

26 October 2019

BY HAND AND E-MAIL

Cayman Islands Government
Government Administration Building
133 Elgin Avenue, PO Box 907
Grand Cayman, KY1-1103
Cayman Islands

Attn: His Excellency the Governor, Martyn Roper, OBE
The Premier, Hon. Alden McLaughlin Jr, MBE JP MLA
The Leader of the Opposition, Hon. Arden McLean, JP MLA
The Attorney General, the Hon. Samuel Bulgin QC
The Auditor General, Ms. Sue Winspear, CPFA
The Elections Supervisor, Mr. Wesley Howell

Dear Sirs and Mesdames

Re: Referendum (People-Initiated Referendum Regarding the Port) Bill, 2019

1. We act for CPR Cayman, which is an unincorporated non-profit organization registered and filed as No. 506 on the 2nd of August 2019 (“**CPR Cayman**”).
2. CPR Cayman was established for the purpose of promoting and partnering with organizations concerned with community awareness and constitutional rights in the Cayman Islands. On the 12th of June 2019, CPR Cayman submitted a petition to Cabinet, signed by more than 25% of registered voters in the Cayman Islands, calling for a referendum on whether the Cayman Islands Government (“**CIG**”) should proceed with the planned cruise berthing project in George Town (the “**Cruise Berthing Project**”). This triggered the requirement for the CIG to conduct a people-initiated referendum on the Cruise Berthing Project (the “**Referendum**”), pursuant to section 70 of The Cayman Islands Constitution Order 2009 (the “**Constitution**”).
3. On 3 October 2019, the Cayman Islands Government (“**CIG**”) laid the *Referendum (People-Initiated Referendum Regarding the Port) Bill, 2019* (the “**Bill**”) before the Legislative Assembly. The Bill sets out a proposed procedure for the holding of the Referendum.
4. **Enclosed** is a copy of a legal opinion prepared by Helen Mountfield QC and Chris Buttler of Matrix Chambers, being specialist public law counsel, addressing certain concerns our client

has in respect to the Bill (the “**Opinion**”). In light of the Opinion, CPR Cayman considers certain aspects of the Bill to be incompatible with section 70 of the Constitution. That being the case, if the Bill is enacted on its current terms, the resulting legislation could be amenable to challenge by way of judicial review.¹

5. The aspects of the Bill that are of particular concern and which we consider to be amenable to judicial review if passed into law, include the following:
 - a. The setting of the Referendum question without first enacting a law that prescribes the manner in which the referendum question is to be set;
 - b. The setting of the Referendum date without first enacting a law that prescribes the manner in which the referendum date is to be scheduled;
 - c. The exclusion of the application of Part V of the Elections Law, 2017, which addresses campaign financing limits, without any separate campaign financing provisions being included in the Bill; and
 - d. The exclusion of the application of section 91(1) of the Elections Law, 2017 which would otherwise ban the sale of intoxicating liquor on referendum day.

6. The adverse consequences of setting the Referendum question and date before enacting legislation that prescribes the procedure for doing so, are already apparent. In particular, we note the following:
 - a. The proposed wording of the question is not neutral as the words “move forward” and “enhanced” both suggest that a yes vote is a step towards progress;
 - b. The inclusion of the cargo port, together with the Cruise Berthing Project, conflates two separate questions and makes the question confusing;
 - c. The proposed date of the Referendum, being 19 December 2019, unnecessarily disenfranchises approximately 220 people who registered as electors between July and October 2019 and who would be able to vote if the Referendum were held in 2020, being less than two weeks after the proposed date;
 - d. The extremely short period between the setting of the Referendum question and the proposed Referendum date means CPR Cayman will not have enough time to find and properly train Referendum observers;

¹ The Legislative Assembly derives its legislative powers from the section 59 of the Constitution and may only legislate “subject to” the Constitution.

- e. The close proximity of the proposed Referendum date to Christmas is likely to discourage voter participation in the Referendum as it is one of the busiest times of year for many people and a much higher percentage of the population will be abroad or in transit than at any other time of year.

For these reasons, the proposed wording of the question and the selection of 19 December 2019 as the Referendum date, could be actionable in their own right as they tend to frustrate the intention of section 70 of the Constitution and Article 25 of the International Convention of Civil and Political Rights, which has been extended to the Cayman Island and which gives every citizen the right to participate in public affairs.

7. The consequences of failing to establish campaign financing limits are also apparent. The CIG has engaged in excessive, one sided campaigning intended to influence the outcome of the vote and has used public funds to do so. This is a clear breach of the Code of Good Practice on Referendums promulgated by the Venice Commission) and may also be unconstitutional.²
8. We understand that the Bill will be debated in the Legislative Assembly on 28 October 2019. We ask that the content of this letter be brought to the attention of the Legislative Assembly in advance of that debate, together with our request that the Bill not be enacted as currently drafted. As an alternative, we request that the CIG consult with our client with a view to finding an accommodation that would:
 - a. Mitigate the consequences of the manner in which the executive branch of the CIG has managed its Referendum campaign to date, which we say has been incompatible with its obligations under the Constitution; and
 - b. Agree a procedure for the holding of the Referendum that would be compatible with the Constitution.
9. As set out in the Opinion, it seems likely that any legislation enacted in accordance with the Bill would be inconsistent with or serve to frustrate the purpose of the Constitution. The result of this is that the legislation could be successfully challenged through the Courts. If a judicial review application becomes necessary, our client will seek a stay preventing the Referendum

² All public bodies are bound by the *Padfield* principle (*Padfield v Minister of Agriculture [1968] AC 997*) which requires the executive arm of Government, including Cabinet, not to act in a way that tends to frustrate the object and purpose of primary legislation, in this case, the Constitution. The campaigning by CIG to date and use of public funds for same is a breach of the *Padfield* principle in contrary to the Code of Good Practice on Referendums, promulgated by the Venice Commission. See Guideline 1.3.1(d).

going ahead until that application has been determined. This would cause delay and unnecessary expense. This can be avoided if the Bill is suitably amended.

10. We invite you to consult with our client to ensure any such amendments achieve the intended result, being a fair and transparent people-initiated referendum, carried out expeditiously and without undue expense.

Yours faithfully
Broadhurst LLC



Kate McClymont
Associate Partner