REF: CC-RES-ADVICE

His Excellency, the Governor Martyn Roper, OBE
Via Email: faye.kulcheski2@gov.ky

Honourable Premier Wayne Panton, JP
Via Email: kristy.watler@gov.ky

Hon. Leader of the Opposition Roy McTaggart, JP
Via Email: roy@mctaggart.ky

15 October 2021

Dear Sirs,

Re: Supplementary Legislation

Introduction

In our Post-Election Update letter of 14 May 2021 ("the Post-Election Update"), we advised that the Constitutional Commission was in the process of considering the various aspects of the Constitution in which supplementary legislation is anticipated with a view to recommending action where appropriate. As also foreshadowed in this Post-Election Update, the Constitutional Commission's efforts in this regard were focussed on the institutions supporting democracy and whether any supplementary legislation or reforms to existing supplementary legislation for these institutions may be required. We now write to advise on the outcomes of this engagement.

Background

The background to this work was set out in the Constitutional Commission's Annual Update published on 2 July 2020 ("the 2020 Annual Update""). At page 4 of the 2020 Annual Update, it was explained that:

> *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*

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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.

Institutions Supporting Democracy

Part VIII of the Constitution establishes a range of institutions designed to support democracy in the Cayman Islands; these are, at section 116, the Human Rights Commission; at section 117, the Commission for Standards in Public Life; at section 118, the Constitutional Commission; at section 119, Advisory District Councils; and, at section 120, the Complaints Commissioner. Each of these institutions have been consulted by the Constitutional Commission in the course of this project, with the obvious exception of Advisory District Councils, which have not as yet been formulated but which are considered below; and the Constitutional Commission itself, which has nevertheless considered this issue itself as also noted below.

In addition, the Constitutional Commission has consulted with the Judicial and Legal Services Commission and the Auditor General on the basis that these entities also support democracy and the rule of law, notwithstanding that they are enshrined in section 105 and section 114 of the Constitution respectively and not directly alongside the other bodies referred to as institutions supporting democracy in Part VIII.

The Human Rights Commission

Following a comprehensive review, the Human Rights Commission responded to the enquiry from the Constitutional Commission to advise that there were several areas in which supplementary legislation would be beneficial to the operations of the Human Rights Commission. In summary, the Human Rights Commission noted that:

1. The main area / power that is lacking is the ability to compel public officials to respond to the Commission's requests for information;

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2. This has been a serious problem in the past and has caused numerous delays in the [Human Rights] Commission moving forward in considering / resolving matters / complaints (one of its essential functions);

3. A potential solution could be to introduce provisions similar to those in the Freedom of Information Act, so as to oblige public officials to respond to the Human Rights Commission; and

4. An indemnity for Members of the Human Rights Commission should be introduced.

The Commission for Standards in Public Life

At page 5 of the 2020 Annual Update, the Constitutional Commission noted that: "… the Standards in Public Life Law [Act] was finally brought into effect on 1 March 2020 and the Standards in Public Life Regulations, 2020 were duly published on 2 March 2020" and that these were "important developments". In the context of this newly established framework, the Constitutional Commission understands that there are some aspects of the legislation that require refinement and that drafting work is underway on a Bill to amend the primary legislation, as well as on an amendment to the Regulations.

While we have not had an opportunity to review and consider the substantive amendments that are being considered by the Commission for Standards in Public Life (for the avoidance of any confusion and to be clear, there is no obligation or expectation to consult the Constitutional Commission on such matters), the Constitutional Commission notes that these revisions are indicative of a need to monitor this type of legislation on an on-going basis.

The Constitutional Commission does nevertheless note that the Standards in Public Life Act, as presently drafted, focuses mainly on the requirement of persons in public life to make annual declarations to the Register of Interests; but that there has been much discussion surrounding whether the Commission for Standards in Public Life ought to be empowered to play some role where the personal actions of a person in public life may be seen to bring their professional reputation / post into disrepute. The Constitutional Commission therefore anticipates that this is a matter that will require some detailed consideration.

The Complaints Commissioner

The utility of on-going review was also something that the Complaints Commissioner, now better known as the Ombudsman, identified in responding to the Constitutional Commission. While the Ombudsman was content with the provisions contained in the Ombudsman Act for the present time, she expressly noted that: "a regular review ought to be established to ensure the law remains current and fit for purpose".

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The Judicial and Legal Services Commission

According to the 2010-2015 Report of the Judicial and Legal Services Commission, "The JLSC [Judicial and Legal Services Commission] believes that bespoke legislation is required to address its role and functions. It does not believe that that legislation has to be extensive, and indeed takes the view that it may be limited to just three principal subjects: its members' liability and indemnification; power to make its own rules and regulations (there is no need to set them all out in primary legislation); and freedom of information ("FOI"). As regards FOI, the JLSC believes that the nature of its work should exempt it entirely from freedom of information legislation. The JLSC has asked [the Government] to be consulted in advance if any legislation is proposed to add new officeholders to the JLSC's remit pursuant to Section 106(4)(f) of the Constitution."

With these objectives in mind, the Judicial and Legal Services Commission has been in discussion with the Portfolio of Legal Affairs and has identified the JLS Model Act created in 2016 by the Commonwealth Secretariat, in collaboration with the Bingham Centre, as a template for the supplementary legislation required. However, these discussions have not to date resulted in a draft Bill and the Judicial and Legal Services Commission remains interested in moving these matters forward.

On indemnification, the Judicial and Legal Services Commission continues to hold the view that all past, present and future members of the Judicial and Legal Services Commission should be specifically protected.

While it is acknowledged that the FOI position of the Judicial and Legal Services Commission is complicated by its relationship with the Commissions Secretariat – the Commissions Secretariat provides services to and holds the records of the Judicial and Legal Services Commission and is subject to FOI – this does not disturb the basic proposition advanced by the Judicial and Legal Services Commission, which is that that the nature and sensitivity of its work merits an exemption.

On the issue of additional offices being added to the remit of the Judicial and Legal Services Commission, this concerns positions such as the Deputy Director of Public Prosecutions and the Solicitor General, whose appointments do not fall within the remit of the Judicial and Legal Services Commission, but who from time to time may act in positions that are appointed by the Judicial and Legal Services Commission (e.g. the Director of Public Prosecutions and the Attorney General). The Judicial and Legal Services Commission takes the view that such posts should also be incorporated into to the offices covered by the Judicial and Legal Services Commission by way of legislation enacted in accordance with section 106(4)(f) of the Constitution.

The Judicial and Legal Services Commission has also identified other issues that pertain to the Constitution itself, rather than the enactment of supplementary legislation. Although these issues – the lack of clarity regarding how complaints against the Chief Justice and President of the Court of Appeal will be handled following the 2016 Amendment of the Constitution; the absence of any

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provision that addresses the retirement age for Judges of the Court of Appeal; and the need to establish more robust arrangements to ensure that any Government of the day allocates adequate funds to the Judiciary and Judicial Administration and in so doing preserves judicial independence and the rule of law – are strictly beyond the scope of this exercise, they are nonetheless worthy of note.

What is nevertheless apparent is that there are evidently issues that the Judicial and Legal Services Commission would like to see addressed; and, insofar as the issues identified are concerned, the Constitutional Commission notes that these matters have now been extant for some considerable time and that this is indicative of the real and present need for improvement in the process by which the Government considers and responds to recommendations for supplementary legislation.

The Auditor General

The independence of the Auditor General is enshrined in Part VII of the Public Management and Finance Act (2020 Revision), along with the powers and duties of the Auditor General and the accountability arrangements for the Audit Office. Given the constitutional importance of this position, further definition as to the operations of the Auditor General and the Audit Office may benefit from the introduction of a distinct Auditor General law. The Constitutional Commission has been advised that this legislative framework is under review by the Auditor General and, as with the responses from the other Institutions Supporting Democracy, this is a process that the Constitutional Commission supports.

Advisory District Councils

In the Post-Election Update, the Constitutional Commission sought to draw attention to the absence of Advisory District Councils with the following remarks:

> *[T]he 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".*
>
> *However, it is already apparent that there is an obvious deficit in respect of the supplementary legislation mandated in section 119 of the Constitution for Advisory District Councils. We write therefore to advise that the Constitutional Commission is presently considering the content of such legislation and to request that if any new efforts are to be made on the implementation of such legislation that the Constitutional Commission be duly consulted.*

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Having now reviewed the Advisory District Councils Act, 2011 ("the 2011 Act") in full, the Constitutional Commission has produced a series of recommendations, which are enclosed in a separate document and which as such will serve as a stand-alone resource on this discrete topic.

In summary, the Constitutional Commission's conclusions and recommendations as regards Advisory District Councils are:

1. There has been a significant failure to implement the legislation necessary to bring Advisory District Councils into being;

2. Notwithstanding that the 2011 Act is already on the statute book, this should be revisited;

3. Given what is already a long-standing delay in realising the constitutional instruction to establish Advisory District Councils, this matter should be considered urgent and the Constitutional Commission strongly recommends that the necessary steps will now be taken accordingly.

The Constitutional Commission trusts that the recommendations contained in the enclosed are instructive as to how this matter could be advanced; and, to these ends, we are available to develop these recommendations and, as always, to further assist generally as may be required.

Constitutional Commission

The Constitutional Commission has no interest in its own aggrandisement. However, if the Constitutional Commission is to fulfil its constitutional mandate, it is imperative that the Constitutional Commission is properly engaged and that its recommendations are, at the very least, duly considered. The constitutional importance of this engagement is underscored by the pronouncements of the Grand Court in *Roulstone v. Cabinet of the Cayman Islands and Legislative Assembly of the Cayman Islands (National Trust for the Cayman Islands Intervening)* [2020 (1) CILR 442].

Specifically at pages 462-3 and 490-1, the Grand Court noted the following in respect of the Constitutional Commission:

> *It is also to be noted that in its October 14th, 2014 letter to the CIG, the chairman of the Commission, Mr. David Ritch, said that "the Commission strongly recommends that the Premier and the Leader of the Opposition establish a Committee to consider this matter in further detail." Perhaps surprisingly, the Government did not take up the Commission's suggestion and indeed it seems that the Government made no response at all to the Commission's concerns. It is equally surprising that, in the course of considering what legislative response was needed to CPR Cayman's petition, it would appear that the views of the Constitutional Commission were not taken into account by the Cabinet or the Legislative*

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Assembly. The court was provided with no evidence that they were or indeed that any member of the Government had consulted the Commission before responding to this first s.70 referendum.

…

Ultimately it must be for the legislature to decide what a general Cayman Referendums Law should contain to guarantee a fair and effective right to vote in a s.70 referendum, no doubt informed by the advice of the Constitutional Commission in discharge of its s.118 Constitutional function to advise the Government on constitutional development in the Cayman Islands. It is, in my view, unfortunate that apparently no Government has seen fit since the Commission published its thoughtful and well-reasoned research paper in 2011 to respond to the Commission's views on what it clearly felt was the obvious need for a general referendum law. It is also surprising that the Government made no response to the Commission's strong recommendation in October 2014 that a Committee be established to consider the issue of what form of law was necessary to enact in response to the enactment in 2009 of s.70 of the Constitution. Had this matter been addressed earlier, the uncertainty and ultimately, as I have found, the incompatibility of the Referendum Law 2019 with the Constitution might well have been avoided.

It is appreciated that, on appeal, the Court of Appeal took a different view to the Grand Court on the substantive matters at issue in this case. However, the Court of Appeal did not disagree with the importance of engagement with the Constitutional Commission. Instead the Court of Appeal expressed its incredulity at: "an apparent failure [by the Government] to consult the Constitutional Commission before deciding how to respond to this the first people-initiated referendum and a background of very surprising non-responsiveness to two significant and highly relevant documents prepared by the Commission" (CICA (Civil) Appeal 6 of 2020 – *The Cabinet et al v. Shirley Roulstone et al* – Judgment delivered 2 July 2020, paragraph 108).

While the Constitutional Commission appreciates that the process by which its reports and recommendations are addressed, and indeed by whom, is not expressly set out, it is unfortunate that the non-responsiveness that the Court of Appeal refers to is by no means an isolated occurrence. Respectfully, it is our obligation to point out that this is in fact the norm.

By way of recent examples, we note that there has been no action – and in most cases not even acknowledgement – of the following important reports, recommendations and requests submitted by the Constitutional Commission:

1. In the Constitutional Commission's Responses to Requests for Comments on Potential Revisions to the Cayman Islands Constitution 2009, dated 27 June 2018 ("the 2018 Report"), the Constitutional Commission made six recommendations. While one of these

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recommendations found its way into the Cayman Islands Constitution (Amendment) Order 2020, there has been no response to the other five (together "the Outstanding Recommendations"). The Outstanding Recommendations refer to greater clarification and precision surrounding:

a. 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;

b. 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 reinstitution of eligibility once a person who has not retained their residency returns to the jurisdiction;

c. 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;

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.

2. In the 2018 Report, the Constitutional Commission further noted that: "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"; and that: "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". On

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this basis, the Constitutional Commission reiterated its request for copies of these records so that they may be made generally available ("the Records Request").

3. The Constitutional Commission initially made the Records Request by letter dated 26 February 2019 addressed to the then Premier and Leader of the Opposition; at which time the Constitutional Commission also requested an explanation as to which, if any, of its proposals, were: (a) included in the draft constitutional changes prepared for the constitutional talks; (b) considered in the course of the constitutional talks; and (c) agreed at the constitutional talks.

4. The Constitutional Commission also restated the Records Request at pages 17-18 in its Explanatory Note on the Proposed Amendments to the Cayman Islands Constitution in the Draft Order in Council of 17 February 2020.

5. In the 2018 Report, the Constitutional Commission also recommended 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 Constitutional Commission has further developed this recommendation in an Explanatory Note, which contains a number of additional associated recommendations in connection with the role of the Speaker, which is also now enclosed for your consideration).

6. In its Explanatory Note on the Proposed Amendments to the Cayman Islands Constitution in the Draft Order in Council of 17 February 2020, the Constitutional Commission also took the opportunity to:

    a. Highlight that 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 to recommend that action be taken to provide and bring into effect all necessary implementing legislation on an urgent basis;

    b. Reiterate that there are other areas of the Cayman Islands Constitution ("the Outstanding Recommendations") that would benefit from clarification and greater precision; and

    c. 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.

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7. In the Post-Election Update, the Constitutional Commission identified various matters requiring attention, consideration and/or response; these being:

    a. The points for consideration previously identified in the Constitutional Commission's Explanatory Notes on the Appointments of the Premier and other Ministers and the Election of the Speaker of Parliament following a General Election, which were summarized for ease of reference as comprising:

        i. The definition of "gain" in section 49(2) of the Constitution;
        ii. Clarification regarding whether an elected member must have stood for election as member of the political party which is said to have gained a majority of seats of elected members;
        iii. The interplay between the election of the Speaker and the formation of the government;
        iv. The extent to which the postelection processes could be further clarified so as to provide the general public with a clearer understanding and expectation of how this should operate;
        v. Any progress made by the Cabinet Office on the completion of the Cabinet Manual, which it is anticipated would assist in this regard and inform the process by which the government is formed, especially in circumstances where there is no clear majority;
        vi. The extent to which agreements and affiliations should be declared prior to an election and the openness and transparency of the process thereafter;
        vii. Whether, as a backstop, there should be a defined time period within which a proclamation must be published by the Governor to call a session of the Parliament following a General Election; and
        viii. Clarification as to the process by which the Speaker and Deputy Speaker are elected.

    b. The records relating to the amendment of the Constitution, in respect of which the Constitutional Commission, explained:

        It is unfortunate that despite being invited to submit recommendations and despite submitting such recommendations (including recommendations pertaining to matters that have once again proved problematic in the wake of the recent General Election), the Constitutional Commission is unaware as to whether its recommendations were considered and rejected or, indeed, whether they were presented at all in the course of the constitutional talks held in London in December 2018. In order to gain a better understanding of whether its recommendations were considered, the Constitutional

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Commission has requested copies of the records of the constitutional talks and the related correspondence.

Having received no response to its initial letter dated 26 February 2019, the Constitutional Commission then restated this request in its Explanatory Note of 17 February 2020. To date, the Constitutional Commission has still not received any response to either of its requests. The Constitutional Commission believes that these records are an important constitutional resource and that, in the interests of openness and transparency, they should be made available to the general public. The Constitutional Commission therefore calls once again for the expeditious release of these records.

c. The Outstanding Recommendations for reform of the Constitution, in respect of which it was reiterated that:

The Constitutional Commission believes that these considered recommendations still merit attention and, in addition to the points noted above arising in the context of the recent General Election, would welcome some engagement on these points as well.

The foregoing represents a significant body of work, which has been produced by the Constitutional Commission in recent years and which merits consideration. To be clear, the Constitutional Commission is not asserting that all of these points should necessarily be adopted. However, the Constitutional Commission has concluded that there is overwhelming evidence in the form of continuing non-responsiveness that illustrates a need for a process by which the Constitutional Commission's recommendations are formally submitted, acknowledged and potentially responded to, even if this is simply to advise that they are rejected. Otherwise, the Constitutional Commission's work is effectively all for naught.

In the premises, the Constitutional Commission now recommends that such a process be crystallised in supplementary legislation enacted in accordance with section 118(5) of the Constitution.

<u>Conclusions</u>

In addition to the individual recommendations made by the various entities established under the Constitution to support democracy and the rule of law in the Cayman Islands that are detailed in this correspondence, the Constitutional Commission has drawn the following generic conclusions for the enactment and review of supplementary legislation designed to support the work of these entities:

1. Members of Commissions should be personally indemnified for their work on Commissions;

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2. Where Commissions have investigative powers and in the course of an investigation require the engagement of public officials, public officials should be obliged to respond promptly to all reasonable enquiries;

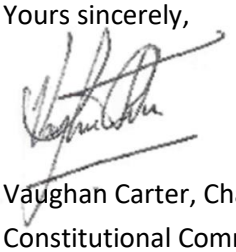
3. Where Commissions make recommendations in accordance with their constitutional functions, there should be a clear established process for the Government to consider and respond to these recommendations;

4. A periodic review of all supplementary legislation to ensure that it remains current and fit for purpose should be agreed and supported by the Government; and

5. The Government should proactively seek to utilise the skills and expertise of the Members of the Commissions in order to advance democracy and the rule of law in the Cayman Islands.

We trust that these conclusions, together with the broader recommendations detailed herein, are well received and given the due consideration that they merit; and, as ever, the Constitutional Commission would like to express its willingness to further assist with these matters in any way that it can.

Yours sincerely,



Vaughan Carter, Chairman
Constitutional Commission

Encl. Constitutional Commission Conclusions and Recommendations: Advisory District Councils
Explanatory Notes: The Speaker of the Parliament of the Cayman Islands

CC: Chairman, Human Rights Commission
Chairman, Commission for Standards in Public Life
Chairman, Judicial and Legal Services Commission
Auditor General
Ombudsman

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