

Report: Select Committee on Elections

10 March 2014

Select Committee Members

- Hon Walton Brown, Chairman
- Hon Jeanne Atherden
- Hon Susan Jackson
- Hon Glen Smith
- Hon Kim Wilson

Support

- Ms Meredith Ebbin, Clerk to the Committee
- Ms Margaret Gazzard, MG Court Reporting

1. Introduction

This Select Committee was established in September 2013 by Parliament with the mandate of “examining and reviewing any matter relating to elections and report its findings and recommendations to Parliament.” Speaker the Hon K Randolph Horton provided the Select Committee with a six-month time frame and the requirement that the report be submitted by the end of February 2014. While the impetus behind setting up this Select Committee was the issue of declaration of interest by candidates in any government contract, as the eventual wording of the motion allowed for a broad range of election-related issues to be examined, the Select Committee was keen to address many of these issues and invited members of the public to appear before the Committee or to submit in writing issues consistent with this umbrella approach. The constraint imposed by time meant many important issues were not discussed in detail, but we do propose a remedy that will ensure such issues get the attention they deserve.

2. Background

a. The 2012 Election

During the 2012 General Election an issue arose of whether or not candidates were required to declare any interest they had in government contracts. While candidates with an interest in government contracts running under the Progressive Labour Party published such interest in accordance with governing legislation, no such publication was made for any candidate running under the One Bermuda Alliance. This led to allegations that at least two of the OBA candidates were in breach and therefore disqualified as a candidate. On December 16 2012 the OBA issued a statement that the two candidates had taken legal advice and neither was in breach of the governing legislation.

The central issue from the Select Committee viewpoint **was** that if a candidate has an interest in a government contract, does not declare it and is allowed to remain a candidate without challenge, then a precedent will **be** set where no candidate will ever again have to declare her or his interest in any government contract. This would portend negatively for good governance.

b. Parliament Debate

During the Parliamentary debate on the motion to establish this Select Committee, the Chairman Walton Brown made the following observation:

“This motion, Mr. Speaker, is designed to have a select committee examine whether the existing legal framework for conducting elections is clear, whether it needs to be reformed, whether it is fine as it is, because as it stands now, Mr. Speaker, we have now set a precedent. And if the December election is a guide to your future elections, no one will ever again need to have to make a declaration of interest in Government contracts. That cannot be the intent of our Constitution, Mr. Speaker. That cannot be the intent of the Parliamentary Election Act. So a committee will establish itself to examine that, to examine whether there is a need to tweak the Constitution, whether there is a need to tweak the legislation. Well, surely, one cannot object to a process that is designed to explore, to understand, and to make the Parliamentary election process better. That is the fundamental intent behind this proposal for a select committee.”

3. Bermuda Constitution and Legislation on Requirement to Disclose Interest in Government Contracts

The Select Committee sought the view of an eminent constitutional lawyer to assist in our work. We are very grateful to the Centre for Justice for agreeing to provide an independent legal opinion, at their expense, from Mr. James Goudie QC from Chambers and Partners, London, UK. Goudie sets out in summary form the main components of both the Bermuda Constitutional Order 1968 and the Legislature (Qualifications and Disqualification) Act 1968 (the “Act”) as they relate to disclosure of interest in government contracts and this is provided below:

Section 30 of the Constitution relates to disqualification for membership of the Senate and House of Assembly. Clause 30 provides, so far as material for present purposes:

“(6) Subject to such exceptions and limitations as may be prescribed by the Legislature, a person shall not be qualified to be elected as a member of the House of Assembly if he has an interest in any Government contract and has not, within seven days of his nomination as a candidate for election, disclosed the nature of the contract and his interest by means of a notice published in the Gazette or in a newspaper published and circulating in Bermuda.

(7) Subject to such exceptions and limitations as may be prescribed by the Legislature, a person shall not be qualified to be appointed as a Senator if he has an interest in any Government contract and has not, at least seven days before the date of his prospective appointment, disclosed the nature of the contract and his interest therein by means of a notice published in the Gazette or in a newspaper published and circulating in Bermuda.

(8) In subsections (6) and (7) of this section and subsection (1)(f) of the following section “Government contract” means any contract made with the Government or with a department of the Government or with an officer of the Government contracting as such.”

Goudie makes the point that, “These are transparency provisions: what they require is no more, and no less, than disclosure of an interest in any Government contract: the interest itself does not disqualify; the lack of disclosure does.” He further states that “Government contract” is clearly

defined, the provisions apply with respect to “any” Government contract and that while “interest” is not defined, it need be no more than “an” interest.

While this Constitutional provision is subject to “exceptions and limitations” prescribed by the Legislature, Goudie goes on to argue that “Subject only to that, disclosure of an interest (at the material time) in any Government contract is mandatory.” Failure to disclose will result in automatic disqualification.

The relevant section of the Act for the purposes of the Select Committee is Section 10 (3):

“A person shall not be deemed to have any interest in a Government contract if the only interest which he has in such a contract is the interest of a joint stock company of which he is a shareholder unless that person either –

- (a) Is a director, officer or manager of that company or of some other company which controls that company and, in addition, is the beneficial owner of at least 10% of the issued capital of either of such companies aforesaid; or
- (b) He is the beneficial owner of at least 50% of the issued capital of that company, or is in a position to exercise more than 50% of the voting rights therein or is otherwise, by means of any arrangement, artifice or device, in a position to exercise directly or indirectly the effective control of that company.”

4. Testimonies

A common thread among persons who appeared before the Committee and who spoke on the issue of candidates’ declaration of interests was that they were all familiar with the practice of making such disclosure as part of the electoral process.

- a. Alex Scott—Member of Parliament 1993-2012, Premier 2003-2006

“This, to my understanding, is to give the public, the voter, full knowledge of the motive, interests, conduct and influence that an individual seeking nomination has before the fact. They know the nature of the individual that they are about to, on, as the French would say, “*sur the point de*”, on the point of nominating for Parliament. And out of the British system, you will find in that outline of the Code of Conduct, time and time again the requirement of a member to declare -- the declaration of a Member’s interests.

At all times, and it’s repeated, At all times Parliament has a right and the Parliamentarian has a duty to make it very clear his or her interests in the matter that they are speaking to, are involved in, or participating in. How more significant, when your Constitution speaks to that very same principle, that the public -- the Constitution is saying here, the public are required to know. And it’s not “may”, it is “shall”, shall not be qualified to be elected as a Member of the House of Assembly if he has an interest in a Government Contract and has not within seven days of his nomination as a candidate for election disclosed the nature of the contract and his interest therein by means of a published notice.”

In response to a question from Committee member Ms Susan Jackson concerning the role of Government or a political official in ensuring the declaration of interest by candidates at the nomination stage, Mr Scott offered the following:

“If I understand your question, the burden is always on the individual and he or she ignores the practice and the principle of revealing his or her interest at her or his risk; that is, if I am - - I have a significant holding in any particular activity as it, specially as it relates to Government activity, and I fail to acknowledge it, I put myself at risk, and it is not incumbent on the Government to go through everyone’s portfolio or holdings; however, at some point in time, if it becomes known and if it becomes relevant to a debate -- well, more than a debate, a decision or something that that member now has an involvement in Parliament, and they have an interest in the company, corporation, so forth, they now certainly, as you have described, warrant further attention from the relevant offices, agencies, officials in Government, to see that all is above board. So, to save yourself the injury of an investigation, to save yourself being exposed, or even being thought to have acted less than honourable, you should always declare, without the Government being required to investigate.

That’s the nature of the Member of Parliament; thus we refer to each other as honourable men and women. You are supposed to, at all times, do the honourable thing, and the Constitution in this particular narrow context prescribes and describes what that honourable thing is to do, make known your interest. Government isn’t supposed to be required to investigate it.”

In response to a query from Committee member Mrs. Jeanne Atherden on the question of interests and conflicts of interest, Mr. Scott made the following observation:

“You may have an interest in some undertaking that is totally unrelated to Government, but if you have an interest, significant or otherwise, related to Government activities, surely the public should be able to see you with unfettered eyes; that is, they should know, all right, Alex Scott’s here telling me he’s going to be in my service, he’s available to help me whenever I want, he’ll make sure the lights are on, he’ll make sure that the buses run on time. But then they come to know that I really have an interest in some new digital concern, digital company, and upon going into Parliament, lo and behold I very quickly become the Minister for that particular area of endeavour. If I have never declared it, the public really are left to assume that it may have just happened; in actual fact, I may have orchestrated the whole thing in my interest.

Now, I have given a hypothetical case, but the public should have the ability to look at me and say: This man is -- he does have holdings and interests in a car company, in a somebody, but I don’t think it is relevant to his nomination and I’m going to support him.”

b. Kim Swan—Member of Senate 1998-2007, Member of Parliament 2007-2012

Mr. Swan informed the Committee that he remembers having to deal with the declaration of interest in a Government contract from as far back as 1983 when he first ran in parliamentary elections. “As far as I can recall, there was a campaign agent that handled that for persons and they would ask you to, you know, make available to them any information that needed to be included.” He further pointed out that during the 2012 election campaign he published a notice in The Royal Gazette newspaper of his interest in freelance work he does at a Government facility out of an abundance of caution and to ensure he was in compliance with the disclosure requirement: “I don’t have any Government contracts but I do work freelance at a Government facility, and just to make sure that I was not in breach...I actually put something in the paper. I believe Charlie Swan did as well.”

c. Mr K Randolph Scott—Parliamentary Registrar and Ms Tenia Woolridge—Assistant Parliamentary Registrar

Mr Scott agreed with a point raised by the Chairman that “a large part of your function is to ensure that elections are conducted with a high level of integrity and that they are smooth, and that there’s nothing contrary to the law that takes place with respect to elections.” On the specific issue of candidates’ requirement to declare their interests in Government contracts, Mr Scott indicated his office has no responsibility in this arena: “There’s really no position—there’s nothing in our Act that guides me in regards to these types of matters.... in regards to the matters such as that which arose during 2012, my hands are pretty much tied. As a public officer I am duty bound to just inform the political parties about those things that they should be aware of, in terms of the various requirements.” Mr Scott did confirm, however, that the Parliamentary Registrar’s website, in its Frequently Asked Questions section, did state that candidates are required to declare their interest in any Government contract.

On the issue of candidates getting more information on disclosure requirements other than what the Parliamentary Registrar send out to political parties, Ms Woolridge commented that, “we didn’t have the authority in the last election to really police it and we don’t have the authority to make any decisions related to it, so maybe people who have that authority, during election time, should be the people to publicly advertise that...by Gazette.”

In response to a question raised by Committee member Mr Smith, Mr Scott responded favourably and proceeded to make the call for the establishment of an Electoral Commission:

“I take Mr. Smith’s point that maybe going forward the Legislation should be amended to allow that bit of information to be on the Nomination Form. I think another way, going forward, too, in terms of best practices or implementing best practices, is that those types of matters that may arise, as the Committee here is trying to deal with, would be best dealt with through an Electoral Commission, to set all those things in place, and then the whole, entire country and all of the political parties and candidates and potential candidates would know what the process is all about.”

d. John Barritt—Member of Parliament 1993-2011

Mr Barritt is a lawyer by profession and submitted a detailed brief on a number of matters relating to elections and called for important reforms. The full submission is contained in the Appendices. On the matter of disclosure of interests, Mr Barritt commenced with the following assessment: “The spirit and the letter of the Constitution Order is clear, it is an disclosure of an interest in a Government contract by a candidate.” He went on to argue, “My view is that with respect to that provision, when you interpret it you should interpret it liberally, not narrowly; that is, you should interpret it for the purposes of disclosure, not for shutting down disclosure.”

e. David Burt—Senator 2010-2012, Member of Parliament 2012-

Mr Burt served as Chairman of the Progressive Labour Party from 2006-2009 and played key roles in the 2007 and 2012 General Election campaigns. He informed the Committee he was aware of the constitutional requirement for election candidates to declare any interest in Government contracts: “Yes, in 2007, I was aware of that requirement. I think both parties at

the time were aware of the requirement and...both parties filed declarations in the newspaper seven days after nomination day, as per, I believe it's the Parliamentary Election Act, but I'm not entirely certain." He informed the Committee he was responsible for putting together the declaration form for publication for the PLP candidates in 2007 and he reported seeing the UBP declaration as well.

In comparing the 2007 and 2012 elections and the declaration issue, Mr Burt observed the following: "What's interesting is that the candidates that were running in 2007 that made those declarations in 2007, the same candidates did not make those declarations in 2012. So, I mean, that raised a point of interest. They were candidates on the ballot in 2007. ...that made declarations and in 2012 for the One Bermuda Alliance, were candidates as well, and did not make declarations, and I think that raised a point of confusion."

Mr Burt went on to make a distinction between entering into a contract with government and merely engaging in a transaction:

"It is my belief that if you are in a contract, like a special contract that's entering, like I'm saying if the Government of Bermuda comes to your office and, you know, buys a camera, then that's not entering into a contract. Yes, you're performing a transaction but it's not entering a contract. But if an individual has a signed contract with a Government Department, I believe that there is no doubt that that is a contract with that Government Department, or with the Government. So, whether it be in the -- when we say the normal course of business, there is the question of what the interpretation of normal course of business is. But I think that -- I don't believe that there is any grey area when we're speaking about actual contracts and, as I said, my IT consulting company had contracts with the Government of Bermuda and I was sure to declare that."

f. Michael Branco—Deputy Chairman, One Bermuda Alliance 2011-2013

Mr Branco was invited to speak primarily about the use of technology during elections and the extent to which technology driven improvements can be made to enhance the electoral system. On the issue of candidates' declaration of interests, Mr Branco indicated he was not aware of candidates being required to make any such declarations. As Deputy Chairman he was also on the Election Committee leading up to the 2012 General Election. When asked if he was privy to any discussion in the One Bermuda Alliance regarding such declarations he replied, "I wasn't privy to any, no."

5. Legal Opinion

The Opinion by Mr. James Goudie, QC was accepted by the majority of Committee members as being the proper interpretation of the Bermuda Constitution and the Act. A number of arguments are advanced in this Opinion:

- a. If the Act was inconsistent with the Constitution, the Constitution would prevail. Given, however, that the Constitution makes exemptions and limitations, the Constitution and Act should be read together. The significance of the Constitution prevailing, argues Goudie, is that the dominant provision is that there must be disclosure of an interest in any Government contract. "The exemptions and limitations should be interpreted narrowly so as to detract to the minimum extent possible from the dominant requirement. Justification for any lack of transparency must be clearly demonstrated." "That said, to

the extent that there are ambiguities in the Act, it would be appropriate to legislate promptly so as to remove them; and also to provide for by whom and how the requirements are to be policed and enforced; and that prominence is given to the requirements on the nomination paper.”

- b. In making provisions for exemptions and limitations the Act is not unconstitutional as the Constitution expressly provides for this. Any imperfections in the Act are matters for amendment. There is a gap, however, in the apparent lack of an enforcement mechanism that needs to be filled.
- c. The legal obligation for a candidate to declare an interest in a Government contract is that she or he must do so under the Constitution unless they clearly come within one of the exceptions in Section 10 of the Act.
- d. In answer to the question, “If there is a legal obligation, what the scope is of that obligation” Goudie argues “When disclosure is required it is mandatory. The sanction of disqualification for non-disclosure is automatic. Prima facie if there is an interest in any Government contract due disclosure must be made.”
- e. The question of “insiders” versus “outsiders” was raised by Member of Parliament Bob Richards in the House of Assembly when speaking on the issue of declaration of interest, where he argued “insiders” must declare but not “outsiders.” Mr Richards says the Act “lists all these exceptions except for one thing”, whether the candidate is not an “insider.” Goudie argues, “I regret that this is fundamentally wrong. The Act lists all the exceptions. There are no others. And they are exceptions. Unless one of the listed exceptions applies, the Constitution mandates disclosure. There is simply no additional or further exception, whether by reference to some concept of ‘outsider’ or otherwise.”
- f. Goudie responds by pointing out that “There is no distinction between so-called ‘insiders’ and so-called ‘outsiders’. No such distinction is made by the Act.” He further makes the following point:

“[P]ursuant to Section 10(2) of the Act, disclosure **must** be made by a candidate, if he or she:-

1. Is a director, officer, manager AND is the beneficial owner of 10% of the company’s issued capital;
2. Is the beneficial owner of more than 50% of the company’s issued capital;
3. Can exercise more than 50% of the voting rights therein; or
4. Can directly or indirectly control the company.”

6. Recommendations

The committee concluded that there were a number of issues raised that are critically important and need to be addressed to ensure Parliament and the electoral process uphold high standards and act within the Constitution. Accordingly it makes the following recommendations:

- a. Establishment of an Electoral Commission
There were a wide range of matters raised by persons who appeared before the Committee which were unable to be explored in detail: absentee voting, maintaining the voting register, adjudicating disputes among candidates and political parties, and electronic voting. A properly constituted independent electoral commission is the ideal vehicle for addressing all these matters. The powers of this Commission would be to decide definitively on all contested matters during an election. Outside of elections it would be able to review best practices globally and propose amendments to improve the electoral system.
- b. Amending the Candidacy Forms to clearly indicate the responsibilities candidates have to meet in order to conform to the law.
- c. In the absence of an Electoral Commission, grant greater powers to the Parliamentary Registrar to be able to adjudicate a specific set of issues rather than simply serving as a disseminator of information.
- d. All political parties and independent candidates carefully review the Goudie Opinion and indicate whether or not they accept its conclusions and will be guided by such in the future.
- e. In the interests of full disclosure, transparency and accountability all candidates disclose any interest they have in any Government contract irrespective of the size of their shareholding or the position they hold in that company holding that contract or whether it is held without a corporate structure.

7. Appendices

- a. Goudie Legal Opinion
- b. Transcripts
- c. Minutes
- d. Submissions

Minority Report

Walton Brown
Kim Wilson

MPs refusal to attend proceedings

Four Members of Parliament declined the Chairman's invitation to appear before the Committee and to answer our questions. This was unfortunate and does not bode well for the effective operation of Committees going forward. If Parliamentarians refuse to participate in a Committee itself established by the Legislature it may well have unintended consequences for the public at large. More importantly, as servants of the public ourselves put into the House of Assembly by the public, Committees represent an important part of Parliament's accountability to that same public.

Candidacies of MPs Hon. Jeff Sousa and Hon. Bob Richards

The impetus for the establishment of this Committee stems from the controversy surrounding the candidacy of Mr. Bob Richards and Mr. Jeff Sousa during the 2012 election. As candidates for the United Bermuda Party in the 2007 General Election both Mr. Richards and Mr. Sousa declared an interest in government contracts in accordance with the Constitution and the Act. Although both men were widely believed to be involved in the same or similar contracts in 2012, neither of them made any declaration in accordance with the Constitution and the Act.

When the issue was publicised before the December 17 2012 election a spokesperson for the One Bermuda Alliance, the party whose banner the two men were running under, declared neither candidate was in breach of the Constitution.

Since both MPs declined repeated invitations to appear before the Committee key facts were not able to be ascertained from them. And a number of questions went unanswered:

1. For the qualifying period did either of them meet the requirement to disclose?
2. What, if any, contracts did companies, where they were either a director, officer or manager and beneficially owned 10% or more of the shares, have with Government?
3. Given that they both disclosed in 2007 why did they not do so in 2012?
4. Where did the Hon Bob Richards derive the concept of "insiders" vs. "outsiders" from?
5. Did he not declare because he considered himself an "outsider" from Government in late 2012?

These are critically important issues to address to ensure Parliament and the electoral process uphold high standards and act within the Constitution. Voters in the constituencies where the Hon Richards and the Hon Sousa ran successfully have a right to expect and to know whether or not those elections are legally valid. And likewise, Parliament should want to know whether or not members sitting its august chambers are legitimately entitled to be doing so. The honourable thing to do is for these two members to make full and immediate disclosure of the right to continue to sit in Parliament.

Recommendation

- a. Parliament act to bring clarity on the eligibility of the Hon members Richards and Sousa to continue to sit in Parliament.