



VIA EMAIL: dritch@rc.com.ky

6th March 2014

Mr. Gary Benham
Head of Governor's Office
Suite 101
Fifth Floor
Government Administration Building
Grand Cayman

Dear Mr. Benham,

I refer to your email of the 10th February 2014 in which you requested the Commission to provide feedback to Her Excellency the Governor as to what changes to our Constitution we feel to be necessary and whether any proposed changes are likely to be controversial.

The issues identified to date for possible change are largely either to remove ambiguity, improve clarity for purposes of interpretation or improve good governance objectives. A few are cosmetic only. None of them however are intended to alter or advance the current constitutional relationship between the Islands and the United Kingdom, a position we have made clear in our earlier correspondence to the Deputy Director of the Overseas Territories Directorate Mr. Tim Colley, dated 8th October 2013.

At this particular juncture, the Commission has not performed an in depth review of the Constitution or solicited public feedback but has produced a rough draft report in tabular form listing areas for review that we believe are worth considering. I stress that this report is very much in rough draft format and is not considered "release or review ready".

So far, we have gathered a certain amount of material from various sources, including the Attorney General who will no doubt communicate to you directly his areas of concern as he was one of the parties copied on your email to me. Our draft report indicates that there are already over 40 issues identified on a purely preliminary basis, and of varying degrees of importance.

We have extracted three random examples to demonstrate why the Commission maintains its stance that a review exercise should be performed.

- (1) As you are no doubt aware, there has already been one case in the Grand Court in which the language of section 61(3) (b) had to be construed. On the facts of the case in question, the Court held that a firm of solicitors in London was an "educational

establishment” within the meaning of the words “attendance as a student at any educational establishment” relative to the question of whether absence from the jurisdiction prior to the elections disqualified a candidate who was employed as an associate trainee lawyer for a period of more than two and a half years. Future election challenges are quite foreseeable given the current wording of that section and the international observer team that visited to cover our elections in 2013 also made observations in their final report as to consideration being given to reduce the period of residency of candidates in the Islands prior to the date of nomination. Should “educational establishment” be better defined or is it to be left to the Courts to construe from time to time on the facts of each case?

- (2) There has also been public commentary in the press about other sections of the Constitution, including criticisms of section 87 relating to the Public Accounts Committee which has been described as a “skeleton provision” by two former Executive Council (now Cabinet) members. Their position is that section 87 should be replaced with the more robust S. 122 of the modern 2011 Turks and Caicos Constitution addressing issues such as conflicts.

Issue 1 above directly impacts upon qualifications for candidacy in a general or by-election and is therefore a matter of potential materiality. Issue 2 is a “good governance” issue relating to the scrutinising of Government accounts and how public revenue is spent.

Issue 3 set out below is also of fundamental importance for reasons to follow.

- (3) Section 49 provides for the appointment of the Premier and other Ministers and is therefore one of the most important sections in the Constitution. It is also a section that is lacking in clarity and open to debate on important questions.

Sub-section (2) states:

“where a political party gains a majority of the seats of elected members of the Legislative Assembly the Governor shall appoint as Premier the elected member of the Assembly recommended by a majority of the elected members who are members of that party”

Section 124 (1) (Interpretation) provides that

In this Constitution unless it is otherwise provided or required by the context-----

“political party” means a group of persons who have united to contest election for membership of the Legislative Assembly”.

In the recent general elections, 9 of the 18 seats were won outright by the PPM and the remaining nine were split between two other parties and independent candidates. No outright majority was won.

In the days between the elections and the appointment of the Premier, one candidate of the other 9 joined the PPM, giving the PPM 10 seats in the Assembly.

Question – was this a “gaining” of a majority within the meaning of section 49 (2)?

In common usage, “gain” means to come into possession of or to acquire.

The following constructions potentially arise out of the wording of the subsection and there might be others:

1. That the intention of the sub-section is that a majority must be acquired at the polls by virtue of the definition of “political party” which requires that the party consist of persons who ran together in an election.

Alternatively

2. That it does not matter whether the persons who ran together acquired a majority at the polls as long as they acquire a majority of seats at any time prior to the first sitting of the Legislative Assembly following a general election.

A subsidiary question arising out of 49 (2) is whether the definition of “political party” in the context thereof means something other than that given in S. 124 (1), a possibility contemplated by S. 124 (1) itself.

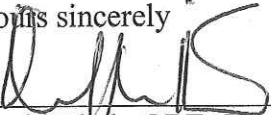
The significance of this issue cannot be overstated as S. 49 (2) allows for the appointment of the Premier without the need for a ballot in the Assembly under S. 49 (3). Also, after the appointment of the Premier, he or she advises the Governor to appoint other Ministers. It is therefore critically important that the circumstances in which the Premier is appointed be free from ambiguity or uncertainty.

It is necessary to clarify section 49, in particular what is meant by “gains a majority” and/or to revise the definition of “political party” as a repeat of this scenario in a future general election could see the entire appointing of the Government challenged in a Court of law with the potential for very serious consequences in the jurisdiction.

We trust that the above sampling of issues arising out of the Constitution will demonstrate that there is, in fact, a need to review and amend certain provisions, even if the list is to be reduced to those matters of elevated importance. While the role of the Commission in any review exercise would be politically neutral, it is possible that some may see one or more of the issues as controversial depending on their perspective but the Commission is of the view that it could produce a table of issues that on any reasonable examination, would be considered uncontroversial.

The Chairman of the Commission is due to meet with the Premier on Monday 8th March to discuss this matter generally and we anticipate that there will be follow-up correspondence to the FCO in the near future which will be copied to you as before.

Yours sincerely

A handwritten signature in black ink, appearing to read 'D. Ritch', written over a horizontal line.

David Ritch, OBE, J.P.

Chairman, Constitutional Commission