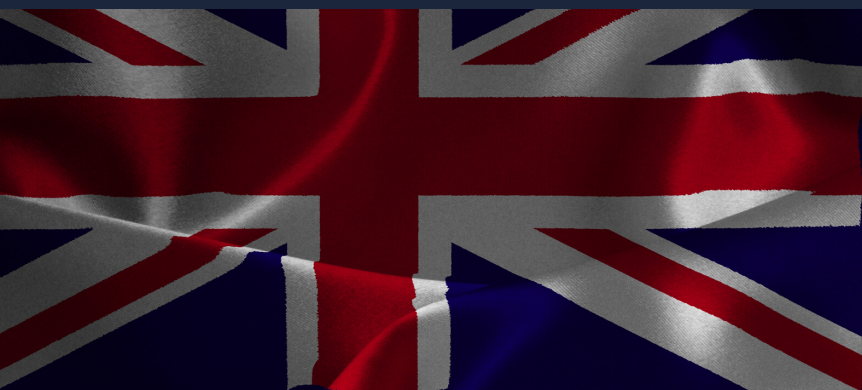




CONSTITUTIONAL COMMISSION

UPDATE • 2 JULY 2020



CONSTITUTION DAY

This Update has been prepared and published in advance of Constitution Day 2020, which this year falls on 6 July 2020. 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 is therefore an ideal opportunity to find out more about the Cayman Islands Constitution and the work of the Constitutional Commission. The Constitutional Commission is keen to hear about how it can further promote understanding and awareness of the Cayman Islands Constitution and, to this end, it is hoped that this Update will stimulate interest and indeed questions, which can be directed to the Constitutional Commission at: info@constitutionalcommission.ky

CONSTITUTIONAL COMMISSION UPDATE

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MEMBERSHIP OF THE CONSTITUTIONAL COMMISSION

The Constitutional Commission has two new Members. Dr Christopher Williams and Ms Sophia Harris were appointed to the Constitutional Commission on 1 January 2020. Dr Williams and Ms Harris join the Chairman, Mr Vaughan Carter, on the three-member Commission, which is established and appointed in line with section 118 of the Constitution.

These new appointments fill the positions vacated by Ms Natalie Urquhart and Mr Olivaire Watler, whose terms lapsed on 31 March 2019 and 14 June 2019 respectively. The Constitutional Commission would like to publicly reiterate its gratitude to

Ms Urquhart and Mr Watler for their contributions to the work of the Constitutional Commission. Notable landmarks realised by the Constitutional Commission during the tenures of Ms Urquhart and Mr Watler include the production of braille and audio versions of the Constitution and the publication of a Report in June 2018 on potential revisions to the Cayman Islands Constitution, the contents of which are discussed in further detail in the course of this Update.

MANDATE OF THE CONSTITUTIONAL COMMISSION

The primary functions of the Constitutional Commission are identified in section 118(3) of the Constitution as:

- 1. Advising Government on questions concerning constitutional status and development in the Cayman Islands;**
- 2. Publishing reports, discussion papers, information papers and other documents on constitutional matters affecting the Cayman Islands; and**
- 3. Promoting understanding and awareness of this Constitution and its values.**

Put simply, the Constitutional Commission's mandate can be encapsulated as: "Advise, Inform and Educate"; and the Constitutional Commission's work to date in fulfillment of this mandate is regularly published and available for review on its website www.constitutionalcommission.ky. One of the important priorities for the reconstituted Constitutional Commission is to add to the body of work available on this website and to encourage an increasing number of people to access and engage with these resources.

The first order of business for the new Constitutional Commission, however, was to respond to the draft Order in Council, which was annexed to a letter sent to the Hon. Premier by the United Kingdom's Foreign and Commonwealth Office on 10 November 2019, and the proposed amendments to the Cayman Islands Constitution therein.

By way of response, the Constitutional Commission produced an: Explanatory Note on the Proposed Amendments to the Cayman Islands Constitution Contained in the Draft Order in Council, which was submitted on 17 February 2020. This Explanatory Note builds upon the earlier Report from 27 June 2018, 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. These two accounts together provide a contextual record of how the proposed amendments in the draft Order in Council originated and also detail the Constitutional Commission's advice and recommendations on reform in the course of this process.

The Constitutional Commission's views on the draft Order in Council and the reform process were summarised in its cover letter to the Explanatory Note as:

1. The amendments contained in the Draft Order in Council represent a move towards greater local autonomy, which the Constitutional Commission considers to be in the best interests of the Cayman Islands;
2. There remain a number of areas where legislation required to fully implement the provisions in the 2009 Cayman Islands Constitution has not been brought into effect and the Constitutional Commission recommends that action be taken to provide and bring into effect all necessary implementing legislation on an urgent basis;
3. There are other areas of the Cayman Islands Constitution that would benefit from clarification and greater precision; and

4. Further consideration should be given as to how future amendments to the Cayman Islands Constitution are processed to ensure that there is at least meaningful public consultation on such amendments.

Given that the draft Order in Council has received approval by way of the unanimous resolution of the Cayman Islands Legislative Assembly, subject only to the provisions relating to an additional Minister being deferred until after the next general elections, it is anticipated that these provisions will be enacted and that the Cayman Islands Constitution will be amended accordingly in due course.

It is also relevant to note that the Constitutional Commission welcomes the opportunity to provide advice to Government in accordance with section 118(3)(a) of the Constitution, not least because the invitation to provide the recommendations that were developed and included in the Explanatory Note was the first time that Constitutional Commission was expressly engaged for this important purpose since its inception under the 2009 Constitution.

SUPPLEMENTARY LEGISLATION

Having performed its duty to advise the Government, some of the broader points raised by the Constitutional Commission in its Explanatory Note now merit further comment, particular in light of several recent events of constitutional significance. The following commentary, which is provided in pursuance of the Constitutional Commission's mandate to inform and educate, begins by revisiting the issue of legislation required to fully implement all of the provisions contained in the 2009 Cayman Islands Constitution.

The 2009 Constitution anticipates supplementary legislation in a range of different ways, including for example:

1. Section 118(5) of the Constitution, which notes that "further provision relating to the establishment and operation of the Constitutional Commission may be made by the Legislature";
2. Section 18(2) of the Constitution, which advises that Government "should adopt reasonable legislative and other measures to protect the heritage and wildlife and the land and sea biodiversity of the Cayman Islands"; and
3. Section 119 of the Constitution, which expects that "a law enacted by the Legislature shall provide for the establishment, functions and jurisdiction of Councils for each electoral district to operate as advisory bodies to the elected members of the Legislative Assembly".

The selection of the particular word used – may, should or shall – to describe the anticipated action of the Government or the Legislature is important. Evidently, where the word "shall" is chosen, there is a heightened expectation that this legislation will be enacted.

This importance is underscored where, as is the case with section 119, the provision in the Constitution is rendered meaningless or inoperable without the supplementary legislation.

It is for these reasons that the Constitutional Commission has previously highlighted the absence of legislation in force to provide for Advisory District Councils, as obliged by section 119. In its Press Release entitled Constitutional Commission Recognises International Day of Democracy on 15 September 2017, the Constitutional Commission explained that: "while such a law was enacted in 2011, this legislation was never brought into force and may now benefit from fresh review and evaluation in light of subsequent constitutional developments, including the establishment of single-member constituencies".

Another of the Institutions Supporting Democracy in Part VIII of the Constitution whose operations have been delayed is the Commission for Standards in Public Life. Notwithstanding that the Commission for Standards in Public Life is established in section 117 of the Constitution and that various functions are also particularised therein, it was determined that supplementary legislation was required to give full effect to this Commission's work. Under section 117(9) (h) of the Constitution, the Commission for Standards in Public Life could be empowered "to exercise such other functions as may be prescribed by a law enacted by the Legislature" and the Standards in Public Life Law, 2014 was duly passed and indeed amended in 2016 for this purpose. However, in the absence of agreement on the necessary supporting regulations, the Standards in Public Life Law was not brought into effect, even after it was first amended.

Agreement on the format for the regulations was achieved earlier this year; following which the Standards in Public Life Law was finally brought into effect on 1 March 2020 and the Standards in Public Life Regulations, 2020 were duly published on 2 March 2020. These are important developments and the Constitutional Commission hopes that they will provide the impetus for a full review of all constitutional provisions where supplementary legislation is not only required by the Constitution, but also where the Constitution identifies supplementary legislation as being desirable or expressly flags the opportunity for such legislation. As regards the latter, the Constitutional Commission also recommends that where the term “may” is deployed in sections like 117(9)(h) and 118(5), these provisions should in any event be kept under regular review.

On related matters, the Constitutional Commission has also previously drawn attention to the constitutional provisions pertaining to people initiated referendums and the issues surrounding section 70(1) of the Constitution, which establishes that: “Without prejudice to section 69, a law enacted by the Legislature shall make provision to hold a referendum amongst persons registered as electors in accordance with section 90 on a matter or matters of national importance that do not contravene any part of the Bill of Rights or any other part of this Constitution”.

On 13 October 2011, the Constitutional Commission published a Research Paper, entitled People Initiated Referendums, in which it was noted that: “The legislation required by the Constitution to govern referendums has not yet been implemented” and that some of the key elements to be included in this legislation, were the settling of the wording of the referendum question; the timeframe for settling the question; and the process to be followed for the administration of the referendum. Those elements described in section 70(2)(b) and (c) of the Constitution were not, however, necessarily considered exhaustive and it

follows that the process may require other legislative guarantees.

Subsequently, in its Proposed Review of the Cayman Islands Constitution, dated 14 October 2014, the Constitutional Commission returned to section 70, describing it as “unclear” and querying “whether this section requires that a law be enacted which governs all people-initiated referendums or simply a law enacted providing for each individual referendum when it is petitioned for”.

Notably, the Constitutional Commission’s Research Paper and its Proposed Review of the Constitution were both referenced by the Grand Court in the first instance decision in *Roulstone v The Cabinet of the Cayman Islands et al* (Cause No. 195 of 2019) (“the Port Referendum Case”), dated 19 February 2020. At the time of preparing this update, the judgment in the Port Referendum Case is subject to appeal and, as such, it would not be appropriate for the Constitutional Commission to comment on the merits of the case herein. It is, however, accepted that the matter concerns a fundamental democratic right guaranteed by the Constitution and that there is a very clear and strong public interest in determining whether the legislation that was enacted for the port referendum is compatible with the Constitution.

Insofar as the role of the Constitutional Commission is concerned, it is also apparent that where the Constitutional Commission has raised issues, there is merit in having greater and more meaningful engagement on these points with a view to clarifying the operation of the Constitution at the earliest opportunity.

THE CONSTITUTIONAL COMMISSION'S RECOMMENDATIONS

It is appropriate to reaffirm that the Constitutional Commission has made various recommendations over the years, which, as far as the Constitutional Commission is aware, have received little traction. The 2014 Review noted above in fact identified 34 suggestions for review; while the 2018 Report, also noted above, responded to a request for other minor proposals for amendment with the following recommendations for consideration where clarification and greater precision was deemed appropriate:

1. Constitutional recognition of the appointment and role of councillors, who have become a feature of successive Governments, but which do not have a clear constitutional footing;
2. The appointment of the Premier under section 49 of the Constitution, with particular reference to: (a) 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 (b) 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;
3. The qualifications of 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 retained their residency returns to the jurisdiction;
4. The disqualification of electors and whether a blanket ban on voting for prisoners serving sentences exceeding 12 months' imprisonment in section 91(1)(a) of

the Constitution should be amended to comply with international human rights law;

5. 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

6. 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.

The first of these points has been addressed in the draft Order in Council with the proposed introduction of Parliamentary Secretaries. However, the draft Order in Council does not encompass any of the other 5 recommendations for consideration that were identified by the Constitutional Commission. In the absence of any feedback, it is not clear to the Constitutional Commission whether these recommendations were considered and rejected or even considered at all.

RECORDS RELATING TO THE AMENDMENT OF THE CONSTITUTION

While engagement on the recommendations themselves would be beneficial, the question of whether they were considered should at least be ascertainable from the records of the constitutional talks held in London in December 2018 and the related correspondence. The Constitutional Commission has therefore requested copies of these records so that they may be made generally available.

Having received no response to its initial letter dated 26 February 2019, the Constitutional Commission has restated this request in its Explanatory Note of 17 February 2020.

THE SPEAKER OF THE LEGISLATIVE ASSEMBLY

One of the recommendations advanced by the Constitutional Commission in its 2018 Report, which is not addressed in the draft Order in Council, refers to the position of the Speaker in the Legislative Assembly and the Constitutional Commission is also cognizant that this important constitutional post has attracted recent public comment in connection with the announcement that the incumbent has taken a leave of absence from the Speakership duties. The Constitution itself does not address this particular scenario and the Constitutional Commission has commenced a review of other comparable jurisdictions to ascertain whether this is an omission in our constitutional arrangements. The Constitutional Commission will publish this comparative analysis in due course, but preliminary findings indicate that similar constitutions tend not to make bespoke provision for the Speaker to take a leave of absence and that such situations would consequently fall to be managed by the procedural rules governing the operation of the Legislature.

This does not necessarily mean that the Cayman Islands Constitution ought not to make more detailed provision relating to the Speaker of what will be termed the Cayman Islands Parliament upon the draft Order in Council being brought into effect. Indeed, this development may very well signal that time is ripe for a general review of the Speakership, in which case the Constitutional Commission would recommend that such review also picks up on the related points that the Constitutional Commission has previously highlighted in its 2014 Review and 2018 Report.

The Constitutional Commission further recommends that specific consideration be given to how the independence of the Speakership can be protected, particularly in circumstances where a general election results in a hung parliament and the appointment of a particular person as the Speaker then becomes a factor in the formulation of the Government and thereby potentially politicises the position.

THE LEGISLATURE AND THE JUDICIARY

In addition to the Port Referendum Case noted above, there have been other cases of constitutional import that have come before the Courts in recent times. Of particular note is the on-going litigation in *Day and Bodden Bush v The Governor of the Cayman Islands, Deputy Registrar of the Cayman Islands Government Registry and the Attorney General of the Cayman Islands* (Cause No. 118/2018 and 184/2018; and on appeal CICA No.9 of 2019) (“the Marriage Equality Case”).

The Constitutional Commission has not commented on substance of the Marriage Equality Case, as this concerns fundamental human rights and therefore, in this regard, is within the purview of the Human Rights Commission. Like the Port Referendum Case, the Marriage Equality Case is also currently under appeal; although unlike the Port Referendum Case, which is presently before the Court of Appeal, the Marriage Equality Case is on appeal to the Judicial Committee of the Privy Council (the final Appellate Court for the Cayman Islands).

Notwithstanding these appeals, what the Constitutional Commission can say at this juncture is that both cases should be followed closely, not just for the particular matters at issue in each case, but also because they will shape and inform the constitutional relationship between the Legislative and Judicial branches of Government. For example, at the heart of the Marriage Equality Case has been the extent to which the Courts can bring legislation that pre-dates the 2009 Constitution into conformity with the Bill of Rights, Freedoms and Responsibilities (“the Bill of Rights”); or whether any dissonance between such legislation and the Bill of Rights should be resolved by the Legislature. The Port Referendum Case has similarly called into question the respective roles of the

Legislature and the Judiciary in the context of whether the Court could quash the Referendum (People-Initiated Referendum Regarding the Port) Law, 2019 (“Port Referendum Law”) on the basis that the Port Referendum Law was unconstitutional; or whether the Legislature should be directed to address and resolve any deficiencies identified in the Port Referendum Law.

Both cases thus raise a fundamental issue; namely, in a constitutional democracy, which branch of Government should have the final say. Should it be the Legislature that is democratically elected by the people; or the independent Judiciary, which is unencumbered by the majoritarian principle and thereby better positioned to protect the rights of minorities? The outcomes of the Port Referendum Case and the Marriage Equality Case will go a long way to determining how this question will be resolved in the Cayman Islands.

THE COVID-19 PANDEMIC AND THE CONSTITUTION

The COVID-19 pandemic has undoubtedly had far-ranging impacts. It has curtailed the opportunity for the newly reconstituted Constitutional Commission to meet, although like many other organisations, the Constitutional Commission has adjusted to the situation and virtual meetings have been held instead. Insofar as the Constitution is concerned, the COVID-19 pandemic has also challenged the organs of Government and their continued operation in the course of this crisis.

In response to this challenge, it is notable that we have seen: the Executive branch of Government subject itself to account in frequent and lengthy press briefings; changes to the Standing Orders of the Legislative Assembly to permit the first ever electronic meeting of the Legislature and the enactment of a number of emergency laws in response to the COVID-19 pandemic; and the Courts respond with a series of proactive procedural initiatives and Practice Directions that have ensured continuity of operations.

While each organ of Government will no doubt reflect upon how operations can be further improved in the face of a similar situation in the future, these actions collectively ensured that the constitutional arrangements in the Cayman Islands were able to withstand the immediate threat of the COVID-19 pandemic.

The Constitutional Commission is aware that questions have been raised as to whether some of the emergency laws that were enacted in response to the COVID-19 pandemic were compliant with the Bill of Rights in the Constitution. While the Constitutional Commission defers to the Human Rights Commission on the substantive issue of compatibility with the Bill of Rights, the Constitutional Commission does note that if any such a challenge was thought appropriate, the constitutional apparatus in the Courts required to deal with this has continued to be available notwithstanding the COVID-19 pandemic.

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.