



COMMONWEALTH OF DOMINICA

MINISTRY OF JUSTICE, IMMIGRATION AND NATIONAL SECURITY

CHAMBERS OF THE ATTORNEY GENERAL

Tel: (767) 266 4278/3092/3378
Fax: (767) 448 6200/ 3022
E-mail: attorneygeneral@dominica.gov.dm

Website: www.dominica.gov.dm

3rd Floor,
Financial Centre
Kennedy Avenue
Roseau
Commonwealth of Dominica

OBSERVATIONS OF THE GOVERNMENT

OF THE COMMONWEALTH OF DOMINICA IN RESPECT TO THE

REPORT OF THE JOINT CARICOM, COMMONWEALTH, OAS

SPECIAL MISSION TO DOMINICA 6-9 AUGUST 2019

Introduction

1. Changes or reform to an electoral process is always a sensitive matter and should be handled with broad stakeholder consultation, with a view to achieve consensus. It is also an issue that benefits from a mature and objective review by all political parties. The existing electoral system has served Dominica very well and, as acknowledged in the Report, delivered credible elections and facilitated the peaceful transfer of power. It is noteworthy that throughout Dominica's post-Independence history there has never been any recorded case of personation (i.e. voter fraud where an individual votes in an election whilst pretending to be a different elector).
2. There have been two main issues concerning the electoral process, which have exercised the minds of the general public over the last few years and on which there is consensus: one is the updating of the register of electors ("the Register") and where appropriate and lawful, the removal of names of electors no longer entitled to remain on it from the Register; and the other is the introduction of photo identification cards for the purpose of voting.
3. There has been a divergence of view on how this could be achieved. The Government in consultation with the Electoral Commission finalised draft legislation that would introduce a confirmation process; would authorise the collection of biometric data from electors for use in relation to the introduction of photo identification cards; and would remove from the Register the names of persons who are dead, ineligible to remain on the register as they have lived overseas continuously for a period in excess of five years or who failed to confirm, after due process was observed, or are, pursuant to the Registration of Electors Act or other law disqualified from voting. These draft amendment Bills and processes were endorsed by an expert from the Commonwealth (COMSEC).
4. The opposition and those opposed to the idea of a confirmation process (which is in substance the same or similar to a re-verification process) have taken the view that there should be a reregistration or re-verification process to update the Register and introduce photo identification cards, and that legislative amendments are not necessary for this. The

Government, based on sound legal advice, disagrees and maintains that the processes provided for in the draft Bills is the most effective way forward.

5. Because consensus was not able to be reached on the issue, the assistance of the Commonwealth, CARICOM, and the OAS was sought and obtained. The Joint Mission visited Dominica and held consultations with stakeholders and their report was recently forwarded to the Government. The report is being provided to the Electoral Commission, Leaders of the political parties in Dominica and other stakeholders, and will be made available on the Government website.
6. The Government is disappointed in several of the conclusions and recommendations made in the report. This is because they do not present a workable solution to achieve the desired reform objectives of removal from the Register of the names of electors not entitled to be on it (e.g. electors who have been absent from Dominica for a continuous period of five years) and the mandatory use of photo identification cards for the purpose of voting.
7. Further, in effect, the Joint Mission is therefore on the eve of a general election recommending a costly, massive, house-to-house re-verification exercise, that will not result in the required properly updated Register nor the full introduction and use of photo identification cards. In addition, the Joint Mission makes other suggestions which are not supported by our laws which are discussed below.
8. The Government is equally disappointed that the Joint Mission failed to refer to and discuss the draft Bills prepared by the Government or Electoral Commission in consultation with the Electoral Commission which were submitted to them for their consideration. These draft Bills were previously reviewed and declared by a consultant legal expert from the Commonwealth to satisfy the requirements of international best practice and to meet the desired effect of updating the Register and mandating that photo identification cards be used for voting.

House-to-House Re-verification of Electors

Inability to deliver

9. That the recommended house-to-house re-verification exercise will not achieve the desired reform of updating the Register of electors is clearly demonstrated by the proposed in the Report that “[t]hose electors not found and who fail to come forward after publication of the “Electors Not Found List”, should remain on the Voters’ List unless and until they are removed under the provisions included in Section 7 of the Registration of Electors Act.”¹. This is effectively the situation which currently exists and will mean that there is therefore no or no substantive change to the existing Register. The unacceptability of this outcome is perhaps especially clearly demonstrated in the recommendation that “[i]n cases where the information cannot be verified, such electors should be allowed to remain on the list to prevent the disenfranchising of a valid elector.”²
10. This will mean that notwithstanding the possibility they may have been absent from Dominica for longer than the previous five years, some electors from the Diaspora will be able to remain on the Register and to vote. Put differently, the recommendation rather than ensuring that only those electors who have satisfied the electoral authorities of their entitlement to be on the Register are on it, will allow the names of electors who are “not found” (or not verified) to remain on the Register and those electors to voter. This contrasts with the more robust, effective and legally sound reform and confirmation process proposed in the draft amendment Bills which will result in the name of an elector who “is not found” or who does not confirm their registration, subject to due process, being removed from the Register. This will result in a new and updated Register.
11. Consequently, the recommended house-to-house re-verification exercise, if adopted, will result in the State unduly and unnecessarily incurring substantial increased expenditure of financial, human and other resources for an exercise which will bring no discernible improvement in the Register or electoral system.

¹ Report of the Joint CARICOM, Commonwealth, OAS Joint Mission to Dominica, Pg. 10 (d).

² Report of the Joint CARICOM, Commonwealth, OAS Joint Mission to Dominica, Pg. 11 (b).

Legality

12. Even if the recommended house-to-house re-verification exercise would otherwise be able to achieve the desired objective of updating the register, which for the reasons set out below it would not, there is no legal basis upon which this recommendation could properly proceed or be implemented under the existing legislative regime. This is important as the Report contains no recommendation for the necessary legislative amendment to enable this exercise to be undertaken. It is noteworthy that neither the Constitution nor any other law in Dominica authorises house-to-house re-verification. The only legislative provisions which could remotely be said, albeit erroneously, to provide legal authority for house-to-house re-verification are Section 8(2) and (3) of the Registration of Electors Act, Ch. 2:03, which, so far as is material, provide as follows:

“(2) ... every occupier of a house shall furnish the registering officer of the polling district in which the house is situated with the names of every person living in that house who, to the best of his knowledge, is qualified to be registered as an elector for that polling district.

(3) ...the person receiving the rent payable by the tenants or lodgers...shall if requested to do so by or on behalf of the registering officer...furnish the registering officer with the name of every tenant or lodger by whom the rent of an apartment, flat or lodging is payable.

13. In any event, these provisions concern first time registrations and would not therefore include any determination of the right to remain registered by re-verification. Therefore, the proposed re-verification of the address of an existing elector would not be covered under this provision or any other existing provision of the law.
14. The proposed house-to-house re-verification exercise is therefore in substance an exercise in futility not merely because of the above-stated inadequacy of the existing legislation; but the indisputable fact that this exercise does not permit or allow the removal of the names of persons from the Register who are not “found”; and no recommendation or proposal was made for due process for those persons not “found” or where there is uncertainty associated with the person.

Lack of Justification and Feasibility

15. The Report has not provided, and it is not apparent from its contents what is the justification for the Joint Mission's recommendation of house-to-house re-verification as opposed to what it describes as "fixed centre re-verification" or indeed the confirmation process provided for in the draft amendment Bills and Regulations. This is particularly significant for a number of important reasons. Quite apart from anything else, it is clear that the Joint Mission required there to be serious consideration of several factors before a decision is made to implement this recommendation. This is demonstrated by the Joint Mission urging the Electoral Commission to "*...immediately and urgently determine a schedule and assess the resources required to complete such an exercise...*".³
16. This suggests that quite apart from the issue of the legality or otherwise of what is recommended, the Joint Mission is clearly unsure whether the recommended house-to-house re-verification exercise can be properly and expeditiously implemented without proper consideration of costs and resources. Perhaps most importantly, it is virtually inconceivable that the recommended house-to-house re-verification exercise can achieve introduction of mandatory use of photo identification cards for the purpose of voting, or the desired updated and accurate Register.
17. Further, the Report does not give any indication that adequate consideration has been given to the limited time-frame available for completion of the recommended house-to-house re-verification exercise or the universally accepted fact (including by the Joint Mission itself) that the Prime Minister is constitutionally empowered to call the general election at any time of his choosing during the remaining eight months. More importantly perhaps, is the fact that should the Prime Minister exercise his constitutional authority to call the election this would even further reduce the time available to the Electoral Commission and Electoral Office not only to complete the house-to-house re-verification process, but critically, also to test and satisfy themselves that the new register, equipment, electoral systems and process would work effectively and efficiently.

³ Report of the Joint CARICOM, Commonwealth, OAS Joint Mission to Dominica, Pg. 9(a).

18. Another matter of concern is the Joint Mission's inclusion of the issues of "re-districting" and boundary changes in its considerations. Whilst doubtless well-intentioned, introduction of this issue is an unfortunate addition of an extraneous layer to an already complicated situation. Under Dominica's electoral laws constituency boundaries and issues of "re-districting" have little, if any, relevance to the two principal reforms which this Mission and Report are concerned with. More significantly, under Dominica's electoral laws constituency boundaries and "re-districting" are not within the purview of the Electoral Commission but rather the Electoral Boundaries Commission, which is a separate constitutional body governed by a separate set of legal procedures and practices. In fact, the re-verification of electors who are "found" will not be of any assistance to the Boundaries Commission as that body is concerned solely with "inhabitants" (which includes persons who are not registered) and not "electors".⁴

Identification Cards

19. The Government is pleased to note that the Joint Mission has recommended amendment of the existing electoral legislation to enable the introduction of photo identification cards for the purpose of voting and to increase the authority of the Electoral Commission in that regard.
20. The recommendation that electors whose names appear on the register but are not 'found' or re-verified should be required to produce some form of "other" identification is however, not provided for in Dominica's law. Similarly, the recommendation that electors in that category should be required to take an oath or affirmation of identity and have their fingerprints taken does not have any basis in law. To achieve this, appropriate amendment of the electoral legislation would be required. However, any such amendment, even if it could be made, would likely have significant and unacceptable discriminatory in effect. The recommendations in this regard are therefore a recipe for confusion, uncertainty and disorder on election day.

⁴ Schedule 2, Constitution of the Commonwealth of Dominica, Ch. 1:01.

Voting by the Diaspora

21. The recommendations under this head are similarly not provided for under Dominica's existing electoral laws and are unimplementable without necessary legislative amendment. Further, in respect to the recommended engagement of the Immigration Department and its records as the basis for determining eligibility or otherwise of an elector to remain on the Register, it would in any event be necessary to follow due process and give the elector in question the opportunity to be heard and make representations before s/he could lawfully be removed from the register.⁵
22. As with on island electors, the recommendation that electors from the Diaspora be required to provide a valid passport in order to be able to obtain a ballot paper and to vote is not provided for under existing law and, for the same reasons, if any such amendment were made, it would likely be held to be discriminatory.
23. In the light of the foregoing, the recommendation that Diaspora electors whose information cannot be verified should be allowed to remain on the Register to prevent disenfranchisement of a valid elector is not acceptable as proposed. The recommendation would fail to deliver one of the principal reforms on which there is consensus, namely removal from the Register of all names of electors who are not lawfully entitled to be there.
24. The Government shares the view of the Joint Mission that "[t]he three areas identified for reform, even though viewed separately, are interconnected.". However, quite apart from what has already been stated, it is not at all clear why the Joint Mission contends that the only or most appropriate means to achieve the necessary reforms is through a two-stage process: first re-verification then issuing of identification cards. The proposal in the draft amendment Bills and Regulations for new applicants to register in the normal manner and thereafter be issued a photo identification card; and for those already registered and entitled to remain on the register to confirm their entitlement to remain registered and thereafter be issued a photo identification card is the best, most workable and the only lawful proposal that has been advanced or is available.

⁵ Regulation 36 of the Registration of Electors Regulations, Ch. 2:03;

Best practice and other considerations

25. In addition to the other reasons advanced as to inadequacies and inappropriateness of the recommendations the following extracts from the Report clearly highlight why the recommendations as proposed cannot be accepted or implemented.

26. Firstly, in the words of the Report, “[e]lectoral reform needs to be carefully managed to ensure that it fulfils its intended and stated purpose, without confusing electors and with minimal disruption to electoral administration.”⁶ [Own emphasis] The Government is of the view that for the reasons set out in this Response, the recommendations contained in the Report, if implemented, will cause confusion and disruption to the electoral process.

27. Secondly, in respect to the issue of timing, the Government endorses the observation made by the Joint Mission that “[b]est practice and international experience show that the earlier in the electoral cycle electoral reform is considered, and implemented, the better.”⁷ [Own emphasis] This very important fact is accentuated and supported by the recent and highly relevant Guyanese case of *Ram v Chief Elections Officer, Guyana Elections Commission and Others* [2019]⁸, in which the Chief Justice (Ag.), in giving the decision of the court stated,

“[177] ... GECOM cannot seek to conduct such registration such as to vary the constitutional timelines for holding elections outside of what is permitted by the Constitution and relevant laws. If this would be a possibility then GECOM may have to consider other options including what other methods of verification of the list may have to be utilized. And given the exhortation of the CCJ, even though it has a duty to provide a credible voters’ list, GECOM cannot operate as though it is in a normal elections cycle... [Own emphasis].

[178] Thus, whatever verification or revision exercise is undertaken to ensure a fair and credible election, whether house to house or otherwise, for the preparation of the

⁶ Pg. 3, 5th bullet point.

⁷ Pg. 3, 6th bullet point.

⁸ *Christopher Ram v Chief Elections Officer, Commissioner of National Registration, Guyana Elections Commission, Attorney General & Guyana Bar Association, Amicus* [2019] HC-DEM-CIV-FDA-1151 @ para. 178.

list of electors for national...elections...must be conducted in the context of [the available time within which the election is to be held]...”. [Own emphasis]

28. These considerations do not appear to have been adequately taken into account and reflected in the house-to-house re-verification recommendations set out in the Report.
29. Thirdly, the Report, quite rightly, recognises that “[t]he capabilities of the equipment should therefore be a factor in determining the way forward”.⁹ Similarly, the statement that “[i]n addition, the time required for training users, collecting and processing the data, and producing and issuing the cards, is of critical importance.”¹⁰ [Own emphasis] However, nowhere does the Report state that the Joint Mission duly considered and was satisfied that these requirements are or are reasonably capable of being met. Indeed, the former quote suggests otherwise.
30. Fourthly, although confined to a single, and inconspicuous, sentence, the Report contains the extremely profound statement that “[a]n unsuccessful attempt at reform could have serious consequences.”¹¹ [Own emphasis]
31. In the light of the matters set out in the preceding paragraphs of this Response, it is reasonable to conclude that any attempt to implement the recommendations as set out in the Report, appears destined to result in serious consequences.

Conclusion

32. The Government recognises that in the limited time available to it the Joint Mission may not have been able to fully appreciate and consider all of the relevant factors including the existence, importance and necessity of the draft amendment Bills.
33. The Government remains firmly of the view that enactment of the draft amendment Bills and Regulations (with or without appropriate further revisions, if necessary) and their provision for a confirmation process is the best and only workable proposal for

⁹ Pg. 8, final paragraph.

¹⁰ Pg. 8, final 2 sentences.

¹¹ Pg. 11, 4th Paragraph.

meaningfully, expeditiously and effectively implementing the electoral reforms which by consensus are required to provide the desired mandatory introduction and use of photo identification cards for the purpose of voting, and revision and updating of the Register of Elector.

A handwritten signature in black ink, appearing to be 'L. A. Peter', is written over a solid horizontal line.

.....
HON. LEVI A. PETER
ATTORNEY GENERAL
26th September 2019

