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17 February 2020

Dear Sirs,

Re: Constitutional Commission – Explanatory Note on the Proposed Amendments to the Cayman Islands Constitution Contained in the Draft Order in Council

As you are aware, the Constitutional Commission (“the Commission”) has been asked to review and comment on the proposed amendments to the Cayman Islands Constitution, which have been agreed in principle by the United Kingdom Government and which are contained in the Draft Order in Council (“the Draft Order”) annexed to a letter sent from Lord Ahmed of Wimbledon, the Minister of State in the Foreign and Commonwealth Office, to the Hon. Premier of the Cayman Islands on 10 November 2019. Following the recent appointment of new members to the Commission, the Commission has now had an opportunity to consider the Draft Order and is pleased to confirm that

it recommends proceeding with the package of amendments that have been negotiated and presented in the Draft Order.

In order to fully explain the Commission's perspective on the Draft Order and to assist the general public in understanding this important development and the underlying process, the Commission has prepared the enclosed Explanatory Note. In addition to addressing the content of the Draft Order and explaining how this represents a move towards greater local autonomy; a move that the Commission considers to be in the best interests of the Cayman Islands; the Explanatory Note also references: (i) matters that were initially said to be under consideration but which do not feature in the Draft Order; (ii) matters that do feature in the Draft Order but which the Commission was not previously consulted on; and (iii) matters that the Commission had raised when consulted but which are not contained in the Draft Order.

While these references do not disturb the Commission's support for the contents of the Draft Order, they do underscore the Commission's recommendation in the Explanatory Note that the full record of the constitutional talks held in London in December 2018 and all relevant correspondence between the Governments of the Cayman Islands and the United Kingdom that gave rise to the final Draft Order should be published and accessible.

The Commission also takes this opportunity to:

1. Highlight that there remain a number of areas where legislation required to fully implement provisions in the 2009 Cayman Islands Constitution has not been brought into effect and to recommend that action be taken to provide and bring into effect all necessary implementing legislation on an urgent basis;
2. Reiterate that there are other areas of the Cayman Islands Constitution that would benefit from clarification and greater precision; and
3. Emphasise, specifically, that further consideration is now given as to how future amendments are processed to ensure that there is at least a meaningful public consultation on such amendments.

The Commission trusts that the enclosed Explanatory Note is both constructive and informative and the Commission looks forward to assisting with its recommendations and indeed any other constitutional considerations.

Yours sincerely,



Vaughan Carter
Chairman, Constitutional Commission

Attach.

Constitutional Commission
Explanatory Note on the Proposed Amendments to the Cayman Islands
Constitution Contained in the Draft Order in Council

Background

Following a process of negotiation between representatives from the Cayman Islands and the United Kingdom's Foreign and Commonwealth Office ("FCO"), a number of proposed amendments to the Cayman Islands Constitution were agreed in principle by the United Kingdom Government. These proposed amendments are contained in a draft Order in Council ("the Draft Order"), which was annexed to a letter sent from Lord Ahmed of Wimbledon, the Minister of State for the Commonwealth and the UN in the FCO, to the Premier of the Cayman Islands, the Hon. Alden McLaughlin, on 10 November 2019.

The package of reforms reflected in the Draft Order represents the conclusion of a process that was prompted by 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 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 constitutional arrangements contained in Schedule 2 to the Cayman Islands Constitutional Order 2009 ("the Cayman Islands Constitution"). Amid apprehensions of constitutional overreach on the part of the United Kingdom, it was proposed that the Cayman Islands Constitution be amended to better clarify the relationship between the Cayman Islands and the United Kingdom.

Both 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".¹

These proposals were conveyed to the Constitutional Commission, along with a request for advice as to any other areas of the Cayman Islands Constitution that would also benefit from concurrent amendment. At the same time, the Constitutional Commission was also 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 a Report entitled: *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. The Constitutional Commission's full Report is available at: www.constitutionalcommission.ky; and readers of this subsequent Explanatory Note are encouraged to consult the previous Report for background and a fuller explanation as to the issues under consideration. In summary, however, the Constitutional Commission noted that: the revisions to the Cayman Islands Constitution in 2009 provided for greater local autonomy, along with some new local involvement in the Governor's special responsibilities of defence, external

¹ The Constitutional Commission has previously noted the following in connection with Associated Status and the Right to Self-Determination: "In the extensive debates that paved the way for the 2009 Constitution, during which the continuing partnership between the United Kingdom and the Cayman Islands was re-shaped, there were many references to the right to self-determination. This right entitles all peoples to "freely determine their political status and freely pursue their economic, social and cultural development" and is fittingly enshrined in the preamble to the Bill of Rights, Freedoms and Responsibilities in Part I of the [Cayman Islands] Constitution. As a matter of international law and in the context of decolonization, the right to self-determination has historically been interpreted to provide for three options. These are: (a) independence; (b) integration; and (c) free association. In more recent times, a fourth option has emerged, whereby decolonization can also be achieved through the emergence into any other political status freely determined by a people."

affairs and internal security; and, to the extent that there was some uncertainty surrounding what had been intended or how these arrangements should work in practice, clarification was welcome by way of amendment to the Cayman Islands Constitution.

On this basis, the Constitutional Commission supported the revisions to the Cayman Islands Constitution that had been proposed in respect of: (i) reserve powers and disallowance; and (ii) internal and external affairs. As regards 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 limited its recommendations to matters where the 2009 constitutional arrangements have given rise to confusion and uncertainties and would accordingly benefit from clarification and greater precision. To this end, the Constitutional Commission recommended consideration of:

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.²

The Constitutional Commission did not therefore undertake a total review of the Cayman Islands Constitution for the purposes of the Report. For a fuller analysis of the Cayman Islands Constitution and potential areas for reform, persons interested may wish to access the table previously produced by the Constitutional Commission and sent to the then Governor of the Cayman Islands, Her Excellency, Ms. Helen Kilpatrick (copied to the then Hon. Premier and Hon. Leader of the Opposition and the Joint Team Leader of the Overseas Territory Directorate of the FCO) on 14 October 2014, which detailed suggested sections of the 2009 Constitution for review and which is also available, together with associated correspondence, on the Constitutional Commission's website.

In the cover letter that accompanied its June 2018 Report, the Constitutional Commission concluded by reaffirming its offer to provide further assistance should any additional input be required. Following the submission and publication of its Report, however, the Constitutional Commission has not been involved in the ensuing constitutional negotiations that have culminated with the Draft Order. By way of clarification therefore, the Constitutional Commission was not engaged in the constitutional talks that took place at the 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.

It is also relevant to note that the Constitutional Commission was not quorate after the terms of two members of the three-member Commission lapsed on 31 March 2019 and on 14 June 2019. In the absence of new appointees, the Constitutional Commission was not therefore in a position to comment on the proposed amendments that had been agreed in principle when the Draft Order was first disseminated. In accordance with section 118(2) of the Cayman Islands Constitution,

² Further reference to these suggestions in the context of what has been included in the Draft Order can be found in the Additional Comments below.

new members were appointed to the Constitutional Commission “by the Governor, acting after consultation with the Premier and the Leader of the Opposition” on 1 January 2020; and the first order of business for the newly reconstituted Constitutional Commission was to prepare these comments on the Draft Order.

The Draft Order

The preceding background is pertinent in understanding that the Draft Order is a final package of proposed amendments to the Cayman Islands Constitution that has been agreed in principle and, with the process of arriving at this agreement having been completed, the next step is for the Cayman Islands to: (i) determine whether it is in agreement with the Draft Order; and (ii) demonstrate to the satisfaction of the FCO that there is sufficient support for the Draft Order so that it may be enacted.

By letter dated 20 November 2019 addressed to the FCO, the Hon. Premier and the current Leader of the Opposition, the Hon. Arden McLean, confirmed that members of the Legislative Assembly were in agreement with the Draft Order, “subject only to the coming into effect of the provisions in section five relating to the additional Minister being deferred until the start of the next term, that is until after the next general elections”. Subsequently, the Draft Order was approved (with the qualification previously noted) by unanimous resolution of the Cayman Islands Legislative Assembly on 6 December 2019, following which the Draft Order has also received public expressions of support from the Cayman Islands Chamber of Commerce, Cayman Finance and the Cayman Ministers’ Association.

It is in this context that the Constitutional Commission is also now called upon to comment on the Draft Order. As to the discrete question of the final Draft Order and whether this finds favour, the Constitutional Commission is pleased to confirm that it would also recommend proceeding with the agreed package of amendments to the Cayman Islands Constitution contained therein. Speaking generally, the package of amendments contained in the Draft Order represents a move towards greater local autonomy, which the Constitutional Commission considers to be in the best interests

of the Cayman Islands. In this regard, it is worth recalling that this is the very same objective that necessitated and underscored the broader and long-overdue constitutional resettlement encompassed in the 2009 constitutional arrangements, which were approved by way 63% of the voters who voted in a referendum held alongside general elections on 20 May 2009. If, as appears to be the case, some of these arrangements require clarification and if, as has proved to be the case, there is scope for taking some additional steps in this direction, then it is difficult to see any fundamental objection to this course of action.

Insofar as the one qualification advanced by the Hon. Premier and Hon. Leader of the Opposition in their letter of 20 November 2019 is concerned, the Constitutional Commission sees no reason to depart from the position approved unanimously by the Legislative Assembly. In so doing, the Constitutional Commission reiterates its understanding that there is no scope to renegotiate the agreed package at this time and notes that this one qualification did not involve any revision of the substantive provisions contained in the Draft Order.

Additional Comments

While not germane to the question of support for the Draft Order, as this task required consideration of the Draft Order taken as a whole, the Constitutional Commission does nevertheless feel that it is appropriate and useful, given its mandate is to “promote understanding and awareness” of the Cayman Islands Constitution, to provide the following additional comments on the content of the Draft Order:

1. The Draft Order itself provides for an Explanatory Note (albeit that this is not part of the Draft Order), which neatly summarises the proposed amendments to the Cayman Islands Constitution. For ease of reference, the Explanatory Note in the Draft Order is restated herein in full:

“This Order makes several amendments to the Constitution of the Cayman Islands. In particular, it changes the name of the Legislative Assembly to the

Parliament, it abolishes the power of disallowance and introduces some pre-legislative controls, it replaces the Governor's reserved legislative power with a right for the Governor to address the Parliament of the Cayman Islands in defined circumstances, and it makes clearer that the Cayman Islands Cabinet has autonomous capacity with respect to domestic affairs. It also changes the circumstances in which the Governor must consult with the Cabinet, and provides for Parliamentary Secretaries and a Police Service Commission. It provides an obligation for the Secretary of State to notify the Premier of proposed Acts of the United Kingdom Parliament that would extend directly to the Cayman Islands or Orders in Council extending any provisions of an Act of the United Kingdom Parliament to the Cayman Islands."

2. The Government of the Cayman Islands has also produced a concise and instructive document entitled Constitutional Changes Explained ("the Constitutional Changes Explained Document"), which is available on a bespoke website (www.explore.gov.ky/constitutionalreform) that has been created to facilitate the reform process and which also contains a number of other key documents (including the Draft Order itself and, notably, the Hansard record of the debate in the Legislative Assembly on the Government Motion No. 3/2019-20 – Cayman Islands Constitution (Amendment) Order 2019 [the Draft Order]). The Constitutional Commission welcomes the provision of this information and will establish a link to this website and also upload all documents to its own website in an effort to ensure that this important material reaches the greatest number of persons.

In a similar spirit of transparency and openness, the Constitutional Commission has previously written to the Hon. Premier and the then Hon. Leader of the Opposition (copied to His Excellency the Governor, Mr. Martyn Roper) on 26 February 2019 requesting that the full record of the constitutional talks held in London in December 2018 and all relevant correspondence between the Governments of the Cayman Islands and the United Kingdom (together "the 2018/2019 Records") be made available (in the same way as the record of the

2009 constitutional meetings were previously published). The Constitutional Commission has not to date received any formal reply to its letter and now takes this opportunity to reiterate its request. In the premises, the Constitutional Commission believes that this information should also be published on the Government's website and encourages all concerned to move swiftly to provide the same.

3. Of the six potential revisions initially advanced by the Hon. Premier and the then Leader of the Opposition and conveyed to the Constitutional Commission, the first five of these are addressed in the Draft Order and, for the reasons noted above and in the June 2018 Report, are welcomed by the Constitutional Commission. In this regard, see:

- a. Clause 4 of the Draft Order, which amends section 32 of the Cayman Islands Constitution in respect of the exercise of the Governor's functions. As the Constitutional Changes Explained Document expounds:

"This section is amended to provide for a requirement to generally consult with the Cabinet on matters dealing with defence, external affairs, and internal security. There are caveats but it is good to have an expectation spelled out in the Constitution that the Governor would consult on these three key areas of his/her responsibility. In addition, there is for the first time a change that allows the actions of the Governor to be subject to judicial review, however the question of whether the Governor has complied with instructions from Her Majesty cannot be questioned in any court. No one should be above the law, and that includes the person serving as our Governor."

- b. Clause 5(3) of the Draft Order, which amends section 44 of the Cayman Islands Constitution to clarify the role of the Cabinet, in respect of which the Constitutional Changes Explained Document advises that:

“The final change to section 44 confirms that, subject to the [Cayman Islands] Constitution, the Cabinet possesses autonomous and exclusive capacity in domestic affairs for any matter that is not –

- i. one of the Governor’s special responsibilities under Section 55;
 - ii. a function that falls within the purview of the Governor acting within his/her authority or by instruction by a Secretary of State; or
 - iii. a function which the Governor carries out after consulting any other authority other than the Cabinet (ex. the Judicial and Legal Services Commission).”
- c. Clause 8 of the Draft Order, which amends section 58 of the Cayman Islands Constitution in respect of the National Security Council and which as the Constitutional Changes Explained Document notes, would:

“... remove the ability for the Governor to use his/her discretion to not follow the advice of the National Security Council on matters of internal security. Instead a Secretary of State would have to instruct the Governor that following the advice would adversely affect Her Majesty’s interest and therefore he/she can go against the advice received from the National Security Council.”

- d. Clause 12 of the Draft Order, which revokes section 80 of the Cayman Islands Constitution and which as the Constitutional Changes Explained Document apprises:

“The [Cayman Islands] Constitution would be amended to delete this entire section that currently allows Her Majesty to disallowance any law passed by the Elected Representatives and assented to by the

Governor. This change would further enhance local autonomy over domestic affairs.”

- e. Clause 13 of the Draft Order, which amends section 81 of the Cayman Islands Constitution by revoking the Governor’s reserved powers and replacing this with a right for the Governor to address the Parliament. There is an element of compromise in this particular provision and it is thus particularly useful to refer to the Constitutional Changes Explained Document’s notes in full on this point:

“Currently this section allows the Governor to directly make laws or amendments to laws which are related to any of the Governor’s special responsibilities, but where the Cabinet or the Parliament is unwilling to support such a Bill. This amendment would revoke the current reserved power and replace it with a section that would give the Governor the ability to make the case directly to the Parliament and to the country as to why such a law is needed. This is a compromise that includes the Governor having to obtain the approval of the Secretary of State before being entitled to address Parliament. This is an important protection for the ability of the Parliament to determine what laws it enacts. The UK would always have the ability to make a law by Order in Council but that is a less direct route and the UK has also agreed that the Government would be consulted before any such order is carried out.”

- f. The power of internal self-government in the Cayman Islands is also fortified by clause 15 of the Draft Order, which inserts a new section 125 into the Cayman Islands Constitution and which protects against the arbitrary extension of legislation (both Acts of the United Kingdom Parliament and Orders in Council) to the Cayman Islands. On this new provision, the Constitutional Changes Explained Document notes that:

“... such proposals should normally be brought by the Secretary of State to the attention of the Premier so that the Cabinet may signify its view on it. This provides meaningful protection that is enshrined in the Constitution. It would not prevent the UK Parliament or Her Majesty’s Government from directly making laws for the Cayman Islands, but it recognises for the first time that the views of the Government and the people of the Cayman Islands must be heard.”

4. It follows that of the six potential revisions initially advanced and conveyed to the Constitutional Commission, only one – the question of the Cayman Islands achieving “Associated Status” – has not been accounted for in the Draft Order. This absence is not at all surprising given that it seems that this question was raised for the purposes of discussion only. However, it would still be useful for the general public to understand how, if at all, these discussions went and what, if anything, they produced. This question is also one that has generated much comment in the Cayman Islands in the past and, as the Constitutional Commission has noted above as well as in its June 2018 Report, this is a matter on which the public will need to receive information and be further consulted.³ This particular issue thus underscores the Constitutional Commission’s request for the 2018/2019 Records to be made available in full to the general public.
5. In addition to the six potential revisions initially advanced and conveyed to the Constitutional Commission, there are several other matters that have found their way into the Draft Order. Unless these were matters that the Constitutional Commission had raised in its 2018 Report in response to the request from the Hon. Premier and the then Hon. Leader of the Opposition for other suggested amendments, the Constitutional Commission would not have previously commented on these matters.

³ For the avoidance of any doubt, the Constitutional Commission notes that as regards any change to the status of the Cayman Islands that would result in a re-classification for the purposes of the United Nations Special Committee on Decolonization, this would be a fundamental issue requiring a referendum.

6. The only matter that falls into the latter category is clause 7 of the Draft Order, which inserts a new section 54A into the Cayman Islands Constitution. Accordingly, the Constitutional Commission interprets this provision as an attempt to regularise the appointment and role of councillors, which, as noted in the 2018 Report, “have become a feature of successive governments, but which do not have a clear constitutional footing”. The Constitutional Changes Explained Document supports the Constitutional Commission’s understanding by confirming that:

“This new section is inserted into the Constitution to give Ministers the ability to receive assistance from Parliamentary Secretaries. The Parliamentary Secretaries must be Elected Representatives and would be appointed by the Governor, acting on the advice of the Premier. Currently a similar system exists where Ministers are assisted by Councillors who may or may not be elected representatives.”

The Constitutional Commission therefore supports the clarification that would be provided to an area that was otherwise unregulated and notes that similar provisions can be found in the constitutional arrangements of the British Virgin Islands. It also relevant to note that this is an arrangement that does potentially strengthen the power of the executive *vis-à-vis* the legislature, as it could tie Government backbenchers closer to the position of the Government, rather than acting independently in certain circumstances where conscience dictates and seeking to hold the Government to account in Parliament. This is a facet that the Constitutional Commission has raised in informal discussions, to which the response has been that it is productive to provide roles for Government backbenchers, whether this is as a Councillor or a Parliamentary Secretary, and, in any event, there is an advantage in providing strong and stable government.

The Constitutional Commission accepts there is certainly some utility in these responses and notes, in the interests of further explanation, that: (i) this is an area in which there are competing interests impacting the balance of the relationship between two organs of government; (ii) there are other proposed amendments that also potentially impact this relationship, including, for example, the proposed increase in the number of Ministers in Cabinet, which is further referenced below; and (iii) in order to properly evaluate the effectiveness of the various checks and balances incorporated in the Cayman Islands Constitution and any amendments thereto, it is important that the full range of provisions envisaged are duly implemented. There remain a number of areas where legislation implementing provisions in the Cayman Islands Constitution, including people initiated referendums⁴, Standards in Public Life⁵ and Advisory District Councils⁶, have not been brought into effect and, with this important objective in mind, the Constitutional Commission recommends that action be taken to provide and bring into effect all necessary implementing legislation on an urgent basis.

The Constitutional Commission acknowledges that in some instances, such as in respect of the Constitutional Commission itself under section 118(5) of the Cayman Islands Constitution, there is a discretion as to whether “further provision relating to ... establishment and operation” is necessary and, in cases such as this, the necessity or otherwise should be kept under regular review.

7. The remaining seven provisions in the Draft Order that are not accounted for above are therefore matters that the Constitutional Commission did not previously comment on in its 2018 Report. It is not clear to the Constitutional Commission when and how these additional matters were introduced into the reform process, which once again goes to the utility of making all of the 2018/2019 Records publically available. This does not, however, mean that

⁴ See section 70(1) of the Cayman Islands Constitution.

⁵ See section 117(7)(h) of the Cayman Islands Constitution.

⁶ See section 119 of the Cayman Islands Constitution.

these additional provisions are not welcome and to assist in the understanding of each of these, the Constitutional Commission notes the following:

- a. Clause 3 of the Draft Order provides for the change in nomenclature for the legislative arm of government, whereby the Legislative Assembly will be referred to as the Parliament. As the Constitutional Changes Explained Document instructs:

“This is important because often the term Legislative Assembly is considered a lower legislative body to a parliament. The term Parliament better recognises what the Legislative Assembly is and avoids confusion when our Elected Representatives travel overseas. A Member of Parliament for the Cayman Islands is clearly understood by more people as it is used by the majority of Commonwealth Countries that have the Westminster system of government, such as Bermuda, Canada, Australia, Jamaica, and New Zealand.”

For all of these reasons the Constitutional Commission supports the renaming of the legislative arm of government.

- b. Clause 5 of the Draft Order also seeks to amend section 44 of the Cayman Islands Constitution to provide for an increase in the number of Ministers in Cabinet from seven to eight (with the proviso now inserted that this would not take place until after the next general elections); and to regulate any other potential increases in the number of Ministers by reference to a formula, which establishes that the number of Ministers cannot be more than 40% plus one of the total number of elected representatives. On this amendment, the Constitutional Changes Explained Document advises that:

“The change was sought because as the country matures the work done by Ministers has become more complex. With the addition of

another Minister there would be the ability to share ever increasing responsibility for portfolios and ministries.”

The Constitutional Commission agrees with this justification. At the same time, the Constitutional Commission also notes that this is another matter that will impact the balance of the relationship between the executive and legislative arms of government and, in this regard, the Constitutional Commission reiterates the contents of its advice at 6 above.

- c. Clause 6 of the Draft Order simply enables the Cabinet Secretary, by way of an amendment to section 48 of the Cayman Islands Constitution, to delegate some of the functions of this office to persons acting and in accordance with his/her instructions. This is a practical clarification of the powers of the Cabinet Secretary and commended by the Constitutional Commission accordingly.

- d. Clause 9 of the Draft Order would create a new entity in the Cayman Islands Constitution; namely a Police Service Commission with appointment and disciplinary powers in respect of the Police Force; and new sections 58A and 58B are proposed for this purpose. While, under the proposed amendments, the Police Service Commission would be chaired by the Governor, there would also be local participation in the functions of the Police Service Commission, with five members experienced in matters of the police, law enforcement, criminal law or matters related to national security to be appointed; two of these members would be appointed by the Governor on the advice of the Premier, one would be appointed by the Governor on the advice of the Leader of the Opposition and the other three would be appointed by the Governor after consulting with the Premier and the Leader of the Opposition.

The Police Service Commission should therefore provide for enhanced local involvement in matters pertaining to law and order in much the same way as the National Security Council already delivers (especially with the refinements proposed in clause 8 of the Draft Order noted above) and, on this basis, the introduction of a Police Service Commission is supported by the Constitutional Commission.

- e. Clause 10 of the Draft Order would amend section 71 of the Cayman Islands Constitution to alter the arrangements in respect of Standing Orders and committees. The Constitutional Changes Explained Document summarises the relevance and effect of this proposed change as follows:

“This change removes the requirement for the Governor to approve Standing Orders made by the Parliament. The current requirement is a holdover from when the Governor was the President of the Legislative Assembly, and its removal is also appropriate to strengthen the separation of powers between the executive and legislative arms of government.”

The Constitutional Commission concurs with this explanation and supports the amendment of section 71 of the Cayman Islands Constitution accordingly.

- f. Clause 11 of the Draft Order would amend section 77 of the Cayman Islands Constitution in connection with the introduction of Bills into Parliament. These effect of changes are described by the Constitutional Changes Explained Document as follows:

“The first change to this section increases the notice period of Bills from 21 days to 28 days and clarifies the circumstances when the notice period can be waived. Currently the Constitution says that the notice

period can be waived “in a case of emergency”; whereas the proposed change would require the Premier to signify that the Bill is too urgent to permit the 28 day notice period. The final change to this section would require the Governor to signify his/her consent for the Parliament to introduce any Bill that concerns one of the Governor’s special responsibilities, that is matters of defence, external affairs, internal security and the public service. If there is a dispute between the Governor and the Parliament over whether a matter falls within the scope of one of those special responsibilities the Premier may refer the question to a Secretary of State, whose decision on the matter would be final.”

The Constitutional Commission takes the view that the extension of the notice period for Bills assists public awareness and scrutiny and is therefore to be welcomed, although it remains to be seen whether the change in the basis upon which the notice period may be waived will result in more or less Bills being impacted in this way. This is therefore something that should be monitored on an on-going basis.

- g. Clause 14 of the Draft Order would amend section 124 of the Cayman Islands Constitution largely to provide consistency in the types of offices and entities that are excluded from the definition of public offices and the Constitutional Commission supports this clarification.

For the avoidance of any doubt, the Constitutional Commission does not object and indeed sees merit in the amendments in the Draft Order that had not previously been considered by the Constitutional Commission.

- 8. This then leaves the matter of the proposals for reform that the Constitutional Commission did include in its 2018 Report in response to the request from the Hon. Premier and the then Hon. Leader of the Opposition, but which do not feature in the Draft Order. It is not apparent to the Constitutional Commission

whether any of these proposals were adopted and presented at the constitutional talks in December 2018 and, if so, what then happened to these. The publication of the 2018/2019 Records would also provide clarity in this regard and, if there is a reason why they were not adopted, the general public ought to be informed of the same.

9. Of the outstanding proposals from the Constitutional Commission's 2018 Report, the Constitutional Commission still maintains that each of these five proposals⁷ relate to a matter in which there is confusion and uncertainty and that, as such, the Cayman Islands Constitution would benefit from amendment to provide clarification and greater precision. For ease of reference, these unaddressed proposals are:
 - 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 for electors in respect of the residency requirements in section 90(1)(b)(iv) of the Constitution and whether there should be provision for prompter reinstatement of eligibility once a person who has not maintained their residency returns to the jurisdiction;
 - c. The disqualification of electors and whether the blanket ban on voting for prisoners serving sentences exceeding 12 months' imprisonment in

⁷ The sixth proposal in the Constitutional Commission's 2018 Report, relating to regularizing the position of Councillors in the Cayman Islands Constitution, does feature in the Draft Order and had been addressed at (6) above.

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 (a) the residency requirement of seven years immediately preceding the date of nomination for election in section 61(1)(e); (b) periods of absence in section 61(3); (c) dual citizenship and section 62(1)(a); and (d) 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.

10. Of all of the Constitutional Commission's proposals that were not adopted, the last of these is perhaps the most topical. This is because the Draft Order was presented in pressing circumstances – just before General Elections in the United Kingdom – and there was a genuine fear that the potential advances presented by the Draft Order would be lost if these were not accepted. As a result of these particular circumstances, the consultation in respect the Draft Order was not as anticipated. The Hon. Premier and Hon. Leader of the Opposition are able to proceed nonetheless in accordance with the terms of the Letter of Entrustment, on the basis that the reforms in the Draft Order, while not minor, were uncontroversial, as demonstrated by the unanimous support of all members in the Legislative Assembly.

It should also be noted that there has been one previous amendment to the 2009 constitutional arrangements (The Cayman Islands Constitution (Amendment) Order 2016) ("the 2016 Amendment") that this was not

subjected legislative scrutiny or public consultation. This Constitutional Commission, which was not consulted at the time, understands that the 2016 Amendment was also processed with the approval of the Hon. Premier and the then Hon. Leader of the Opposition in the Cayman Islands and by the United Kingdom accordance with the terms of Letter of Entrustment, which permits minor or uncontroversial amendments to proceed on this basis.

The difficulty, however, is that it is not always clear what is minor and/or uncontroversial; hence the Constitutional Commission's call for clarification as to how the Cayman Islands Constitution is susceptible to amendment. 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.⁸

⁸ See also the letter from the Cayman Islands Chamber of Commerce, dated 10 December 2019, which is available at www.explore.gov.ky/constitutionalreform.