



Helen Kilpatrick, CB
Her Excellency the Governor
Government Administration Building
Grand Cayman KY1-9000
CAYMAN ISLANDS

Via Email: gary.benham@gov.ky

14 October, 2014

Your Excellency,

Re: Proposed Review of the Cayman Islands Constitution

Following on from our previous correspondence, the Constitutional Commission wishes to take this opportunity to inform you that it has completed its review of the Constitution by examining it section by section. In addition, while it has not engaged in a public consultation on the subject the Commission has included comments received from various other parties.

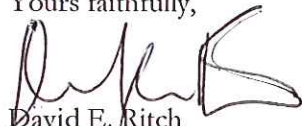
During its review the Commission identified several sections which are sufficiently important to warrant being considered for amendment. There are various reasons for the identification of these sections, including, without limitation, ambiguity or uncertainty. The sections detailed on the attached table are those the Commission believes are capable of being dealt with without the need for a referendum and it wishes to make it clear that the review was carried out on a limited basis only and not for the purpose of considering any form of Constitutional advancement at this time or to propose amendments it felt could only be achieved via a referendum.

The Commission fully understands that it is ultimately for the Honourable Premier and the Honourable Leader of the Opposition to determine whether, and if so when, to take this matter forward in accordance with the tenor of the Letter of Entrustment dated 10th June 2009, a copy of which is attached for easy reference.

The Commission strongly recommends that the Premier and the Leader of Opposition establish a Committee to consider this matter in further detail and if such a Committee is established the Commission would have no objection to being included in the membership thereof.

In closing the Commission wishes to indicate that it considers the contents contained in the attached to be in the public interest and therefore in one month the Commission shall post these documents on our website www.knowyourconstitution.ky.

Yours faithfully,



David E. Ritch

Chairman

Constitutional Commission

att: 1. Table detailing suggested sections of the 2009 Constitution for review
2. Letter of Entrustment

cc: Honourable Premier
Honourable Leader of the Opposition
Joint Team Leader, Overseas Territory Directorate, Foreign and Commonwealth Office

Table detailing suggested sections of the 2009 Constitution for review
Compiled by the Constitutional Commission
14 October, 2014

No.	Page	Heading	Section	Comment
1.	11	Fair trial	s.7(2)(a)	Subsection 11(a) (of section 7) appears to permit the passage of legislation, from time to time, that could erode the substantive right of presumption of innocence. An amendment may be desirable to empower the court to make the decision rather than authorising legislation which may cause a violation of an individual's right. Such an amendment would allow the court to ensure that any impairment of a person's right is minimal and proportionate to what is necessary to securing the fundamental rights of members of the society as a whole.
2.	17	Non-discrimination	s.16	This section lists the instances where its subsection (1) does not apply but does not indicate that subsection (3) does not apply. The question therefore is whether regardless of the section's explicit exclusions must subsection (3) be abided by?
3.	19	Lawful administrative action	s.19	Supporting legislation might be necessary to enforce this section. In South Africa the Promotion of Administrative Justice Act 2000 was enacted giving effect to the right to administrative action that is lawful, reasonable and procedurally fair and to the right to written reasons for administrative action as contemplated in section 33 of the Constitution of the Republic of South Africa,1996 [and to provide for matters incidental thereto].
4.	19	Education	s.20	It is queried how this section is supposed to work in practice and may therefore require a policy discussion.
5.	23	Functions of the Governor	s.31(3)	What are the limitations to the exercise of the Governor's powers under subsection (3), if any?
6.	28	Cabinet Secretary	s.48(3)	Should an additional subsection providing for the Cabinet Secretary to provide administrative support to the National Security Council be included (as detailed in s.58.
7.	29	Appointment of the Premier	s.49(2)	What does the word "gain" mean and at what point in time? Is it at the polls or subsequent to an election but before the House is sworn in, or either?

No.	Page	Heading	Section	Comment
8.	29	Appointment of the Premier	s.49(3)	This section is ambiguous because it is not clear whether the Speaker is counted in order to determine what is a majority where the Speaker is one of the elected members of the LA even though he/she has no vote unless it is a casting vote. Amend to make it clear the Speaker is counted.
9.	33	National Security Council	s.58(11)	This could be included under the section which lists other duties of the Cabinet Secretary.
10.	35	The Legislative Assembly	s.60(1)(a) &(b)	S.60(1)(b) should be amended to provide that the LA shall consist of 18 elected members when the Speaker is chosen from outside and 17 other elected members where the Speaker is chosen from within the House. (See section 65(1)(a)).
11.	35	Qualifications for membership of the Legislative Assembly	s.61(1)(e)	This section warrants review as it appears to potentially disenfranchise anyone who studies abroad and takes up employment either during or after their studies.
12.	35	Qualifications for membership of the Legislative Assembly	s.61(3)	This section also warrants review as it appears to potentially disenfranchise anyone who has to spend significant periods of time abroad with a dependent at any hospital, clinic or other medical institution.
13.	36	Qualifications and Disqualifications	s.62(1)(a)	<ol style="list-style-type: none"> 1. Reducing the required period of residency of candidates in the Cayman Islands prior to the date of nomination would open up the universal right to stand for elective office to a larger number of otherwise qualified citizens. A clear legal definition of "his/her own act" in relation to other citizenship could bring more clarity for the Elections Office when deciding on eligibility of candidates, as well as for potential candidates when deciding whether to contest elections. 2. Consideration should be given whether dual nationals, other than British Citizens, should be qualified or disqualified from elected membership. 3. Allegiance should perhaps be defined.
14.	36	Qualifications and Disqualifications	s.62(1)(e)	In order to make it unequivocal that this section is not in any way circumscribed by the Rehabilitation of Offenders Law, language to the effect that "notwithstanding the provision in any other law," should be inserted.
15.	36	Disqualifications for elected membership	s.62(1)	May be prudent to include any offence(s) which fall under the Anti-Corruption Law, the Elections Law, or the Standards in Public Life Law.

No.	Page	Heading	Section	Comment
16.	37	Speaker and Deputy Speaker	s.65(1)(a)	It should be made clear that where the Speaker is elected from within and there is a vote to decide a matter, the Speaker is still included for the purposes of determining a majority even without a vote notwithstanding the Speaker having only a casting vote.
17.	40	People initiated referendum	s.70(1)	It is unclear as to whether this section requires that a law be enacted which governs all people initiated referendums or simply a law enacted providing for each individual referendum when it is petitioned for.
18.	41	Standing Orders	s.71(10)	Sets out the category of persons that a Standing Committee of the LA may summon whereas the Legislative Assembly (Immunities, Powers and Privileges) Law is much wider. Is s.5 of the Legislative Assembly (Immunities, Powers and Privileges) Law ultra vires the Constitution in that it seeks to significantly expand without limitation the category of persons that can be summoned. Should 71(10) be amended to mirror s.5 if there is an issue? Compare s.38 of the 1962 Constitution which was in force when the Legislative Assembly (Immunities, Powers and Privileges) Law was first enacted with the 2009 Constitution. Did the LA have greater powers of summons under the 1962 Constitution and if so what impact did the current Constitution have on the powers to summon contained in the Legislative Assembly (Immunities, Powers and Privileges) Law as a consequence of 71(10), if any.
19.	42	Introduction of Bills	s.77(2)	What constitutes an emergency? There is potential for this section to be abused. A policy discussion may be required to determine what circumstances should be considered an emergency so that all parties are clear as to when Standing Orders may be suspended.
20.	42	Return of Bills by Governor	s.79(1)	It should be made clear as to whether or not if after the 60 days has passed the Governor can still table amendments.

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21.	44	Prorogation and dissolution	s.85	<p>1. This section provides a mechanism to extend the life of the House where it has been dissolved but there is no provision in the Constitution to allow for an extension of the House if it has not been dissolved prior to an emergency occurring. This would require a Constitutional Amendment as was the case in 2004. There is perhaps the need to add a mechanism which allows for extension through consultation and agreement between the Governor, the Legislative Assembly and the Foreign and Commonwealth Office in appropriate circumstances where this other situation prevails.</p> <p>2. In utilising the powers in this section the Governor is able to recall the House after it has been dissolved but does not provide a "long-stop" date as to when the general elections would then be held to trigger the subsequent dissolution.</p>
22.	44	Public Accounts Committee	s.87	<p>This skeleton section allows Ministers and Legislators to be members of the Public Accounts Committee even when their own government's accounts are being considered and to remain a member even when that member has a conflict of interest. In contrast, Section 122 of the modern Turks and Caicos Constitution 2011 provides for the PAC to consist of "at least three members of the House appointed by the Speaker from among members who are not Ministers; and two persons expert in public finance who are not members of the House" (one by the Speaker and one by the Governor acting in his/her discretion). The Chairman must be an opposition representative. If a member becomes a Minister, he loses his/her seat immediately in the PAC. The modern and accountable Turks and Caicos Constitution further provides (in s.122(4)) that after consulting the Chairman of the PAC and the Speaker, the Governor, acting in his/her discretion (i.e. his or her unfettered discretion) considers that any member of PAC has a conflict of interest, he/she may appoint another member (who need not be a legislator) to temporarily replace the conflicted member.</p>
23.	46	Qualification of electors	s.90(1) (b)(iv)	<p>Consideration should be given to reducing the required period of residency in the Cayman Islands prior to registration as an elector which could increase the number of registered electors and enhance overall inclusiveness of the election process.</p>

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24.	47	Right to vote at elections	s.92(1)	Section 92(1), should be amended by inserting the words “or members” after the words “an elected member” to avoid confusion in the event single member constituencies are not introduced before the next election or, as is being proposed, Cayman Brac and Little Cayman remain a multi-member constituency after the other multi-member constituencies become divide into single member constituencies.
25.	48	Tenure of office of judges of the Grand Court	s.96	Should judges be extended from age 65 to age 70 only under extraordinary circumstances? Should the Constitution list these circumstances? (N.B. The Commission understands the Governor is currently engaged in discussions surrounding this section).
26.	53	Judicial and Legal Services Commission	s.106(10)	Should there be an expanded subsection conferring on the JISC authority to establish a procedure for dealing with the complaints of persons other than the judiciary in s.106(4) or should there be a specific reference to all persons listed that the JISC will perform its functions as set out in other laws (i.e. the PSMI)?
27.	53	Judicial and Legal Services Commission	s.106	It has been queried whether it is suitable to have a non-lawyer as the Chair of a judicial advisory body.
28.	53	Judicial and Legal Services Commission	s.106	The issue was raised regarding the absence of Magistrates from the Constitution; in some instances they are treated like regular civil servants which could give a poor perception of the autonomy of the courts.
29.	53	Judicial and Legal Services Commission	s.106(1)	It has been suggested that the language be revisited to provide that disciplinary actions short of removal from office, e.g. reprimand, should be devolved to the Chief Justice and President of the Court of Appeal, in a manner similar to the position in the new TCI Constitution. (N.B. The Commission understands the Governor is currently engaged in discussions surrounding this section).
30.	54	Judicial Administration	s.107	There needs to be clarification of what constitutes “judicial administration” and “adequate funds”.
31.	56	Auditor General	s.114	1. Are there adequate provisions to ensure the independence of the Auditor General in his/her duties? 2. Should the holder of that office be entitled to contractual (unlimited) renewals or should there be a term limit of a specified number of years?

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32.	58	Constitutional Commission	s.118	The Constitutional Commission feels it prudent to expand the Commission from 3 to 5 members and insert a provision to provide the Commission with funding from general revenue.
33.	60	Interpretation	s.124	Public Office and Public Officer require a more detailed description; and consideration should be given allowing that description to repeal all other mentions of ‘Public Office and Public Officer’.
34.	60	Interpretation	s.124	The definition of “political party” needs to be revisited – if the makeup of the party changes after the election i.e. after the election has been contested, but before the House has been sworn in, does the context in section 49(2) require that a different definition of “political party” be used? (See section 124 (1)).



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From the Parliamentary Under Secretary of State

The Hon W McKeeva Bush OBE JP MLA
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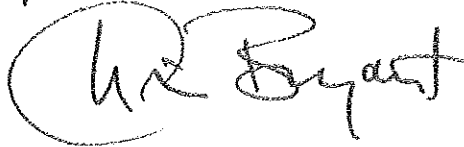
10 June 2009

Dear Mr Bush

As part of the Constitutional Modernisation process the Cayman Islands Government made the following proposal:

“After the present modernisation process has been completed, further changes to the Constitution should not be made without the authorisation of a referendum, unless the change is declared by the Premier and the Leader of the Opposition to be minor or uncontroversial, in which case a resolution of Parliament would be sufficient. The UK Government should be invited to agree that it would honour this referendum requirement.”

In general the United Kingdom Government approves the idea that substantial constitutional changes should be supported by the people of the Cayman Islands in a referendum. Accordingly, the United Kingdom Government would normally use its best endeavours to honour this referendum requirement. However, there may be exceptional circumstances where it would not be possible or appropriate to do so, and for that reason the United Kingdom Government must reserve its position on this matter.

Yours sincerely


CHRIS BRYANT