. The Ministry's response is simple: As of today, the only recourse afforded an injured employee of a business not providing this protection, or his family in the event of a fatality on the job, is an action in the courts. The protection of the Workers' Compensation provision will serve to minimise reliance on the court system, minimise attorney fees, and minimise the time required to access funds for medical and financial intervention for those who are injured as a result of their employment.

One respondent asserts that "percentages of disability" for the purpose of "permanent partial disability" are issues of fact to be determined by the courts. The Ministry has proposed in its recommended legislative changes that the determination of disability (or percentages thereof) be made by physicians who are qualified and competent to make such assessments. It has also recommended doing away with the outdated and incomplete Schedule to the Current Workmen's Compensation Law completely. In support of that position, the Ministry refers the writer to a recently published article in the Encyclopaedia of Occupational Health and Safety, 4th Edition (1998), entitled, "Workers' Compensation Systems, Overview", by Terence G. Ison, which states: "A danger of schedules that should not be exclusive is the tendency for them to become exclusive. The theory is that when a claim is made for an unscheduled disease or injury, the evidence will be investigated, to determine whether it resulted from employment. Some jurisdictions are avoiding this danger by not using a schedule at all."

The same employers' group also suggested "that since the current Workmen's Compensation Law and the proposed Workers' Compensation Law seem to provide that employers are liable whether negligent or not, the standard approaches 'strict liability', and that perhaps we should go to a 'no fault' system altogether". The Ministry agrees. Most countries have done just that.

The later conventions of the ILO embody five general principles: First, employment injury benefits must be financed by employers, because workplace safety is the employer's responsibility, and so is compensation for unsafe conditions; second, compensation must be in the form of periodic payments; third, minimum standards must be provided as to coverage offered; fourth, minimum compensation levels must be provided; and fifth, migrant workers must be afforded equality with nationals insofar as their coverage under this provision is concerned. Clearly, international standards call for a "no-fault" system in workers' compensation provisions. That means making employers responsible for any work-related injuries to their employees, without regard to fault. The Ministry had suggested in its proposal a system giving employees partial responsibility for their own injuries if they wilfully or wantonly or with reckless disregard fail or refuse to use the safety equipment provided by the employer or otherwise contribute their own injuries. The Ministry is willing to accept the suggestion of the employers' group advising a "no-fault" system of workers' compensation.

The writer of the above-referenced comments also suggests that instead of a Workers' Compensation Law providing benefits for an injured worker or the family of a worker killed at his job, the injured party has a perfectly adequate resource in the court system, by suing a negligent employer. As discussed above, the Ministry disagrees with this assessment and would refer the writer again to the "Workers' Compensation Systems, Overview." That article points out that the preparation and filing of claims for workers' compensation is a simple matter that does not require legal talent, and that some jurisdictions prohibit the charging of legal fees for these functions. Advocacy, if needed at all, is only used on behalf of the worker. The decisions are quicker, alleviating the need for delay of necessary treatment or

rehabilitation. The expenses are less and court time is minimal as these decisions can be made by Tribunals.

The Adequacy of the Current Labour Law

At its introduction into the Cayman Islands, around 1987, the current Labour Law was considered adequate. As times change laws must change to accommodate current situations and changing circumstances. An analysis must be made to consider what provisions work and what provisions do not. As in any legislation, labour legislation must be adjusted in such a way to avoid the problems and technical mistakes that lead to a lack of enforceability. An unenforceable law is an ineffective law.

The following are specific provisions mentioned by the responding groups as being “adequate” in the current law:

- ◆ **Gratuities**
- ◆ **Contracts**
- ◆ **Probationers**
- ◆ **Family (Compassionate) leave**
- ◆ **Overtime protection**
- ◆ **Maternity/Paternity leave**
- ◆ **Breaks**
- ◆ **Severance Pay**
- ◆ **Unfair Dismissal**
- ◆ **Retirement/Resignation Pay**
- ◆ **Employee-Swapping**
- ◆ **Tribunal Powers**
- ◆ **Powers of the Director**

Gratuities

One of the major problems in employment relations in Cayman has been the misappropriation of funds collected as gratuities by employers, both large international service-based companies as well as smaller local ones. The current law provides for the distribution of those funds, but does not provide for adequate oversight or

enforcement. The current law gives the burden of pursuing misappropriations to the Director of Labour, who is authorised to file suit against employers failing to properly report their distributions. This power was given to a government official who was not required to have a legal background or training as a prerequisite for holding the position. The Legal Department is reluctant to pursue these cases without proper and timely-filed documentation. As timely documentation has not been required to be submitted to the Department of Labour, employers have considered that requirement as waived. The police department (CID) is reluctant to investigate abuses that they believe to be the responsibility of field officers working for the Department of Labour. This set of circumstances has essentially left the requirements of the Law unenforceable and, therefore, ineffective. That is an example of why laws, either in substance or in nuance, must be updated to reflect the outcome of legal analyses regarding what has failed, why, and how the law can be revised so as to accomplish its objective.

The provisions of the new labour legislation regarding minimum wage establishment, gratuity reporting and penalties for failure to comply are essential to giving this legislation “teeth.” A law that cannot be or has not been enforced is a law without effect. Whether the failure of the current law happened to be in its substantive provisions or in its presumed waiver is not the issue; enforceability is the issue. The stumbling blocks to a law’s enforceability are what must be addressed in legislative changes. This is what the Ministry has attempted to do by encouraging the establishment of a minimum wage and by encouraging employers to abandon the practice of charging a gratuity percentage on top of a service bill. Although not requiring employers to give up this practice, the Ministry encourages it by establishing rigorous standards for specific reporting on the part of employers and by establishing significant penalties for failure to comply. The new legislative proposal will reduce the opportunities for businesses to get away with unfair distributions. By shifting the filing obligation from the Director of Labour (now Director of Employment Services) to the Legal Department, the potential for loss of the right to pursue these actions by the running of the statute of limitations, the lack of adequate investigative resources and/or legal training necessary to carry out enforcement of the standards, is minimised.

As an adjunct to addressing the gratuity distribution problems encountered in the recent past, the Ministry has determined that defining the terms “wage earner” and “salaried employee” is essential to an understanding of the classes of employees having a right to share in any gratuities collected by an employer. The groups responding to the White Paper objected to this addition, stating that the current law does not differentiate between these two groups. Ergo, this proposal addresses that deficiency.

Contracts

Another comment made regarding the “adequacy” of the current labour law concerned the Ministry’s call for the use of contracts of employment. The objection stated that the requirement in the current law for a “statement of conditions of employment” was adequate. We disagree. A written statement of employment conditions and a mutually agreed upon or negotiated contract of employment are not the same. In addition the current law excludes domestics from even the protection of a written statement of employment conditions. The Ministry is concerned with protecting the rights of all the residents of Cayman, regardless of their economic or social status.

A contract of employment within minimum standards set by statute will serve to clarify issues between employers and employees and minimise conflicts amongst them. When the expectations and responsibilities of both parties are set out in writing, potential conflicts can be resolved by reference to the document instead of by reference to the Tribunals or to the court system. Conflict prevention, by the use of written instruments, is preferable to conflict resolution in any form, as well as being less-costly and less-time-consuming. *The Ministry will provide a contract format or template for the convenience of employers not already using them.*

Probationers

The Ministry proposed, on the recommendation of several members of the Employment Forum, that the notice period for probationers be extended from the 24-hour period allowed in the

current law to a two-week period. The rationale presented to the Ministry for this recommendation was that often employers put a lot of time, training and money into probationers, making it unfair for them to quit their positions with only 24-hours notice. The employers' groups are conflicted about the two-week-notice proposal and would prefer a notice period of one day per month of probationary employment. The Ministry has no objection to that recommendation.

Compassionate Leave

The White Paper proposed extending the definition of immediate family for the purpose of compassionate leave to grandparents and siblings of employees in addition to the parents, spouses and children allowed under the current law. One group suggested that the statute remain as is, but provide that contracts between employers and employees control the circumstances. We are of the opinion that the mention of other familial inclusions in the body of the law would serve to set a standard for contract provisions. The Ministry agrees that if the parameters of inclusion are extended, it might lead to abuse on the part of some employees. That is of particular concern since the current law provides for this leave to be remunerable in five-day-per 12-month-period increments. *The Ministry suggests that the statute provide that any sick family member is permissible as the subject of an employee's compassionate leave, but that any specifics outside of/in addition to the minimum standards set out by the law may be established by contract between the employer and employee.*

Overtime Opt-Out

The employers' groups consistently opposed the Ministry's recommendation that the opting-out-of overtime provision in the current law be done away with. We are committed to the concept of overtime pay for overtime hours or in the alternative comp-time as remuneration for those hours. We are also committed to the idea that by contract employers and employees be allowed to opt for a forty-five or a forty-eight hour workweek in lieu of a forty-hour workweek. This should eliminate opposition based on the premise that employers would have to hire more workers to cover their job requirements, and the argument that employees would have to take other jobs to cover their

income needs if they were not allowed to work overtime hours for regular pay. It would also eliminate the largest quantity of unresolved cases before the Labour Tribunals since the current law makes the Tribunals responsible for determining whether the employee requested to work overtime for regular pay of his own volition or whether employer pressure influenced the request.

Vacation/Public Holiday

An issue was raised in regard to vacation and public holiday pay being memorialised in the contract of employment. It was stated that since this time off is statutory it should not be a contractual issue. We disagree. It is important that contracts take precedence over statutes so long as they provide at least the minimum standards required by those statutes. This is particularly important in a service-based economy where there are always employees who must work on public holidays, in order to service the needs of tourists and employers. It is also important for the contract to agree between the parties when vacation can be taken and when the pay for that vacation time will be tendered. Untimely tender of vacation pay has been a source of conflict to be resolved by labour officers. An inclusive contract would alleviate the question of when it is due and payable.

Maternity/Paternity Leave

All the groups responding opposed the increase in maternity benefits and the introduction of paternity benefits. The White Paper made reference to the fact that in the UK maternity leave was up to twenty-eight weeks. In our proposal, we asked for this leave to remain at twelve calendar weeks, with eight weeks at full pay and four weeks at no pay. The increased cost to employers would amount to just one-half months pay. It was stated that our comparison to the UK was unfair. It was asserted that in the UK and other countries, programs like Workers' Compensation and Maternity/Paternity benefits are funded by the employees. We would point out that in countries with social security systems, funding usually comes half from the employer and half from the employee. They are not funded by employee contributions alone.

It has been suggested that paternity leave be shortened to one week instead of two, as proposed in the White Paper, and that it should be limited to once every twelve months. *The Ministry is willing to go along with this suggestion. We recommend that this leave be provided for by contract if the parties agree that more than the minimal time will be required by a particular employee, and/or the employer wishes to make more time remunerable, perhaps as a perk for some valuable employees.*

Statutory Breaks

The Ministry is of the opinion that statutory breaks should be limited, as it is in the current law to specific industries. It disagrees with the argument that employers will suffer by the loss of 30 minutes a day out of employees' time utilisation. The Ministry is of the opinion that employees who are well-provided-for by their employers are more likely to use their time wisely, be more loyal, and have a lower "no-show" rate. Employees who can look forward to a few minutes break-time each morning and afternoon are apt to find the full eight to nine hour workday easier to tolerate, less tiring and stressful, and are likely to work with more energy and enthusiasm.

Pay Statements

Another contentious point was the proposed requirement of pay statements for all employees, with such statements to be inclusive of all deductions. We also proposed that employers be required to retain copies of the statements for a period of six years. In the ordinary course of business, pay statements are necessary to minimise failure to pay and/or failure to pay the correct amount claims. The reason for the six-year retention is that this period of time represents the statute of limitations for pursuing a debt claim. Section 32 of the current law requires that any employer with more than ten employees keep an accurate record on each employee, recording his time, leave taken, and any remuneration paid during each pay period. The employer must keep this record for two years. Section 33 requires that each employee receive a pay statement showing basic pay, gratuities, and the nature of any deductions. The new proposal would simply include those who employ less than ten persons and extend the retention time by four years.

Severance Pay

We proposed amending section 41 to provide severance pay at the highest basic rate paid over the employees' last year, rather than base it on the latest basic wage. Our reasoning in this was predicated on information from the labour officers responsible for conciliating complaints, as well as data from Tribunal members who must rule on complaints should conciliation fail. This information showed that employers often reduce the pay of employees they are planning on terminating. Our proposal would prevent such reprehensible behaviour.

Unfair Dismissal

We proposed that when the Tribunal finds a dismissal to be unfair, a penalty be levied. Some found fault with this. Section 55 of the current law allows a Tribunal to award compensation in the amount of one week's wages for each week worked. This amounts to nothing more than severance pay. The complainant has the right to proceed to court for an award of damages against the employer in cases determined by a Tribunal to be unfair. An additional penalty levied at the Tribunal stage would deter employers from repeated unfair dismissals. Such penalties would apply only when a blatant disregard for the law is obvious, and only after a full hearing. The Tribunal would follow precise guidelines in making these determinations. As provided for by our current law, any damages awarded in court would be due for reduction by the amount of penalty paid.

Retirement/Resignation Pay

In the course of discussions with the Employment Forum, before the White paper was published, employers made us aware of their interest in offsetting their portion of contributions made to the pension plans of older employees. Some employers had allowed older employees not qualifying under the Pensions Law for participation in those plans, to participate nonetheless. These employers were of the opinion that there should be an offset to the Resignation/Retirement Allowance of those employees. We agreed. Thus the new proposal provided for this

offset, which is not allowed under Section 47 of the current law. In their response to the White Paper, the employers' groups reacted negatively to this proposition, stating that there was no need for this proposed offset. *As we included it solely for the benefit of employers, the Ministry at this point has no opposition to its exclusion.*

Employee-Swapping

Regarding the employee-swapping provision of the proposed legislation, the groups responding stated that this could be handled contractually between employers sharing an employee. This is exactly what the Ministry recommended in its proposal – contractual specifications making the primary employer responsible for all the benefits and income of a shared employee. This is a simple process, not the administrative nightmare perceived by the respondents. Having only one employer being responsible for pay and benefits of a shared employee will actually reduce administrative difficulties. By contract, the secondary employer will reimburse the primary employer, based on the employee's usual wage/salary plus the pro-rated costs of his/her benefits. The employee would then have recourse to a single primary employer.

Another employer group agreed that the employee-swapping provision of the proposed seemed fair and would ensure that employees' affairs are managed effectively by employers. They stated that this change offers protection to employees in the form of secured benefits. We concur.

Tribunals

One employer group responding to the proposals asserted that the existing legislation is adequate as to which issues Tribunals can hear and determine. We disagree. One of the main failings of the current legislation is that it gives the Tribunals the right to hear any complaint brought by employers and employees per Section 74. However, in the body of Section 74, there are guidelines as to hearing unfair dismissals, severance pay, and overtime-with-regular-pay issues. Nothing else. *We intend to extend the Tribunals' power, following appropriate training, to*

handle any employment-related complaint. This was the intent of the current law.

Powers of the Director

Some groups who responded to the White Paper contended that the current laws relating to the Director of Labour (Director of Employment Services) are adequate as they now stand. The old legislation gave the Director power to ensure that employers were not breaching their statutory duties toward their employees. Where employers were shown to have breached those duties, criminal sanctions were available. However, the old law does not provide for adequate enforcement. The new legislation will provide for enforcing sanctions, not only when employers breach their duties, but when employees breach theirs as well. It is essential that such sanctions be adequate and workable.

Comments Regarding Proposed Pension Law and Regulation Changes

The proposed changes to the National Pensions Law and Regulations drew protests from the responding groups. One point that was made was that “the 2% contribution was not likely to be sufficient to cover disability claims.” That is true. The same is true for pension benefits generally. It has only been four years since Cayman made pensions mandatory, and those contributions are not adequate to cover pension claims. This is always the case when a new system requiring contributions comes into being. As a matter of fact, in a system as new as ours, a fifty-year old should be contributing 37% of his/her income to a pension plan to earn a pension that would support the worker’s current standard of living.

A 2% contribution is not much, but it is a start. And it must be emphasised that any contribution not used/required for death or disability benefits will be distributed at retirement age as part of the accumulated pension contribution, with interest, made by or on behalf of the employee. “It should be noted that all contributions form part of the accumulated contributions that make up the employees’ accounts.” (See page 18, White Paper)

Another point raised was that “this change will be an administrative nightmare; how does an administrator determine degree of disability?” Administrators will not make these determinations. The administrator simply purchases a policy as needed for a disabled employee. We reiterate, decisions about disability and degrees of disability will be made by qualified physicians, not by lawyers or pension administrators.

It was stated that “the number of persons claiming disability will be potentially alarming. It opens the door for abuse by those wanting quick cash.” Again, policy terms and medical reports of physicians will determine disability, not administrators. Administrators will not have to pay for a policy unless doctors agree that an employee is disabled.

The largest employers' group insisted that including domestics under the pensions law requirements would result in increased burdens to Caymanians. This seems to intimate that the least protected and poorest population in Cayman should be excluded. This Ministry prides itself on its support of Human Rights issues and refuses to exclude the poorest, most needy, and quite possibly the hardest working segment of our society. (See page 17, White Paper) “Include in the security of old age those who work in the least paid jobs in the Country.”

Someone else commented that “there is no need for the administrators of pension plans to be provided with written contracts of employment.” It is the Ministry's intent to make all aspects of the new employment legislation interrelated and interdependent. The proposal calls for the application for registration of a pension plan and the submission of financial statements at the end of the year to be accompanied by a copy of the contracts of employment. This process does not have to be, and indeed should not be, an exercise in paper management. Rather it should be contained in a database transferable through electronic means. It is significant in that it will serve to notify the Superintendent, the administrators of pension plans and the Department of Labour that employers' businesses are in compliance with the new legislation. The importance of these provisions is that cross-referencing of the various interrelated bits of employment

legislation will provide checks and balances underpinning the concept of fairness. This is not, as has been pointed out by the largest employers' group, a job that can be solely done by the Director of Employment Services and his Department. There must be shared responsibility amongst all the participants in statutory employment provisions; assuring that all aspects of the requirements are met before the registration of a pension plan (or for that matter before Trade and Business licenses can be renewed).

Our legislation prior to these recommended changes has been piece-meal. If all bits are not interdependent, gaps are left in enforcement. Again, legislation without enforceability is ineffective and worthless.

A concern regarding the recommendation of an actuarial review of both kinds of pension plans, defined benefits and defined contributions, was raised. The current law requires actuarial review of a defined contribution plan every five years and of a defined benefits plan every three years. We are not opposed to maintaining the review periods, so long as the clause allowing the Superintendent of Pensions to call for these reviews more frequently, remains in place in the proposals. This would only be necessary should he determine or reasonably suspect there is a problem.

Lastly, there was a question as to why the Civil Service Pension Plan would be exempt from the requirements of trust status. This is a reasonable question and there is a simple answer. The Ministry would like to see the Civil Service to come under the auspices of the employment law package. We believe that all employees should be treated equally under the laws. However, the current Civil Service Pension Plan was established under a separate law. And since that law did not call for the plan to be set up under trust, it must be exempted from that requirement in order to bring it under the auspices of the National Pensions Law. A basic "grandfather clause" is the only way to effectuate this merger. Our Ministry does not have authority over the Civil Service. Thus we cannot adjust, amend or influence it in any way other than peripherally.

Comments Regarding Trade Union Law Changes

Points of contention regarding the proposed Trade Union Law changes are as follows:

- ◆ **“Trade Unions send a negative message internationally, potentially damaging the already sluggish economy”;**
- ◆ **“Hospitality industry is already fragile; businesses can move to less expensive, less regulated, more attractive destinations”;**
- ◆ **“Would have a negative impact on customer service, as unions do not provide for individual rewards for good service”;**
- ◆ **“Are teachers and health workers included?”**
- ◆ **“Most modern governments have enacted employment and human rights legislation adequately ensuring the rights of all employees. There can be very suitable minimum rights employment legislation provided by government at no cost, in lieu of employees’ desire to be unionised”;**
- ◆ **“Unionisation would add an unnecessary formal aspect to the ‘tranquil’ procedures which both employers and employees now use for ‘Association’;**
- ◆ **“If there are strong laws which protect the employees and monitor organisations, then there is no need for unions to organise and become third party representatives for workers in the Cayman Islands”;**
- ◆ **“The government should take care of employees by monitoring companies via their own agencies, with strong labour laws and policies. It would be detrimental to the Cayman Islands if this job were handed over to unions”.**

The last few comments from the employers’ groups are particularly encouraging to us, as they argue for the legislative changes proposed and discussed previously in this document.

The current Trade Union Law establishes a Register of and Registrar for Trade Unions, but it does not specifically establish the right to “Freedom of Association.” The law speaks as if this right exists and provides rules for regulating unions, from registered offices to

prohibition of tort actions against them and/or their members, without actually spelling out the rights of Freedom of Association, Collective Bargaining or Right to Strike. Our current law is reasonably far reaching in its protection of unions, without specifically establishing such rights.

Our proposed changes seek to specify the rights that the current law seems to assume in its protection of unions, members and trustees. Our changes to this law are for the most part cosmetic.

The significance of these changes, though, was brought to fore in June of this year when the Minister for Education, Human Resources and Culture was invited to the meeting of the United Nations Committee on Economic, Social and Cultural Rights. He reported the areas which were specifically asked of the Cayman Islands and those areas bearing relevance to the jurisdiction of the Cayman Islands. Of import regarding Trade Union legislation and proposals were the following questions: “What is being done to foster the growth of trade unions or other such vehicles which represent the collective desires of workers?” “What protections do employees have when they resort to collective bargaining actions?” “Are employees properly protected from intrusive employers?”

With these proposals our government is not actively promoting unions. We are attempting to establish unequivocally the basic rights mentioned above; it is up to the unions themselves to organise and establish their own memberships.

Consider page 26 of the White Paper: A trade union can apply to the Tripartite Body to be certified as a bargaining agent only if the majority of employees of an employer (51%) are members in good standing of that union. They must provide evidence of that majority to the Tripartite Body and must show that the majority actually wants the union to be their bargaining agent. The Tripartite Body still has to determine the appropriateness of the bargaining unit in regard to the nature and scope of duties of the employees in the unit and consider the views of the employer as to that appropriateness.

This is not promotion of trade unions, although that is what is expected of ourselves and other countries, by international standards. It is establishing the rights of employers and employees to associate, organise, bargain collectively and strike. It is formalising the Human Rights aspect of trade union legislation. It will satisfy the questions of international organisations that Cayman has indeed established and protected these rights.

The Ministry disagrees that the establishment of rights of association, collective bargaining and strike send negative messages internationally. The questions above, posed to our Minister, should prove beyond doubt that these established rights are expected on an international scale. We contend that the established rights of employees and employers will boost the perception of the Cayman Islands as a place to do business internationally because we meet minimum standards.

The claim that business can move to less expensive, less regulated and more attractive destinations is something this Ministry is trying to prevent with its proposed legislative changes. Promoting the notion that Cayman is compliant with international standards regarding businesses and employment will help our market recover. Reducing fears about the lack of job protection and increasing security in employment by offering employees a full package of employment benefits will draw a market back to our shores.

The Ministry holds that the provisions of rights to associate and collectively bargain will not negatively impact our service industry in relation to rewarding individual good service. What we are doing now (gratuities situation) does not reward good individual performance, and these are actions permitted by and condoned by our current legislation.

As to whether teachers and health care workers would have the right to organise, the answer is, yes. They would be restricted by legislated, internationally permitted standards as to when they could reasonably exercise the right to strike. When emergent conditions were in place this right would be postponed.

The comment regarding unionisation adding an unnecessary formal aspect to the “tranquil” procedures which both employers and employees now use warrants this comment: We are hard-pressed to call any procedures now used for dispute resolution amongst employers and employees “tranquil.”

This piece of legislation should not be feared. It is the clarification of rights already implied in the current law.

Trade and Business Licensing Law

This Government is of the opinion that for too long its various departments and agencies have operated in isolation. We believe that government should, as a dynamic entity, operate as a whole. As it is now, communication is limited; the concept of ‘joined-up’ government is not well established in Cayman. The Director of Labour, now the Director of Employment Services has a seat on the Immigration Board. Pursuant to Section 29 of the 2001 Trade and Business Licensing Law, sections 8 and 9 of the Immigration Law applies to the members of the Trade and Business Licensing Board in all respects as though they were members of the Immigration Board.

One group stated that this proposed change puts all employers/businesses at risk and raises serious issues of subjectivity, administrative delays, potential litigation, loss of business and business interference. We disagree. The addition of a member who already has a position on the Immigration Board can hardly disrupt the practice of this Board.

This Ministry believes that businesses not in compliance with the laws should not have their Trade and Business licenses renewed until they are in compliance. Sharing information amongst governmental bodies about bad practices in businesses will serve to eliminate those bad practices and bring business owners into compliance.

The Trade and Business Licensing Law already provides for an appeal to the Governor from a decision of the Board. This was a point raised by one of the respondents in its opposition to this proposal.

Can it be detrimental to the future business of these Islands to require that businesses be in compliance with legislative standards such as contractual obligations, pension provisions and workers' compensation provisions?

The proposed electronic exchange of information by the Departments of Immigration and Employment Services will make compliance easier to monitor and less time consuming than it is now.

It must also be understood that the initial focus will be on assisting those businesses not in compliance by targeting those who need help. We are not seeking to destroy businesses, but to help them comply with international standards and thus become attractive to overseas investors, tourists and potential workforce.

Our emphasis will be on helping the transition to the new requirements and particularly assisting small businesses adopt and comply with best business practices.

This effort can only bolster Cayman's position globally. It will take time and we understand that. We are willing to phase these changes in, giving employers/businesses time to plan, prepare and comply, while at the same time postponing sanctions for non-compliance until reasonable and adequate time and effort have been put into this reformation process.

Confidential Relationships Law Proposed Changes

The respondents are also opposed to the proposed changes to the Confidential Relationships Law. The current law already allows inspectors, constables, the Financial Secretary and others that are authorised by the Governor to seek, divulge or obtain confidential information. A bank can divulge such information to the extent it is reasonably necessary to protect the bank's interest, either against its customers or third parties in respect of transactions of the bank.

Paragraph (C) of section 3(2) of the law says that these disclosures can be made in accordance with this or any other law.

Section 5 says that every person receiving confidential information by operation of section (2) is fully bound by this law, as if such information had been entrusted to him/her in confidence.

Offences for divulging are provided in the law, as are the penalties.

Individual employees already have a right to go to the Labour Department (Employment Services Department) and complain that specific statutory rights have been denied. By adding the Director's name and the name of the Superintendent of Pensions to the list of those rightfully able to receive such information, the system will not be impaired or abused.

The power that the Director of Employment Services and the Superintendent of Pensions would have would be investigative only, and could only be shared by essential governmental bodies. This would assist in the effort to get businesses compliant with the new legislative requirements.

As an aside, although there is no in proposal for it, ordinary employees who are denied pension, workers' compensation protection, or any other duly required provision under the employment laws of this country should be able, without fear of retribution, to disclose these facts to an appropriate governmental official. They already have the right to disclose this information to the labour officers, but the effect is not always without reprisals.

CONCLUSION

The Ministry is grateful for the considerable effort that has been made by the groups responding to its White Paper. All of the comments and suggestions made have been considered, weighed and balanced in regard to the interests of the social partners (employers, employees and government). We have attempted to address all of the issues raised by the respondents. One of the Ministry's concerns at this point in the process of employment legislation reform is to make certain that the interests of all the parties are considered.

The Cayman Islands must embrace modern labor concepts through comprehensive legislative reform, an undertaking that is essential to our being able to compete effectively and profitably in a global market. The unified support of the social partners for revision of the current employment laws is the key to accomplishing that reform in an orderly and efficient manner to the benefit of all concerned.