



REF: CC-RES-ADVICE

His Excellency, the Governor Martyn Roper, OBE
Via Email: faye.kulcheski2@gov.ky

Honourable Premier Wayne Panton, JP
Via Email: kristy.watler@gov.ky

Hon. Leader of the Opposition Roy McTaggart, JP
Via Email: roy@mctaggart.ky

14 May 2021

Dear Sirs,

Re: Constitutional Commission Post-Election Update

We write by convention to His Excellency, the Governor, the Hon. Premier and the Hon. Leader of the Opposition and take this opportunity to welcome the new post-holders amongst the addressees to their respective roles and to introduce them to the work of the Constitutional Commission.

By way of background, we note that the Constitutional Commission is established under section 118 of the Constitution; comprises three members; and is charged with the following functions: (a) to advise the Government on questions concerning constitutional status and development in the Cayman Islands; (b) to publish reports, discussion papers, information papers and other documents on constitutional matters affecting the Cayman Islands; (c) to promote understanding and awareness of this Constitution and its values; and (d) to exercise such other functions as may be prescribed by a law enacted by the Legislature.

For ease of reference, we have enclosed copies of the Constitutional Commission's most recent general Update, which was published on 2 July 2020, in advance of Constitution Day last year. This publication provides a useful summary of the topics that the Constitutional Commission has been actively considering. In light of certain issues that were raised with the Constitutional Commission in the course of the recent General Election, both in our consultation with the Commonwealth Parliamentary Association British Islands and Mediterranean Region's virtual election observation mission and in enquiries from various local correspondents, the Update also serves as a reference point for the following matters that we raise herein for your individual and collective attention.

Appointment of the Premier and other Ministers and the Election of the Speaker of Parliament

Please also find enclosed the Constitutional Commission's Explanatory Notes on the Appointment of the Premier and other Ministers and the Election of the Speaker of Parliament following a General Election, which were published on 20 April 2021 in response to several enquires requesting clarification on these matters and to help address certain uncertainties in the post-election process.

In publishing these Explanatory Notes, the Constitutional Commission was careful at the time to focus its efforts on education and information. The Constitutional Commission did, however, signpost that there were a number of matters that would merit future consideration. Some of these matters have

previously been flagged by the Constitutional Commission in its Table detailing suggested sections of the 2009 Constitution for review, published on 14 October 2014 (“the 2014 Review”) and/or in the Constitutional Commission’s Responses to Requests from His Excellency the Governor and the Hon. Premier and Hon. Leader of the Opposition for Comments on Potential Revisions to the Cayman Islands Constitution 2009, published on 27 June 2018 (“the 2018 Report”) (both of which can be accessed in the resources at: www.constitutionalcommission.ky/constitutional-matters). In addition, there are other matters that have come to light more recently, which are also referenced in the Explanatory Notes.

For ease of reference, these matters in total comprise:

- (a) The definition of “gain” in section 49(2) of the Constitution;
- (b) Clarification regarding whether an elected member must have stood for election as member of the political party which is said to have gained a majority of seats of elected members;
- (c) The interplay between the election of the Speaker and the formation of the government;
- (d) The extent to which the postelection processes could be further clarified so as to provide the general public with a clearer understanding and expectation of how this should operate;
- (e) Any progress made by the Cabinet Office on the completion of the Cabinet Manual, which it is anticipated would assist in this regard and inform the process by which the government is formed, especially in circumstances where there is no clear majority;
- (f) The extent to which agreements and affiliations should be declared prior to an election and the openness and transparency of the process thereafter;
- (g) Whether, as a backstop, there should be a defined time period within which a proclamation must be published by the Governor to call a session of the Parliament following a General Election; and
- (h) Clarification as to the process by which the Speaker and Deputy Speaker are elected.

As the Constitutional Commission now embarks on a further analysis of these matters, we write to advise that the Constitutional Commission would be pleased to receive any input on these matters, which would assist and inform our analysis.

Constitutional Amendments

The Constitutional Commission was pleased to lend its support to the amendments to the Constitution contained in the Cayman Islands Constitution (Amendment) Order 2020. In the course of the process that led to these amendments, the Constitutional Commission made several submissions, which are also all available at: www.constitutionalcommission.ky/constitutional-matters.

We now take this opportunity to record several outstanding matters arising from the Constitutional Amendments:

1. Records relating to the amendment of the Constitution

It is unfortunate that despite being invited to submit recommendations and despite submitting such recommendations (including recommendations pertaining to matters that have once again proved problematic in the wake of the recent General Election), the Constitutional Commission is unaware as to whether its recommendations were considered and rejected or, indeed, whether they were presented at all in the course of the constitutional talks held in London in December 2018. In order to gain a better understanding of whether its recommendation were considered, the Constitutional Commission has requested copies of the records of the constitutional talks and the related correspondence.

Having received no response to its initial letter dated 26 February 2019, the Constitutional Commission then restated this request in its Explanatory Note of 17 February 2020. To date, the Constitutional Commission has still not received any response to either of its requests. The Constitutional Commission believes that these records are an important constitutional resource and that, in the interests of openness and transparency, they should be made available to the general public. The Constitutional Commission therefore calls once again for the expeditious release of these records.

2. Outstanding recommendations for reform of the Constitution

In the 2014 Review noted above, 34 suggestions for review were identified. More recently, in the 2018 Report, also noted above, the Constitutional Commission responded to a request for other minor proposals for amendment with six recommendations for consideration where clarification and greater precision was deemed appropriate, of which the following five are outstanding:

- (a) The appointment of the Premier under section 49 of the Constitution, with particular reference to: (i) whether an elected member must have stood for election as a member of the political party which is said to have gained a majority of seats of elected members of the Legislative Assembly for the purposes of subsection (2); and ii) the role of the Speaker in subsection (3) and whether this is in any way compromised when the Speaker is an elected member as opposed to when the Speaker has been appointed from outside of the Legislative Assembly;
- (b) The qualifications of electors in respect of the residency requirements in section 90(1)(b)(iv) of the Constitution and whether there should be provision for prompt reinstatement of eligibility once a person who has not retained their residency returns to the jurisdiction;
- (c) The disqualification of electors and whether a blanket ban on voting for prisoners serving sentences exceeding 12 months' imprisonment in section 91(1)(a) of the Constitution should be amended to comply with international human rights law;
- (d) The qualifications and disqualifications for elected membership to the Legislative Assembly in sections 61 and 62 of the Constitution and whether these need clarification on account of the range of case law that these provisions have generated, with particular reference to (i) the residency requirement of seven years immediately preceding the date of nomination for election in section 61(1)(e); (ii) periods of absence in section 61(3); (iii) dual citizenship and section 62(1)(a); and (iv) the rehabilitation of offenders and section 62(1)(e); and
- (e) The process by which the Constitution may be altered in the future, the Letter of Entrustment of 10 June 2009 that presently informs this process and what constitutes a minor or uncontroversial change as referenced therein.

The Constitutional Commission believes that these considered recommendations still merit attention and, in addition to the points noted above arising in the context of the recent General Election, would welcome some engagement on these points as well.

Supplementary Legislation

As foreshadowed in the documentation referenced above (see, in particular, page four of the Constitutional Commission Update, 2 July 2020), the Constitutional Commission has also been considering the various aspects of the Constitution where supplementary legislation is anticipated, with a view to recommending action where appropriate. The Constitutional Commission's efforts in

this regard have focussed on the institutions supporting democracy and whether any supplementary legislation or reforms to existing supplementary legislation for these institutions may be required.

In due course, the Constitutional Commission will consolidate, submit and publish its recommendations. However, it is already apparent that there is an obvious deficit in respect of the supplementary legislation mandated in section 119 of the Constitution for Advisory District Councils. We write therefore to advise that the Constitutional Commission is presently considering the content of such legislation and to request that if any new efforts are to be made on the implementation of such legislation that the Constitutional Commission be duly consulted.

Conclusions

If the Constitutional Commission is to fulfil its constitutional mandate, it is imperative that it is engaged on important constitutional issues. The Constitutional Commission has identified a number of matters that require attention and/or consideration and we look forward to further input and engagement with the Government and all concerned parties and persons on these matters.

To this end, we also advise that the Constitutional Commission is generally available to attend any meeting considered desirable; and respectfully suggest that this is now an opportune time to introduce new post-holder to the work of the Constitutional Commission

Thank you for your attention to the various matters addressed in this correspondence and we look forward to further engagement, particularly on those matters that have been outstanding for some time, at your earliest convenience.

In closing, please also note that, consistent with the Constitutional Commission's established practice and its commitment to openness and transparency, this correspondence and any response to this correspondence will be published on the Constitutional Commission's website in seven business days.

Yours sincerely,



Vaughan Carter
Chairman
Constitutional Commission

Encls. Constitutional Commission Update, 2 July 2020

Explanatory Notes on the Appointment of the Premier and other Ministers and the Election of the Speaker of Parliament following a General Election, 20 April 2021