



CONSTITUTIONAL COMMISSION

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Explanatory Notes on the Appointment of the Premier and other Ministers and the Election of the Speaker of Parliament following a General Election

Introduction

Following the recent General Election in the Cayman Islands, the Constitutional Commission has received several enquiries regarding the subsequent process by which the Premier and other Ministers are appointed and the Speaker of the Parliament is elected. In response and in fulfilment of the designated function in section 118(3)(c) of the Constitution, to promote understanding and awareness of the Constitution and its values, the Constitutional Commission has prepared the following explanatory notes:

Appointment of the Premier and other Ministers

The process by which the Premier and other Ministers are appointed is established in section 49 of the Constitution. This process begins with the appointment of the Premier, who is appointed by the Governor.

Aside from the limitation in section 49(4) of the Constitution,

which prevents the Governor from appointing “as Premier a person who has held office as Premier during two consecutive parliamentary terms unless at least one parliamentary term has expired since he or she last held that office”, the principal directions in the Constitution are contained in section 49(2) and (3).

Section 49(2) of the Constitution addresses the situation where a political party gains a majority of the seats of elected members of the Parliament, in which case the Governor shall appoint as Premier the elected member of the Parliament recommended by a majority of the elected members who are members of that party. This provision is relatively straightforward where a party is clearly successful at a General Election and where a majority of the elected members are members of that party. However, this is by no means always the case and, in the absence of such an outcome, it will be necessary to seek guidance from elsewhere in the Constitution.

Section 49(3) of the Constitution directs that: “If no political party gains such a majority or if no recommendation is made under subsection (2), the Speaker shall cause a ballot to be held among the elected members of Parliament to determine which elected member commands the support of the majority of such members, and shall record

the vote of each member voting; and, where such a ballot is held, the Governor shall appoint as Premier the elected member who obtains a majority of the votes of the elected members.” Therefore, in the event that no political party gains a majority in accordance with section 49(2) of the Constitution, the Governor is unable to appoint the Premier until the elected Members of Parliament have voted so as to determine which elected member can command the support of the majority of such members.

In summary, unless there is a clear victory by one party, the process remains in the hands of the politicians; and, in due course, following a vote in Parliament, the Governor will then act in accordance with the outcome of that vote and appoint the Premier accordingly. To do otherwise and, in the event that no political party gains a majority, to empower the Governor to simply appoint as Premier the Member of Parliament who has the support of a majority of the elected members, as some correspondents have suggested, risks drawing the Governor into the political process and raises questions as to how such a position is demonstrated with certainty. In the premises, the vote in Parliament should provide a definitive outcome without compromising the Governor.

Once appointed, the Premier will advise the Governor on the appointment of the other Ministers and, in line with section 49(6) of the Constitution, the appointments of the Premier and the other Ministers shall be made by the Governor by instrument under the public seal.

Election of the Speaker of the Parliament

The election of the Speaker and the Deputy Speaker of the Parliament is governed by section 65 of the Constitution, which provides:

(1) At the first sitting of Parliament after a general election, and as soon as practicable after a vacancy occurs in the relevant office otherwise than on a dissolution of the Parliament, the elected members of the Parliament shall by a majority vote elect—

(a) a Speaker from among the elected members of Parliament, or persons who are qualified to be elected as members of Parliament, other than Ministers; and

(b) a Deputy Speaker from among the elected members of Parliament other than Ministers;

and the election of the Speaker and the Deputy Speaker shall take precedence over any other business of the Parliament.

The election of the Speaker and Deputy Speaker are therefore the first orders of business for the new Parliament and, on this basis, would take precedence over the vote anticipated in section 49(3) of the Constitution regarding the appointment of the Premier. It is worth noting in the context of this explanatory note that this could have some impact on the question of whether the Speaker is to be a Member of Parliament or not, particularly where an election outcome is tight. Where there are a relatively small number of elected members in Parliament, the position of each individual member is more likely to have a significant impact on the composition of any majority; and, in these circumstances, it may be that an elected Member of Parliament could be perceived as being more valuable as a voter in the appointment of the Premier and the premise by which the government is then established, rather than being elected as the Speaker. As a result, the question of whether or not the Speaker is a Member of Parliament could

become a factor in any post-election political negotiations regarding the appointment of the Premier and the formation of the government.

As to the process by which the Speaker and Deputy Speaker are to be elected, the Constitution is silent as to who should preside over these elections and also on what could occur in the event that there is no majority in favour of a particular appointment.

Future Considerations

The objective of this explanatory note has been to identify and explain the relevant constitutional provisions as they stand.

Although the Constitutional Commission has provided some limited commentary, the Constitutional Commission has limited its observations regarding alternative propositions while the current process plays out.

In due course, at a more appropriate time, the Constitutional Commission intends to revisit some of the points previously noted by the Constitutional Commission regarding the appointment of the Premier and the election of the Speaker; including:

(a) the definition of “gain” in section 49(2) of the Constitution (see table detailing suggested sections of the 2009 Constitution for review, 14 October 2014 (“the Constitutional Commission’s 2014 Review”));

(b) 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 (see 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 (“the Constitutional Commission’s 2018 Responses”)); and

(c) the interplay between the election of the Speaker and the formation of the government (see also the Constitutional Commission’s 2014 Review and the Constitutional Commission’s 2018 Responses).

At this time the Constitutional Commission also intends to review other matters that have arisen

following the recent General Election, including:

(d) the extent to which the post-election processes could be further clarified so as to provide the general public with a clearer understanding and expectation of how this should operate;

(e) 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;

(f) the extent to which agreements and affiliations should be declared prior to an election and the openness and transparency of the process thereafter;

(g) 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

(h) clarification as to the process by which the Speaker and Deputy

Speaker are elected; and

(i) any other relevant matters that may arise in the interim.

