

TITLE: ARE ORDERS IN COUNCIL THE UK'S ULTIMATE WEAPON?

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Before we can begin to look at Orders in Council it is necessary to review, albeit briefly, the legal history of the Cayman Islands. This will allow us to place Orders in Council in their historical context.

The Cayman Islands are a Colony, which was settled by the English in the 17th century. Colonies can be acquired by settlement or can be ceded. The difference may seem academic but it does have legal implications. The Cayman Islands (although a Settled Colony), unlike most other British Colonies, is not a British Settlement for the purposes of the British Settlements Act 1887. This is because in 1863 Cayman became a Dependency of Jamaica and remained that way until shortly after Jamaica itself gained independence in 1962. At that time the Cayman Islands made the decision to separate from Jamaica and become a Colony or Dependent Territory (now Overseas Territory) directly of the United Kingdom. This is still the legal and constitutional position today.

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So what are Orders in Council? But firstly who or what is this “Council”? It is the Privy Council that sits and meets in London. It is not to be confused with the Judicial Committee of the Privy Council, which consists of eminent Judges from Britain and from other Commonwealth countries and is the highest Court of Appeal in the Cayman Islands and also in many independent Commonwealth countries.

The Privy Council has as its members senior British politicians past and present who come from all political parties. All senior British Cabinet Ministers are appointed Privy Counsellors. Membership does not cease when a Minister leaves office or indeed even when his Party loses power. Appointment as a Privy Counsellor is for life and entitles the holder to be called “The Right Honourable”. This means that there are many Privy Counsellors but only those who are serving Cabinet Ministers attend meetings of the Council. Meetings are held at the Privy Council offices in Downing Street, London. They are private and the press do not attend. What discussions take place? How are decisions taken? Who comprises the Council at any particular meeting? I have no idea! These matters are never made public.

The Privy Council is the body through which Her Majesty or The Crown makes prerogative Orders, hence the name Order in Council. The Crown delegates this authority to the Privy Council and in doing so she acts as Her Majesty in Council. The Queen does not attend meetings of the Privy Council except on ceremonial occasions, but she does send a representative.

So how does all of this affect the Cayman Islands?

The first Constitution of the Cayman Islands made in 1972 was made by Order in Council under the West Indies Act 1962. The full name is Cayman Islands (Constitution) Order 1972. In the 1972 Constitution and indeed in all subsequent amendments to the Constitution, a general power of legislating for the Cayman Islands is reserved to Her Majesty in Council. These Orders in Council have all the force of an English Statute or a Cayman Islands Law, but they have never been debated or voted on by M.L.A.'s in the Legislative Assembly or by M.P.'s in the House of Commons (British Parliament). This reserved power by the British Government is not limited in anyway. It can be used at any time and for any purpose that the British Government of the day deems to be for the "good governance" of the Cayman Islands. The wishes or desires of the people of the Cayman Islands do not have to be taken in to account at all. We know this to be true because the two times that legislation specifically affecting the Cayman Islands has been imposed by Orders in Council (other than amendments to the Constitution which are always by way of Order in Council) they were both in direct contradiction of the stated wishes of the Caymanian people. These two occasions were the abolition of the death penalty and judicial corporal punishment by Caribbean Territories (Abolition of Death Penalty for Murder) Order 1991 and the legalisation of homosexual acts between consenting adults in private by Caribbean Territories (Criminal Law) Order 2000. I believe it is generally accepted that the Cayman Islands Legislative Assembly would have passed neither of these two pieces of prerogative legislation.

So, to answer the question that forms the title of this article "Are Orders in Council the UK's ultimate weapon"? Indeed they are. So long as the Cayman Islands Constitution contains this power reserved to the British Government through Her Majesty in Council, the Legislative Assembly will never be a Sovereign Parliament and the wishes of the Caymanian people will always be subservient to the dictates of the British Government.