

**IN THE MATTER OF A PEOPLE INITIATED REFERENDUM REGARDING THE
CONSTRUCTION OF A CRUISE SHIP PORT IN THE CAYMAN ISLANDS**

OPINION

A. INTRODUCTION

1. The Cayman Islands Constitution Order 2009 (“**the Constitution**”) provides for people-initiated referendums on matters of national importance if a petition signed by not less than 25% of registered electors is presented to the Cabinet. On 12 June 2019, Cruise Port Referendum Cayman (“**CPR Cayman**”) presented a petition to the Governor (the chair of the Cabinet) calling for a referendum on the question of whether to proceed with the cruise port project at George Town. After significant delay, the Cabinet accepted that the petition was valid and, on 3 October 2019, laid the *Referendum (People-Initiated Referendum Regarding the Port) Bill 2019* before the Legislative Assembly.

2. We are now asked to advise CPR Cayman on the following matters:
 - 2.1. The lawfulness of the proposed procedure for the referendum, in relation to (a) the referendum question, (b) the date of the referendum, (c) campaign financing and (d) bars and alcohol.

 - 2.2. The significance of a vote against the port by the majority of voters, but which constituted less than 50% of the electorate.

3. Our opinion is structured as follows:
 - 3.1. The constitutional right to a people-initiated referendum (section B).

 - 3.2. International law and guidance (section C).

3.3. The lawfulness of the proposed procedure (section D).

3.4. The effect of a vote against the port by the majority of voters but by less than 50% of the electorate (section E).

B. THE CONSTITUTIONAL RIGHT TO A PEOPLE-INITIATED REFERENDUM

4. Uniquely among British Overseas Territories, Caymanian law makes provision for people-initiated referendums¹. Section 70 of the Constitution provides:

People-initiated referendums

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.

5. We make the following observations:

5.1. Section 70 confers a freestanding right. It is without prejudice to section 69 (which empowers the legislature to initiate referendums).

5.2. Once a valid petition has been presented to the Cabinet, the Cabinet is under a duty to settle the wording of the referendum within a reasonable time and determine the date on which the referendum shall be held *as prescribed by law*. However, we understand

¹ According to the Constitutional Commission of the Cayman Islands, research paper on people initiated referendums, 13 October 2011.

that there was no such law in place when the Cabinet settled the wording of this referendum and determined the date on which it would be held.

5.3. Once Cabinet has taken the steps set out above, the Legislature is required to enact a law providing for the referendum.

5.4. The result of a referendum held in this way is legally binding if assented to by more than 50% of registered electors.

6. The following legal principles are applicable.

7. First, the Constitution, made by Order of the Queen in Council pursuant to s 5(1) of the *West Indies Act 1962*, is the supreme source of law in the Cayman Islands. The Legislative Assembly derives its legislative powers from the Constitution: s 59 provides that the Legislative Assembly may only legislate “subject to” the Constitution. Thus, any law passed by the Legislative Assembly is in principle amenable to challenge, by way of judicial review by the Grand Court, on the ground that it is incompatible with the Constitution.

8. Second, in relation to the Constitution, the Legislative Assembly, and all public officials and bodies, are bound by the *Padfield* principle (*Padfield v Minister of Agriculture* [1968] AC 997). The *Padfield* principle is an important facet of the rule of law. It establishes that the executive must not act so as to frustrate purpose of primary legislation enacted by the legislature. It is for the courts to determine the object and purpose of the legislation and for determining whether a particular action would frustrate that object and purpose. Although developed in the context of primary legislation in the United Kingdom, in our view, the principle must apply *a fortiori* to the Constitution of the Cayman Islands, given the supreme nature of that instrument.

9. Third, as explained by Bennion on Statutory Interpretation: “*It is a principle of legal policy that the municipal law (that is the law of the individual state) should conform to public international law. The court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative*

intention, should presume that the legislator intended to observe this principle” (7th edition, section 26.11).

C. INTERNATIONAL LAW AND GUIDANCE

10. The UK has extended the International Convention on Civil and Political Rights (“**the ICCPR**”) to the Cayman Islands.

11. Article 25 of the ICCPR provides:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.

12. In General Comment No 25: Article 25 (Participation in Public Affairs and the Right to Vote) (12 July 1996), the Human Rights Committee of the ICCPR stated that, for the purpose of Article 25: “*Citizens also participate directly in the conduct of public affairs when they ...decide public issues through a referendum*”. The rights of Caymanian citizens under Article 25 ICCPR therefore underscore the fundamental nature of the right under section 70 of the Constitution.

13. The European Commission for Democracy through Law (“**the Venice Commission**”) is the Council of Europe’s advisory body on constitutional matters. The UK Supreme Court has attached weight to the opinions of the Venice Commission (see *R (Barclay) v Lord Chancellor & Secretary of State for Justice* [2010] 1 AC 464, para 68, *per* Lord Collins).

14. The Venice Commission has promulgated a Code of Good Practice on Referendums. We note that the Cayman Islands Cabinet considered it appropriate to have regard to that Code when setting the referendum question². A number of the provisions of the Code are relevant

² Press release by the Office of the Premier, 3 October 2019: <https://www.caymancompass.com/core/wp-content/uploads/2019/10/Premiers-Office-referendum-date-statement.pdf>

to the issues on which we are asked to advise. In our view, they reflect common sense standards of fairness and propriety.

15. First, in relation to campaign finance:

- 15.1. Guideline I.2.2(a) provides: *“Equality of opportunity must be guaranteed for the supporters and opponents of the proposal being voted on. This implies a neutral attitude by administrative authorities, in particular with regard to: ...iii. public funding of campaign and its actors...”*.
- 15.2. That is developed by guideline I.2.2 (d), which provides: *“Equality must be ensured in terms of public subsidies and other forms of backing. It is advisable that equality be ensured between the proposal’s supporters and opponents. Such backing may, however, be restricted to supporters and opponents of the proposal who account for a minimum percentage of the electorate. If equality is ensured between political parties, it may be strict or proportional. If it is strict, political parties are treated on an equal footing irrespective of their current parliamentary strength or support among the electorate. If it is proportional, political parties must be treated according to the results achieved in the elections”*.
- 15.3. Guideline I.2.2(g) provides that: *“Political party and referendum campaign funding must be transparent”*.
- 15.4. Guideline I.2.2(h) provides: *“The principle of equality of opportunity can, in certain cases, lead to a limitation of spending by political parties and other parties involved in the referendum debate, especially on advertising”*.
- 15.5. Guideline II.3.4(a) provides: *“The general rules on the funding of political parties and electoral campaigns must be applied to both public and private funding”*. The explanatory report states that this means: *“National rules on both public and private funding of political parties and election campaigns must be applicable to referendum campaigns”* (para 24).
- 15.6. Guideline II.3.4(b) provides: *“The use of public funds by the authorities for campaigning purposes must be prohibited”*.

- 15.7. In the event of a breach of the funding rules “*for instance if the cap on spending is exceeded by a significant margin, the vote may be annulled*” (explanatory report, para 24).
16. We note that detailed provision was made in primary legislation to give effect to those principles in relation to the European Union referendum in the United Kingdom, through the *European Union Referendum Act 2015* (see schedule 1 on campaigning and finance controls).
17. Second, the Code provides that voters must be able to form an opinion on a referendum question freely. To this end:
- 17.1. Guideline I.3.1(b) provides: “*Contrary to the case of elections, it is not necessary to prohibit completely intervention by the authorities in support of or against the proposal submitted to a referendum. However, the public authorities (national, regional and local) must not influence the outcome of the vote by excessive, one-sided campaigning. The use of public funds by the authorities for campaigning purposes must be prohibited*”.
- 17.2. Guideline I.3.1(c) provides: “*The question put to the vote must be clear; it must not be misleading; it must not suggest an answer...*”.
- 17.3. Guideline I.3.1(d) provides:
- “The authorities must provide objective information. This implies that the text submitted to a referendum and an explanatory report or balanced campaign material from the proposal’s supporters and opponents should be made available to electors sufficiently in advance, as follows:*
- i. they must be published in the official gazette sufficiently far in advance of the vote;*
 - ii. they must be sent directly to citizens and be received sufficiently far in advance of the vote;*

iii. the explanatory report must give a balanced presentation not only of the viewpoint of the executive and legislative authorities or persons sharing their viewpoint but also of the opposing one.”

18. Third, the Code provides that “*Apart from rules on technical matters and detail (which may be included in regulations of the executive), rules of referendum law should have at least the rank of a statute*” (guideline II.2(a)).
19. Fourth, in relation to people-initiated referendums, the Code indicates that it is for those proposing the referendum to identify the question, subject to the right of the authorities to “*correct faulty drafting*”, such as “*when the question is obscure, misleading or suggestive*” (guideline III.4(g)).
20. Fifth, the Code advises against “*an approval quorum (approval by a minimum percentage of registered voters), since it risks involving a difficult political situation if the draft is adopted by a simple majority lower than the necessary threshold*” (guideline III.7). The explanatory report states: “*If a text is approved – even by a substantial margin – by a majority of voters without the quorum being reached, the political situation becomes extremely awkward, as the majority will feel that they have been deprived of victory without an adequate reason*” (para 52).

D. THE PROPOSED PROCEDURE

21. On 3 October 2019, the Premier’s Office announced that:
 - 21.1. The referendum would be held on 19 December 2019.
 - 21.2. The Cabinet had determined the referendum question to be: “*Should the Cayman Islands continue to move forward with building the cruise berthing and enhanced cargo port facility?*”
22. On the same date, the Government laid the *Referendum (People-Initiated Referendum Regarding the Port) Bill 2019* before the Legislative Assembly. We consider the following parts of the Bill to be particularly relevant to the matters we have been asked to address.

23. The recital to the Bill provides, in part: “*in accordance with section 70(2)(b) and (c) of the Constitution of the Cayman Islands, the Cabinet has settled the wording of the referendum question and has made a determination on the date for the holding of the referendum in a manner prescribed by this Law*” (emphasis added). As set out below, we consider that to make the Law prescribing the manner in which the Cabinet may set the referendum question after the Cabinet has set the question is contrary to s 70(2)(b) of the Constitution.
24. Clause 3 of the Bill provides for the Cabinet to appoint the day for holding the referendum, not earlier than 30 days after publication of the notice.
25. Clause 4 prescribes the question to be asked (which matches the question formulated by the Cabinet) and provides that the outcome of the referendum shall be binding on the Government if more than 50% of registered electors vote in favour of, or against, the question specified.
26. Clause 6(1) provides: “*The functions which, in relation to an election, are conferred on the Supervisor or a Deputy Supervisor by the Elections Law (2017 Revision) shall, in relation to the referendum, be discharged by those officers respectively*”. Clause 12(1) provides: “*For the purposes of the referendum, votes shall be cast, and the proceedings shall be conducted, so far as may be, as if the referendum was an election of members to the Legislative Assembly and the Elections Law (2017 Revision) and any rules in force under that Law shall, for those purposes, be construed accordingly, but any reference to a candidate, nomination, agent, election agent, polling agent or counting agent shall, unless the context otherwise requires, be disregarded*”. However, clause 12(2) and schedule 2 to the Bill limit the application of the Elections Law 2017 to the referendum, including by omitting the provisions relating to election expenses (under Part V of the Elections Law) and removing the ban on the sale of intoxicating liquor (under s 91 of the Elections Law).
27. Clause 12(4) gives the Cabinet the power to amend the provisions of schedule 2 and thereby alter the referendum procedure. Clause 14 empowers the Cabinet to make regulations for the conduct of the referendum as appear to it to be necessary or expedient.

28. We now turn to the specific aspects of the procedure on which we are asked to advise: (a) the referendum question, (b) the date of the referendum, (c) campaign financing and (d) bars and alcohol.

D.1 The referendum question

29. As we touched on above, we consider there to be a flaw in the procedure by which the referendum question was formulated. Section 70(2)(b) of the Constitution provides that *“the Cabinet shall settle the wording of a referendum question or questions within a reasonable time period as prescribed by law”*. In our view, the words *“as prescribed by law”* attach to the manner in which the Cabinet shall settle the wording of a referendum question. Thus, the Legislative Assembly is responsible for passing a law which prescribes the procedure for settling the question and the Cabinet is responsible for settling the wording in accordance with that law.

30. The sequence is clear and obvious: the law must come before the wording is settled. In our view, there is nothing surprising about this constitutional provision: as is clear from the Venice Commission’s Code of Good Practice (and as accords with common sense) the formulation of a referendum question is a matter of importance and potential controversy; it is therefore not surprising that the Constitution should require the legislature to prescribe guidelines for its formulation. Further, the Venice Commission recommends that, apart from rules on technical matters and detail, referendum procedure should be specified by primary legislation, and that is what s 70(2)(b) of the Constitution provides.

31. If we are right in our construction of s 70(2)(b) of the Constitution, then the Cabinet has breached the Constitution by setting the referendum question before a law has been passed prescribing the manner in which the question should be set. Further, the Legislative Assembly would breach the Constitution by purporting to ratify the referendum question after the event. Both actions would, in our view, be amenable to judicial review in the Grand Court.

32. We consider that error to be particularly material, given that we consider the referendum question to be open to criticism in the following respects:

- 32.1. First, the words “*continue to move forward with building*” are prolix. In our view, the question should simply be: “*Should the cruise berthing facility be built?*”
- 32.2. Second, we do not consider that the word “*enhanced*” is neutral because it implies that the “*enhanced cargo port facility*” would constitute an *improvement*. In that respect, we consider the question risks unfairness (as a matter of common law) and falls foul of Guideline I.3.1(c) of the Venice Commission’s Code. If the Cabinet wishes to distinguish the new cargo port facility from the existing facility, more neutral descriptive terms are available, such as “larger” or “refurbished”.
- 32.3. Third, we consider it doubtful whether the cargo port facility properly forms part of the referendum question at all, given that it was not put in issue by the petition. Unless the cargo port facility forms part and parcel of the cruise berthing port facility (which is what the petition questioned), then we do not consider that it properly forms part of the referendum question, because s 70 of the Constitution contemplates that the question will follow from the petition. If, as we are told, the cargo port facility could be developed without the cruise port facility (and vice versa), then we consider it inappropriate for the issues to be merged. However, it would be open to the Government to seek to raise a separate question (under s 69 of the Constitution) relating to the proposal to develop the cargo port. We note the point made in the press release from the Premier’s Office (that the proposal was described as including an “enhanced cargo point” at a Chamber of Commerce luncheon in 2015), but this does nothing to alter our view.

D.2 The date of the referendum

33. In our view, the setting of the date for the referendum was flawed in a similar manner to the setting of the referendum question. Section 70(2)(c) of the Constitution provides that “*the Cabinet shall make a determination on the date the referendum shall be held in a manner prescribed by law*”. Thus, the Legislative Assembly is responsible for passing a law which prescribes the procedure for setting the date for the referendum and the Cabinet is responsible for setting the date in accordance with that law. Again, the sequence is clear and obvious: the law must come before the date is set.

34. If we are right in our construction of s 70(2)(c) of the Constitution, then the Cabinet has breached the Constitution by setting the referendum date before a law has been passed prescribing the manner in which the date should be set.

35. Again, we consider that this breach of the Constitution is material, for the following reasons:

35.1. First, there is likely to be real controversy about the short period between the setting of the question (which, in our view, was itself unlawful) and the date of the referendum. As set out above, the Venice Commission states that voters must be provided with sufficient information for and against the proposal and recommends that an explanatory report or balanced campaign material from the proposal's supporters and opponents should be made available to electors sufficiently in advance of the referendum. Unless such material has already been sent to all electors, it appears doubtful whether there would be sufficient time before 19 December 2019 to prepare, publish and disseminate that material and allow electors sufficient time to digest it. We do not consider that the information previously disseminated by the Government to explain its proposal discharges this obligation; what is required is a balanced explanatory report setting out the pros and cons of the issue on which a referendum is being called or campaign material from the proposal's supporters and opponents.

35.2. Second, we understand from CPR Cayman that the date of 19 December 2019 is controversial and is perceived to have been chosen with a view to suppressing voter numbers (which would be a breach of the *Padfield* principle). This is because the date falls shortly before Christmas, on one of the busiest days for the tourist industry, and a public holiday has been declared, which means that the date forms the first day of school holidays. In those circumstances, many voters may be abroad (and voters are typically less willing to vote by post), voters may find it more difficult to make time to vote, and the casting of postal ballots may be impeded by seasonal postal delays.

35.3. Third, we are told that if the referendum were held in January rather than December, then an additional 200 persons, who registered between July and October 2019,

would be eligible to vote, thereby adding, approximately, 1% to the size of the electorate.

35.4. Fourth, we are instructed that CPR Cayman will have insufficient time to train observers, so as to be able to exercise their right under clause 7 of the Bill to observe the conduct of the referendum at each counting station.

D.3 Campaign financing

36. We make the following observations about campaign financing.

37. First, we note that the Venice Commission recommends a prohibition on the expenditure of public funds and ensuring equality of arms between those for and against the referendum proposal, as set out above.

38. Second, we consider that a serious disparity in campaign spending between the proponents and opponents of the referendum would frustrate the constitutional rights of the petitioners to a fair and effective referendum and would breach the *Padfield* principle.

39. On the information before us, there is a stark inequality of arms between the proponents of the port (the Government and certain commercial interests) and the objectors (CPR Cayman and other non-profit groups). We are told that the Government has already spent CI\$217,000 on advertising and that a “pro-port” lobby group called “Cayman’s Port, Cayman’s Future” is funded by a group of businesspeople. We are told that no public funding has been made available to the objectors to the port.

40. Third, the *Elections Law 2017* recognises the need for controls over campaign spending to ensure a fair elections procedure. The Bill excludes the application of those provisions to this referendum, yet puts nothing in their place.

41. Fourth, s 70(1) of the Constitution requires the legislature to make a law governing referendum procedure.

42. Fifth, there would be little difficulty in enacting campaign finance controls, for example in the manner provided by the *European Union Referendum Act 2015*.

43. In those circumstances, we consider that the absence of provision for campaign financing in the Bill is a serious flaw. We consider there to be a real risk that if (as we are told is likely) the lack of restriction on campaign financing results in a serious imbalance in campaign spending, the referendum will be rendered unlawful on the ground that the Legislative Assembly failed to make a law governing the referendum procedure in a way that safeguarded the constitutional right to a fair and effective people-initiated referendum. As we have explained above, a law which is incompatible with the Constitution is liable to be struck down by the Grand Court. The obvious way of addressing that risk is for the Bill to be amended to make provision for campaign financing.

D.4 Bars and alcohol

44. Section 91(1) of the *Elections Law 2017* provides: “*No intoxicating liquor shall be sold, offered for sale or given away at any premises situate in any electoral district in which an election is being held, to which a licence issued under the Liquor Licensing Law (2016 Revision) applies, at any time between the opening of the poll and one hour after the close of the poll*”. We infer that the legislative purpose of that provision is to ensure that the election is conducted in an orderly manner and to encourage voter participation.

45. As set out above, the Bill proposes to disapply that provision in relation to the referendum. The only reason we have seen is contained in a press release from the Premier’s office, which states: “*licensed bars and similar establishments will be permitted to remain open to minimise disruption during the holiday season*”. This reasoning appears to us to be inadequate. First, it fails to grapple with the purpose behind section 91(1) of the *Elections Law 2017*, which appears to apply with equal force here. Second, any disruption would be self-inflicted, in that it would be a product of the Cabinet’s choice of date. Third, in circumstances where the purposes behind section 91(1) of the *Elections Law 2017* appear to include promoting voter turnout and the Premier appears to perceive a non-vote as a vote in favour of the port project (as to which, see below), we consider there to be a real risk that the Grand Court would conclude that the disapplication of section 91(1) of the *Elections Law 2017* would unlawfully frustrate the purpose of s 70 of the Constitution, which is to secure that a fair and effective referendum is held.

E. THE EFFECT OF A VOTE BY LESS THAN 50% OF THE ELECTORATE

46. We have watched the Premier's interview with the Cayman Compass³ and note his statement that, in the event of a non-quorate majority of voters opposing the port project, *"We would proceed with the project because essentially people not turning out to vote is a clear indication they are not opposed to the project"*.
47. In our view, the Premier is incorrect to state that people not turning out to vote is a clear indication that they are not opposed to the port project. People may not vote for a variety of reasons, including other commitments or feeling that they are insufficiently informed on the issues.
48. Although we do not consider that the Premier's comments cross the line into unlawful conduct, he and the Cabinet do need to be careful not to create the impression that those turning out to vote oppose the port development because that would undermine the secrecy (or, at least, the perceived secrecy) of the ballot and would therefore be contrary to the purpose of s 70 of the Constitution.
49. Further, if the Government were to take more active steps to suppress turnout, for example by offering incentives to those staying at home or by actively discouraging civil servants from voting, then that would in our view be clearly unlawful. It would be plainly contrary to the purpose of s 70 of the Constitution and might well constitute electoral fraud.
50. We understand that those instructing us are concerned that the Premier's comments indicate that the Government has predetermined its response to the referendum in the event that the quorum is not reached. However, we do not consider that the Premier's comments can be taken as any kind of binding decision. As the majority of the UK Supreme Court observed in *R (Miller) v Secretary of State for Exiting the European Union* [2018] 1 AC 61, para 119: *"such public observations, wherever they are made, are not law: they are statements of political intention"*.

³ <https://www.caymancompass.com/2019/10/06/premier-lets-get-on-with-it/>

51. Further, although a majority vote with less than the approval quorum would not be legally binding under s 70 of the Constitution, it would be advisory. An advisory referendum may still have substantial political force, as the EU referendum in the United Kingdom has shown. As the Supreme Court observed in the *Miller* case, although the force of the referendum was political rather than legal, “*It has already shown itself to be of great political significance*” (para 124). Furthermore, we note that, in the UK, the House of Lords Select Committee on the Constitution (Referendums in the United Kingdom, HL Paper 99, para 197) noted that “*because of the sovereignty of Parliament, referendums cannot be legally binding in the UK, and are therefore advisory*”. However, it went on to state that: “*it would be difficult for Parliament to ignore a decisive expression of public opinion*”, a recommendation with which the UK Government agreed (HL Paper 34, p12). The Venice Commission made a similar point, as set out above.

52. It is not for us to prejudge the political significance of any outcome of the referendum. However, in light of the observations of the eminent bodies recorded above (which accord with common sense), we anticipate that the effect of a significant majority vote against the port proposal might well have a powerful political effect.

F. CONCLUSION

53. For the reasons set out above, we consider that:

53.1. The proposed referendum procedure would be unlawful.

53.2. Although we suspect that the Premier has underestimated the political significance a non-quorate majority vote, without further evidence of efforts to suppress voter turn-out we do not consider his comments to have been unlawful.

HELEN MOUNTFIELD QC
CHRIS BUTTLER

MATRIX
23 OCTOBER 2019