

# OFFICE OF THE PUBLIC DEFENDER

## JAMAICA'S COUNTRY PRESENTATION

CONFERENCE OF COMMONWEALTH NATIONAL HUMAN RIGHTS INSTITUTIONS

FEBRUARY 26 – FEBRUARY 28, 2007

The office of Public Defender is a commission of the Parliament, established by statute, the Public Defender (Interim) Act, 1999<sup>(i)</sup> ('the Act'). It is mandated to **protect** and **enforce** the rights of "**citizens**"<sup>(ii)</sup> (My emphasis).

The Public Defender is appointed by the Governor General after consultation with the Prime Minister and the Leader of the Opposition. He holds office until the age of seventy years. His status (including remuneration and terms of tenure) is equivalent to that of a Judge of the Supreme Court. In particular, he may only be removed from office by reason of inability to discharge his functions due to infirmity of mind or body or, for misbehaviour.

The process of removal commences with a resolution of both chambers of the Parliament (House of Representatives and Senate) that the question of removal be investigated. Thereafter, the Governor General appoints a tribunal of persons who hold (or have held) office as a judge of a court of unlimited jurisdiction in civil and criminal matters, in some part of the Commonwealth. The tribunal is required to enquire into the matter, report its findings of fact to the Governor General and, advise him whether the Public Defender ought to be removed from office; in which case "the Governor-General **shall** by instrument under the Broad Seal" remove him from office.<sup>(iii)</sup> He is not, at any time after he ceases to hold office, (whether by removal or otherwise), eligible for appointment in the public service.

Subject to the approval of a Commission of the Legislature<sup>(iv)</sup> the Public Defender may appoint and employ at such remuneration and on such terms as he prescribes, such officers and agents as he considers necessary, to assist him in the proper performance of his functions under the Act.<sup>(v)</sup>

By the foregoing provisions, inter alia, the **independence** and **security of tenure** of the Office are institutionalized. The Public Defender is therefore appropriately equipped to commit, fearlessly and unwaveringly, to the conscientious discharge of his mandate.<sup>(vi)</sup>

The Public Defender replaced an earlier commission, that of 'Ombudsman', created by an Act of 1978<sup>(vii)</sup> ('the 1978 Act') and which, classically, was mandated to investigate complaints of maladministration by public authorities, defined<sup>(viii)</sup> to mean a Ministry, department or agency of Government or the police services.<sup>(ix)</sup>

The jurisdiction and functions of the Ombudsman were prescribed in Part III of the 1978 Act. That measure provided that:

"S. 12 (1). ..... where an Ombudsman is of the opinion —

- (a) that any person or body of persons has or **may have** sustained injustice as a result of any action taken by an authority or an officer or a member of such authority, being action taken in the exercise of the administrative functions of that authority; or
  - (b) that any action taken (whether before or after the 29<sup>th</sup> day of March, 1994) by a political party, its members or supporters —
    - (i) constitutes or is likely to constitute a breach of any agreement, code or arrangement for the time being in force between or among political parties in Jamaica; or
    - (ii) is likely to prejudice good relations between the supporters of various political parties, the Ombudsman may investigate the action so taken.
- (2). Subject to the provisions of subsection (3), an Ombudsman shall not investigate —
- (a) any such action aforesaid in respect of which the complainant has or had a remedy by way of proceedings in any court or in any tribunal constituted by or under an Act of Parliament; or
  - (b) any such action or matters as are described in the Third Schedule;<sup>(x)</sup> or
  - (c) the exercise of the powers conferred on the Governor-General by section 90 of the Constitution (which relates to the prerogative of mercy); or
  - (d) any action which, by virtue of any provision of the Constitution, may not be enquired into by any court of law.
- (3) An Ombudsman —
- (a) may conduct an investigation into any such action as is mentioned in subsection (2)(a), if he is satisfied that in the particular circumstances it is not reasonable to expect the complainant to take or have taken such proceedings;
  - (b) may (to the extent that such investigation is not in conflict with paragraph 4 of the Third Schedule<sup>(x)</sup>) conduct an investigation into any reports made to a Service Commission in respect of the appointment, removal, promotion, disciplinary control or other personnel matters in relation to any person; and
  - (c) shall not be precluded from conducting an investigation in respect of any matter by reason only that it is open to the complainant to apply to the court for redress under section 25 of the Constitution

(which relates to redress for contravention of provisions for the protection of fundamental rights and freedoms).

- (4). If any question arises as to whether he has jurisdiction to investigate any case or class of cases under this Act, an Ombudsman may apply to the Supreme Court for a declaration determining that question.
  - (5). The fact that an action is commenced in any court in connection with a matter under investigation by an Ombudsman shall not, unless the court otherwise directs, preclude such investigation.
  - (6). An Ombudsman, after consultation with the Prime Minister and the Leader of the Opposition may —
    - (a) appoint a Tribunal comprised of representatives of political parties to assist him in the investigation of complaints arising out of an action referred to in subsection 1 (b); and
    - (b) make regulations in relation to the constitution and operation of the Tribunal, and otherwise in relation thereto, so, however, that any regulations so made shall be subject to negative resolution.
  - (7). The fact that a Tribunal is not appointed under subsection (6) shall not affect the validity of anything done by an Ombudsman in the exercise of powers conferred on him by subsection (1) (b).
13. An investigation pursuant to Section 12 may be undertaken by an Ombudsman on his own initiative or on a complaint made to him pursuant to Section 14.
14. (1) A complaint to the Ombudsman may be made by any person or body of persons, whether incorporated or not, who claims to have sustained such injustice as is mentioned in paragraph (a) of Section 12 (1) or to be affected by any such action as is mentioned in paragraph (b) thereof, but such complaint shall not be made by—
- (a) a local authority; or
  - (b) a body constituted for the purposes of the public service or a local authority.
- (2) Where the complainant—
- (a) is a minor, the complaint may be made by his parent or guardian or any other suitable person;

- (b) is unable to act for himself by reason of infirmity, or any other cause or has died, the complaint may be made by his personal representative, or a member of his family, or any other suitable person.
- (3) Every complaint to the Ombudsman shall be made in writing.
- (4) Notwithstanding anything provided by or under any law—
  - (a) where a complaint made by a person who is an inmate of a Government institution or is detained therein is addressed to the Ombudsman, it shall be forwarded to the Ombudsman by the person for the time being in charge of that institution; and if such complainant is contained in a sealed envelope, the envelope shall be forwarded unopened; and
  - (b) regulations made under this Act may make provision for ensuring confidentiality of communication between any such person as is mentioned in paragraph (a) and the Ombudsman.
- 15. (1) An Ombudsman may, in his absolute discretion, determine whether to undertake or continue an investigation under this Act and in particular, but without prejudice to the generality of the foregoing, may refuse to undertake or continue any investigation if he is of the opinion that —
  - (a) the subject-matter of the complaint is trivial;
  - (b) the complaint is frivolous or vexatious or not made in good faith;
  - (c) the complainant has deferred for too long the making of his complaint to the Ombudsman;
  - (d) the complainant does not have a sufficient interest in the subject-matter of the complaint; or
  - (e) having regard to all the circumstances of the case, no investigation or further investigation is necessary.
- (2) Where an Ombudsman decides not to undertake or continue the investigation of a complaint, he shall inform the complainant of his decision and give reasons thereof.
- 16. The powers conferred on an Ombudsman by this Act may be exercised notwithstanding any provision in any law that an act done thereunder shall not be challenged, reviewed, quashed or called in question.”

The provisions of S. 12 (1)(b) were introduced by an amendment of 1994<sup>(xi)</sup>. They placed on legislative footing, a prior formal agreement arrived at by an ‘Electoral Advisory Committee’ (comprised of representatives of the two major political

parties<sup>(xiii)</sup> whose functions were broadly designed to promote and effectuate peaceable politicking in a highly volatile and charged atmosphere. (That Committee has itself since been elevated to a permanent parliamentary commission consisting of representatives of the two parties and, independents, one of whom is Chairman.)

When the 1978 Act was repealed in 1999, the S. 12 provisions were incorporated in the Public Defender (Interim) Act.<sup>(xiii)</sup> But that jurisdiction has now, in turn, been conferred upon yet another parliamentary commission, the 'Political Ombudsman'.

All of the former jurisdiction of the Ombudsman was transferred to the Public Defender by the Act. But importantly, the provisions of Part III of the Act (which lays down the functions of the Office) [S. 13 - (1) (a)] may be **compared** and **contrasted** with those of the 1978 Act, S. 12 (1)(a) and (3) (c). The former now provides that —

- "S.13. (1)* ..... the Public Defender shall investigate any action taken where he is of the opinion—
- (a) that any person or body of persons—
    - (i) has sustained injustice as a result of any action taken by an authority or an officer or member of such authority, in the exercise of the administrative functions of that authority; or
    - (ii) **has suffered, is suffering or is likely to suffer an infringement of his constitutional rights as a result of any action taken by an authority or an officer or member of that authority.**" (My emphasis)

It will be observed that whilst the old Ombudsman shall have investigated any action if of opinion that any person or body of persons '**may have**' sustained injustice thereby, the Public Defender may not. To that extent the powers of the latter are reduced. They are further whittled down by S. 13 (2) (d) of the Act in that he is **expressly** precluded from investigating—

"any action taken by the Director of Public Prosecutions in the exercise of his constitutional functions;" or

"any action which, by virtue of any provision of the Constitution, may not be enquired into by any court of law."<sup>xiv</sup>

The 'constitutional rights' referred to in the Act, S. 13 (1) (ii), are, primarily, the Fundamental Rights and Freedoms guaranteed to "**every person** in Jamaica" [cf. the Act, S. 4 (1) — the rights of "**citizens**"] and deeply entrenched in the Constitution, Cap. III, SS. 13-24. They mirror Articles of the European Convention on Human Rights and the Universal Declaration of Human Rights and protect the right to life, freedom of movement, privacy of home and other property, freedom of conscience and freedom of expression as well as the freedoms of assembly and of association. They also protect **against** arbitrary arrest or detention, torture, inhuman or degrading treatment or other punishment and the compulsory acquisition of property or interest or right therein (save with the award of fair compensation and, the means of enforcing the right to

such compensation) as well as discrimination on the ground of race, ethnic origin or religion, inter alia. Finally and most importantly, the Chapter contains provisions designed to ensure due process in criminal proceedings including the presumption of innocence, the independence and impartiality of trial courts established by law, the right to confront and cross-examine adversaries, adequate time and facilities for preparing a defence and access to Counsel of choice.

Thus, in defence of rights the duty of the Public Defender is to investigate allegations of injustice which flow from administrative action of the State or its agents as well as the abuse or infringement of Constitutional guarantees.

The investigative mechanism is entrusted to an Investigation Division consisting of a number of investigators of varied expertise and experience in the activities of Ministries and State agencies. A legally qualified Deputy Public Defender directs investigations and informs the Public Defender on the progress of investigations.

A Ministry, agency, other authority or officer against which or whom an allegation is made, is required to be informed of the allegation and is invited to respond.

On the conclusion of an investigation the Public Defender may make to the entity concerned such recommendations as he thinks fit and may recommend any or all of the following -

- (a) that the action which was the subject matter of the complaint be reviewed;
- (b) the alteration of an enactment, rule or regulation which causes or may cause injustice or infringement of constitutional rights;
- (c) that compensation be made to the complainant.

The ultimate recourse is a Special Report to Parliament, where there has been failure on the part of an agency to comply with a recommendation. In addition, the Public Defender ensures that any person who alleges that his constitutional rights have been, are being or, are likely to be infringed is provided with ready access to professional advice and where necessary to legal representation from a cadre of Counsel set up by him, in which event he authorizes payment of legal aid out of funds provided by Parliament to the Public Defender for that purpose.

Recently, consensus has emerged in the Jamaican Parliament that the vastly dreadful wrong perpetrated against black Africans in the Atlantic slave trade is the quintessential crime against humanity. It has left an enduring legacy of poverty and degradation of their descendants, in the Western world and elsewhere. The Office shares the view that although explicit apology by the former slave trading nations of Western Europe may palliate, they are plainly inadequate in meeting the pertinent demands of natural law. We shall therefore be associating ourselves with claims for equitable reparations in the form of direct financial settlements, debt relief and

support for programmes of poverty eradication, the building or strengthening of democratic institutions as well as the promotion of foreign direct investment and market access. For the trade and forced labour which it engendered over centuries amount to one of the most egregious instances of man's inhumanity to man which basic civilised instinct will not allow to pass without redress.

Earl Witter  
**Public Defender**  
 February 19, 2007

#### FOOTNOTES

(i.) S. 4; (the provisions of the statute will be 'deeply entrenched' in a Constitution completing the process of political independence by the proclamation of republican status, after the process of reform of the Jamaica Constitution, 1962, is itself completed.); (ii.) Ibid; (iii.) See generally, the Act. S. 5.; (iv.) Comprised of the Speaker of the House of Representatives (Chairman), the President of the Senate, the Leaders of Government and Opposition business in the House and Senate, respectively and, the Minister of Finance; (v.) Ante, S. 11; (vi.) But see p. para. below. (vii.) The Ombudsman Act, 1978, S. 3 (1); (viii.) Ibid, S. 2; (ix.) The 'Jamaica Constabulary Force, the Island Special Constabulary Force (auxiliaries) and the Rural Police; authorities also included limited liability companies in which the Government or an agency held 'not less than 51% of the ordinary shares if declared by the House and Senate to be an 'authority'; (x.) The Third Schedule [S. 12 (2) (b)] generally excluded the commencement or conduct of court proceedings, action in relation to an order or direction to the Military, action in relation to extradition requisitions and the grant of national honours and awards.; (xi.) Act 5 of 1994, S. 4 (a).; (xii.) The governing People's National Party and opposition Jamaica Labour Party.; (xiii.) The Act S. 13 (1) (b); (xiv.) See generally, the Political Ombudsman Act, 2002, S. 12.; (xv.) The Act, S. 13 (2) (c). The Office of Director of Public Prosecutions is established by the Constitution, Cap. III, S. 94 (1). He is empowered to investigate and undertake **criminal** proceedings in any forum other than a court martial or to take over and continue or discontinue any such proceedings at any time before judgment [S. 94 (3)]. And in the exercise of his powers he "**shall not** be subject to the **direction** or **control** of any other person or authority" [S. 94 (1)]. Advice rendered by the Judicial Committee of the Privy Council in recent appeals now make clear however that the exercise by the Governor General of the prerogative of mercy, hitherto thought impregnable, is in fact subject to judicial oversight. See e.g. Neville Lewis & Ors. v. A.G. (Ja.) & Anr. , P.C. Appeals #s 60,65 & 69 of 1999; # 10/2000; Judgment del'd. Sept. 12, 2000.

The following are synopses of instances of successful intervention by the Public Defender to secure the protection of fundamental and other rights:

**1. LIFE, LIBERTY OR SECURITY OF THE PERSON INFRINGED**

01/08/01 C-304/01 David Hardy

Detainees forced by security force to lie in the street in W/Kingston 10/08/01 C-304/01 Markeeno Gonzales on 10<sup>th</sup> July 2001 during a disturbance in Western Kingston, David and Markeeno were detained by members of the security force and made to lie in the street face down without shirts for hours, under intense heat from the Sun. The office negotiated with the Attorney General who made an offer of Two Hundred Thousand Dollars (\$200,000.00) each in full and final settlement. The offer was accepted and in late 2004 the amount was obtained.

**2. FAILURE/NEGLIGENCE IN AFFORDING SECURITY TO INMATE**

CI-89/03 Aston Myrie

On April 20, 2003, prison warders of the St. Catherine Adult Correctional Centre came to unlock the cells. Mr. Myrie was subsequently stabbed in right eye by an inmate. The office negotiated with the Attorney General's Department and an award of Eight Hundred Thousand Dollars (\$800,000) was received in full and final settlement for injuries sustained.

**3. MAGISTERIAL ERROR IN SENTENCING**

13/07/05 CI-28/05 Allan Douglas

Three - year suspended sentence converted to consecutive sentence in (Intervention by Public error by Resident Magistrate. When information received complainant had already begun to serve the converted sentence. The Office petitioned the Governor General for remission of sentence. Compensation awarded.

**4. CRUEL OR DEGRADING TREATMENT**

09/5/06 C-216/06

Reneto Adams Police Superintendent not reinstated after acquittal of charges. Mr. Adams' complained that following his arrest for murder, trial and acquittal on December 20, 2005, he was not able to secure reinstatement. He also claimed that no charges or disciplinary proceedings were brought against him or to his knowledge pending since his acquittal. On our intervention, Mr. Adams' reinstatement was fast tracked, hence he being able to resume his duties as a police officer.

**5. COMPENSATION AWARDED FOR INCARCERATION DUE TO TARDY DISPOSAL OF APPEAL;**

**EXPOSURE TO VIOLENCE**

CI-133/00

Michael Stewart

Settlement of case after spending 5 years in jail and then released by the Court of Appeal. On 16<sup>th</sup> of April 1997 Michael was convicted in the Home Circuit Court for sacrilege. He was sentenced to 8 years at hard labour. On 24<sup>th</sup> April 1997 Michael appealed his conviction & sentence. He languished in custody for 5 years awaiting his appeal. While at the General Penitentiary he was injured in his right eye by an inmate. The appeal was allowed on 22<sup>nd</sup> July 2002. The conviction was squashed, sentence set aside and he was ordered to be released. The Office claimed compensation on the grounds of mental suffering, disgrace and humiliation caused by the false imprisonment and an award for damages for injuries received during incarceration. The Attorney General made an award of Eight Hundred Thousand Dollars (\$800,000.00) in full and final settlement. However, this was rejected by Mr. Stewart who later took up the matter with his private counsel.

**6. PROTECTION AGAINST DISCRIMINATION ON RELIGIOUS GROUNDS**

03/05/00 C-129/00

Rastafarian Religion

Legal status of Rastafarian faith recognized by Correctional Service in relation to the right to worship in accordance with converts' faith, in prison chapel, following intervention by the Office of the Public Defender.