



ANY REPLY OR SUBSEQUENT REFERENCE TO THIS COMMUNICATION SHOULD BE ADDRESSED TO THE DIRECTOR OF PUBLIC PROSECUTIONS AND NOT TO ANY OFFICER BY NAME AND THE FOLLOWING REFERENCE QUOTED:-

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Our Ref.  
Your Ref.

**OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**  
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JAMAICA

July 27, 2023,

The Most Honourable Andrew Holness, ON PC MP  
Prime Minister  
Office of the Prime Minister  
1 Devon Road,  
Kingston 10

The Honourable Delroy Chuck KC  
Minister of Justice  
Ministry of Justice  
61 Constant Spring Road,  
Kingston 10

**Delivered by E Mail and by hand**

Dear Prime Minister and Minister,

**Re: Proposed Amendment to Section 96 of the Constitution of Jamaica 1962**

The office of the Director of Public Prosecutions and by extension, the Crown Counsel within the Department are duty bound to prosecute crimes on behalf of the state, to advise government bodies on matters of law and generally serve in the public interest. This function is of such vital importance that I am moved to respectfully present to you certain critical considerations that affect the amendment of section 96 of the Constitution, in respect of the office of the Director of Public Prosecutions, at this time.

**Background**

On the 25<sup>th</sup> day of July 2023, the Minister of Justice, the Honourable Delroy Chuck, KC tabled a motion in Parliament to amend the aforementioned section of the Constitution. It

was on that same day, that the people of Jamaica and the Opposition Leader became aware of the intentions of the Government to amend the Constitution.

### **Supremacy of the Constitution**

The Constitution, being the Supreme law of the land, the process of Constitutional amendment is one that must be treated with utmost care and due consideration. It must not offend the Rule of Law. For an amendment of the Constitution in respect of the Director of Public Prosecution to be effected and in particular, Section 96, the justification must be compelling and appropriate in the public interest, the interest of Justice and the needs of society.

The justification given by the Minister of Justice, was to the effect that the age ceiling for both the office of the Director of Public Prosecutions and the Auditor General is five years shorter than that provided under the Pensions Act. He said:

*“the proposed amendment to the Constitution will allow for the expansion of the term of service from sixty years to sixty five years thereby addressing the inconsistency that currently exists between the two pieces of legislation and by extension, creating a more equitable playing field for all.”*

This justification does not accord with settled principles of Constitutional Law, most important of which is the recognition that the Constitution is the supreme law and any law that is in contravention of the Constitution is void ab initio.. Indeed, the supremacy of the Constitution is declared in Section 2 which states:

**2. Subject to the provisions of sections 49 and 50 of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.**

Consequently, the courts must take judicial notice of the fundamental law of the land: **R v Kurt Mollison** (No.2) SCCA No. 61/97, delivered 29.5.2000. All persons, government functionaries and the legislature must also take notice and act in accordance with, and with due regard for, the provisions of the Constitution

The Constitution is the standard and crucible by which the validity of legislation will be tested. Acts of Parliament, and other forms of legislation must therefore conform to the Constitution, otherwise it will be struck down for invalidity. This application of this principle was recently seen in the NIDS case, **Julian J Robinson v the Attorney General** [2019] Jam FC Full o4, where the legislation was struck down for unconstitutionality, and most recently the cases involving detention of persons under the state of Emergency, **The Minister of National Security et al v Everton Douglas et al** [2023] JMCA,39.

In addition, legislations being proposed for promulgation, or amendment, have to be vetted by the draftsman and Committee of Parliament, to ensure that they are not in breach of the Constitution during the enactment process.

This means therefore, that any dichotomy, between the Pensions Act and the Supreme law of the land, which is perceived, cannot be resolved by simply amending the Constitution, in these circumstances so that it conforms with the Pensions Act. Rather, the Pensions Act must conform with the provisions of the Constitution. The rationale posed for the amendment is therefore flawed.

### **Unique role of the Director of Public Prosecution in the administration of Justice**

Furthermore, when considering any amendment of the Constitution, in respect of the office of the Director of Public Prosecution it must be borne in mind that its Director is not an ordinary civil servant to be treated with, as part of the same playing field as civil servants. Different functions and obligations exist in relation to their nature, character and functions and so perforce, different considerations must also apply.

The office of the Director of Public Prosecutions is the office in which the framers of the Constitution invested responsibility for the prosecution of all criminal matters in the country. Furthermore, to ensure its effectiveness, the office has been accorded with independence from control by any authority, except the Courts by judicial review, in accordance with the Principle of Separation of Powers. The mass of workers affected by the Pensions Act do not fall in the same category as the office of the Director of Public Prosecution.

It is pellucid that the architects of the Constitution, applied much care, thought and examination into the establishment of the post. The age bar was not arbitrarily or randomly stipulated at section 96, but based on a rational, deliberate and intentional consideration for the needs of the society and the effective functioning of the office in accordance with its constitutional mandate and characteristics.

### **Absence of any real inconsistency**

It is proposed that there is in fact no real inconsistency between the Constitution and the Pensions Act. The Constitution, provides for the Director of Public Prosecutions to be granted an extension, up to the age of sixtyfive, where he/she has attained the age of sixty. It is noted that a 1958 amendment of the Pensions Act provided for the age of retirement to be fifty-five years and in special cases, fifty: **Section 8 Pensions Act**. The Pensions Act was amended a few years ago to allow for the age of retirement to be sixty five. It is now in accord with the Constitution, bringing civil servants in line with the age applied to the Director and the Auditor General, from 1962.

The extension process provided for by Section 96 was in fact engaged in respect of the present Director, when an extension was granted for three years, to end sometime in September, 2020.

## **Uncertainties surrounding the extension**

It must be noted that, it is not certain what period of extension was actually granted to the Director, because, like the general public, it has only been heard, no documentation to this effect, has been seen. Interestingly, it has also been reported that an extension of two years and six months was actually granted and not three years. There is much uncertainty and rumours, surrounding this extension. Indeed it has also been rumoured that the Director has applied for another extension, although there has been no confirmation or denial by the authorities officially.

This atmosphere of uncertainty is unfortunate given that the office of the Director of Public Prosecutions is a public office, mandated to serve the public interest. Therefore transparency, due process and the utmost probity must be observed at all times, in treating with its administration, operation and most undoubtedly the retainer of the office holder.

## **Contractual Implications of the amendment**

### **Breach of contract**

Another implication of the amendment is the fact that the extension of the age of retirement materially changes a term and condition of the contracts of employment for the two office holders. If they have not been consulted, consented to the change, or themselves made representations requesting such a change then Parliament by this amendment would be unilaterally changing the terms of their contract. A unilateral change of contract is a breach of contract.

The Minister has been reported in the Press, as saying that neither of the two office holders affected by this change have been consulted. It means therefore that by passage of this bill, Parliament is in the process of breaching their contracts of employment, which is a serious matter.

## **Section 95 of the Constitution**

Of significance is Section 95 of the Constitution, which prohibits the making of any changes in the terms and conditions of the employment of the Director of Public Prosecution to the disadvantage of the office holder. The section provides:

**95. The Director of Public Prosecutions shall receive such emoluments and be subject to such other terms and conditions of service as may from time to time be prescribed by or under any law :**

**Provided that the emoluments and terms and conditions of service of the Director of Public Prosecutions, other than allowances that are not taken into**

**account in computing pensions, shall not be altered to his disadvantage during his continuance in office.**

Changing the age of retirement is effectively a change to the terms and conditions of employment. There is no similar provision in respect of the Auditor General.

### **Absence of Consultations**

The absence of consultation is also cause for concern because it is customary to have discussions and informed examination of proposals to enact or amend legislation. The promulgation of the amendments to the changes to the Pensions Act a few years ago was marked by an extended period of deep dialogue with all stakeholders, and dissemination of information to guide effective implementation. This was classic change management in operation.

These amendments affect only two officeholders, so rationally speaking, the process of discussion and consultation with them and all stakeholders would be far less complicated than the amendments of the Pension Act.

Furthermore, it has been reported that the Minister indicated that the proposed amendments had been at the Ministry of Finance from May. In these circumstances, there was more than ample time to have engaged the usual consultations in relation to the proposal.

### **Timing of the proposal**

The submission of this Bill in the last few days of the legislative calendar and the lack of consultation with the office holders, and stakeholders is of critical concern in respect of the office of the Director of Public Prosecutions. This is because, the amendment would seemingly redound to the benefit of the present office holder who is at the tail end of an extension that expires sometime in September 2023. In addition, we are awaiting the decision of the Supreme Court in relation to a claim by a convict, Mervin Cameron, challenging the validity of that extension and any further extension.

The entire circumstances begs the questions, what is the reason for these amendments in light of the absence of consultations. What is the great mischief and problem that Parliament must urgently address at this point in time, in this rushed manner? Has the Director of Public Prosecutions asked for an extension? Is this amendment being proposed to enable a further extension, since the Constitution clearly prevents any further extension?

Having attended staff meetings with the Director and heard her say that she is not certain what will happen in September, but that she will ensure there is a smooth transition to the next Director, it is clear that there was some anticipation on her part that she might not demit office in September at the end of the extension. On the other hand the Constitution is clear that she will have to demit office in September once the extension expires. The

question again would be whether she has requested another extension and the basis for same given the provisions of the Constitution?

Respectfully I say that there is need for clarity in respect of all these questions, having regard to the fact that the office of the Director of Public Prosecutions is a public office established under the Constitution and invested with responsibility for criminal prosecutions.

### **Previous Directors**

In the history of the office, the present circumstances, are unprecedented, as no other Director has ever received two extensions. In fact, the provision specifically stipulates that the extension has to be agreed before the age of sixty. This in effect means that only one extension can be granted. This has always been respected by all parties and all previous Directors. The amendment however, has the consequential effect of granting to this present Director two extensions.

It must be noted that Ms. Llewellyn is at present, the longest serving Director, having held office for fifteen years up to present. If this amendment is passed she will not only serve seventeen years, but could serve in all twentytwo years, if she gets an extension to the age of seventy. The question must be asked, whether this is desirable? Is this the best way forward for the office to serve the public interest?

### **Succession Planning**

Up to the demission of office by Mr. Kent Pantry KC, in 2008, at the age of sixty, there has always been succession planning that enabled a smooth transition from the incumbent Director to an officer within the ranks of the office, when the incumbent Director, has reached the age of sixty. This has been in recognition of the fact that the public interest demands that competent and experienced prosecutors are well trained and their services retained for as long as possible to ensure continuity of knowledge, sustained competence, and institutional integrity. For those who are not able to serve as Director, they are also able to transition and ultimately serve in other areas of the justice system with distinction.

Other Directors have consequently, moved from the position of Director to the Judiciary as Puisne Judges, Judges of the Court of Appeal and notable Consultants. One very eminent individual being the Honourable Justice Ian Xavier Forte (retired), who served the Court of Appeal as President, with great distinction and scholarship. The late Honourable Justice James Kerr also moved up to serve on the Court of Appeal. Mr. Kent Pantry has served the country in various capacities, including as Consultant and Dean of the Law School at the University of Technology.

The administration has always looked within the office of the Director of Public Prosecution for successors and the policies for mentorship and training have up to Mr. Pantry's leadership provided room for consideration of persons within the office for the post of Director. This present Director is the most recent beneficiary of the succession

planning practices of the previous Director. However, the customary transition process allowing for the transition of a successor seems to be stymied at this point, although there are competent and capable senior officers presently on staff.

### **Current complement of Senior officers**

Currently there are five Senior Deputies, one of whom is a Kings Counsel, with over twenty years at the bar and myself, a former Director of Public Prosecutions of Montserrat, with thirtyone years at the bar. Of note is the fact that Mr. Jeremy Taylor, KC, is only the second prosecutor to have attained the rank of Kings Counsel, on his merit, that is without being the holder of the office of Director. His Lordship Justice Lloyd Hibbert, retired, is the first.

### **Importance of Due Process**

It bears reiterating, that Constitutional amendments ought to be for good and compelling reasons based on the interest of society, now and in the future. It ought not to be based on considerations appropriate solely to the interests of an individual. The determinative question must be whether this amendment is necessary for the good order and governance of the society, at this time, given the role and function of the Office of the Director of Public Prosecutions.

Whilst the legislative power and autonomy of Parliament is recognised, it is settled law that this power must be exercised in accordance with the rule of law. The procedure engaged is very important. It is customary that where legislative amendments are being proposed, the government of the day, consults with the opposition and stake holders. In relation to Constitutional amendments there is an even greater necessity for consultation. Moreover, sufficient notice of the proposed amendments should be given in advance to ensure that the legislative process is not hijacked.

Having regard to the nature and effect of this amendment, the importance of the office of Director of Public Prosecutions to the system of Justice and to the maintenance of law and order, it is absolutely imperative that the requisite notice given, and consultations are had so as to ensure due process. Adherence to the Rule of law requires a process that is transparent, open and consultative. The fact that the usual discussion and consultative process involved in amending the Constitution are not being observed in this case, and the proposed amendment was placed on the legislative calendar at the eleventh hour is most unfortunate and very concerning.

In the circumstances as an Attorney, and officer of the Court who has sworn to uphold the law and the Constitution, and also a member of staff in the Office of the Director of Public Prosecutions, I am constrained to present these concerns to you.

## **Justification for extension granted in 2020**

The present Director was granted an extension in 2020 on the basis (we are told, having never seen or heard any written disclosure from the Government or the Director), that the justification for the extension includes that there are several high profile matters which requires her attention, including the Klansman trial and Uchence Wilson trial. We note that these cases have now been completed, Moreover, none of these cases were prosecuted by the Director herself; in fact, two of the Senior Deputies previously mentioned were the chief Prosecutors in those matters.

What valid reasons are there now, for a further extension, having regard to the fact that an extension of five years had been requested in 2020 but the government after due consideration granted only three, or two and a half years, whichever the case may be?

## **Viability and growth of the office of the Director of Public Prosecution**

I must note that myself, and other officers have grave concerns about the viability and growth of the office under the leadership of Ms. Paula Llewellyn as Director of Public Prosecutions. Some have even expressed a lack of confidence in her leadership.

An effective leader is one that inspires, motivates, mentors and provides equal opportunity for the growth and development of staff and succession to ensure institutional cohesion and continuity. Of equal import is the planning and implements policies and strategies for the effective prosecution of criminal matters in the public interest.

Under the leadership of the current Director, the office has consistently lost some of the most gifted legal minds. The attrition rate has never been as high as is currently being experienced in the past seven years, in the history of the office. It will continue as there are many persons seeking to leave.

## **Effective Prosecution**

Effective prosecution, in the public interest requires competent practitioners. Of the fifty six prosecutors, less than fifty percent have experience of five years and over. In this era of trial readiness and case management, inexperienced prosecutors are being asked to represent the state's interest in prosecuting matters that are complex, serious, and are outside their areas of experience and knowledge.

Furthermore, the constant complaint from judges, especially in Case Management Court point to the inability of the office to effectively prepare cases for trial within a reasonable time. There are many cases of significant vintage, currently before the courts which require particular attention and strategies that this office at present has not been able to address effectively. The recent case of **Lascene Edwards v R** [2022] UKPC,11. represents a critical warning as to the possible fate of matters of significant vintage, before the court, even though a conviction has been obtained.



## **Absence of representation by the Director and Crown Counsel in Privy Council Appeals**

Remarkably and inexplicably, Counsel in the office, as well as the Director herself, have not appeared for the Crown in the Privy Council since Ms. Llewellyn took office in 2008. Prior to 2008, senior officers, appeared in the Privy Council, either separately or with the Directors, including Mr. Kent Pantry KC and Mr. Glen Andrade, KC. The Crown has since been solely represented by Counsel based in the United Kingdom. In fact, the Crown is represented by Counsel based in the United Kingdom, in the appeal of **R v Adijah Palmer et al.**

It is to be noted that the Crown has been represented by UK based Counsel at enormous costs to the public purse despite the fact that there are competent and knowledgeable Prosecutors at the Office who are capable of handling the matters in the Privy Council.

Having regard to the unique issues that arise in trials conducted in Jamaica and our superior knowledge of local criminal law, criminal procedures, the society and conditions of life in Jamaica, the Jamaican Counsel are actually better placed to represent the Crown. Additionally, the absence of appearance by local counsel in these matters also deprive local prosecutors of the benefits of invaluable training and exposure, which are to be derived from appearing in the Privy Council.

### **Requests**

It must note that myself and other prosecutors have concerns about the viability of the office under the present leadership. Some have even expressed lack of confidence in her leadership going forward. However, they wish to remain anonymous, out of fear.

In the circumstances, I am humbly asking for a reconsideration of this proposed amendment, as in all the circumstances, it would be manifestly unjust and unreasonable, for Ms. Paula Llewellyn KC, to be given an extension for another term, by virtue of these amendments, or any means whatsoever. The enormous challenges to law and order posed by criminal elements and the demands of prosecuting in this modern era, requires new strategies and an injection of fresh ideas into the office of the Director of Public Prosecutions.

While we recognise and laud the contribution that Ms. Llewellyn has made to the office and the country, the period of change and transition, mandated by, when the age limits have been attained by an office holder, has now arisen. Humbly I say that it is incumbent on us all to recognise and respect this fact, mandated by our Constitution, the supreme law. It behoves us then to initiate the requisite procedures to engage a new Director who will take the office ably into the future.

## **Request for investigations**

For these reasons, I humbly ask that an investigation be launched into the operations of the office of the Director of Public Prosecutions, to ascertain its viability, at this time, given the massive haemorrhage caused by the constant departure of prosecutors. Furthermore, I also recommend that an objective/anonymous poll be conducted to ascertain from the whole staff, whether they are in support of, and have confidence in, the leadership of Ms. Llewellyn.

## **Conclusion**

In the circumstances, I ask for the postponement of any further vote on this amendment, and the launching of an investigation into the viability of the office. If this I done I am certain that you will find that there are serious issues to be addressed, which may warrant a conclusion that the proposed amendment should not be effected at this time in respect of the office of the Director of Public Prosecutions, if at all.

Yours Faithfully,



Kathy Ann Pyke (Ms.)  
Senior Deputy Director of Public Prosecutions

**CC –The Honourable Derrick McKoy KC- Attorney General of Jamaica**  
**The Honourable Marlene Malahoo Forte KC, JP. MP- Minister of Legal and Constitutional Affairs**  
**The Honourable Mark Golding, Leader of the Opposition**  
**Senator the Honourable Tom Tavares- Finson OJ CD KC JP- President of the Senate**  
**Senator Donna Scott- Mottley - Senate Leader of Opposition Business**

