

Constitutional Commission

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OPINION OF THE CONSTITUTIONAL COMMISSION OF THE CAYMAN ISLANDS

IN RESPONSE TO THE QUERY:

**ARE CIVIL SERVANTS CONSTITUTIONALLY ENTITLED TO SIGN PETITIONS,
I.E., IS PROTECTION AFFORDED UNDER SECTION 11 OF THE CONSTITUTION?
MORE SPECIFICALLY, COULD CIVIL SERVANTS SIGN PETITIONS PURSUANT TO SECTION 70
OF THE CONSTITUTION, RELEVANT TO PEOPLE-INITIATED REFERENDA?**

OPINIONS OF THE CONSTITUTIONAL COMMISSION ARE OFFERED TO ADVISE AND EDUCATE
AND ARE NOT TO BE CONSTRUED AS A JUDGMENT OF FACTS AND ISSUES
WHICH IS A MATTER FOR A COURT OF LAW

SUMMARY:

Determining an equitable balance between the exercise of democratic values such as freedom of expression with the promotion of professional value of responsive service by a civil servant is a complex issue. The question posed must be considered within the context of the public interest which in itself is difficult to define. Simply put, public interest may be defined as the consideration of a broader conception of social common interests versus individual self-interests as stated in section 108(a) of the 2009 Constitution.

In this particular scenario, the questions to be answered are – in what circumstances would a civil servant, whose conduct should be politically neutral, be allowed to engage in political activity? I.e., when should a civil servant be allowed to sign a petition to be submitted to the government which he or she is serving? Further, if the issue is deemed to be a matter of national importance, is protection afforded to the civil servant or does his or her freedom become more restricted? Is his or her position or level of influence in decision making relevant? Should certain sectors of the civil service be completely free to participate in any political activity?

The Commission recommends that Head of the Civil Service meet with the Civil Service Association to formulate appropriate guidelines regarding involvement in political activities. Details should specify, for clarity, the existing limitations, i.e prohibition against running for public office, section 62(2) of the Constitution, as well as define the nature of political activities contemplated by section 5(d) of the PSML to address the current ambiguities. For these guidelines to have the force of law required by section 11(2) of the Constitution, they must be referred to Parliament by the Cabinet and enshrined in the PSML.

In the absence of clearly stated legal restrictions placed on civil servants and their involvement in political activities, any actions arising out a civil servant's exercise of their freedoms under section 5(d) of the PSML and sections 11 of the Constitution may be a matter best decided in a court of law.

BACKGROUND

These queries appear to have been triggered by recent advancements in the Constitutional framework, namely the inclusion of human rights declarations under Part I of the Constitution, Bill of Rights, Freedoms and Responsibilities and the power to present petitions as a basis for people-initiated referendums pursuant to section 69 of the 2009 Cayman Islands Constitution. In the interest of promoting understanding and awareness of the Constitution and its values, the Constitutional Commission, as mandated by section 118, seeks to highlight the issues to be addressed. Any opinions expressed are merely to advise, educate and provide a basis for further discussion on the issues examined. If a legal ruling is required, that becomes a matter to be determined by the Courts and beyond the remit of this Commission.

MODEL GOVERNANCE

In a democratic society, freedom of expression is one of the key tenets underpinning all of the other freedoms, privileges and responsibilities. A strong, apolitical public service is also a key element in providing stability and good governance. Thus, analysis of this query must focus on the question of reasonable justification for the imposition of restrictions on public officers. The question posed must then be considered within the context of the public interest which in itself is a complex issue and difficult to define.

Simply put, public interest may be defined as the consideration of a broader conception of social common interests versus individual self-interests. In this particular scenario, the questions to be answered are – in what circumstances would a civil servant whose conduct should be politically neutral be allowed to engage in political activity? I.e., when should a civil servant be allowed to sign a petition to be submitted to the government which he or she is serving? Further, if the issue is deemed to be a matter of national importance, is protection afforded to the civil servant or does his or her freedom become more restricted? It is essential to look at the system of governance and the role of civil servants in the Cayman Islands to understand why certain restrictions may be imposed.

Government in Cayman follows the UK Westminster model which is based on the assumption of parliamentary sovereignty. All key decisions are made by the Members of the Legislative Assembly; members of the Legislative Assembly are representatives, not delegates, and should act in what they judge to be the public interest, not as advocates for their own interests or necessarily for the interests of their constituents, but for the common good of the country. However, in Cayman, as in other overseas territories, there are some constraints on the power of Parliament. Ultimately, the Cayman Islands is still answerable to the UK Parliament and Her Majesty the Queen, thus the Governor has certain reserve powers which are rarely used. Legitimacy and democracy are to be maintained because Ministers are

answerable to the Legislative Assembly. Decision are taken by the Ministers (and if necessary by the whole Cabinet), and implemented by a neutral civil service.

The Public Service is a politically neutral body, with the function of impartially implementing the policy programme of the elected government. Its traditional role is to provide honest and impartial advice and make all information relevant to a decision available to Ministers, implement ministerial decisions lawfully taken, support individual and collective ministerial responsibility and provide the branches and agencies of government and the public with information on results of work carried out.

In carrying out its functions, the public service also assists in sustaining and strengthening democratic institutions, promotes the public trust and confidence in the government, promotes democratic values of accountability and transparency while carefully maintaining political neutrality in providing responsible, responsive service. Any conflicts that arise must be resolved in favour of the public interest. Public interest could be said to be a touchstone of motivation for the public servant. It is for the public service what justice and liberty are for the legal profession.

In practice, the relative power and influence of senior officials varies from Government to Government, and with the character and experience of the officials and their Ministers. Modern developments, including freedom of information, less deferential media and more assertive citizens, are making the workings of government more open and transparent, moving away from the ethos of secrecy previously nurtured by the Official Secrets Act and General Orders. Other jurisdictions are actively promoting a more open sharing of governance issues and allowing more freedom for civil servants. A comparison is offered below.

CONSTITUTIONAL ADVANCEMENTS

The provisions relevant to freedom of expression are found in section 11 of the Constitution. It should be noted that Part I of the Constitution does not come into effect until November 6th, 2012, however preparations are being made to ensure that the necessary mechanisms are in place prior to that date.

The provisions of section 11 of the 2009 Cayman Islands Constitution state:

- (1) No person shall be hindered by government in the enjoyment of his or her freedom of expression, which shall include freedom to hold opinions, and to receive and impart ideas and information without interference, and freedom from interference with his or her correspondence or other means of communication.
- (2) Nothing in any law or done under its authority shall be held to contravene this section to the extent that it is reasonably justifiable in a democratic society –
 - a. in the interests of defence, public safety, public order, public morality or public health;
 - b. for the purpose of protecting the rights, reputations and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, or regulating telecommunications, posts, broadcasting or other means of communication, or public shows or entertainments; or

- c. for the imposition of restrictions on public officers in the interests of the proper performance of their functions.

In interpreting this section, the key elements to consider are found in the phrases :

- (i) “no person shall be hindered by government in the enjoyment of his or her freedom of expression”;
- (ii) “reasonably justifiable in a democratic society”;
- (iii) “[legal]imposition of restrictions on public officers in the interests of the proper performance of their functions”.

Freedom of expression as defined in section 11(1) includes the freedom to hold opinions and to receive and impart information without interference through correspondence or other means of communication. Section 11(2) allows certain restrictions of that freedom to be imposed by legislation, provided that those restrictions are reasonably justifiable in a democratic society. Section 11(2)(c) specifies that restrictions may be imposed on public officers in the interests of the proper performance of their functions.

STATUTORY INTERPRETATION

The Constitutional provisions governing the Public Service are contained in Part VI of the 2009 Constitution. Section 108 speaks to the “overriding duty of public officers” which is subject to the Constitution, thus would include reference to sections 11 and any others provisions relevant to public officers in their private and public capacity. The duty of the public service set out under section 108 is twofold – (a) to act in accordance with the best interests of the Cayman Islands and not in their own private interests, and (b) to implement Government policy to the best of their ability and in accordance with the directions given to them by the Cabinet or other responsible person or authority.

The legislation currently in place governing the conduct of the Public Service is the Public Service Management Law (PSML). Part II of the PSML contains the Public Service Values (s 4) and Code of Conduct (s 5). The values to which the public service shall aspire and which shall govern its management include

- 4(a) to serve diligently the government of the day, the Legislative Assembly and the public in an apolitical, impartial and courteous manner and to deliver high-quality policy advice and service;
- 4 (b) to uphold the proper administration of justice and the principles of natural justice, and to support public participation in the democratic process.

Failure to comply, in a significant way, with the Public Servant’s Code of Conduct contained in section 5 of the PSML shall be grounds for discipline or dismissal. The Code of Conduct affirms honest, conscientious, courteous and respectful behaviour and requires that duties be fulfilled with professionalism, integrity and care. Everyone with whom the public servant interacts must be treated impartially and without harassment of any kind. Two key provisions which speak to involvement in political activity are found in section 5 (c) and (d), namely

5(c) a public servant must be politically neutral in his work and serve the government of the day in a way that ensures that he maintains the confidence of the government, while also ensuring that he is able to establish the same professional and impartial relationship with future governments;

5(d) a public servant, as a member of the public, has the right to be politically informed but must ensure that his participation in political matters or public debate or discussions, does not conflict with his obligations as a public servant to be politically neutral.

There are other provisions which speak to avoiding any activities that would bring the public service into disrepute. The public servant must obey the law and comply with all lawful and reasonable directions, including work place rules established by his superiors. Disclosure and avoidance of conflicts of interests, limited use of official resources and adherence to confidentiality rules regarding official information are also part of the public servant's mandate.

Section 67 of the PSML recognises the Cayman Islands Civil Service Association as the duly appointed representative of the civil service and requires the Head of the Civil Service, the Portfolio of the Civil Service and chief officers to similarly recognise the Association and to liaise with it as appropriate over human resource issues. Sections 22 and 23 speak to freedom from political pressure, which is defined as any attempt directly or indirectly to influence a personnel or other input-related decision of a chief officer vested in a chief officer by the PSML or any other law, or to change advice tendered by a chief officer to the Governor, the Cabinet, a Minister or an Official Member from what would have been had the influence not been applied.

The Personnel Regulations 2006, written under the authority of section 66 of the PSML, does not provide any details relevant to defining political activity which may be permitted or restricted pursuant to section 5(d) of the PSML. Nor does it seem that there are any current written policies offering clear directions on a public servant's limitations on participating in political activities. The information that was provided to the Commission related to restrictions under the previous General Orders, quoting Chapter 9, section 10, "*No officer shall sign or procure signatures to any public petition to the Government which may require executive action or which relates to any action or proposals of the Government of the Islands or any other Government.*" There was correspondence in April 2008 from the Chief Secretary's office prohibiting participation of civil servants in "any public demonstration or event that can be construed as objecting to any actions or proposals by the Government of the day." This response to a query by the CICSA did not refer to any particular statutory provisions. The Commission has not been provided with any equivalent document issued pursuant to the 2009 Constitution or the PSML.

COMPARISON TO OTHER JURISDICTIONS

In contrast, section 4.4 of the UK Civil Service Management Code requires departments and agencies to make clear to staff any restrictions on their taking part in political activities. The UK Code further defines political activities that may be subject to restriction. Restricted activities include the holding of

an office in a political party; speaking in public on matters of national political controversy; expressing such views to the press or in books, articles or leaflets; being announced as a candidate for Parliament (including the European Parliament) or election to a local authority or local political organisation; or canvassing on behalf of a candidate. Civil servants in the industrial and non-office grades are known as the “politically free” category and have the freedom to take part in all political activities. There is discretion to permit other staff to take part in local or national political activities in accordance with prescribed “Guidelines and Principles on Participation in Political Activities”.

In response to our query to the Scottish Parliament, the response received was that the Public Petitions Committee of the Scottish Parliament confirmed that anyone, including civil servants, can present or sign a petition. In the UK there are processes currently in place to allow petitions to be offered more freely to Parliament(s) through electronic media.

The Canadian context appears to be similar to the UK and even provides a self-assessment tool to help public service employees assess and make reasonable decisions about participating in political activities. The purpose of the tool is to help determine whether a given political activity would impair or could be perceived by others as impairing the ability of the public servant to perform their duties in a politically impartial manner. Each activity must be assessed on a case-by-case basis in light of a combination of factors including the nature of the activity to be engaged in, the specific circumstances, the nature of the public servant’s duties and the level and visibility of their position. The public servant is also encouraged to discuss their specific circumstances with their manager and the departmental designated political activities representative in their organisation.

The other UK Overseas Territories were requested to provide information regarding any policies interpreting equivalent constitutional provisions protecting freedom of expression. We were specifically looking at whether the other Overseas Territories have policies in place which are used to guide public officers/civil servants in their expression including any restrictions placed on them by way of political activities (i.e. signing of petitions, etc.). The only response received was from Montserrat who indicated that they were in the process of setting up a Secretariat to be tasked with developing policy under their Constitution.

CONCLUSION

Having regard to the advancements made for more openness and transparency in a democratic society, it is now timely that the question of the level of involvement in political activity afforded to civil servants is clarified.

The Cayman Islands Civil Service deserve to be provided with clearly defined policies detailing any limitations or restrictions on their rights to freedom of expression and the freedom to be politically informed. Consideration of the local context is essential. While it may be argued that the size of the jurisdiction is an important factor to be considered, it can also be argued that providing clear procedure and processes and promoting open, respectful communication is essential in establishing good governance no matter how large or small the populace is.

The Commission recommends that Head of the Civil Service meet with the Civil Service Association to formulate appropriate guidelines regarding involvement in political activities. Details would include specifying, for clarity, the existing limitations, i.e prohibition against running for public office, section 62(2) of the Constitution as well as defining the nature of political activities contemplated by section 5(d) of the PSML and addressing the current ambiguities. For these guidelines to have the force of law required by section 11(2) of the Constitution, they must be referred to Parliament by the Cabinet and enshrined in the PSML.

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