



CONSTITUTIONAL COMMISSION

UPDATE • 5 JULY 2021



CONSTITUTION DAY

This Update has been prepared and published in connection with Constitution Day 2021, which this year falls on 5 July 2021. The first Monday of July is designated as Constitution Day in the Cayman Islands in commemoration of the first Cayman Islands Constitution that was adopted on 4 July 1959.

Constitution Day provides an ideal opportunity to find out more about the Cayman Islands Constitution and the work of the Constitutional Commission and this Update contains a summary of some of the important work undertaken by the Constitutional Commission in the last year, together with an indication of the issues that the Constitutional Commission will be looking at in the year ahead. The Constitutional Commission is particularly keen to engage the general public in its call for the submission of local constitutional resources and hopes that early publication of this intent on Constitution Day 2021 will garner interest in the project before its full launch in January 2022. The Constitutional Commission is also interested generally in hearing about how you think it can further promote understanding and awareness of the Cayman Islands Constitution. All ideas, as well as any questions arising from this Update, can be directed to the Constitutional Commission at info@constitutionalcommission.ky.

CONSTITUTIONAL COMMISSION UPDATE

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EDUCATE

CALL FOR SUBMISSIONS

The Constitutional Commission publishes information papers and other documentation on constitutional matters in an effort to promote understanding and awareness of the Cayman Islands Constitution and its values. These resources have proved to be valuable educational tools. However, the Constitutional Commission recognises that these resources are limited and it is often difficult to locate records of important local constitutional events.

The Constitutional Commission is therefore embarking on a project to collect local constitutional records and to create a comprehensive digital repository so that they can be accessed easily. The Constitutional Commission hopes that this will not only preserve our constitutional history, but that it will also aid discovery and learning for future generations.

This project will be officially launched in January 2022. However, Constitution Day usually provides the Constitutional Commission with its best opportunity to reach out to the general public and the Constitutional Commission is therefore using this day to give early notification of this initiative. So, in the intervening period between now and the official launch, the Constitutional Commission encourages everyone to check their personal archives and records. If you have useful constitutional resources such as: photographs, letters, audio recordings, documents, newspaper and magazine clippings, personal recollections and accounts of events, we'd love to hear from you.

Contact us at: info@constitutionalcommission.ky with the subject heading "Constitutional Resource - Contact List" and we will add your information to our contact list database.



Call for Submissions

The Constitutional Commission is embarking on the creation of an online Resource Centre to facilitate a centralized location of constitutional resources to inform, engage and inspire all Caymanians and people who reside in the Cayman Islands in learning about the Cayman Islands Constitution.

What are Constitutional Resources: Photographs, letters, audio recordings, documents, newspaper and magazine clippings, personal recollections and accounts of events.

If you have any of the above items please email info@constitutionalcommission.ky with the subject heading 'Constitutional Resource - Contact List'

CAPTURING CAYMAN'S CONSTITUTIONAL JOURNEY - COLLECTING TODAY WHAT WILL BE IMPORTANT TOMORROW.

CHILDREN'S CONSTITUTIONAL COMIC BOOK

The Constitutional Commission is committed to engaging as many people as possible on the Constitution and its values and has also recently refocused efforts to inspire interest amongst the younger members of our community. The Children's Constitutional Comic Book attempts to explain the important parts of the Constitution through a colourful child friendly representation of information in basic terms, and a quiz section to ensure the vital information is being retained.

The Children's Constitutional Comic Book will be released in early 2022 and available in hard copy for all schools, and will also be turned into an e-book, accessible via the Constitutional Commission's website: www.constitutionalcommission.ky. (Below is a snapshot of the comic book content).

PART III
The Executive

THE BODY REFERRED TO AS THE **CABINET** IS RESPONSIBLE FOR THE DAY-TO-DAY RUNNING OF OUR GOVERNMENT.

OUR CABINET MEMBERS CREATE GOVERNMENT POLICIES IN AREAS INCLUDING BUT NOT LIMITED TO HEALTH, CULTURE, SPORTS, THE ENVIRONMENT AND EDUCATION. THESE AREAS, SOME OF WHICH MAY BE COMBINED, ARE KNOWN AS PORTFOLIOS. EACH PORTFOLIO IS ASSIGNED TO A DIFFERENT CABINET MEMBER BY THE GOVERNOR ON THE ADVICE OF THE PREMIER. THE CABINET MEETS REGULARLY AND, IN ADDITION TO THE MEMBERS, OTHER PERSONS MAY BE INVITED TO ATTEND IN ORDER TO ASSIST WITH THE WORK OF CABINET.

MEMBERS OF PARLIAMENT (MPs) FORMERLY MEMBERS OF THE LEGISLATIVE ASSEMBLY OR MLAs) WHO ARE NOT CABINET MEMBERS CAN ALSO ATTEND SPECIAL MEETINGS OF THE CABINET ONCE EVERY THREE MONTHS IN ORDER TO REPRESENT THEIR PARTICULAR DISTRICT AND TO MAKE REPRESENTATIONS IN CONNECTION WITH THE PLANNING AND PREPARATION OF THE BUDGET.

OUR PREMIER CAN ONLY HOLD OFFICE FOR A MAXIMUM OF EIGHT YEARS (OR TWO CONSECUTIVE FOUR-YEAR TERMS). ALTHOUGH A FORMER PREMIER WHO HAS SERVED IN THIS POSITION FOR EIGHT CONSECUTIVE YEARS CAN BECOME PREMIER AGAIN AFTER A GAP OF ONE FOUR-YEAR TERM. THE PREMIER HAS LOTS OF ADDITIONAL RESPONSIBILITIES BESIDES THE SUBJECT MATTERS THAT ARE ASSIGNED BY THE GOVERNOR. THESE ADDITIONAL RESPONSIBILITIES INCLUDE ASSISTING THE GOVERNOR DURING PUBLIC EMERGENCIES, APPOINTING PERSONS TO VARIOUS BOARDS AND COMMISSIONS AND PUBLIC OFFICES, AND ADVISING THE GOVERNOR ON DIFFERENT TOPICS DURING CABINET MEETINGS.

OUR MINISTERS ARE APPOINTED BY THE GOVERNOR WITH ADVICE FROM THE PREMIER. ONE OF THESE MINISTERS IS ALSO APPOINTED AS THE DEPUTY PREMIER. A MINISTER IS USUALLY APPOINTED FOR THE AMOUNT OF TIME THAT HE OR SHE WAS ELECTED TO PARLIAMENT. ALTHOUGH THE GOVERNOR CAN APPOINT ANOTHER MP TO CARRY OUT DUTIES IN HIS OR HER PLACE IF NECESSARY.

OUR PARLIAMENTARY SECRETARIES ARE APPOINTED BY THE GOVERNOR ON ADVICE BY THE PREMIER. A PARLIAMENTARY SECRETARY IS ELECTED BY THE PREMIER FROM AMONG THE ELECTED MP THAT SUPPORT THE GOVERNMENT TO PROVIDE ASSISTANCE TO THE MINISTER BE ELECTED.

THE ATTORNEY GENERAL AND THE DIRECTOR OF PUBLIC PROSECUTIONS ARE BOTH CHOSEN BY THE GOVERNOR ON THE ADVICE OF THE ATTORNEY GENERAL AND LEGAL SERVICES COMMISSION. THE ATTORNEY GENERAL IS THE PRINCIPAL LEGAL OFFICER WHO GIVES ADVICE TO THE CABINET AND PARLIAMENT ON LEGAL ISSUES BUT DOES NOT VOTE AT EITHER MEETING. THE DIRECTOR OF PUBLIC PROSECUTIONS IS THE PRINCIPAL LEGAL OFFICER RESPONSIBLE FOR PROSECUTING CRIMINAL OFFENCES BEFORE THE COURTS IN THE CAYMAN ISLANDS.

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POP QUIZ

PART III - THE EXECUTIVE

MULTIPLE CHOICE. THIS SECTION IS A MULTIPLE-CHOICE QUIZ WITH FOUR ANSWER CHOICES. READ EACH QUESTION AND ANSWER CHOICE CAREFULLY AND CHOOSE THE ONE BEST ANSWER.

1. What is the body that is responsible for the day-to-day running of our government?
 - a. Parliament
 - b. Civil Service
 - c. Cabinet
 - d. Caucus
2. Cabinet is made up of which group of people?
 - a. The Governor, the Premier, and the Attorney General
 - b. The Governor, the Deputy Governor, the Premier, and the Leader of the Opposition
 - c. The Governor, the Deputy Governor, and the Premier
 - d. The Premier, the Government Ministers, the Deputy Governor, and the Attorney General
3. Various Cabinet Members are assigned a portfolio by whom?
 - a. The Governor and Deputy Governor
 - b. The Governor on advice of the Premier
 - c. The Deputy Governor on advice of the Premier
 - d. The Governor on advice from the Attorney General
4. Members of Parliament (MPs) were formerly known as?
 - a. Members of the House
 - b. Members of the Country
 - c. Members of the Legislative Assembly (MLAs)
 - d. Members of Cabinet
5. MPs who are not Cabinet Members can also attend special meeting of Cabinet once every _____ to represent their particular district and in connection with budgetary planning and preparation.
 - a. Year
 - b. 6 months
 - c. 9 months
 - d. 3 months

POP QUIZ

PART III - THE EXECUTIVE (CONTINUED)

MULTIPLE CHOICE

6. What is the title of the individual that is responsible for the organisation and management of the Cabinet Office?
 - a. Parliament Secretary
 - b. Cabinet Officer
 - c. Cabinet Secretary
 - d. Cabinet Member
7. The leader of the Government is the Premier. The Premier is appointed by whom?
 - a. Her Majesty the Queen
 - b. The Governor
 - c. The Deputy Premier
 - d. The Leader of the Opposition
8. Which group of individuals provides approval on the Premier?
 - a. The majority of the official Opposition
 - b. The majority of the MPs of the largest elected party
 - c. The majority of the Members of Parliament
 - d. The majority of Cabinet
9. The Premier can only hold office for how many years?
 - a. A maximum of 8 years
 - b. A maximum of 4 years
 - c. Two consecutive four-year terms
 - d. ALC
10. What are the Premier's responsibilities?
 - a. Overseeing subject matters assigned by the Governor and advising the Governor on different topics during Cabinet meetings
 - b. Appointing persons to various Boards and Commissions and public offices
 - c. Assisting the Governor during public emergencies
 - d. All of the above
11. Our Ministers are appointed by _____ upon advice from the _____.
 - a. The Governor, the Deputy Governor
 - b. The Premier, the Governor
 - c. The Governor, the Premier
 - d. The Governor, the Attorney General

POP QUIZ

PART III - THE EXECUTIVE (CONTINUED)

MULTIPLE CHOICE

12. One of the Ministers is appointed to which senior position?
 - a. The Deputy Governor
 - b. The Deputy Premier
 - c. The Premier
 - d. The Governor
13. Which advisory group/Board or Commission advises the Governor on the appointment of the Attorney General and the Director of Public Prosecutions?
 - a. The Cayman Islands Law Society
 - b. Cayman Islands Legal Practitioners Association
 - c. The Judicial and Legal Services Commission
 - d. Commission For Standards in Public Life
14. What is the title of the principal legal officer who gives advice to the Cabinet and Parliament on legal issues?
 - a. The Chief Justice
 - b. The Attorney General
 - c. The Director of Public Prosecutions
 - d. The Cabinet Secretary
15. What is the title of the principal legal officer responsible for prosecuting criminal offences before the courts in the Cayman Islands?
 - a. The Principal of the Court of Appeal
 - b. The Chief Justice
 - c. The Director of Public Prosecutions
 - d. The Attorney General
16. Our Parliamentary Secretaries are appointed by the Governor on advice by the Premier. A Parliamentary Secretary is selected from among the elected members of Parliament to provide assistance to which individuals?
 - a. The Ministers
 - b. The Premier
 - c. The Governor
 - d. The Speaker of Parliament

OUR CONSTITUTIONAL HISTORY TIMELINE

For those with an interest in our constitutional history, the Constitutional Commission has updated its historical timeline of the development of the Cayman Islands Constitution to account for recent further constitutional reforms. At the same time, the Constitutional Commission has also transformed this document into an interactive, user-friendly on-line resource, which can be accessed at <http://www.constitutionalcommission.ky/constitutional-history>

Constitutional Modernisation (continued)

Efforts to modernise the Cayman Islands Constitution were rejuvenated with the establishment of a Constitutional Review Secretariat in March 2007. These efforts, which once again involved extensive public consultation, gave rise to a new draft constitution, which contained some significant modernisation and a Bill of Rights, Freedoms and Responsibilities. While the Bill of Rights, Freedoms and Responsibilities did not go as far as some had hoped, it met the benchmark that the United Kingdom had set and exceeded this in respect of the rights of children, environmental rights, the right to lawful administrative action, and enhanced rights to education. This compromise was ultimately agreed by the United Kingdom in constitutional talks in London in February 2009 and approved by the people of the Cayman Islands in a referendum on 20 May 2009.

The 2009 Constitution

The 2009 Constitution came into effect on 6 November 2009 and consists of nine parts and 125 sections. A comprehensive educational guide has been published by the Constitutional Commission and should be consulted for a full review of the contents of the 2009 Constitution. In summary for present purposes, the 2009 Constitution enshrined human rights in the constitution, established various institutions to support good governance, including a Constitutional Commission and a Human Rights Commission, established greater local autonomy in government, including the allocation of the finance portfolio to an elected Minister, placed limits on public debt, sought to curtail some of the Governor's executive powers, put in place a local Deputy Governor, provided locally elected governments with a role in external affairs, and also provided for local participation in internal security via the establishment of a National Security Council.

These are all significant advances. However, the 2009 constitutional arrangements nevertheless fell short of full internal self-government, a step that the United Kingdom appeared reluctant to consider without some commitment on the part of an Overseas Territory to proceed to independence. For the time being at least, this seemed to be the extent of the modernisation process without a fundamental change in the relationship between the United Kingdom and the Cayman Islands. This is not to say that there were not issues that needed refining, to which end there has been on-going debate concerning, amongst other matters, the implementation of Advisory District Councils as envisaged in the Constitution, the enactment and implementation of legislation to properly give effect to the work of the Commission for Standards in Public Life, which is also contained in the Constitution, the operation of the National Security Council and the effective local participation therein, and the functional practicalities of a Cabinet in which the elected Ministers and the Premier have an enhanced role and where the Governor still attends and presides but is not formally a member.

Other significant constitutional events post-2009 include the ratification of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) in March 2016(9) and, most notably, a 2016 constitutional amendment, which modified the administration of the judiciary by extending the tenure of Grand Court Judges from age 65 to age 70 and revising the arrangements for discipline of the judiciary.

Further Constitutional Reform

The enactment of the Sanctions and Anti-Money Laundering Act 2018 by the United Kingdom Parliament and local concerns that the provisions therein relating to the manner in which public registers of beneficial ownership information were to be

Further Constitutional Reform (continued)

established in United Kingdom Overseas Territories (such as the Cayman Islands) did not accord with the level of autonomy that had been assigned to the Cayman Islands under the 2009 Constitution have resulted in recent proposals for further constitutional reform, particularly regarding clarification of the constitutional relationship between the Cayman Islands and the United Kingdom.

The Hon. Premier and the then Leader of the Opposition, the Hon. D. Ezzard Miller, initially advanced six potential revisions involving:

1. The powers reserved to Her Majesty under section 125 of the Constitution;
2. The extent of the United Kingdom's power over 'international affairs';
3. The extent of the power of internal self-government in the Cayman Islands;
4. The power of disallowance;
5. The power of Cabinet in relation to, for example, the National Security Council; and
6. The route to the Cayman Islands achieving 'Associated Status'.

These proposals were conveyed to the Constitutional Commission, along with a request for advice as to any other areas of the Constitution that would also benefit from concurrent amendment. At the same time, the Constitutional Commission was contacted by the then Governor of the Cayman Islands, His Excellency, Mr. Anwar Choudhury, for comments on the six potential revisions proposed and, where possible, for examples of these potential revisions in operation.

In response to these requests, the Constitutional Commission produced its 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, dated 27 June 2018, which largely endorsed the revisions that were proposed.

Welcoming clarification of the uncertainty surrounding some provisions in the 2009 Constitution for increased local autonomy and local involvement in the Governor's special responsibilities of defence, external affairs and internal security, the Constitutional Commission supported the proposed revisions to the Constitution in respect of (i) reserve powers and disallowance, and (ii) internal and external affairs. As regards to associated status and the right to self-determination, the Constitutional Commission provided guidance on how this right may be realised and, while acknowledging that what was being proposed were merely 'discussions' as to the 'route' to 'Associated Status', the Constitutional Commission also noted that 'any substantive proposal to actually move in this direction would involve a fundamental change in the constitutional arrangements of the Cayman Islands and would, necessarily, require more consideration and consultation'.

In reply to the specific request from the Hon. Premier and Hon. Leader of the Opposition for other potential areas for reform, the Constitutional Commission again limited its recommendations to matters where the 2009 constitutional arrangements had given rise to confusion and uncertainties and would accordingly benefit from clarification and greater precision. The other potential areas for reform identified by the Constitutional Commission were:

1. The appointment and role of councillors;
2. The appointment of the Premier;
3. The qualifications for electors;
4. The disqualification of electors;
5. The qualification and disqualification for elected membership of the Legislative Assembly; and
6. The process by which the Cayman Islands Constitution may be altered in the future.

The Constitutional Commission did not therefore undertake a total review of the Constitution for the purposes of the Report. In the cover letter that accompanied its

Further Constitutional Reform (continued)

June 2018 Report, the Constitutional Commission concluded by reaffirming its offer to provide further assistance should any additional input required. Following the submission and publication of its Report, however, the Constitutional Commission was not engaged in the constitutional talks that took place at the United Kingdom's Foreign and Commonwealth Office ('FCO') in London in December 2018, nor was it a party to the discussions between the Governments of the Cayman Islands and the United Kingdom, which it is understood then took place in the course of 2019, all of which culminated in a draft Order in Council ('the Draft Order'), which was annexed to a letter sent from Lord Ahmad of Wimbledon, the then Minister of State for the Commonwealth and the UK in the FCO, to the Premier of the Cayman Islands, the Hon. Alden McLaughlin, on 10 November 2019.

The Hon. Premier and the Hon. Leader of the Opposition jointly responded to Lord Ahmad's letter on 20 November to confirm that a consensus had been reached by members of the Legislative Assembly on a package of reforms presented in the Draft Order, subject to delaying provisions relating to an additional Minister taking effect after the next general election. Subsequently, the Draft Order was approved (with the aforementioned qualification) by unanimous resolution of the Cayman Islands Legislative Assembly on 6 December 2019, following which the Draft Order also received public expressions of support from the Cayman Islands Chamber of Commerce, Cayman Finance and the Cayman Ministers' Association. In summary, the Draft Order contains the following provisions and amendments to the 2009 Constitution:

1. changing the name of the Legislative Assembly to Parliament;
2. abolishing the power of disallowance and introducing some pre-legislative controls;
3. replacing the Governor's reserved legislative power with a right for the Governor to address the Cayman Parliament in defined circumstances;
4. clarifying Cabinet's autonomy regarding domestic affairs;
5. changing the circumstances in which the Governor must consult the Cabinet;
6. providing for Parliamentary Secretaries;
7. providing for a Police Service Commission; and
8. providing an obligation for the UK Secretary of State to notify the Premier of proposed Acts of the UK Parliament that would extend directly to Cayman or Order in Council extending any provisions of an Act of the UK Parliament to Cayman.

In a letter to His Excellency the Governor, the Hon. Premier and the Hon. Leader of the Opposition on 17 February 2020, the Constitutional Commission presented an explanatory note in which the Constitutional Commission provided its support for the Draft Order, along with a commentary on the reform process. The Constitutional Commission's explanatory note is available in full on the Constitutional Commission's website.



Photo: Cayman Islands Government Ministerial Service

The Cayman Islands Constitution (Amendment) Order 2020, was approved on 11th November 2020 and came into effect on 3rd December, 2020. The Order makes several amendments to the Constitution of the Cayman Islands. Most notable amendments include the name change of the Legislative Assembly to the Parliament; abolishment of the power of disallowance and introduction of some pre-legislative controls; more defined autonomy of the Cayman Islands Cabinet with respect to domestic affairs; the provisions for Parliamentary Secretaries and a Police Service Commission and an obligation for the Secretary of State to notify the Premier of proposed Acts of the United Kingdom Parliament that directly extend to the Cayman Islands.

OUR CONSTITUTIONAL HISTORY DIGITAL TIMELINE



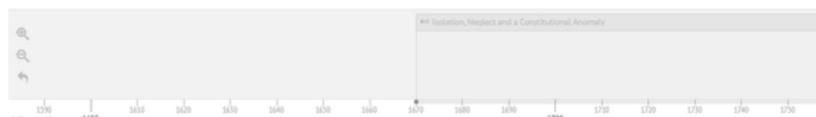
THE CAYMAN ISLANDS: OUR CONSTITUTIONAL HISTORY TIMELINE

Cayman's journey to constitutional democracy.

Cayman's Constitutional Journey

Commissioner Secretariat

PH: Sebastian, Nectess and a Computational Anomaly



INFORM

EXPLANATORY NOTES

In an effort to inform the general public on matters of constitutional importance, the Constitutional Commission publishes Explanatory Notes from time to time. These Explanatory Notes are published, for example, when there are significant constitutional issues left unaddressed; where there is an opportunity to use current events as a basis for illustrating the operation of the Constitution; and where a need arises for some explanation as to what the Constitution provide.

OUTSTANDING MATTERS ARISING FROM THE 2020 AMENDMENT TO THE CAYMAN ISLANDS CONSTITUTION

Following the 2020 amendment to the Cayman Islands Constitution, a number of questions remain unanswered. Foremost amongst these from the Constitutional Commission's perspective are: what happened to the proposals for amendment that the Constitutional Commission was invited to tender http://www.constitutionalcommission.ky/upimages/publicationdoc/ConstitutionalCommissionsResponsesToRequestsForCommentsOnPotentialRevisionstotheCaymanIslandsConstitution2009_270618_1543527160_1543527201.pdf; and, more fundamentally, what actually transpired in the constitutional negotiations that took place between the Cayman Islands delegation and the United Kingdom Government? The Constitutional Commission has been pressing for the release of the records of these talks, along with all related correspondence, so that there is a full record of the process and events that eventually gave rise to the Cayman Islands Constitution (Amendment) Order 2020.

On 14 May 2021, the Constitutional Commission wrote to His Excellency, the Governor, together with the new Hon. Premier and Hon. Leader of the Opposition, to introduce the work of the Constitutional Commission. At this time, the Constitutional Commission also took the opportunity to once

more request all records relating to the recent amendment of the Constitution. In accordance with the Constitutional Commission's commitment to openness, this correspondence can be viewed at: http://www.constitutionalcommission.ky/upimages/publicationdoc/LettertoGovernor,PremierandLeaderofOpposition_140521_1623093995_1623093995.pdf; and, similarly, the Constitutional Commission will publish all responses as and when any are received.

In the wake of the 2020 amendment to the Constitution, there are two main queries that have subsequently been raised with the Constitutional Commission by the general public. The first of these relates to the process by which the Constitution can be amended and the second to the retention of the Governor's powers to enact legislation in section 81 in the Constitution. The Constitutional Commission is pleased to offer the following points of clarification on these important issues.

Amending the Cayman Islands Constitution

- The Constitution itself does not contain any provisions pertaining to the amendment of the Constitution.

- During the Constitutional Modernisation process that led to the new Constitution in 2009, the Cayman Islands Government proposed that: "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."
- The United Kingdom Government response to this proposal is contained in a Letter of Entrustment to the 2009 Constitution, which can be accessed at: http://www.constitutionalcommission.ky/updates/publicationdoc/FutureAmendmentsToTheConstitution_1509220779_1509220779.pdf, and which states: "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 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."
- Several important points can be derived from the Letter of Entrustment: (i) there is no legal requirement that amendments to the Constitution are subject to referendum; (ii) the United Kingdom Government gave its political approval to the idea that future amendments to the Cayman Islands Constitution, which are considered "substantial" should be supported by the people through a referendum, albeit that the United Kingdom Government reserved its final position; and (iii) amendments declared "minor" or "uncontroversial" by the Premier and the Leader of the Opposition may evidently proceed without a referendum.
- The 2009 Constitution was first amended in 2016 with the Cayman Islands Constitution (Amendment) Order 2016, which contained various amendments relating to the Judiciary, and which, in the absence of any public debate, were apparently declared to be "minor" or "uncontroversial" by the then Premier and the Leader of the Opposition.
- This 2016 Order amended the Constitution Order in the following ways: (i) the tenure of judges of the Grand Court was extended from the age of 65 to 70; (ii) the Governor's power to exercise disciplinary control over the Chief Justice and the President of the Court of Appeal was removed; and (iii) the power to exercise disciplinary control over judges of the Grand Court and magistrates and judges of the Court of Appeal is transferred to the Chief Justice and the President of the Court of Appeal respectively.
- The Constitutional Commission was not consulted on the 2016 amendment, but following its enactment the Constitutional Commission wrote to Her Excellency the Governor to seek advice as to whether the Constitutional Commission could be expected to be consulted when the Constitution is to be amended. The Constitutional Commission did not receive any clarification on this point.
- The Constitutional Commission was however consulted by the then Premier and Leader of the Opposition on the proposals that resulted in the 2020 amendment and, as noted above, the Constitutional Commission was also

invited to submit its own proposals.

- One of the six proposals that the Constitutional Commission advanced for consideration in response to this invitation was: "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."
- This proposal was not addressed in the Cayman Islands Constitution (Amendment) Order 2020 and is one of the reasons why the Constitutional Commission is keen to understand what happened to its proposals and what transpired in the course of the constitutional negotiations.
- The process by which the 2020 amendment was advanced following the negotiations saw a draft Order in Council sent to the Government of the Cayman Islands, which contained the amendments agreed in principle by the United Kingdom Government. This draft Order did not contain some matters that were initially said to be under consideration; but did contain some other matters that were not part of the prior consultation with the Constitutional Commission. In addition, only one of the six recommendations proposed by the Constitutional Commission found its way into this draft Order.
- The Constitutional Commission was invited to offer its support to the Draft Order, which it did in a detailed Explanatory Note http://www.constitutionalcommission.ky/upimages/publicationdoc/ConstitutionalCommissionCoverLetterExplanatoryNotetoCIG_170220_1582828896_1582828903.pdf, dated 17 February 2020. In so doing, the Constitutional Commission concluded by reiterating its position that the process by

which the Constitution is amenable to amendment would benefit from clarification, in the following terms:

"The difficulty, however, is that it is not always clear what is minor and/or uncontroversial ... While the Constitutional Commission accepts that a referendum may not be practicable for every amendment to the Cayman Islands Constitution, the Constitutional Commission recommends that further consideration is now given as to how future amendments are processed to ensure that there is at least a meaningful public consultation."

Section 81 of the Cayman Islands Constitution

- Section 81 of the Constitution contains a reserve power for the Governor to legislate for the Cayman Islands, with the prior approval of the Secretary of State in the United Kingdom.
- Legislation is usually enacted by the elected Cayman Islands Parliament and, given that this reserve power runs counter to democratic principles, it is only very rarely used in extreme circumstances.
- The reserve power in section 81 was slated to be removed from the Constitution and this position was reflected in the draft Order when it was first presented to the Government of the Cayman Islands.
- In the interim, the Cayman Islands Parliament failed to pass the Domestic Partnership Bill 2020 and the reserve power in section 81 was utilised to enact the Civil Partnership Act, along with 11 other consequential pieces of legislation, in order to provide a functional equivalent to marriage for same-sex couples in accordance with the Court of Appeal's

direction. For further detail, see the Constitutional Commission's Explanation of the Constitutional Issues Arising from the Day and Bodden Bush Litigation http://www.constitutionalcommission.ky/updates/publicationdoc/AnExplanationoftheConstitutionalIssuesArisingfromtheDayandBoddenBushLitigation_FINAL_1623105592_1623105603.pdf.

- As a result of the Governor having to fall back on using section 81, the United Kingdom Government determined that it was not appropriate to remove this provision from the Cayman Islands Constitution at this time and the draft Order was revised accordingly.
- The circumstances in which the reserve power in section 81 was used to enact the Civil Partnership Act were exceptional and are not likely to arise regularly or indeed often if at all. Even if section 81 had been

removed from the Constitution, the United Kingdom Government in any event still retains the power to legislate for the Cayman Islands by way of Order in Council (the very process by which the Cayman Islands Constitution is enacted).

- Notwithstanding, that section 81 has been retained the Cayman Islands Constitution (Amendment) Order 2020 has secured important advances for the Cayman Islands in its relationship with the United Kingdom. On related legislative powers, for example, the new section 126 of the Constitution makes it mandatory for the United Kingdom to consult with the Premier on any legislation or Orders in Council that may directly affect the Cayman Islands, thereby providing Cabinet with an important opportunity to signify its view on the matter and, potentially, for there to be broader consultation around the issues.

CONSTITUTIONAL ISSUES ARISING FROM THE DAY AND BODDEN BUSH LITIGATION

Introduction

In April 2018 the Cayman Islands General Registry rejected the marriage application of two women: Chantelle Day, a Caymanian ("the First Petitioner"); and her British partner, Vicki Bodden Bush ("the Second Petitioner") (together "the Petitioners").

As a result the Petitioners were unable to marry in the Cayman Islands. At this time there was also no provision for civil unions in the Cayman Islands and so the Petitioners had no functional equivalent to marriage available to them. In addition to being unable to marry or to enter into a civil union in the Cayman Islands this situation gave rise to a number of

associated challenges for the Petitioners, including: the immigration status of the Second Petitioner and her ability to work in the Cayman Islands; and the rights of the Petitioners to found a family together with their adopted child.

In the premises the Petitioners felt that they had no option but to challenge the decision in the Courts. This then set in train a legal process that has progressed from the Grand Court through the Court of Appeal and ultimately to the final court of appeal for the Cayman Islands, the Judicial Committee of the Privy Council ("the Privy Council") in London, England. This litigation therefore provides an excellent illustration of the operation of the judicial arm of government as established in

the Cayman Islands Constitution ("the Constitution").

In the course of this litigation the matter has also required legislative input and, consequently, it serves as a case study of how the judicial and legislative arms of government interact under the Constitution and of the different sources of legislation that are facilitated by the Constitution.

Much has already been written specifically on the topic of same-sex marriage and civil unions and, no doubt, there will be further analysis of these matters in the wake of the final decision handed down by the Privy Council. This informational note, however, is not intended to be a commentary on the merits of the various decisions handed down by the different Courts. Rather, the objectives here are to use the issues arising from the Day and Bodden Bush litigation to highlight various aspects of the Constitution and, in so doing, to assist the general public in understanding the constitutional context in which these complex issues have been considered.

Concluding Remarks

Notwithstanding that the final judgement from the Privy Council is still pending, the Day and Bodden Bush litigation has already given rise to a number of important constitutional issues of note, including:

- The function of appellate courts and their role in analysing important constitutional issues in cases that come before them;
- The interplay between the judicial and legislative branches of government, particularly in connection with the protection and enforcement of fundamental human rights, and especially where persons in a minority group are seeking to rely upon these rights in the Constitution; and
- The use of the Governor's reserve legislative powers, which, following the enactment of the Civil Partnership Act, were not removed from the Constitution as had previously been proposed.

[Click here for the complete Explanation.](#)

ADVISE

At times the Constitutional Commission will also offer constructive advice alongside its explanatory informational notes. When the Constitutional Commission was called upon to provide some explanation as to the constitutional processes to be applied following the recent General Election, the Constitutional Commission addressed this need, but also took the opportunity to identify a series of matters for future consideration and advice.

EXPLANATORY NOTES ON THE APPOINTMENT OF THE PREMIER AND OTHER MINISTERS AND THE ELECTION OF THE SPEAKER OF PARLIAMENT FOLLOWING A GENERAL ELECTION

Introduction

Following the recent General Election in the Cayman Islands, the Constitutional Commission has received several enquiries regarding the subsequent process by which the Premier and other Ministers are appointed and the Speaker of the Parliament is elected. In response and in fulfilment of the designated function in section 118(3)(c) of the Constitution, to promote understanding and awareness of the Constitution and its values, the Constitutional Commission has prepared the following explanatory notes:

Appointment of the Premier and other Ministers

The process by which the Premier and other Ministers are appointed is established in section 49 of the Constitution. This process begins with the appointment of the Premier, who is appointed by the Governor.

Aside from the limitation in section 49(4) of the Constitution, which prevents the Governor from appointing "as Premier a person who has held office as Premier during two consecutive parliamentary terms unless at least one parliamentary term has expired since he or she last held that office", the principal directions in the Constitution are contained in section 49(2) and (3).

Section 49(2) of the Constitution addresses the situation where a political party gains a majority of the seats of elected members of the Parliament, in which case the Governor

shall appoint as Premier the elected member of the Parliament recommended by a majority of the elected members who are members of that party. This provision is relatively straightforward where a party is clearly successful at a General Election and where a majority of the elected members are members of that party. However, this is by no means always the case and, in the absence of such an outcome, it will be necessary to seek guidance from elsewhere in the Constitution.

Section 49(3) of the Constitution directs that: "If no political party gains such a majority or if no recommendation is made under subsection (2), the Speaker shall cause a ballot to be held among the elected members of Parliament to determine which elected member commands the support of the majority of such members, and shall record the vote of each member voting; and, where such a ballot is held, the Governor shall appoint as Premier the elected member who obtains a majority of the votes of the elected members." Therefore, in the event that no political party gains a majority in accordance with section 49(2) of the Constitution, the Governor is unable to appoint the Premier until the elected Members of Parliament have voted so as to determine which elected member can command the support of the majority of such members.

In summary, unless there is a clear victory by one party, the process remains in the hands of the politicians; and, in due course, following a vote in Parliament, the Governor will then act in accordance with the outcome of that vote

and appoint the Premier accordingly. To do otherwise and, in the event that no political party gains a majority, to empower the Governor to simply appoint as Premier the Member of Parliament who has the support of a majority of the elected members, as some correspondents have suggested, risks drawing the Governor into the political process and raises questions as to how such a position is demonstrated with certainty. In the premises, the vote in Parliament should provide a definitive outcome without compromising the Governor.

Once appointed, the Premier will advise the Governor on the appointment of the other Ministers and, in line with section 49(6) of the Constitution, the appointments of the Premier and the other Ministers shall be made by the Governor by instrument under the public seal.

Election of the Speaker of the Parliament

The election of the Speaker and the Deputy Speaker of the Parliament is governed by section 65 of the Constitution, which provides:

(1) At the first sitting of Parliament after a general election, and as soon as practicable after a vacancy occurs in the relevant office otherwise than on a dissolution of the Parliament, the elected members of the Parliament shall by a majority vote elect—

(a) a Speaker from among the elected members of Parliament, or persons who are qualified to be elected as members of Parliament, other than Ministers; and

(b) a Deputy Speaker from among the elected members of Parliament other than Ministers;

and the election of the Speaker and the Deputy Speaker shall take precedence over

any other business of the Parliament.

The election of the Speaker and Deputy Speaker are therefore the first orders of business for the new Parliament and, on this basis, would take precedence over the vote anticipated in section 49(3) of the Constitution regarding the appointment of the Premier. It is worth noting in the context of this explanatory note that this could have some impact on the question of whether the Speaker is to be a Member of Parliament or not, particularly where an election outcome is tight. Where there are a relatively small number of elected members in Parliament, the position of each individual member is more likely to have a significant impact on the composition of any majority; and, in these circumstances, it may be that an elected Member of Parliament could be perceived as being more valuable as a voter in the appointment of the Premier and the premise by which the government is then established, rather than being elected as the Speaker. As a result, the question of whether or not the Speaker is a Member of Parliament could become a factor in any post-election political negotiations regarding the appointment of the Premier and the formation of the government.

As to the process by which the Speaker and Deputy Speaker are to be elected, the Constitution is silent as to who should preside over these elections and also on what could occur in the event that there is no majority in favour of a particular appointment.

Future Considerations

The objective of this explanatory note has been to identify and explain the relevant constitutional provisions as they stand. Although the Constitutional Commission has provided some limited commentary, the Constitutional Commission has limited its observations regarding alternative propositions while the current process plays out.

In due course, at a more appropriate time, the Constitutional Commission intends to revisit some of the points previously noted by the Constitutional Commission regarding the appointment of the Premier and the election of the Speaker; including:

(a) the definition of “gain” in section 49(2) of the Constitution ([see table detailing suggested sections of the 2009 Constitution for review, 14 October 2014 \(“the Constitutional Commission’s 2014 Review”\)](#));

(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 ([see 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, 27 June 2018 \(“the Constitutional Commission’s 2018 Responses”\)](#)); and

(c) the interplay between the election of the Speaker and the formation of the government (see also the Constitutional Commission’s 2014 Review and the Constitutional Commission’s 2018 Responses).

At this time the Constitutional Commission also intends to review other matters that

have arisen following the recent General Election, including:

(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; and

(i) any other relevant matters that may arise in the interim.

Click [here](#) for the Explanatory Note.

CONSTITUTIONAL QUESTIONS

If members of the general public have any questions arising from the contents of this Update and the educational commentary provided, please send these to info@constitutionalcommission.ky and the Constitutional Commission will seek to respond with a consolidated collection of questions and answers, which will be published on its website at www.constitutionalcommission.ky.