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27 June 2018

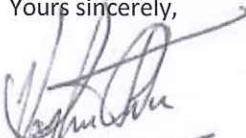
Dear Sirs,

**Re: Constitutional Commission's Responses to Requests for Comments on Potential Revisions to the Cayman Islands Constitution 2009**

Thank you for inviting input from the Constitutional Commission ("the Commission") on potential revisions to the Cayman Islands Constitution 2009. As the accompanying response notes, the Commission has received requests from both His Excellency the Governor and the Hon. Premier and Hon. Leader of the Opposition. In responding to these requests, the Commission has produced a consolidated response, which, in anticipation of this response being available to the general public, includes some explanatory material in order to assist persons who are not necessarily versed in constitutional matters. While the Commission recommends that the response be read in full, it has also provided an Executive Summary, which can be found at the end of the response.

The Commission trusts that it has addressed all of the various requests. However, should any additional input be required, the Commission remains available to further assist.

Yours sincerely,



Vaughan Carter  
Chairman, Constitutional Commission

Encl.



**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

## Introduction

The Constitutional Commission is one of the “Institutions Supporting Democracy” enshrined in Part VIII of Schedule 2 to the Cayman Islands Constitutional Order 2009 (the “Constitution”). The functions of the Constitution Commission are detailed in section 118(3) of the Constitution and, subject to further legislative amplification, are (a) to advise the Government on questions concerning constitutional status and development in the Cayman Islands; (b) to publish reports, discussion papers, information papers and other documents on constitutional matters affecting the Cayman Islands; and (c) to promote understanding and awareness of this Constitution and its values.

Following the recent enactment by the United Kingdom Parliament of the Sanctions and Anti-Money Laundering Act 2018 and the provisions therein relating to the establishment of public registers of beneficial ownership information in United Kingdom Overseas Territories, the Constitutional Commission has been contacted by the Hon. Premier and the Hon. Leader of the Opposition in the first instance; and, subsequently, by His Excellency, The Governor. In both exchanges, broader issues involving the constitutional relationship between the Cayman Islands and the United Kingdom have been raised with the Constitutional Commission and, in this regard, the Constitutional Commission was advised by the Hon. Premier and the Hon. Leader of the Opposition of six potential revisions to the Constitution that were under consideration.

These potential revisions involve:

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-governance 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”.

In accordance with its advisory function in section 118(3)(a) of the Constitution, the Constitutional Commission has been tasked by His Excellency to provide brief comments on these potential revisions and, where possible, examples of such revisions in operation. In addition, the Constitutional Commission has also been engaged by the Hon. Premier and the Hon. Leader of the Opposition: to advise as to any other areas of the Constitution that would benefit from clarification at this time.

The Constitutional Commission understands that these requests have been made in anticipation of a prompt and succinct response and the Constitutional Commission has responded accordingly herein. At the same time, the Constitutional Commission is also conscious that this correspondence will, and indeed should, be made available to the general public. So, without wishing to lengthen needlessly, some contextual background has therefore been incorporated to assist readers who are not necessarily versed in constitutional matters. Consistent with the Constitutional Commission's past practice and with its mandate in section 118(3)(b) and (c) of the Constitution, the Constitutional Commission will publish this communication on its website in due course.

### **Reserve Powers and Disallowance**

The proposed revisions involving reserve powers and the power of disallowance both relate to the legislative function and the shared involvement therein between the democratically elected local legislature and the United Kingdom, whether that be through the Governor or the Secretary of State with responsibility for overseas territories. Put simply, these two suggested modifications to the legislative arrangements under the Constitution would clearly result in greater local autonomy. As to whether such a realignment is in any way problematic, it should be noted at the outset that the proposed revisions would not remove the United Kingdom from the legislative function entirely. There are, in addition to the provisions proposed to be amended, other provisions in the Constitution that facilitate the United Kingdom's continued involvement in the legislative process.

Section 78 of the Constitution, for example, still permits the Governor to refuse to assent to a Bill passed by the Legislative Assembly. It does so, however, in limited circumstances and only after the Governor has explained to the members of the Legislative Assembly why he or she proposes to refuse assent and has also afforded members the opportunity to submit their views on the matter in writing to the Secretary of State in the United Kingdom. The way in which this particular power has come to be regulated and the general trend reflected in the interplay between local institutions and the United Kingdom's representatives may be instructive when considering how other aspects of the Constitution might better operate.

In addition to the power of the Governor to refuse assent, there remains the ultimate backstop, the power of the United Kingdom Parliament to legislate directly for an overseas territory. As a matter of general constitutional law, the United Kingdom Parliament is sovereign and has the

unfettered power to legislate as it sees fit; including the power to revise or repeal the West Indies Act 1962, the very Act upon which the Cayman Islands Constitution is premised. In practice, the United Kingdom Parliament would usually legislate for an overseas territory only when the territory so requests or, in extreme circumstances, where the United Kingdom's security was in issue.

The significance of the Sanctions and Anti-Money Laundering Act 2018 was that this enactment did not follow the conventional practice, albeit that this is an exception to the norm. The proposed revisions to the legislative function would not disturb the United Kingdom Parliament's definitive power in this regard; they would, however, clarify and limit when the United Kingdom could intervene short of resorting to what is effectively the nuclear option.

Turning to the proposed revisions, the Constitution currently makes provisions for reserve powers in section 81 in connection with the Governor's areas of constitutional responsibility and, more generally, in section 125, under which: "There is reserved to Her Majesty full power to make laws for the peace, order and good government of the Cayman Islands." Similarly broad reserve powers, which enable legislation to be extended by Order in Council, are contained in most other United Kingdom Overseas Territory constitutions. The oft-cited exception is Bermuda, whose constitution omits any reference to these reserve powers. The generally accepted explanation for this, and other related differences in the Bermudan Constitution Order 1968, is that these were agreed in anticipation of Bermuda becoming independent.

It does not however necessarily follow that reserve powers can, or indeed should, only be omitted in a pre-independence constitution. The preferable approach would be to consider whether such wide-ranging reserve powers continue to be appropriate in the context of a modern constitutional partnership between the United Kingdom and an increasingly sophisticated and mature overseas territory, such as the Cayman Islands.

It is also important to appreciate that the removal of Her Majesty's reserve powers would not necessarily prevent the United Kingdom Parliament from legislating for an overseas territory even where, as is the case with Bermuda, Her Majesty's reserve power to legislate by Order in Council for the peace, order and good government had been dispensed with.

An alternative option to the complete removal of Her Majesty's reserve powers would be to better define the circumstances in which these reserve powers can be utilised; clarifying, for example, that they only apply to matters involving the most serious of circumstances, such as a fundamental breakdown in public order or endemic corruption in the government, legislature or

judiciary. This approach would, at least, bring some clarity to the concept of “peace, order and good government”, which is, as it stands, somewhat nebulous and conceivably open to an excessively broad interpretation.

A similar potential tension in the relationship between many overseas territories and the United Kingdom also arises where the United Kingdom has the power to override legislation passed locally. This power of disallowance is contained in section 80(1) of the Constitution, which permits any law passed by the Legislative Assembly and assented to by the Governor to be “disallowed by Her Majesty through a Secretary of State”.

Historically, such powers were established to preserve the dominant position of the colonial government and in so doing to ensure that laws passed in the colonies were always consistent with Acts of Parliament. The modern position, as reflected in section 80 of the Constitution, is a little more nuanced in that the Secretary of State is obliged to provide the Legislative Assembly with an opportunity to reconsider the law that has been called into question and to remedy the perceived defect themselves.

For a period in the eighteenth century, the power of disallowance was sometimes limited by its restriction to a defined period after the local legislation was enacted. However, this limitation no longer applies and the power of disallowance is effectively unfettered, save for the window for reconsideration.

Given that the exercise of the power of disallowance involves countermanding the democratic will of a locally elected legislature, it is not surprising that this power is rarely used. This lack of deployment is sometimes advanced as a justification for the retention of the power. However, it may also be taken as support for the alternative proposition; namely that such powers should be removed altogether, as is now proposed in respect of the Cayman Islands. In this regard, it is notable that the power of disallowance no longer applies in Gibraltar, following its removal in that overseas territory when the Gibraltar Constitution Order 2006 was enacted and brought into force.

### **Internal and External Affairs**

In addition to the legislative modifications being considered, the proposed revisions also contemplate a range of adjustments to executive powers and the relationship between those who are assigned executive functions. In section 43 of the Constitution, executive authority is

allocated to the Cabinet and to the Governor as Her Majesty's representative. Broadly speaking, the Cabinet is responsible for internal governance, while the "special responsibilities" of defence, external affairs and internal security are retained by the Governor under section 55 of the Constitution, subject to certain provisos therein.

This division of executive powers and the balancing thereof had been re-calibrated in 2009, with several key revisions incorporated into the Constitution. Greater local autonomy in this regard was notably achieved with the appointment of a Minister with responsibility for finance and the requirement that the Deputy Governor, who has day-to-day oversight of the Civil Service, be Caymanian. In addition, the local arm of the executive was also permitted greater involvement in relation to some of the Governor's "special responsibilities", as embodied in the opportunity for Ministerial engagement in external affairs in accordance with section 55(4) and Cabinet involvement with international agreements where such agreements affect internal policy under section 55(3).

Greater local autonomy is thus a discernible trend and a clear objective of the most recent constitutional arrangements in the Cayman Islands and, to the extent that there is now some uncertainty surrounding what was intended or how these new arrangements should work in practice, any clarification is welcome. While the Constitution can never cater for every eventuality, it is not desirable to have a situation where interpretation and/or application of the Constitution varies unduly depending upon the individuals who hold positions at particular times. It is against this backdrop that the proposed revisions should be considered.

The National Security Council was one of the new initiatives incorporated into the Constitution in 2009, with the clear intention of facilitating local involvement in matters of national security, which were previously the preserve of the Governor. To this end, the special responsibility of the Governor for internal security in section 55 of the Constitution is expressly caveated with reference to section 58; this being the section that establishes the National Security Council and the composition thereof.

It would appear by all accounts that the National Security Council has not always operated effectively and/or as anticipated. Without casting any aspersions as to why this outcome has transpired, some clarification in this regard would seem to be in the interests of all concerned. The proposed revision draws particular attention to the relationship between Cabinet and the National Security Council and while the Constitutional Commission has not had the benefit of what specifically has precipitated this aspect of the proposal, there does appear to be some



confusion amongst the public as to who is ultimately responsible for security and associated policing issues: whether it is the Governor, the Commissioner of Police, the elected representatives or the National Security Council?

As regards international affairs, there are two related proposals being advanced. The first is a further clarification to the relationship between Cabinet and the Governor, so as to make it clear that the United Kingdom's power over "international affairs" be confined to the enforcement and implementation of clear international obligations of the United Kingdom alone. This position may well have been thought to be implicit, given the way in which section 55(3) of the Constitution is already constructed, namely that: "The Governor shall not enter, agree or give final approval to any international agreement, treaty or instrument that would affect internal policy or require implementation by legislation in the Cayman Islands without first obtaining the agreement of the Cabinet, unless instructed otherwise by a Secretary of State." However, if this is not the case, any ambiguity could usefully be resolved at this time.

The second related proposal, which takes the position a step further, is that it should be made clear that, provided that Cayman Islands is not in breach of international standards, the power of internal self-governance is absolute. The effect of such revision would be to confirm that United Kingdom's powers in respect of the Cayman Islands do not permit interference with a matter that falls within the remit of the local government, unless there is an established international standard, presumably reflected in an international agreement; in which case, the provisions of section 55(3) of the Constitution, as clarified, would apply. This is the underlying issue at the heart of the recent dispute surrounding the establishment of public registers of beneficial ownership information and, for this reason alone, would benefit from clarification.

### **Associated Status and the Right to Self-Determination**

In the extensive debates that paved the way for the 2009 Constitution, during which the continuing relationship 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 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.

A detailed analysis of what are now four options is beyond the scope of this paper. However, without wishing to over-simplify matters, these options can be usefully viewed on a spectrum, with the establishment of a sovereign and independent State at one end and the integration into an independent State at the other. In the middle then is the notion of free association, which “should be the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes” and “should be one which respects the individuality and the cultural characteristics of the territory and its peoples, and retains for the peoples of the territory which is associated with an independent State the freedom to modify the status of that territory through the expression of their will by democratic means and through constitutional processes”.

With a distinct form of separate sovereignty, the free association option is often construed as a variant of independence and can thus be positioned more to that side of the spectrum; leaving the new fourth option, which is also a hybrid but which permits a closer relationship with an administering power, on the other side of the midpoint. Under either of these two options, there would continue to be a sharing of certain responsibilities and, as such, these are the closest options to the current constitutional arrangements that apply in the Cayman Islands.

While respectful of the right to self-determination and of the United Nations Committee that seeks to resolve the status of non-self-governing territories, the United Kingdom’s position on free association has not always been consistent with the interpretation applied by the United Nations. In this context, it would be helpful to get some clarity as to whether free association, and indeed the new fourth option, are considered to be viable options for future consideration by the Cayman Islands and its people.

At this juncture, the Constitutional Commission understands that what is presently proposed are merely “discussions” regarding the “route” to “Associated Status” and that, as such, this is distinct from the other, more tangible, potential revisions that have been advanced. For all of the reasons noted above, if such discussions can be entered into with a view to realising greater clarity, this ought not to be objectionable. Any substantive proposal to actually move in this

direction, however, would involve a fundamental change in the constitutional arrangements of the Cayman Islands and would, necessarily, require more consideration and consultation.

### **Other Reforms for Consideration**

In response to the invitation from the Hon. Premier and Hon. Leader of the Opposition, the Constitutional Commission has also considered whether there are other aspects of the Constitution that are ripe for amendment at this time. In so doing within the limited time available, the Constitutional Commission has been guided by:

1. The instruction that any additional proposals should be restricted to relatively minor amendments;
2. The understanding that all proposals currently under consideration will be subject to some public consultation and debate in the Legislative Assembly prior to any formal presentation to the United Kingdom;
3. The suggestions previously identified by the Constitutional Commission for review, which are published on the Constitutional Commission's website ([www.constitutionalcommission.ky](http://www.constitutionalcommission.ky));
4. Other matters that have been brought to the attention of the Constitutional Commission and/or raised in the course of its deliberations; and
5. A particular focus on those aspects of the 2009 constitutional arrangements that have given rise to confusion or uncertainties and which would benefit from clarification and greater precision.

On this basis, the Constitutional Commission recommends consideration of:

1. Constitutional recognition of the appointment and role of councilors, 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 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;
  4. The disqualification of electors and whether the 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 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.

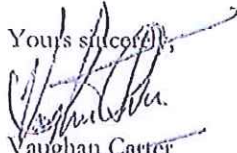
Should additional assistance be required, the Constitutional Commission stands ready to provide as necessary.


## Executive Summary


1. The Constitutional Commission has been asked by His Excellency the Governor to comment on six potential revisions to the Constitution, which have been proposed by the Hon. Premier and the Hon. Leader of the Opposition and which are under consideration at this time.
2. The Hon. Premier and the Hon. Leader of the Opposition has also requested that the Constitutional Commission identify other areas of the Constitution that would benefit from clarification.
3. The proposed revisions involving reserve powers and the power of disallowance would modify the legislative arrangements under the Constitution, resulting in greater local autonomy.
4. Her Majesty's reserve powers to legislate by Order in Council for the peace, order and good government do not feature in all United Kingdom Overseas Territory constitutions, having previously been removed in respect of Bermuda.
5. The removal of Her Majesty's reserve powers would not necessarily prevent the United Kingdom Parliament from legislating for an overseas territory,
6. An alternative option to the complete removal of Her Majesty's reserve powers would be to better define the circumstances in which these reserve powers can be utilised.
7. The power of disallowance involves countermanding the democratic will of a locally elected legislature.
8. The power of disallowance no longer applies in Gibraltar, following its removal in that overseas territory under the Gibraltar Constitution Order 2006.
9. This division of executive powers between the Cabinet and the Governor were reorganised under the 2009 Constitution so as to provide for greater local autonomy and some new involvement in the Governor's special responsibilities of defence, external affairs and internal security.
10. While the Constitution can never cater for every eventuality, to the extent that there is now some uncertainty surrounding what was intended or how these new arrangements should work in practice, clarification is welcome.
11. It is not desirable to have a situation where interpretation and/or application of the Constitution varies unduly, depending upon the individuals who hold positions at particular times.

12. It does appear that the National Security Council has not always operated effectively and/or as anticipated and there also appears to be some confusion amongst the public as to who is ultimately responsible for security and associated policing issues as a result.
13. Any ambiguity surrounding international affairs and that the United Kingdom's power in this regard ought to be confined to the enforcement and implementation of clear international obligations of the United Kingdom alone could be usefully resolved at this time.
14. The recent dispute surrounding the establishment of public registers of beneficial ownership information has brought to the fore the question of the United Kingdom's powers in respect of the Cayman Islands where a matter falls within the remit of the local government and where there is not an established international standard and, for this reason alone, would benefit from clarification.
15. The right to self-determination 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 Constitution.
16. As a matter of international law and in the context of decolonization, there are now four accepted options, of which free association and the emergence into any other political status freely determined by a people are the closest options to the current constitutional arrangements that apply in the Cayman Islands.
17. The United Kingdom's position on free association has not always been consistent with the interpretation applied by the United Nations and it would be helpful to get some clarity as to what options are considered to be available for future consideration by the Cayman Islands and its people.
18. What is presently proposed are merely "discussions" regarding the "route" to "Associated Status".
19. 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.
20. Where the 2009 constitutional arrangements have given rise to confusion or uncertainties and these aspects would benefit from clarification and greater precision, the Constitutional Commission also recommends consideration of the following:
  - a. The appointment and role of councilors;
  - b. The appointment of the Premier;

- c. The qualifications for electors;
  - d. The disqualification of electors;
  - e. The qualifications and disqualifications for elected membership to the Legislative Assembly; and
  - f. The process by which the Constitution may be altered in the future.
21. It is understood that all proposals currently under consideration will be subject to some public consultation and debate in the Legislative Assembly prior to any formal presentation to the United Kingdom.
22. The Constitutional Commission stands ready to provide any additional assistance as necessary.

Yours sincerely,  
  
Vaughan Carter  
Chairman, Constitutional Commission

  
Natalie Urquhart (COLEMAN)  
Member, Constitutional Commission

  
Olivaire Watler  
Member, Constitutional Commission