



Subcommittee Report on the National Conservation Bill, 2013 (the "**Bill**")

1 Executive Summary

- 1.1 The Cayman Islands have a history of enacting environmental protection legislation to various degrees and are already subscribed to a number of environmental treaties, conventions and agreements with and through the United Kingdom. However, with the passage of the 2009 Constitution (the "**2009 Constitution**"), the Government of the Cayman Islands is now required to have due regard to the need to foster and protect the environment in all decisions, and is directly answerable for any breach of that obligation to the people of the Cayman Islands.
- 1.2 The Bill reflects the Government's attempt to provide a modern environmental law which: (i) fulfils its constitutional obligations to the people of the Cayman Islands; (ii) promulgates existing international agreements and obligations into local law; and (iii) enhances the protection and conservation of various endangered, threatened and endemic plants, habitats and wildlife in the Cayman Islands.
- 1.3 The Bill would establish a National Conservation Council (the "**Council**") responsible for setting national policies for the conservation and sustainable use of natural resources, establishing and maintaining protected areas, conserving and restoring populations and critical habitat of protected species and promoting public awareness and education on the Bill and its conservation efforts. However, the Council would not be autonomous and, like other Government advisory bodies, would be subject to oversight by the responsible Ministry.
- 1.4 Almost half of the Council will be comprised of Government officials and the majority of the persons comprising the Council would not be required to have specific scientific or technical expertise. Given that the Bill obliges every Government entity to ensure its specific decisions are consistent with and does not jeopardise the protection and conservation of protected areas, protected species or their critical habitats, Government officials would likely be drawn from a wide cross-section of Government Ministries, departments, agencies and authorities. With such a wide pool to draw from, an opportunity is presented for a Council with a balanced composition that could provide an authoritative sounding board for environmental queries from Government entities which might otherwise have required expensive consultancy services and/or judicial direction.
- 1.5 The Bill also allows for the utilisation of an Environmental Protection Fund (the "**Fund**") for the purposes set out in the Bill, which include the acquisition of land for the purposes of conservation. While the purpose for doing so would be new, the mechanism for such acquisition is already in place and in operation through existing legislation. The Council will not have absolute power over individual land owners, whose rights to peaceful enjoyment of their property under section 15 of the 2009 Constitution, subject to law and prescribed

purposes, will remain undisturbed. Nevertheless, the use of monies from the Fund would be subject to careful oversight and approval by Cabinet.

- 1.6 While not mandatory under the Bill, the use of environmental impact assessments ("**EIAs**"), which have become increasingly common with large scale developments within the Islands, are expected to become more prevalent. It is likely, however, that the extent of the use of EIAs will vary according to the size of the proposed development and the area to be developed. Whether the Bill will stifle, curtail or foster responsible development in the Cayman Islands will be dictated by the real estate and property development markets, which will change as always to meet legislative or natural change regardless, however, it is noted that regulation can solve problems that markets ignore. As such, speculation as to what impact the Bill may have until it has been enacted into legislation will remain just that.
- 1.7 It is outside of the scope of this forum to comment on the species of flora and fauna which would become protected under the Bill. What is clear is that the Bill would grant protection to a number of species, many of which may not be known to the general public. However, certain notoriously invasive species, such as the Lionfish and Green Iguana are not expressly mentioned within the list of species that can be either hunted or collected. Given, for example, the uncertainty surrounding the status of the green iguana in the past, the Government may wish to consider specifically identifying these species, ensuring that existing growth management programs remain on statutory footing. For the uninitiated, a companion guide to assist the public with the easy identification of those protected species under Part 1, as well as those species under Part II, would greatly assist with the prevention of unintended hunting and/or collecting.
- 1.8 It is impossible not to mention the considerable attention the Bill has received, since its inception so many years ago and recently. However, like any other proposed legislation, any legal analysis of the Bill will be both limited and theoretical until such time as it has been passed and fully implemented. No legislation is perfect and the legislative process of refinement and revision apply equally in the case of the Bill. Should similar attention be given to the monitoring and consultative process provided under the Bill, that legislative process would be enriched in a way seldom enjoyed by other legislation.

2 Domestic and International Obligations

- 2.1 The Cayman Islands has a history of enacting environmental protection legislation to various extents and are already subscribed to a number of environmental treaties, conventions and agreements with and through the UK. Of note: on 26th of September 2001 the Cayman Islands Government signed up to the UK Charter on the Environment ("**UK Charter**") entered into by the UK and the Overseas Territories ("**OT**"). This commitment to the UK Charter creates an obligation for the Cayman Islands to implement the UN Convention on Biological Diversity 1972 ("**Biodiversity Convention**") and the 1992 Rio Declaration on Environment and Development ("**Rio Declaration**"). The Rio Declaration creates duties for the UK, a large portion of which pertain to its OTs since the number of endemic species recorded amongst the OTs dwarfs the number in the UK itself. Failure to fulfil its obligations under the UK Charter, Biodiversity Convention and Rio Declaration could theoretically place the Cayman Islands in a position where it was at odds with the UK.
- 2.2 If enacted, the proposed Bill would represent positive steps by the Government to fulfil commitments under the UK Charter, including: bringing together government departments, representatives of local industry and commerce, environment and heritage organisations, the Governor's office, individual environmental champions and other community representatives in a forum to formulate a detailed strategy for action (paragraph 1) by the creation of the

Council and advisory committees (previous entities like the Marine Conservation Board and Planning boards did not satisfy necessary characteristics); protecting and restoring key non-marine habitats, species and landscape features (paragraph 2) by creating protected areas and conservation areas; ensuring that environmental impact assessments are undertaken before approving major projects (paragraph 4) thereby avoiding unilateral activities of government; open and consultative decision making on proposals that may affect the environment (paragraph 5); and, abiding by the Rio Declaration principles (paragraph 11).

2.3 Domestic environmental protection laws are not, however, antithesis to the Cayman Islands and there are many laws currently in force in the Islands which fall appropriately under the banner of "environmental" law¹. Chief among these would be the Marine Conservation Law ("MCL") having now been in place for over 25 years, which the Bill seeks to replace.²

2.4 Perhaps most importantly, the personal right of an individual to the protection of the environment did not exist in any substantial form until the passage of Constitution for the Cayman Islands, 2009 ("**2009 Constitution**") where it is enshrined at Part I, section 18³. Prior to the passing of the 2009 Constitution, the Government released a 2009 Draft Constitution & Explanatory Guide ("**Explanatory Guide**") which provided:

"You and your community would have the right to the protection and preservation of your environment. Government would be obligated to implement legislation and other measures to protect Cayman's heritage, wildlife, and land and sea biodiversity; prevent pollution and ecological degradation; promote biodiversity; secure ecologically sustainable development and use of natural resources."

2.5 The Bill therefore appears to be the Government's attempt to fulfil its constitutional obligations to the people of the Cayman Islands in addition to the Islands' international obligations and lists its main objective providing a modern environmental law which will consolidate various national conservation laws, promulgate existing international agreements into local law and enhance the protection and conservation of various endangered, threatened and endemic plants, habitats and wildlife in the Cayman Islands.

¹ A list of the main environmental laws currently in force in the Cayman Islands include: Environment Protection (Overseas Territories) Order, 1988; Travel (Departure Tax and Environmental Protection Fee) Law (2003 Revision) (as amended); Development and Planning (Tree Preservation Orders) Regulations (1998 Revision); Marine Conservation Law (2013 Revision) ; Marine Conservation Directives (2003 Revision) ; Marine Conservation Regulations (2004 Revision) ; Marine Conservation (Amendment) Directives, 2009; Marine Conservation (Fishing Licences) Regulations, 2003 ; Marine Conservation (Grouper Spawning Areas) Notice, 2007 and 2011; Marine Conservation (Marine Parks) Regulations (2007 Revision) ; Marine Conservation (Turtle Protection) Regulations (2008 Revision) ; Merchant Shipping (Marine Pollution) Law, 2001 (Law 42 of 2001) ; Merchant Shipping (Marine Pollution) (Reporting of incidents involving harmful substances) Regulations, 2004 ; Merchant Shipping (Marine Pollution) Regulations, 2004 ; Restricted Marine Areas (Designation) Regulations (2003 Revision) ; Merchant Shipping (Oil Pollution) (Cayman Islands) Order 1998 ; Oil Pollution (Compulsory Insurance) Regulations 1976 ; Air Navigation (Overseas Territories) (Environmental Standards) Order 2004 ; Aerial Spraying Protection Law (9 of 1974) (1997 Revision); Animals Law (2013 Revision) ; Airports (Straying Animals) Regulations (1997 Revision) ; Animals (Disposal) Regulations, 1997 ; Animals (Exportation, Importation, Protection and Control) Regulations (2004 Revision) ; Endangered Species Protection and Propagation Law (21 of 1978) (1999 Revision); Endangered Species (Trade and Transport) Law, 2004 (Law 14 of 2004); and Endangered Species Bred in Captivity or Artificially Propagated Regulations (1998 Revision) Notice.

² Regulations under the Marine Conservation Law remain if the Bill is passed into law.

³ The Bill of Rights, Freedoms and Responsibilities came into force on 6 November 2012. The preamble of the Constitution states that the people of the Cayman islands affirms that it is "*a country that manages growth and maintains prosperity, while protecting its social and natural environment*" and "*a country that respects, protects and defends its environmental and natural resources as the basis of its existence*".

3 Administration and Enforcement

- 3.1 The Bill will establish a National Conservation Council (the "**Council**") which will be responsible for setting national policies for the conservation and sustainable use of natural resources, establishing and maintaining protected areas, conserving and restoring populations and critical habitat of protected species and promoting public awareness and education on the Bill and its conservation efforts.
- 3.2 Paragraph 1(1) of the Schedule 2 to the Bill states that the Council will comprise of 13 voting members, 6 of whom will be Government Officials and 7 individuals appointed by the Cabinet. Of the 7 Cabinet appointees, at least three must have relevant scientific or technical expertise. It is not clear what "relevant scientific or technical expertise" means or whether such appointees will likely be drawn from certain Government Departments (e.g. the Department of Environment, the National Trust etc.) or from the wider community. If the expression is intended to mean individuals drawn from a particular Government Department, then the language of the Bill would benefit from expressly stating so. The Government may also wish to consider increasing the number of members on the Council who may be drawn from the wider community. Such individuals may not be considered to have "relevant scientific or technical expertise" but may have other relevant knowledge and/or understanding that would prove useful to the Council.
- 3.3 Each year the Council will be required to prepare and submit a report on its activities to the responsible Ministry. After receiving the report, the Minister will have three months to seek approval of the report from Cabinet and lay such report before the Legislative Assembly.
- 3.4 The Bill also vests certain powers and duties with the Director of Environment which include the provision of advice and support to the Council, the appointment of a secretary to the Council and the administration and enforcement of the Bill. Conservation officers will be appointed to carry out and enforce the provisions of the Bill.
- 3.5 The Bill will, however, bring with it certain operational and staffing changes as public servants' positions would be replaced e.g. the role that was previously filled by the Marine Conservation Board will now fall under the remit of the Council. The expanded powers of the Council will mean a fairly wholesale overhaul of the management apparatus in place at Department of the Environment will be required. The role of enforcement in the marine sector will remain the same, though conservation officers will further be required for the terrestrial environment.
- 3.6 The Bill also appears to take on enforcement of international conventions in the Caribbean region (the Protocol Concerning Specially Protected Areas and Wildlife to the Regional Convention (Kingston, Jamaica, January 1990)) which would mean any vessel registered in Cayman that is in breach of any marine law in a jurisdiction that is also a party to that convention would require the Council to take action under the Bill. An increased budget and expansion of personnel will likely be required under the Bill.

4 Management of the Environmental Fund

- 4.1 The advancement of environmental protection is not new to the Islands and the Bill is foreshadowed by the efforts of successive Governments which have been steadily collecting "environmental protection fees" from visitors⁴ to the Cayman Islands for over 15 years⁵, with

⁴ The Travel (Departure Tax and Environmental Protection Fee) Law (2003 Revision) (as amended) provides at section 6 that environmental protection fees are to be collected from every outbound traveller and tourist. Pursuant to the Customs Tariff Law

an "Environmental Protection Fund" (the "**Fund**") having been established by Government Motion No. 14/97 for the "*purpose of defraying expenditure incurred in protecting and preserving the environment of the Islands*"⁶. In the past, this Fund has accumulated over \$40 million dollars over the years⁷ but has been left largely unutilised by the Government, save for matters of critical national importance.

- 4.2 The Bill provides that 100% of the environmental protection fees collected under the Travel (Departure Tax and Environmental Protection Fee) Law; and all fees paid under the Bill and any fines, compensation and costs imposed in respect of offences under the Bill, shall be paid into the Fund. These provisions are subject to regulation and amendment by the Governor. However such regulations made the Governor are subject to negative resolution of the Legislative Assembly.
- 4.3 The Fund can also be funded by voluntary contributions or grants by individuals or organisations can be paid into the Fund by the Government. The Government may itself make any additional appropriations into the Fund from revenue, borrowings or other funds as long as it is made in accordance with the Public Management and Finance Law (2013 Revision) (the "**PMFL**"). What effect this will have on the financing of the National Trust, which is heavily dependent on both Government revenue and private contributions, is not yet clear.
- 4.4 Recommendations for use of the Fund must be made to the Ministry as part of the normal budget process. The Council shall advise Cabinet on the use of the Fund and shall be responsible for the management of the Fund as directed by Cabinet. Pursuant to section 46(1), the Bill provides for the Fund to be used for: (i) the acquisition and management of protected areas; and (ii) for measures to protect and conserve protected species and their critical habitat.
- 4.5 In addition to these conditions, the use of the Fund will be regulated as an appropriation⁸ in accordance with the PMFL. This would mean that the use of public monies to acquire land would be regulated by sections 17 through 27 of the PMFL which deal with the requirements for Government budgeting. During this phase the government would go through a budget process which includes: (i) a strategic phase; (ii) a detailed planning and budgeting phase; (iii) a Governor in Cabinet collective review phase; (iv) a Legislative Assembly review phase; and (v) a documentation phase. This would include a final annual plan and estimates which would include approved appropriations made concerning the Fund.
- 4.6 The Council would enter into agreements with the Department (although not defined appears to refer to the Department of the Environment), other government entities, non-governmental organisations or persons to carry out any of the activities required to give effect to the purposes of the Fund. Payments would be made by the responsible Ministry on the direction of the Council. The activities being funded will be periodically reviewed and shall be included

(2011 Revision), an "Environmental Tax" of CI\$1,000 is also chargeable to automobiles and other mechanically propelled vehicles specified in the Fifth Schedule of that law.

⁵ The Miscellaneous Provisions (Fees and Duties) (Temporary) (Amendment) (Environmental Protection Fees) Law, 1998 (Law 3 of 1998)

⁶ Hansard 23 December 1997.

⁷ Based on an article by Norma Connolly of the Caymanian Compass entitled "\$40M sitting in unused environment fund" dated 17 January 2012 - <http://www.compasscayman.com/story.aspx?id=92327>

⁸ Appropriation under the PMFL is defined as "a power given by an Appropriation Law to the Governor in Cabinet to incur executive expenses, make an equity investment, acquire or create executive assets, or lend or borrow money for a particular purpose." Except to the extent provided by a law, an appropriation lapses at the end of the financial year to which the law by which the appropriation is granted relates.

in the annual report of the Council which shall account for the uses of monies of the Fund, including activities which were only part funded by monies from the Fund.

- 4.7 Of note, the Council can only make recommendations to Cabinet concerning appropriations from the Fund and it must follow the same procedures utilised by every other government department to gain approval. Appropriations to and from the Fund will no doubt be carefully reported and scrutinised through the Government budgeting process, just like every other appropriation.

5 Acquisition of Private Land

- 5.1 The Bill provides that the Government may designate any area of Crown Land or Cayman waters as a protected area. For private land, section 9(4)(b) of the Bill envisages that the Council would recommend to Cabinet that an area which is not Crown land be acquired by the Crown and a protected order be made or, in the alternative, for a conservation agreement be made with the proprietor of the land.
- 5.2 The Government's ability to acquire land for any public purpose and to compensate anyone with an interest in such land for damages and loss of land is regulated by the Land Acquisition Law (1995 Revision) (the "**Acquisition Law**").
- 5.3 Within the Acquisition Law there is provision for dispute resolution between the parties regarding objections to the acquisition of land as well as the amount of compensation to be awarded in respect thereof. Although the Bill makes provision for dispute resolution relating to such objections, it does not specifically incorporate similar provisions found in the Acquisition Law.
- 5.4 The main difference between the Acquisition Law and the Bill is that there is no provision for negotiation between the parties for the acquisition and compensation of land. It is up to the aggrieved person to object after a notice has been published. Further, the Bill does incorporate certain provisions of the Limitation Law (1996 Revision) relating to compensation but the Acquisition Law does not.
- 5.5 The Bill is also silent on the designation of a protected area where the land owner does not wish to sell his land to Government or enter into a conservation agreement. Whilst the Government may not be able to force a land owner to sell his land or enter into a conservation agreement, it does seem plausible that the land owner could be restricted in the use of his land should he wish to develop the land and seek planning permission as such permission may be contingent on compliance with the Bill. Leaving it opaque, as it is now, would mean that the Council would have to set and govern its own procedure until such time as one can be mandated by regulation or otherwise. A possible solution would be to include a specific provision in the Bill that deals with situations where the land owner chooses not to sell nor enter into a conservation agreement but would like to develop the land. The Government may also wish to consider incorporating, or expressly dis-applying the terms of, the Acquisition Law into the Bill for purposes of consistency and the avoidance of doubt of the relationship between each.
- 5.6 It is important to note, however, that the Council will not have absolute power over individual land owners. Section 15 of the Bill of Rights provides that Government cannot interfere in the peaceful enjoyment of any person's property nor can it compulsorily take possession of any person's property, or compulsorily acquire an interest in or right over any person's property, unless it is (a) in accordance with law and (b) for prescribed reasons, such as where the interference, taking of possession or acquisition is necessary or expedient in the interests of,

for example, utilisation of any property in such manner as to promote the public benefit. Acquisition for the conservation of natural resources would not contravene this right.

- 5.7 Importantly, when making decisions contrary to private persons, the Council, just like any Government entity, will always be subject to human rights considerations. From the Explanatory Guide:

"When making human rights judgments, Cayman's courts must consider European Court case law. However, local courts would also be required to interpret some rights using the principle of 'margin of appreciation,' which means that a government may lawfully infringe human rights if it is justified, and serves a legitimate public purpose."

- 5.8 The Explanatory Guide defines Margin of Appreciation⁹:

"'Margin of Appreciation' balances the human rights of individual citizens, against the protection and safety of the public. If this balance did not exist, human rights would inevitably override the protection of the public, and therefore pose great concern to the interest and security of the public. In particular, the media as a public watchdog would be entitled to a high degree of protection.

Margin of appreciation also means that government could be justifiably excused for infringing human rights if it is in the public interest.

Importantly, not all rights – such as the absolute rights against slavery and torture – would be subject to margin of appreciation."

6 Management of Development

- 6.1 There are obligations imposed on every "entity" (this would include, for example, the Planning Department) to comply with the provisions of the Bill to ensure its decisions (i.e. planning approval for the development of land) is consistent with and does not jeopardise the protection and conservation of protected areas, protected species or their critical habitats. Under section 41 of the Bill, every entity is required to take into account the views of the Council before taking any action including the grant of any permit or licence that would or would be likely to have an adverse effect on the environment generally or any natural resource.

- 6.2 Before granting its approval, the Council may require an environmental impact assessment ("EIA") to be carried out on an area within the proposed development by the applicant, at the applicant's cost. EIAs are being increasingly called for with major developments¹⁰. This was foreshadowed somewhat in *National Trust for the Cayman Islands v. Planning Appeals Tribunal*¹¹, where Sanderson, J held that although the Development & Planning Law did not require that an environmental impact assessment to be prepared before permission could be granted to develop wetlands, the learned judge went on to note:

"I can envisage a proposed development which could have a foreseeable environmental impact but which the Central Planning Authority might nevertheless decide to approve, subject to the production of an environmental report the purpose of which would be to identify how to minimize or confine such impact."

⁹ Page 14.

¹⁰ See, for example, the Environmental Impact Report for the East End Seaport Project, May 2011, conducted by Hesperides Group, LLC and, to a further extent, the accompanying Economic Impact Study, dated November 2010, performed by Deloitte.

¹¹ [2000] CILR 521 at page 542.

- 6.3 Although their use would not be mandatory for all applications, it is conceivable that EIAs could become *de rigueur* for planning applications going forward. Under the Bill the EIA and other related documents would be available to the public for inspection and review, so there is scope that a considerable body of technical environmental work will be created to the benefit of the Department of the Environment and the public, whether accessible freely or under the auspices of the Freedom of Information Law.
- 6.4 How development will be impacted by the Bill will be determined by the property development and real estate markets. As continued development of the Islands takes place and space becomes a premium, it should be expected that new and novel developments¹² will be submitted. Section 6 of the Development & Planning Law clearly indicates that "*special purpose developments*", defined as "*development of land for a purpose which is unfamiliar or uncommon in the Islands including such a purpose as primary manufacturing*" require much greater considerations on the part of the CPA, such as:
- (a) the likely impact of the proposed development on the infrastructure of the Islands as well as on the educational, social, medical and other aspects of life in the Islands;
 - (b) whether there are other issues of national importance which are relevant to the determination of the application for development and require evaluation;
 - (c) whether there are technical or scientific aspects of the proposed development which are of so unfamiliar a character as to jeopardise a proper determination of the question unless there is a special inquiry for the purpose;
 - (d) to identify and investigate the considerations relevant to, or the technical or scientific aspects of, the proposed development which, in its opinion, are relevant to the question whether the application should be approved; and
 - (e) assess the importance to be attached to those considerations or aspects.
- 6.5 The breadth of these considerations, arguably when taken with the Government's obligations under the 2009 Constitution and the Bill, would point towards either the increased use of EIAs by developers in their applications to address these considerations or an increased demand by the Central Planning Authority and the Development Control Board for the applicant developers of large or special purpose developments to do so. It is likely, however, that the extent of the use of EIAs will vary according to the size of the proposed development.
- 6.6 Under the Development & Planning Law, the Central Planning Authority and the Development Control Board may consult with all suitable and applicable department and agencies of the Cayman Islands Government, the Bill will require these entities to confer with the Council, the importance of which, as well as the Department of Environment, can be expected to increase as public interest in environmental issues and the interplay with development continues.
- 6.7 Where the Council has agreed to a proposed development and imposed conditions, it could at its discretion direct a schedule of inspections to be carried out by or on behalf of the Director to ensure compliance with any conditions imposed. The Central Planning Authority or the Development Control Board will not be able to issue a certificate of completion in

¹² Heralded, to a degree, by the development of Camana Bay.

respect of the proposed action until the Council has certified that the conditions imposed have been complied with.

7 List of protected and hunted species under Schedule 1

- 7.1 It appears that most of the protected species listed in Part 1 of Schedule 1 are drawn from species protected under existing international agreements/conventions as well as other species considered to be endangered, threatened and endemic to the Cayman Islands.
- 7.2 Although the Bill lists specific species, in the event that new or unknown species were discovered, section 16(1) provides that the Council may modify Schedule 1 and provides material guidance for it to consider before doing so. It would also be possible for any person or organisation to petition the Council to modify Schedule 1. The Bill allows for a fair and transparent process to add species, during which time affected stakeholders would be notified and could raise their thoughts and concerns. It would also allow for each addition to be analysed in detail, taking into account all relevant factors not only those that may have been considered by the Council/Department of Environment.
- 7.3 It is outside of the scope of this forum to comment on the species of flora and fauna which would become protected under the Bill. The extent of the species lists will of course be subject to scientific and technical input. However, there may be unintended consequences involved with having such an expanded initial list. The Government may wish to consider starting with a smaller list of the most endangered and endemic species necessary to be considered protected species, if it has not done so already.
- 7.4 Regarding the list of hunted species under Part 2 of Schedule 1, there are certain species such as Lion Fish and the Green Iguana which have not been specifically identified. It is now common knowledge that these species are not endemic to the Cayman Islands and have significantly increased in population in recent years to the detriment of other local species and their habitat. Given, for example, the uncertainty surrounding the status of the green iguana in the past¹³, the Government may wish to consider specifically including these species under Part 2 and placing existing growth management programs aimed at reducing their population to more manageable numbers on statutory footing.
- 7.5 Finally, for the uninitiated, a companion guide to assist the public with the easy identification of those protected species under Part 1, as well as those species under Part II, would greatly assist with the prevention of unintended hunting and/or collecting.

December 2013

¹³ Which ultimately led to legislative clarification in the form of the Animals (Amendment) Law, 2010.