



REF: CC/RES/CHANGESTOCONSTITUTION

His Excellency, the Governor
Mr Martyn Roper, OBE
Office of the Governor
5th Floor Government Administration Building
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CAYMAN ISLANDS

Via Email: faye.kulcheski2@gov.ky

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Your Excellency,

Prior to your impending departure from our Islands, the Constitutional Commission would like to formally place on record its gratitude for your efforts to champion the work of the Constitutional Commission and indeed to assist all the other institutions that support democracy in our Constitution that are similarly administered through the Commissions Secretariat. The Constitutional Commission has welcomed your engagement both by way of regular individual consultations and in the meetings with all the Chairpersons of the various Commissions that you kindly hosted. In addition to which, the Constitutional Commission has also appreciated the positive messages posted on your social media accounts, which have highlighted the important work of the Constitutional Commission and particularly our Annual Updates published on the occasion of Constitution Day in July each year.

In this context, the Constitutional Commission would also like to take this opportunity to provide a short summary of matters outstanding and on-going, which we trust will assist with a smooth transition to your successor.

We are obliged to begin with the numerous matters that were detailed in the Constitutional Commission's letter dated 15 October 2021 (hereinafter referred to as "the Constitutional Commission's Consolidated Correspondence" so as to reflect the range of issues captured therein). The Constitutional Commission's Consolidated Correspondence is a lengthy document, which should be considered in its entirety both for background and in order to fully appreciate the breadth of the issues in play. However, for present purposes it must suffice to make two principal observations. Firstly, as is emphasised in the Constitutional Commission's Consolidated Correspondence, the Constitutional Commission is not asserting that all the points that it raises should necessarily be adopted. However, and secondly, the Constitutional Commission's Consolidated Correspondence nevertheless represents a significant body of work and some more formal process is clearly required in order to properly consider and process any recommendations submitted by the Constitutional Commission, even if this is simply to advise that there is no interest in them being taken forward.

The Constitutional Commission acknowledges your letter of 1 November 2022, sent in reply to the Constitutional Commission's Consolidated Correspondence ("the Governor's Reply"), and the acceptance therein that more can be done to ensure that timely responses are provided to the Constitutional Commission. In light of the content of the Governor's Reply, the Constitutional

Commission had expected to be engaged further, but, regretfully, the Constitutional Commission has not been subsequently contacted or engaged on any of the matters raised in the Constitutional Commission's Consolidated Correspondence.

In the premises, and in the spirit of collaboration and dialogue in which the Governor's Reply concludes, the Constitutional Commission now notes the following in connection with the five points contained in the Governor's Reply. For ease of reference, these five points are taken in the order in which they were presented in the Governor's Reply:

1. Meeting with the Honourable Premier

The Constitutional Commission was pleased to meet with the Honourable Premier and grateful for your efforts in arranging this meeting. This meeting took place on 11 February 2022 and the Honourable Premier was generous with his time. As previously reported, many of the issues raised in the Constitutional Commission's Consolidated Correspondence were covered in this meeting. The main outcome of this meeting, however, was that the Constitutional Commission was tasked on an urgent basis with the provision of recommendations on the enforcement of a Parliamentary Code of Conduct. These recommendations were duly produced, and an associated Guidance Note, dated 8 March 2022, was subsequently published on the Constitutional Commission's website.

While the Constitutional Commission was not otherwise consulted on the contents of any Parliamentary Code of Conduct, the Constitutional Commission is now aware that such a Code was signed by all elected Government and Official Members of the Parliament and delivered to the Clerk of Parliament on or around 3 January 2023. For unfortunate reasons, which are explained below, the Constitutional Commission has been unable to consider or comment on this Code. It is, however, relevant to note that the Constitutional Commission has received correspondence from the Honourable Leader of the Opposition, dated 27 September 2022, emailed to the Constitutional Commission on 5 January 2023, which suggests that the Code does not reflect the principles noted in the Constitutional Commission's Guidance Note. That the Constitutional Commission has been unable to confirm or otherwise clarify this situation is unfortunate and threatens to undermine the credibility of the Constitutional Commission on a critical issue that falls squarely within the Constitutional Commission's remit.

In addition, and for the avoidance of any doubt, the Constitutional Commission has not been subsequently engaged on any of the other issues raised in the Constitutional Commission's Consolidated Correspondence following the meeting with the Honourable Premier on 11 February 2022.

2. Additional Responses to be Collated and Forwarded

The Constitutional Commission understands and appreciates that the Governor does not have responsibility for all the issues raised in the Constitutional Commission's Consolidated Correspondence and the Constitutional Commission therefore welcomed the undertaking in the Governor's Reply to pass these issues on to the relevant leads for additional responses, which would then be collated and forwarded to the Constitutional Commission.

As foreshadowed above, the Constitutional Commission has not received any further responses subsequent to the receipt of the Governor's Reply, which was received some four and a half months ago. Insofar as this timeline is concerned, it is also relevant to note that it is now 18 months since the Constitutional Commission's Consolidated Correspondence was

sent. Given this further delay, it would be instructive to know who these relevant leads are, when they were assigned their responsibilities to respond, and when the Constitutional Commission can now expect to receive their responses.

3. Response from Judicial and Legal Services Commission

The Constitutional Commission was confused by the reported response from the Chairman of the Judicial and Legal Services Commission (“JLSC”) that was summarised in the Governor’s Reply, insofar as it is reported that the “only” matter which needs to be addressed relates to section 105(1) of the Constitution. This confusion arises because all the issues raised in the Constitutional Commission’s Consolidated Correspondence in relation to the JLSC had previously been discussed in correspondence with the JLSC and indeed had been first suggested by the JLSC. The Constitutional Commission merely reported the result of its enquiries with the various institutions that support democracy, including the JLSC, in respect of the need for supplementary legislation and, for the avoidance of any doubt, the Constitutional Commission was not therefore responsible for the genesis of these other issues relating to the JLSC that are referenced in the Constitutional Commission’s Consolidated Correspondence. As noted in the 2010-2015 Report of the JLSC and referenced in the Constitutional Commission’s Consolidated Correspondence, “The JLSC believes that bespoke legislation is required to address its role and functions”.

The Constitutional Commission does not of course have the benefit of your correspondence with the JLSC and so it is difficult for the Constitutional Commission to respond and potentially explain this anomaly. However, it may be that the JLSC is now highlighting a need to amend the Constitution itself, as distinct from (and in addition to) the supplementary legislation that is proposed for consideration in the Constitutional Commission’s Consolidated Correspondence. In any event, and without in any way intending to act contrary to the wishes of the JLSC, it would still be instructive to receive a response to the other issues relating to the JLSC that are contained in the Constitutional Commission’s Consolidated Correspondence. For the reasons explained above, and with all due respect to the JLSC, it is probably not helpful for the JLSC to respond to the Constitutional Commission on the points that the JLSC had itself raised with the Constitutional Commission in the first place, and so it would be more rewarding if these points could be considered independently, with, one would anticipate, further consultations with the JLSC as necessary thereafter.

4. Documentation Relating to the 2019/2020 Constitutional Negotiations

The Constitutional Commission has been advised that the Foreign, Commonwealth and Development Office has taken the view that no additional documents relating to the 2019/2020 constitutional negotiations can be shared other than those that are already in the public domain. The Constitutional Commission has previously explained that transparency surrounding the amendment of our Constitution is one of the main concerns raised by the general public in the Cayman Islands and, in these circumstances, as we discussed, the Constitutional Commission would be left with no option but to make requests for information under the relevant freedom of information legislation in the Cayman Islands and in the United Kingdom.

Accordingly, the Constitutional Commission has now submitted requests for information to the Governor’s Office, the Attorney General’s Office, the Office of the Premier and the Cabinet

Office in the Cayman Islands and the Foreign, Commonwealth and Development Office in the United Kingdom, with the following covering explanation:

Background

In 2018, the Cayman Islands Constitutional Commission ("the Commission") was invited by the then Premier and then Leader of the Opposition to make additional suggestions for amendments to the 2009 Cayman Islands Constitution ("the Constitution") to supplement certain potential amendments that were already under discussion. At approximately the same time, the Commission was also tasked by the then Governor to provide research and context into those potential amendments being considered.

The Commission was pleased to provide this input and did so in its Paper dated 27 June 2018. It is not clear to the Commission what, if anything, happened with its recommendations therein. The Commission has consequently followed up repeatedly with all relevant parties in the interim period, in order to ascertain not just what happened with its recommendations, but also in an effort to obtain all relevant records relating to the ensuing process that ultimately resulted in the amendment of the Cayman Islands Constitution (The Cayman Islands Constitution (Amendment) Order 2020).

Most recently, these requests were encompassed within the Commission's correspondence of 15 October 2021, which dealt with a range of important constitutional matters, and which was, by convention, addressed to His Excellency, the Governor, the Hon. Premier and the Hon. Leader of the Opposition. On 1 November 2022, the Commission received a reply from His Excellency, the Governor, which in this regard advised that; "there is no additional documentation about the 2019/20 Constitutional negotiations from the UK or Cayman Governments that can be shared other than that which is already in the public domain."

The Commission believes that it has a legitimate interest in what happened to the recommendations that it was requested to provide by Cayman representatives. The Commission further maintains that this interest is underscored by the express engagement of the Commission by the UK's representative in the Cayman Islands in certain matters that were in fact subsequently the subject of constitutional amendment. Moreover, and in light of the sentiments regularly expressed to the Commission from members of the general public, the Commission takes the view that the people of the Cayman Islands ought to have access to all relevant documentation relating to an amendment of their Constitution and the Commission has therefore resolved to submit the following requests for information in an effort to finally gain access to the same.

Request

Therefore, the Commission requests all relevant documentation relating to the process by which the Cayman Islands Constitution was amended with the enactment of The Cayman Islands Constitution (Amendment) Order 2020, including the records of the constitutional talks were held at the United Kingdom Government's Foreign and Commonwealth Office in December 2018 and all related documents and correspondence produced both before and after this meeting and dating back to the inception of the proposals to amend the Cayman Islands Constitution following the passing of the Sanctions and Anti-Money Laundering Act 2018 by the United Kingdom

Parliament. For the avoidance of any doubt, the records requested include, but are not necessarily limited to, correspondence (both internal to the UK and Cayman Islands Governments, between the UK Government and the Cayman Islands Government, and between the UK or Cayman Islands Government and any third parties); documentation relating to any related meetings, including minutes, notes, transcripts and other such records; and any notes, memoranda or other record produced in connection with this process and the amendment of the Cayman Islands Constitution.

5. Consultation with the Attorney General's Office

As discussed previously, the Constitutional Commission would welcome the engagement of any office in the work of the Constitutional Commission, not least the esteemed Honourable Attorney General. Prior to receiving the Governor's Reply, the Constitutional Commission had in fact already written directly to the Honourable Attorney General on 12 October 2022, inviting his engagement and indicating our willingness to meet. While the Constitutional Commission awaits a reply to its letter of 12 October 2022, the Constitutional Commission nevertheless wishes to reiterate that as soon as it is properly constituted, it will be ready and willing to meet with anybody genuinely interested in engaging on the many important issues concerning our Constitution, including those identified in the Constitutional Commission's Consolidated Correspondence.

This final point in response to the Governor's Reply naturally brings us to the further and indeed fundamental concern foreshadowed above, which is that for the second time in recent years, the Constitutional Commission is unable to properly function due to the lack of a member. The Constitutional Commission is only comprised of three members and so, when it is even one member down, it is not practicable for the Constitutional Commission to operate and conduct business in the usual way. The Constitutional Commission was faced with this predicament between 31 December 2021 and 2 March 2022; and has now been in the same situation since 31 December 2022. It is therefore imperative that the Constitutional Commission is properly re-constituted as soon as possible and that arrangements are in place to ensure continuity of business when the terms of members lapse in the future.

In addition to the interruptions to the work of the Constitutional Commission caused by insufficient members, the Constitutional Commission's work has also been impacted by the significant staffing issues, now experienced by the Commissions Secretariat over a prolonged period of time. The Constitutional Commission has previously explained, for example, how the temporary redeployment of the Public Relations and Education Coordinator in the Commissions Secretariat negatively impacted the educational efforts of the Constitutional Commission, such that a number of public commitments announced by the Constitutional Commission had to be rolled back. The Constitutional Commission, however, understood that this redeployment was due to extreme circumstances and that once this temporary situation no longer existed, the Public Relations and Education Coordinator would be back in post and the educational work of the Constitutional Commission could be reinitiated with renewed vigour.

This, however, has not proved to be the case and while it is not always possible to account in advance for staff members leaving, as was the case with the departure of the Public Relations and Education Coordinator on 5 November 2022, this post has now been vacant for over 4 months and, as far as the Constitutional Commission is aware, this critical position has not been advertised in the interim. This post is central to the work of the Constitutional Commission and to the fulfilment of the Constitutional Commission's constitutional mandate and, accordingly, the Constitutional Commission would be

grateful for any update that you can assist with obtaining regarding recruitment for the vacant Public Relations and Education Coordinator post.

Notwithstanding these challenges, the Constitutional Commission, with the support of the Commissions Secretariat, remains committed to public engagement and education and, as you will have seen at the recent Conyers Inter-School Debate, the participants there were all actively and articulately debating contemporary constitutional issues facilitated by the Constitutional Commission. In addition to the final debate that you observed, in which the students tackled the difficult question of the removal of the Governor's reserved powers in section 81 of the Constitution, the students also debated other constitutional topics including: whether permanent residents should be allowed to stand for election; whether the Speaker should necessarily be a Member of Parliament; and whether amendments to the Constitution should be approved by a majority in a referendum. These motions all provoked interesting arguments on both sides and in so doing, one of the Constitutional Commission's main overarching objectives of getting our young people to think about our constitutional arrangements was certainly advanced.

In order to prepare the participants, the Constitutional Commission offered its services to all participating schools and was invited to attend all but one of the schools to present on the history and development of our Constitution. I am pleased to report that these presentations were also well received, although the Constitutional Commission was met with the now familiar refrain of, we need more of this in our schools, and if only we had more relevant local examples of constitutional issues. These are precisely the issues that the Constitutional Commission has long identified as being critical if a greater understanding and awareness of our Constitution is to be engendered. It is a concern that the Constitutional Commission's efforts to address and respond to these issues over many years have either not been acted upon by the relevant government departments or are now faltering due to a lack of resources in the Commissions Secretariat.

Accordingly, when you pass on the baton to your successor, if there is one message that could be conveyed at this time on behalf of the Constitutional Commission, it would be to highlight the importance of constitutional education and the need to conserve, collate and construct locally relevant resources in order to help relay important constitutional principles to our young people in a way that they will recognise as being relevant to them.

The Constitutional Commission trusts that the collaboration and dialogue that you have consistently encouraged will continue notwithstanding your departure and we look forward to meeting with your successor in due course to discuss all the important issues noted herein as well as those further explored in the Constitutional Commission's Consolidated Correspondence.

In closing the Constitutional Commission would like to wish you and your family good health and great happiness in your new endeavours; and to thank you once again for your support for our work.

Yours sincerely,



Vaughan Carter
Chairman, Constitutional Commission

cc: Honourable Attorney General