

CONSTITUTIONAL COMMISSION
OF THE CAYMAN ISLANDS

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**RESEARCH OF THE CONSTITUTIONAL COMMISSION
OF THE CAYMAN ISLANDS ON THE TOPIC OF:**

PEOPLE INITIATED REFERENDUMS

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RESEARCH PAPERS OF THE CONSTITUTIONAL COMMISSION ARE OFFERED TO
ADVISE, EDUCATE AND STIMULATE DISCUSSION TO FACILITATE PUBLIC INPUT
AND PROPOSE SOLUTIONS OF THE ISSUE

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Introduction

The Constitutional Commission is of the view that legislation should be passed as soon as possible to govern the referendum process whether initiated by the Legislative Assembly pursuant to section 69 of the Cayman Islands Constitution Order 2009 (the Constitution) or by the people of the Cayman Islands under the provisions of section 70 of the Constitution.

In this paper we seek to promote a clearer understanding of the people-initiated referendum and its relevance in a democratic society. We first take a brief look at the types of democracy and discuss the elements of a people-initiated referendum. We offer suggestions for a process to be followed and invite comment from the Members of the Legislative Assembly and the public on proposals that will lead to the drafting of legislation.

Background

The Cayman Islands Constitution is a written master plan of governance for the Cayman Islands. It is the fundamental law of the country and contains the principles and rules upon which the government is founded in addition to detailing the rights, freedoms, and responsibilities of all persons in the Cayman Islands. As a British Overseas Territory, the Cayman Islands are under the sovereignty of the Crown, wherein there are two sources of power – Her Majesty the Queen in Parliament (United Kingdom) and the Royal Prerogative. Therefore, our constitution regulates the divisions of sovereign powers, directing to which persons or institutions each of these powers is delegated and the manner in which it is to be exercised.

Types of Democracy

Democracy is a political system based on the belief that there should be equality amongst all people and that the people's interest is paramount, therefore the governing practices are decided by the people. The people will either execute those practices collaboratively by themselves in a direct democracy or they will elect officials to represent the opinions of the people in a representative democracy. In today's society, there is a movement to include elements of direct democracy in a representative democracy to ensure that the representatives are fully informed of the wishes of the people.

Direct democracy is the type of governance that a growing number of political parties, citizens and states around the world are embracing. For example, Switzerland, Italy, Liechtenstein and twenty-four States in the United States of America (USA) utilize direct democracy; 70% of the USA population now live in a state that gives them the right to vote on initiatives and referendums. Moreover, the European Union has incorporated referendums into its constitution. The Swiss experience is one illustration of direct democracy being successful at empowering a nation to decide issues of national importance. The Swiss have used direct democracy for over one hundred and forty years through the citizens initiated referendum, constitutional referendum, veto referendum and the recall referendum; all of which are binding on the Swiss government.

Representative democracy is a form of government founded on the principle of elected officials representing the people. It is based on the premise that Parliament (the elected legislature) is sovereign. The Cayman Islands, as an Overseas Territory of the United Kingdom, governs through this form of government, however the 2009 Constitution includes elements of direct democracy as part of the modernisation process. The United Kingdom now includes referendums and petitions in its governance framework, although its model of democracy is representative democracy based on the premise that Parliament (the elected legislature) is sovereign. The Cayman Islands, as an Overseas Territory of the United Kingdom, governs through the representative model of democracy, however the 2009 Constitution includes elements of direct democracy as part of the modernisation process.

People-Initiated Referendums

People-initiated referendum is a method used in direct democracy. Another method of exercising direct democracy is where public meetings are held so that the people, not representatives, may reach a decision as to which new policies should be enforced.

Generally, the concept of people initiated referendum can be viewed as the right reserved to 'the people', to directly vote on a specific issue as a means of expressing their opinion within the scope of national importance and without contravening the Bill of Rights or any part of the constitution. This may include the right to reject or amend, inter alia, acts of the legislature, existing laws, proposed laws, policies, and regulations or to decide on particular circumstances or political issues.

Referendums may be mandatory or optional. A mandatory referendum is a referendum that must be held in certain circumstances or in relation to certain issues. For example, a referendum is mandatory to determine issues of constitutional advancement, such as independence. An optional referendum can be initiated either by the government or by the people on matters that are considered to be of national importance.

Constitutional Modernisation

The Cayman Islands Constitution Order (2009) gave effect, for the first time in the country's history, to People Initiated Referendums. That is, prior to the 2009 constitution, the only referendum option available in the Cayman Islands was through an initiative by the majority of elected members of the legislative assembly. Specifically, the previous Constitution Order (1972), Section 29(2) stated –

Power to Make Laws: 1972 Constitution

(2)..... a law may make provision for the holding of a referendum amongst persons qualified as electors in elections to the Assembly on a question declared by resolution, adopted by a majority of the elected members of the Assembly, to be a matter of national importance and specified in such law.

As a result of the constitutional modernisation process, there are now two provisions for referendums included in the Constitution Order 2009 which allow for (i) Parliament (Legislative Assembly) initiated (Section 69) and (ii) People Initiated (Section 70) to be held on a matter or matters of national importance. The provisions of Section 69 require a mandatory referendum to be held on the question of the independence of the Cayman Islands. Currently it is optional for other issues of national importance to be determined by referendum at the initiation of either the Government or the electorate.

The Constitution Order (2009) provides the basis in law for people initiated referendums; specifically section 70:

70.— (1) *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.*

(2) *Before a referendum under this section may be held—*

(a) there shall be presented to the Cabinet a petition signed by not less than 25 per cent of persons registered as electors in accordance with section 90;

(b) the Cabinet shall settle the wording of a referendum question or questions within a reasonable time period as prescribed by law; and

(c) the Cabinet shall make a determination on the date the referendum shall be held in a manner prescribed by law.

(3) *Subject to this Constitution, a referendum under this section shall be binding on the Government and the Legislature if assented to by more than 50 per cent of persons registered as electors in accordance with section 90.*

This means that any person(s) can begin a referendum by presenting to Cabinet a petition signed by 25% of the electorate seeking a decision of the people on a matter or matters of national importance. Cabinet is the part of the executive body of government responsible for (i) creating policies regarding all aspects of government business, and (ii) implementing such policies. If the petition is valid, the Cabinet is then responsible for finalising the wording of the referendum question and deciding a date for the referendum vote. The purpose of Cabinet's involvement regarding the wording of the referendum question is to ensure that the question is clearly stated on the ballot and not misleading to the qualified electors voting on the matter(s). It is essential that the process for designing the question is clear, and is adhered to. Details of the process would be included in any legislation formulated to govern referendums.

Ultimately, the matter being petitioned forms the foundation for a referendum question in relation to the matter, which is put to the electorate for a vote. It is crucial that the question is stated clearly, simply and neutrally so that the voters understand it and can be confident that they have voted in the way that they intended to. The referendum becomes legally binding on the government when more than 50% of the electorate vote in favour of the referendum question. If less than 50%, it may be considered advisory and taken into consideration by the government in its decision making process as is done in other jurisdictions. This would also be a matter to include in the referendum legislation.

As of 1 October, 2011, the total number of registered voters (the electorate) was 15,187. Based on the preceding number, the following table outlines the necessary number of petition signatures and subsequent referendum votes to successfully pass a people initiated referendum –

People Initiated Referendum (Requirement as of 1 October, 2011)		
Total Electorate	Petition (25%)	Referendum (50%)
15,187	3796.75	7593.50

Qualifications to Sign and Vote

Notably, the Constitution does not place restrictions as to qualifications necessary to initiate a referendum; however, the document is clear regarding the fact that valid signatures for the petition and the referendum votes require persons to be qualified registered electors.

The criteria for qualified registered voters are set out in sections 90 and 91 of the Constitution. Under section 90, there are three circumstances in which a person may be entitled to be registered as a voter, providing that the person would not be considered disqualified by virtue of the provisions of section 91:

- (i) already entitled to be registered as a voter prior to 6th November, 2009;
- (ii) (ii) a Caymanian aged 18 years or more who is resident in the Cayman Islands at the date of registration, having been resident here for a period or periods amounting to at least two years out of the four years immediately preceding the date of registration;
or
- (iii) If not 18 years at the date of the issue of the writ, will attain the age of 18 years on or before polling day

For the purposes of determining period of absences from the Islands, section 61(3) allows five (5) purposes to be disregarded. Those purposes are (i) performance of duty on behalf of the Government; (ii) attendance as a student at any educational establishment; (iii) attendance as a patient at any hospital, clinic or other medical institution; (iv) employment as a seaman aboard an ocean-going vessel; or employment as a crew member on any aircraft.

Section 91 of the Constitution specifies three grounds for disqualification of electors.:

- (i) A person who is either serving a sentence of imprisonment exceeding twelve months or is under a period of suspended sentence which exceeds twelve months;
- (ii) A person certified to be insane or otherwise adjudged to be of unsound mind under any law in force in the Cayman Islands;

- (iii) A person disqualified for registration as an elector by any law in force in the Cayman Islands relating to offences connected with elections.

For the purposes of ascertaining disqualification for a sentence of imprisonment, at least one sentence of imprisonment that is being served consecutively with other sentences of imprisonment must exceed twelve months. However, no account will be taken of a sentence of imprisonment imposed as an alternative to or in default of the payment of a fine. Any sentence of imprisonment imposed by a court outside the Cayman Islands must relate conduct amounting to an offence in the Cayman Islands which would be punishable by imprisonment of twelve months or more.

Outline of the Basic Process Contemplated for the Administration of People-Initiated Referendums

Prior to Petition

- ✧ Standardised petition forms
- ✧ Topics able to be decided on (or not) by referendum
- ✧ Petition question approval process clearly defined
- ✧ Notification of initiating a petition
- ✧ Gazette publication following approval

Collection of Signatures

- ✧ Financing of the petition (disclosure)
- ✧ Promoting awareness of the petition
- ✧ Soliciting signatures of electors
- ✧ Persons permitted to collect signatures on behalf of the petition's originator
- ✧ Required information of electors signing the petition (name, address, DOB, signature)
- ✧ Timeframe in which to collect signatures
- ✧ Timeline to collect additional signatures if the original petition submitted to Cabinet does not meet threshold (25%)

Verification of Signatures / Certification of Petition

- ✧ Measures to confirm identity (and qualification) of persons signing
- ✧ Restrictions placed on civil servants and others based on the nature of the petition
- ✧ Amending the petition following presentation to Cabinet
- ✧ Withdrawal clause (for the petitioner) in the instance the legislature fulfils the petition
- ✧ Body / Authority responsible for counting & verifying petition signatures
- ✧ Timeframe allotted for counting and verify petition signatures
- ✧ Cabinet's allotted time to finalise wording
- ✧ Publication of petition results
- ✧ Cabinet's decision of when to hold the referendum

The Referendum process

- ✦ Proclamations
- ✦ Publication of the Writ of Referendum
- ✦ Voter Education
- ✦ The Referendum
- ✦ Publication of Referendum Results

British Overseas Territories and People Initiated Referendums

Country	People Initiated Referendum	Referendum Process
Anguilla	No	Not outlined in its Constitution. Full power reserved by Her Majesty to amend the Order.
Bermuda	No	Not outlined in its Constitution. Full power reserved by Her Majesty to amend the Order.
British Antarctic Territory	No	Not outlined in its Constitution. Full power reserved by Her Majesty to amend the Order.
British Indian Ocean Territory	No	Not outlined in its Constitution. Full power reserved by Her Majesty to amend the Order.
British Virgin Islands	No	Not outlined in its Constitution. Full power reserved by Her Majesty to amend the Order.
Cayman Islands	Yes	<p>Power to provide for a referendum A law enacted by the Legislature may make provision to hold a referendum amongst persons registered as electors in accordance with section 90, on a matter or matters of national importance, when so resolved by the majority of the elected members of the Assembly; but the question of whether the Cayman Islands should seek any amendment to their Constitution that may result in their independence shall be deemed to be a matter of national importance.</p> <p>People-initiated referendums A law enacted by the Legislature shall make provision to hold a referendum amongst persons registered as electors on matters of national importance that do not contravene any part of the Bill of Rights or any other part of the Constitution.</p>

		<p>Before a people initiated referendum may be held—</p> <p>(a) they must present to the Cabinet a petition signed by not less than 25 per cent of persons registered as electors</p> <p>(b) Cabinet shall settle the wording of a referendum question or questions within a reasonable time period as prescribed by law; and</p> <p>(c) Cabinet shall make a determination on the date the referendum shall be held in a manner prescribed by law.</p> <p>Subject to the Constitution, a people initiated referendum is binding on the Government and the Legislature if assented to by more than 50 per cent of persons registered as Electors.</p>
Falkland Islands	No	<p>Constituencies may be amended by Ordinance; but no Bill for any such Ordinance can be enacted unless it has been supported in a referendum by at least two-thirds of those voting who are registered as electors in each constituency.</p>
Gibraltar	No	<p>Any right or limitation set out in sections 1 to 15 of the Constitution may be amended if –</p> <p>(a) a motion proposing that amendment is carried by a majority of at least three-quarters of the total number of Members of the Parliament; and</p> <p>(b) the Parliament's vote on such motion is thereafter supported by a simple majority of the votes cast in a referendum of all persons entitled to vote in elections to the Parliament; and</p> <p>(c) the consent of Her Majesty signified through a Secretary of State has been obtained before any such motion or referendum.</p>
Montserrat	No	<p>The Premier, if authorised by resolution of the Legislative Assembly adopted by a two-thirds majority of the elected members of the Assembly, shall request discussion of amendment of this Constitution with Her Majesty's Government in the United Kingdom.</p>
Pitcairn Islands	No	<p>Not outlined in its Constitution. Full power reserved by Her Majesty to amend the Order.</p>

St Helena	No	Not outlined in its Constitution. Full power reserved by Her Majesty to amend the Order.
South Georgia and South Sandwich Islands	No	Not outlined in its Constitution. Full power reserved by Her Majesty to amend the Order.
Sovereign Base Areas of Akrotiri and Dhekelia	No	Not outlined in its Constitution. Full power reserved by Her Majesty to amend the Order.
Turks and Caicos Islands	No	Not outlined in its Constitution. Full power reserved by Her Majesty to amend the Order.

Looking Ahead – Addressing Legislation

Negotiators of the Constitution Order (2009), through Section 70 – people initiated referendums – indeed fostered the concept of direct democracy, subsequently providing an avenue for the electorate to gain more control with respect to matters of national importance that directly affect their lives. Critics of direct democracy argue that it weakens representative democracy by undermining the role and importance of elected representatives. However, supporters of the use of referendums argue that direct democracy acts as a useful discipline on the behaviour of elected representatives, ensuring that they fully consider the likely views of voters when taking decisions on their behalf. As previously noted, other jurisdictions have found people-initiated referendum to be a very useful tool in enhancing democracy.

The legislation required by the Constitution to govern referendums has not yet been implemented. Some key elements to be included have been described in Section 70(2)(b) and (c), namely the settling of the wording of the referendum question; the time frame for settling the question and the process to be followed for the administration of the referendum.

Various factors must be taken into account to ensure that the process is clear and reliable. One issue to determine is whether the referendum will be held separately or with another poll. It is sometimes argued that combining polls can increase the risk that voters will confuse separate issues (e.g., the performance of the incumbent government can be confused with the issue on which the referendum is being held). However, from an administrative point of view, it may be more cost effective to hold a referendum at the same time as an election. There is also the question of whether to regulate referendum campaigns in a manner similar to election campaigns. This is an important consideration to ensure open debate and a fair and free campaign and referendum. Voter education, the role of government and the role of the media are also key issues in the administration of a referendum.

Opportunity for Public Input

The Constitutional Commission invites your comments regarding the topic of people-initiated referendum. Please contact the Commission's Secretariat to make an appointment. You may also send your comments to:

- P.O. Box 391 Grand Cayman KY1-1106 or
- E-mail us directly – info@constitutionalcommission.ky or
- Comment through our website- www.Knowyourconstitution.ky