



CONSTITUTIONAL COMMISSION

UPDATE • 1 JULY 2022



TABLE OF CONTENTS

P. 1-2

- Constitutional Day Message from the Chairman

P. 3

- The Executive
- Improvements to the Operation of the Executive Branch of Government
- Publication of Summaries of Cabinet Meetings

P. 4

- About the Cabinet

P. 5

- Ministerial Code of Conduct
- What are the Seven Principles of Public Life?

P. 6

- Opportunities for Further Improvements to the Executive Branch of Government
- Cabinet Manual

P. 7

- Examples of Cabinet Manuals
- Period of Election Sensitivity Policy

P. 8

- The Legislature
- About Parliament
- Parliamentary Code of Conduct

P. 10-11

- Speakership

P. 12

- The Judiciary
- About the Judiciary

P. 13

- Day and Bodden Bush Litigation

P. 14

- Judicial Committee of the Privy Council
- About the JCPC

P. 15

- Lady Arden of Heswell

P. 16-18

- Constitutional Commissions Advice and Recommendations

Constitution Day Message from the Chairman of the Constitutional Commission

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 and, once again, the Constitutional Commission has prepared and published an annual Update to coincide with Constitution Day.

This 2022 Update follows the template established in recent years by illustrating the efforts of the Constitutional Commission to provide information and education in connection with the Constitution. This year the information in the Update is organised in three sections to reflect the three branches of government; namely the Executive, the Legislature and the Judiciary.

Under the executive section, the Constitutional Commission acknowledges two significant initiatives introduced by the government that have improved the operations of the executive branch of government, while at the same time identifying further enhancements that could still be made. In the legislative section, the Update showcases some of the work published by the Constitutional Commission in the last year, with a particular focus on a Parliamentary Code of Conduct and on the Speakership in Parliament. In the section on the judiciary, the Update uses the recent decision in the *Day and Bodden Bush* case as a platform for explaining and exploring the role of the Judicial Committee of the Privy Council as the final Court of Appeal for the Cayman Islands.

The 2022 Update then concludes with a section that references the views of the courts as to why the Constitutional Commission's reports are important and continues with a summary of the recommendations that the Constitutional Commission has made in recent years and which are awaiting action.

I would also like to take this opportunity to welcome Mrs. Annikki Hill as a new Member of the Constitutional Commission, joining Dr. Christopher Williams and myself on the three-member panel; and to thank departing member, Mrs. Sophia Harris, for her dedicated service and generous support. Like Mrs. Harris, Mrs. Hill is an Attorney-at-Law and her appointment, therefore, ensures that the Constitutional Commission will continue to have an additional legal perspective. Mrs. Hill, who also practices as an executive leadership and life coach, has previously served the Cayman community as the Deputy Chair of the Labour Appeals Tribunal, the Chair of the Health Insurance Standing Committee of the Cayman Islands Insurance Association, and as a Director on the R3 Cayman Foundation Board; and is therefore well positioned to make a valuable contribution to the work of the Constitutional Commission moving forward.

In reviewing events in the preceding year, it is notable that both the Manager of the Commissions Secretariat and the Ombudsman have demitted office and moved onto pastures new. Together with the Auditor General, these posts are central to the effective operation of the independent institutions that support democracy and good government in our Constitution. The Constitutional Commission would like to wish Deborah Bodden and Sandy Hermiston well in their new ventures and to welcome Marilyn Conolly and Sharon Roulstone to their respective posts. Times of change can be challenging, particularly when this involves transitions in more than one role, but it also presents opportunity, and the Constitutional Commission looks forward to working with and alongside Ms. Conolly and Ms. Roulstone in their important constitutional positions.

On a sadder note, the Constitutional Commission also extends its condolences to the families of Hon. Sybil McLaughlin, MBE, JP, National Hero and the first Speaker of what was then the Legislative Assembly; Mr. Arley James (A.J.) Miller, who was the last surviving Vestryman in Cayman's original legislative body, the Assembly of Justices and Vestry, prior to its transition to the Legislative Assembly on 13 July 1959; and Hon. Benson O. Ebanks, OBE, who also served in the Legislative Assembly as well as being a member of the 2002 Constitutional Modernisation Review Commission. Our constitutional arrangements are built on the shoulders of these Caymanian constitutional giants and on Constitution Day 2022 we pay tribute to their great contributions.



Vaughan Carter
Chairman
Constitutional Commission



EDUCATE & INFORM

THE EXECUTIVE



IMPROVEMENTS TO THE OPERATION OF THE EXECUTIVE BRANCH OF GOVERNMENT

Two significant initiatives have informed the operations of the executive branch of government in the course of the last year, both of which are wholeheartedly welcomed by the Constitutional Commission as positive and progressive supplements to the system of governance founded in our Constitution.

PUBLICATION OF SUMMARIES OF CABINET MEETINGS

The first of these significant initiatives – the decision to publish a summary of the decisions taken at each Cabinet meeting – provides the general public with a better sense of the business that our government is engaged in on a weekly basis. This development is notable

given that Cabinet meetings themselves are conducted in private and it is therefore helpful to understand why this is the case in order to fully appreciate the importance of this step.

There are, in fact, good constitutional reasons why the internal discussions of Cabinet are secret. Our system of government is premised on the government being held to account by the representatives of the people in Parliament and this requires that the position of the government should be clearly articulated. If the position of the government was unclear or if there were different members of the government saying different things, then the Members of Parliament would not be able to perform this task effectively. So, while Ministers are free to air their individual views in the course of the deliberations in Cabinet, once Cabinet has established the government's position, the convention of collective responsibility means that

all Ministers must then defend the agreed position.

It follows that this mechanism by which the government is in theory held accountable would be undermined if the minutes of Cabinet meetings, with all the debates around the formulation of policies and positions, were published in full. In this context, the publication of summaries of the decisions taken at each Cabinet meeting provides some level of transparency without disturbing the broader constitutional arrangements.

Summaries of decisions of a sensitive nature, matters of national security, those where publication breaches regional or international conventions and those relating to personal privacy are understandably not disclosed.

The Cabinet summaries are available on the Cayman Islands Government's digital channels and at: <https://www.gov.ky/about-us/our-government/the-cabinet>

CABINET POST MEETING SUMMARIES

Weekly, the Cabinet Office will publish a summary of the decisions taken at each meeting, following confirmation of the Minutes for the meeting.

June 22, 2022
Post Meeting Summary
Cabinet Post Meeting Summary 22 June 2022

June 15, 2022
Post Meeting Summary
Cabinet Post Meeting Summary 15 June 2022

Cabinet Office
Cayman Islands Government

CABINET OF THE CAYMAN ISLANDS – POST MEETING SUMMARY

His Excellency the Governor Mr. Martyn Roper, OBE, chaired the meeting of the Cabinet held on Tuesday, 14th June, 2022 in the Cabinet Conference Room, Government Administration Building.

All Ministers and Members of Cabinet were present.

At this meeting Cabinet:

- Confirmed advice given by circulation on 8th June 2022 to the Governor for the disposal of freehold interest in Block 11D Parcel 92 and Block 11D Parcel 94, subject to preparation and tabling of a report to Parliament in accordance with the Governor (Vesting of Lands) Act (2005 Revision);
- Confirmed approval granted by circulation on 9th June 2022 of request to Finance Committee for Appropriation changes under section 12 of the Public Management and Finance Act (2020 Revision);

ABOUT THE CABINET

The Cabinet's website also contains additional information about the Cabinet, including the following:

Did you know?

- The Cabinet is composed of the Premier, seven other Ministers, one of whom is the Deputy Premier, and two non-voting ex-officio members.
- The Cabinet is responsible for formulating and directing the implementation of policy related to every aspect of government, with the exception of the Governor's special responsibilities.
- The Governor appoints the Premier on the recommendation of the elected members of the majority party in the Parliament or following the result of a vote held among the elected members of the Parliament.
- The Governor also appoints the remaining seven Ministers in accordance with the advice of the Premier.
- The ex-officio members are the Deputy Governor and the Attorney General.
- The Governor appoints the Deputy Governor in accordance with Her Majesty's instructions and the Attorney General on the advice of the Judicial and Legal Services Commission.
- The Cabinet Secretary has the charge of the Cabinet Office, which provides advice to the Cabinet on matters of policy and coordinates the development and implementation of policy between departments and ministerial portfolios and across the wider government sector.

MINISTERIAL CODE OF CONDUCT



The second of the significant initiatives relating to the operations of the executive branch of government was the implementation of the Cayman Islands' first-ever Ministerial Code of Conduct.

Cabinet approved the Ministerial Code of Conduct, which promotes greater accountability within the executive branch of government, on 27 July 2021. Under the Ministerial Code of Conduct, Ministers are expected to comply with the "Seven Principles of Public Life", otherwise known as the "Nolan Principles".

WHAT ARE THE SEVEN PRINCIPLES OF PUBLIC LIFE?

1. Selflessness – Holders of public office should act solely in terms of the public interest.

2. Integrity – Holders of public office must avoid placing themselves under any obligation to people or organisations that might try to influence their work in an inappropriate manner. They should not act or take decisions in order to gain financial or other material

benefits for themselves, their family, or their friends, or other connected persons. They must declare and resolve any interests and relationships touching on their public office.

3. Objectivity – Holders of public office must act and take decisions impartially, fairly and on merit, using the best evidence and without discrimination or bias.

4. Accountability – Holders of public office are accountable for their decisions and actions and must submit themselves to whatever scrutiny necessary to ensure this.

5. Openness – Holders of public office should act and take decisions in an open and transparent manner. Information should not be withheld from the public unless there are clear and lawful reasons for doing so.

6. Honesty – Holders of public office should be truthful.

7. Leadership – Holders of public office should exhibit these principles in their own behaviour. They should actively promote and robustly support the principles and be willing to challenge poor behaviour wherever it occurs.

Commenting on the inception of the Ministerial Code of Conduct, His Excellency, the Governor, noted that: "it was a monumental step and a strong indicator of the government's commitment to accountability and transparency" and added that as "an integral part of good governance", the Ministerial Code of Conduct "encourages greater trust between the wider community and those they have elected to represent them". The Hon. Premier also explained that: "The more transparent we are, the more accountable we are to the public"; and: "The better we are at transparency, the better we will get at decision-making and resource allocation".

The complete Ministerial Code of Conduct is available at:

[https://www.gov.ky/publication-detail/ministerial-code-of-conduct-v11-27.07.21.](https://www.gov.ky/publication-detail/ministerial-code-of-conduct-v11-27.07.21)

OPPORTUNITIES FOR FURTHER IMPROVEMENTS TO THE OPERATIONS OF THE EXECUTIVE BRANCH OF THE GOVERNMENT

The establishment of a Ministerial Code of Conduct is indeed a landmark and the Constitutional Commission joins with His Excellency, the Governor, and the Hon. Premier in recognising the importance of this achievement. However, the Constitutional Commission believes that the Ministerial Code of Conduct should be part of a comprehensive Cabinet Manual, which would codify and explain the internal rules and procedures under which the government operates. Accordingly, the Constitutional Commission looks forward to the publication of a full Cabinet Manual incorporating the Ministerial Code of Conduct in due course.

CABINET MANUAL

The Constitutional Commission has had an interest in the development of a Cabinet Manual since it was cited as a document that would soon be published by the then Premier on the occasion of the departure of former Governor Kilpatrick in 2018. More recently, the importance of the Cabinet Manual was also referenced by the Constitutional Commission in its Explanatory Notes on the Appointment of the Premier and other Ministers and the Election of the Speaker of Parliament Following a General Election.

The Constitutional Commission is particularly interested in the development of a Cabinet Manual in the context of how the government is formed following a General Election. The Constitutional Commission published its Explanatory Notes on 20 April 2021 because it sensed that there was a degree of concern surrounding who would form the next government and while it is hoped that the Explanatory Notes provided some assistance and assurances to the general public, the Constitutional Commission feels that further clarification of what should occur in this transitional period would be beneficial.

Chapter Six of the Cabinet Manual in New Zealand, for example, deals with *Elections, Transitions and Government Formation*, while Chapter Two of the Cabinet Manual in the United Kingdom also addresses *Elections and Government Formation*. The Constitutional Commission recommends that a Cayman Islands Cabinet Manual should incorporate a similar chapter on the formation of the government, which accounts for peculiarities of the local political landscape, the preponderance of independent candidates and the absence of two dominant political parties that often exist in Westminster styled constitutions like our own.

EXAMPLES OF CABINET MANUALS

The Constitutional Commission endorses the need for a Period of Election Sensitivity Policy and looks forward to reviewing such policy and to its prompt implementation.

The New Zealand Cabinet Manual can be accessed at:

<https://dpmc.govt.nz/sites/default/files/2017-06/cabinet-manual-2017.pdf>

The United Kingdom's Cabinet Manual is available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/60641/cabinet-manual.pdf.

PERIOD OF ELECTION SENSITIVITY POLICY

Recent events have illustrated that the civil service would also benefit from improved direction as to how to operate in the period immediately prior to a General Election following the announcement of the same, as well as in the transitional period after the General Election but before a new government is formed.

Following recommendations by the Auditor General, His Excellency, the Governor, has recognised that: "the jurisdiction has learnt important lessons for the future, especially the need for clearer policies and practices during periods of election sensitivity" and the Hon. Deputy Governor has announced that as a consequence of the Auditor General's recommendations, a formal policy entitled "Period of Election Sensitivity" has been developed and once approved by Cabinet, "this guidance will provide clear information on how Civil Servants and Ministers should conduct Government business once an Election has been called".



ABOUT PARLIAMENT

Information about Parliament, including the following, can be found on its website (<http://www.legislativeassembly.ky/portal/page/portal/lglhome/aboutus>)

“

Did you know?

- The House of Parliament of the Cayman Islands is a unicameral Legislature comprising 21 Members, 19 of whom are the Elected Representatives for the Islands' 19 constituencies: one each from West Bay Central, West Bay North, West Bay South, West Bay West, George Town Central, George Town East, George Town North, George Town South, George Town West, Prospect, Red Bay, Bodden Town East, Bodden Town West, Newlands, Savannah, North Side, East End, Cayman Brac East, Cayman Brac West & Little Cayman.

- There are two Ex-Officio Members who are appointed by the Governor, the Deputy Governor and the Attorney General.
- The Governor may at any time, by Proclamation, prorogue or dissolve the Parliament.

- The Governor shall dissolve the Parliament at the expiration of four years from the date when the Parliament first meets after any general election unless it has been sooner dissolved.
- There shall be a general election at such time within two months after every dissolution of the Parliament as the Governor shall, by Proclamation, appoint.
- The first meeting of every session of the House shall, by Proclamation, be held on such day as the Governor shall appoint. A session usually consists of four meetings. A meeting comprises several sittings.

PARLIAMENTARY CODE OF CONDUCT

Having established a Code of Conduct for Ministers, there has been an expectation that a similar code will be put in place for all Members of Parliament. However, to date, no Parliamentary Code of Conduct has as yet been announced, although it is understood that work in this regard is underway.

The Constitutional Commission has considered the need for a Parliamentary Code of Conduct, which it supports; and, following an enquiry regarding how such codes may be enforced, it produced a Guidance Note entitled Parliamentary Codes of Conduct and Enforcement on an expedited basis.

In its Guidance Note, the Constitutional Commission points out that relevant learning can be derived from the United Kingdom's House of Commons Committee on Standards and the *Review of the Code of Conduct: Proposals for Consultation* in its Fourth Report of Session 2021-22 ("the House of Commons Committee on Standards Review"), which was published as recently as 29 November 2021 and which can be found at:

<https://committees.parliament.uk/publications/7999/documents/82638/default/>.

Paragraph 198 of the House of Commons Committee on Standards Review is particularly instructive as it captures how a hybrid system for enforcement has evolved as best practice in parliamentary democracies, in which traditional self-regulation by Parliament has come to be augmented by a number of independent components in order to provide effective enforcement:

The current standards system in the House of Commons is sometimes described as a "hybrid" system, because it maintains the House's traditional assertion that it has the right to regulate its own affairs (the doctrine known as "exclusive cognisance") but it includes significant elements that are independent of MPs. These include:

- the independent Parliamentary Commissioner for Standards
- the Independent Parliamentary Standards Authority which considers matters relating to Members' salary and expenses
- the independent lay members of the Committee on Standards (who have an effective voting majority on the Committee)

- the external Independent Complaints and Grievance Scheme (ICGS) investigators overseen by the Commissioner
- the Independent Expert Panel (IEP) which hears appeals and recommends sanctions in ICGS cases.

In addition, the Recall of MPs Act 2015, read together with the relevant Standing Orders, means that any suspension for at least fourteen days or ten sitting days can lead to a by-election if ten per cent of the Member's constituents sign a recall petition.

Given the House of Commons Committee on Standards Review represents a contemporary consideration of the current issues arising in the context of Parliamentary Codes of Conduct and their practical enforcement, the Constitutional Commission advised that the Conclusions and Recommendations in the House of Commons Committee on Standards Review should inform the current local developments; as should the Draft Revised Code of Conduct at Annex 1 to the House of Commons Committee on Standards Review, which, for the purposes of "Upholding the Code", proposes that:

1. *The application of this Code shall be a matter for the House of Commons, and particularly for the Committee on Standards, the Independent Expert Panel and the Parliamentary Commissioner for Standards in accordance with Standing Orders.*
2. *The Commissioner may investigate a specific matter relating to a Member's adherence to the rules of conduct under the Code.*
3. *Members must co-operate at all times with the Parliamentary Commissioner for Standards in the conduct of any investigation and with the Committee on Standards and the Independent Expert Panel in any subsequent consideration of a case.*

4. Members must not disclose details in relation to:

(i) any investigation by the Parliamentary Commissioner for Standards except when required by law to do so, or authorised by the Parliamentary Commissioner for Standards; nor

(ii) the proceedings of the Standards Committee or the Independent Expert Panel in relation to a complaint unless required by law to do so, or authorised by the Committee or the Panel.

5. Members must not lobby a member of the Committee on Standards, the Independent Expert Panel or the Parliamentary Commissioner for Standards, or their staff, in a manner calculated or intended to improperly influence their consideration of whether a breach of the Code of Conduct has occurred, or in relation to the imposition of a sanction.

6. Members must not seek to influence, encourage, induce or attempt to induce, a person making a complaint in an investigation to withdraw or amend their complaint, or any witness or other person participating in a complaint to withdraw or alter their evidence.

7. Failure to comply with a sanction imposed by a sub-panel of the Independent Expert Panel shall be treated as a breach of the Code.

8. Failure to comply with a sanction imposed by the Committee on Standards or the House relating to withdrawal of services or facilities from a Member shall also be treated as a breach of the Code.

SPEAKERSHIP

On 20 October 2021, the Constitutional Commission also published Explanatory Notes on The Speaker of the Parliament of the Cayman Islands. The position of Speaker in the Cayman Islands is of historical significance for several reasons. Prior to 1991,

when the first Speaker was appointed, the legislature was presided over by the Governor, and prior to the Governor, the Commissioner. The inception of the Speakership position thereby created a separation of the local legislature from Her Majesty the Queen's representative in the Cayman Islands. It also facilitated the appointment of a local person to this prominent position and, notably, the appointment of the Hon. Sybil McLaughlin, MBE, JP as the first Speaker of the then Legislative Assembly on 15 February 1991 was also the first appointment of a woman to such a position in the Commonwealth.

Under the constitutional arrangements in the Cayman Islands, the Speaker can be an elected Member, which is the case in the United Kingdom's House of Commons, but may also be someone unelected, who is nevertheless entitled to be elected to Parliament. While arrangements in respect of the Speaker may differ in some forms so as to accommodate the particular needs of small jurisdictions – it is not always being practicable to assign an elected Member to the position where there is only a limited pool of elected Members – the general principles of independence and impartiality should be applicable to all Speakers, irrespective of the size of the jurisdiction.

As the independent arbiter of the Parliament, the Speaker is therefore expected to act impartially in the exercise of various important functions that are central to the effective operation of a parliamentary democracy, including :

- (i) the maintenance of decorum in debates;
- (ii) the calling of Members to speak;
- (iii) the giving of rulings on points of order and allegations of breaches of privilege;
- (iv) the naming and suspending of members for misconduct;
- (v) appointing Members to committees;
- (vi) accepting or refusing motions on the Order Paper;
- (vii) regulating questions in the House; and

(viii) generally acting as servant of the Parliament or its spokesperson.

In addition to the ability to elect a Speaker from outside of Parliament, which remains a feature of the Cayman Islands Constitution under the 2009 Constitution and the subsequent amendments thereto, there are other aspects of the Speaker's role in the Cayman Islands that have departed from the norms of the Speakership as originally conceived. By way of further example, in the United Kingdom's House of Commons, the independence and impartiality of the Speaker is insulated by the convention that the Speaker's constituency is not contested at an election and the Speaker is therefore re-elected unopposed. However, in smaller jurisdictions, where the numbers required to acquire a majority in the Legislative Assembly are more acutely impacted by the outcome in one constituency; where party politics may not be as rigid as is the case in the United Kingdom; and where politicians are thereby often reliant upon their individual performance in the House in the preceding term as a campaign platform for re-election; it has not always proved practicable for the Speaker to be completely detached from the political arena. Hence the position in the Cayman Islands, whereby if the Speaker is an elected Member of Parliament, the Speaker is still obliged to contest their seat at a future election.

Notwithstanding these variances, there is still, at the very least, a conventional expectation that the Speaker in the Cayman Islands will nevertheless respect the principles of independence and impartiality. On several occasions in recent times, questions have, however, arisen as to whether the constitutional rules relating to the Speakership in the Cayman Islands are sufficiently robust to ensure that these principles of independence and impartiality, and the integrity of the position in general, are appropriately respected.

The Constitutional Commission has analysed this question in detail in its Explanatory Notes and has recommended that the following points be given further consideration:

1. Whether, on balance, it would be preferable to only be able to select a Speaker from outside of the members of Parliament?
2. Whether, if possible, it would be desirable to detach the election of the Speaker from the post-election negotiations, the appointment of the Premier and the formation of the government?
3. Whether the Constitution and/or the Standing Orders should be clarified to ensure that the Public Accounts Committee's (PAC) constitutional function is not frustrated by the Speaker?
4. Whether the Constitution and/or the Standing Orders should make specific provision for the Speaker to take a leave of absence and for any consequential arrangements for the Speakership?
5. Whether the Constitution and/or the Standing Orders should make specific and more sensitive provision for mental health challenges?
6. Whether there ought to be some additional mechanism, constitutional or otherwise, whereby a Speaker can be held to account in circumstances where the Speaker is charged and/or convicted of a criminal offence?
7. Whether a Parliamentary Code of Conduct would be sufficient to protect and preserve the integrity of the Speakership in all circumstances?

THE JUDICIARY



ABOUT THE JUDICIARY

An introduction to the judicial arm of government can be found on the Judicial Administration's website (<https://www.judicial.ky/courts>), which includes the following:

Did you know?

- The courts of the Cayman Islands administer justice in keeping with the Constitution, the Laws of the Islands and the well-established principles of common law, which have been developed by the local, the British and other courts of the Commonwealth of Nations.
- Criminal proceedings for breaches of the Laws of the country are taken before the courts to be heard by a magistrate (in the case of proceedings before the Summary Court), or a judge, or judge and jury (at the election of the defendant) in the case of proceedings in the Grand Court.

- Generally, the more serious offences are tried on indictment in the Grand Court, although the Summary Court has jurisdiction to try serious drug charges and to impose very severe penalties in respect of such offences. Civil disputes having a subject matter of up to CI\$20,000.00 are also taken in the Summary Court.
- The Grand Court, as a court of unlimited jurisdiction, tries all other types of civil disputes, including the most complex commercial and trust disputes which often arise in respect of Cayman Islands corporate or trust entities.
- The structure of the court system is hierarchical with appeals lying to the Court above at each stage. The Summary Court is the first in the hierarchy, followed by the Grand Court, the Court of Appeal and finally, Her Majesty's Judicial Committee of the Privy Council.
- There is a separate right of petition to the European Court of Human Rights for persons who reside in the Cayman Islands having regard to the extension of the European Convention on Human Rights to the Islands.

DAY AND BODDEN BUSH LITIGATION

On 14 March 2022, the long-awaited decision in *Day and another (Appellants) v The Government of the Cayman Islands and another (Respondents) (Cayman Islands)* [2022] UKPC 6 ("Day and Bodden Bush") was finally handed down by the Judicial Committee of the Privy Council. The Constitutional Commission has previously provided [An Explanation of the Constitutional Issues Arising from the Day and Bodden Bush Litigation](#), which details the significance of this litigation in a broader constitutional context, with particular reference to:

- (i) the construction of "existing law" in effect prior to the Constitution with such modifications, adaptions, qualifications and exceptions as may be necessary to bring the law into conformity with the Constitution;
- (ii) the interplay between the judicial and legislative branches of government; and
- (iii) the use of the Governor's reserve legislative powers.

By way of update on the previously issued Explanation of the Constitutional Issues, the issues to be determined by the Judicial Committee of the Privy Council in the appeal of Ms. Day and Ms. Bush were:

1. Does the Bill of Rights in the Constitution of the Cayman Islands provide a right for Ms. Day and Ms. Bush to access the institution of marriage?
2. If so, should the Order of the Grand Court of the Cayman Islands – which modified the Marriage Law so as that "marriage" is defined to mean "the union between two people as one another's spouses" – be restored?

Dismissing the appeal, it was held that:

1. In the context of the Bill of Rights, section 14 is the right which specifically deals with marriage (in technical legal terminology, the "lex specialis" which governs that topic) and

that right is confined to opposite sex couples. The other sections of the Bill of Rights have to be interpreted in light of section 14(1), meaning that none of them can be construed as including a right for a same-sex couple to marry.

2. The Bill of Rights is a specific legal instrument which must be interpreted in its particular context and as a coherent, internally consistent whole. The right to marry in section 14(1) has been drafted specifically to make it clear that it applies only to opposite-sex marriage. Within the scheme of the Bill of Rights section 14(1), as the "lex specialis", defines who has a constitutional right to marriage, and therefore other general provisions in sections 9, 10 and 16 cannot be interpreted to circumvent the express limits on the right to marry in section 14(1). To do so would be to undermine the coherence of the Bill of Rights.
3. The Board's interpretation is supported by the case law regarding the interpretation of the European Convention on Human Rights ("ECHR"). In various cases, the European Court of Human Rights has found that article 12 of the ECHR (the equivalent "lex specialis" on marriage in the ECHR) was determinative of the scope of the right to marry and was limited to the traditional concept of marriage as being between a man and a woman. The other more general provisions in the ECHR, equivalent to those in the Bill of Rights, therefore had to be interpreted in the light of that and accordingly could not be read so as to extend to provide a right to same-sex marriage.

4. The Board points out that the interpretation given to the Bill of Rights in its judgment does not prevent the Cayman Islands' Legislative Assembly from introducing legislation to recognise same-sex marriage.

5. The effect of the Board's interpretation is that this is a matter of choice for the Legislative Assembly [the Parliament] rather than a right laid down in the Constitution.

The full judgment of the Judicial Committee of the Privy Council in *Day and Bodden Bush* is available at:
<https://www.jcpc.uk/cases/docs/jcpc-2020-0033-judgment.pdf>.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

The final decision in *Day and Bodden Bush* also provides an opportunity to explore and explain the role of the Judicial Committee of the Privy Council ("JCPC") and why it functions as the final court of appeal for the Cayman Islands.

The JCPC used to be the highest court of appeal for the overseas countries, which made up the British Empire, including places such as Canada, Australia, New Zealand and India. In the 1920's, the JCPC was said to be the final court of appeal for more than a quarter of the world's population. When the British Empire became the Commonwealth of Nations and its members gradually sought independence, many established their own "Supreme Court" to serve as their final court of appeal. However, some chose to retain their links with the United Kingdom and the JCPC.

(Source:
https://www.supremecourt.uk/docs/beginner_s-guide-to-the-judicial-committee-of-the-privy-council.pdf)

ABOUT THE JCPC

Did you know?

that in addition to being the final court of appeal for the Cayman Islands, the JCPC also serves as the final court of appeal for the following jurisdictions?

- Appeals in the United Kingdom from the Disciplinary Committee of the Royal College of Veterinary Surgeons and against certain schemes of the Church Commissioners under the Pastoral Measure 1983; other rarely-used jurisdictions such as appeals from the Arches Court of Canterbury and the Chancery Court of York in non-doctrinal faculty causes; appeals from Prize Courts; disputes under the House of Commons Disqualification Act; appeals from the Court of Admiralty of the Cinque Ports and appeals from the High Court of Chivalry; and, additionally, Her Majesty also has the power to refer any matter to the JCPC for "consideration and report" under section 4 of the Judicial Committee Act 1833.
- Appeals from the Crown Dependencies: Jersey, Guernsey and the Isle of Man.
- Appeals from independent Commonwealth countries: Antigua and Barbuda; The Bahamas; Grenada; Jamaica; Saint Christopher and Nevis; Saint Lucia; Saint Vincent and the Grenadines; and Tuvalu.
- Appeals from Associated States of New Zealand, Cook Islands and Niue, notwithstanding that New Zealand itself abolished appeals to the JCPC in October 2003.

- Appeals from independent republics within the Commonwealth: the Republic of Trinidad and Tobago; Kiribati; and Mauritius.
- Appeals from other overseas territories: Anguilla; Bermuda; British Antarctic Territory; British Indian Ocean Territory; British Virgin Islands; Falkland Islands; Gibraltar; Montserrat; Pitcairn Islands; St Helena, Ascension and Tristan da Cunha; Turks and Caicos Islands; and Sovereign Bases: Akrotiri and Dhekelia.
- By agreement between the Her Majesty, the Queen, and the Sultan of Brunei, some civil appeals from Brunei are also heard by the JCPC, in which cases, the opinion of the JCPC is reported to the Sultan instead of to Her Majesty.

LADY ARDEN OF HESWELL



On 25 March 2022, the Rt. Hon. Lady Arden of Heswall, a recently retired Justice of the Supreme Court of the United Kingdom, who also served on the JCPC (including as a member of the Board in *Day and Bodden Bush*), delivered the 2022 Guest Lecture

at the invitation of the Hon. Chief Justice and the Judges of the Grand Court. Entitled, *Taking Stock of Recent Case Law of the Judicial Committee of the Privy Council – Its Breadth and Depth*, Lady Arden's lecture acknowledged the diversity of the work of the JCPC, but also paid particular attention to the role of the JCPC as a constitutional court.

Concluding on the theme of the JCPC as a constitutional court, Lady Arden made the following important statement:

[The JCPC] discharges the role of as a constitutional court. It performs this role even though the UK itself does not have a written constitution or any concept of fundamental rights. The Judicial Committee discharges its role by focusing on the constitution of the jurisdiction from which the appeal comes in the light of its particular content and provisions as a unique document and in the context of the traditions and customs of that jurisdiction. There is evidence that the original constitutions of countries which had formerly been British colonies that they were negotiated individually with local representatives of the people of that country. This supports the Judicial Committee's approach. Moreover, even applying a generous interpretation, there are limits on fundamental rights, and that where those limits apply, it is for the democratically elected legislature of that country to decide what steps to take. The Judicial Committee will consider any relevant international instrument that will help it interpret the text. The Convention is particularly relevant where the bill of rights or constitution reflects those rights. The Judicial Committee does not, of course, apply its own conception of values. It will give the provisions of the constitution a liberal or generous interpretation so far as the text permits.

The text of Lady Arden's 2022 Guest Lecture is available at: <https://judicial.ky/wp-content/uploads/publications/speeches/TakingStockassenttotheGrandCourt of the Cayman Islands on 29 April 2022.pdf>.

ADVISE

ADVICE AND RECOMMENDATIONS

CONSTITUTIONAL COMMISSION'S ADVICE AND RECOMMENDATIONS

In addition to the education and information that the Constitutional Commission provides in its various publications (all of which are available at:

<https://www.constitutionalcommission.ky/constitutional-matters>), the Constitutional Commission is also mandated to provide advice to the Government on questions concerning constitutional status and development in the Cayman Islands.

The Grand Court and the Court of Appeal have both highlighted the relevance of this advice. 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], the Grand Court noted at pages 462-3:

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 Assembly.

The Grand Court continued at pages 490-1:

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.

While the Court of Appeal took a different view to the Grand Court on the substantive matters at issue in this case, it did not, however, disagree on the importance of engagement with the Constitutional Commission.

Set against this backdrop, the Constitutional Commission wrote to His Excellency, the Governor, the Hon. Premier and the Hon. Leader of the Opposition on 15 October 2021,

outlining a series of new recommendations, together with outstanding issues that had been raised in previous publications and not addressed. These included:

1. In respect of the various commissions enshrined in the Constitution:

- (i) Members of Commissions should be personally indemnified for their work on Commissions;
- (ii) 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;
- (iii) 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;
- (iv) 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
- (v) 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.

2. In respect of Advisory District Councils:

- (i) There has been a significant failure to implement the legislation necessary to bring Advisory District Councils into being;
- (ii) Notwithstanding that the 2011 Act is already on the statute book, this should be revisited;
- (iii) 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.

3. In respect of the Constitutional Commission's outstanding reports and recommendations:

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

(iv) 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;

(v) 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" (further considerations in connection with the Speakership have also been identified by the Constitutional Commission in the course of the last year in its Explanatory Notes on The Speaker of the Parliament of the Cayman Islands);

(vi) 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; and

- (vii) In its 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;
 - (b) The records relating to the amendment of the Constitution; and
 - (c) The Outstanding Recommendations for reform of the Constitution.

The Constitutional Commission concluded this correspondence by stating that:

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.

Following the submission of this correspondence, the Chairman of the Constitutional Commission has met individually with His Excellency, the Governor, the Hon. Premier and the Hon. Leader of the Opposition to discuss these matters. While these were all positive discussions, there has not as yet been any substantive response to

or proposal arising from these various reports and recommendations. The Constitutional Commission's correspondence of 15 October 2021 is available at:

https://www.constitutionalcommission.ky/uploads/publicationdoc/LettertoGovernorPremierandLeaderofOppositionreSupplementaryLegislation_151021_1643814176_1643814176.pdf.

The Constitutional Commission's Conclusions and Recommendations on Advisory District Councils can be accessed at:

https://www.constitutionalcommission.ky/uploads/publicationdoc/Enclosure1-ConstitutionalCommissionConclusionsandRecommendationsonAdvisoryDistrictCouncils_151021_1643925864_1643925864.pdf.

JOIN OUR MAILING LIST

Would you like to receive the Constitutional Commission's reports and recommendations directly to your inbox when they are published?

If so, please contact the Constitutional Commission at:
info@constitutionalcommission.ky.

All of the Constitutional Commission's reports and recommendations are also published on its website: <https://www.constitutionalcommission.ky/>.

