

The Draft Constitution: Responsibility-Sharing and Greater Accountability, or the Road to Independence?

By: The Caymanian Bar Association

Apprehension has been expressed by some sectors of the public about the 2009 draft Constitution (the product of the negotiation talks between the Cayman delegates and the Foreign and Commonwealth Office) (the “Draft Constitution”) based on their belief that it represents a radical shift of power away from the Governor to the locally elected Government. The source of this concern appears to be two-fold: (i) while ultimate executive authority would remain with Her Majesty it would now be exercised on her behalf by the Government, including both the Governor *and the Cabinet*; and (ii) the use of the term “Premier”, which many believe represents the final step in constitutional advancement before achieving political independence.

Premier

The term “Premier” itself does not import any particular powers to the office. Instead, one must examine the provisions of the Draft Constitution as they relate to the Premier and make appropriate comparisons with the Constitutions of other British Overseas Territories in order to reach a sound conclusion on the matter.

Under the Draft Constitution, the Premier would be appointed by the Governor on recommendation of either (i) a majority of elected members of the Legislative Assembly of the Premier’s political party where such party gained a majority of seats in the Legislative Assembly or (ii) by a ballot of all elected members of the Legislative Assembly where the Premier’s political party does not have such majority. Cabinet Ministers would then be appointed by the Governor on recommendation of the Premier.

Conversely, the Premier may be removed by the Governor under the Draft Constitution, upon a two-third's majority vote of no confidence in the Government by the members of the Legislative Assembly. The Premier may also be removed by the Governor upon a general election in which the Premier’s party has not secured the majority of seats.

In a real sense the elected Government is the Premier’s Government since, although formally appointed to and removed from office by the Governor, the other Ministers are selected by the Premier, may be removed upon the Premier’s advice and must vacate office if the Premier vacates office.

Under the Draft Constitution, a vote of no confidence to remove the Premier would require the support of at least twelve out of eighteen elected legislators. This would entail the votes of the entire backbench and also at least one Cabinet Minister (who is appointed upon the advice of the Premier and would be removed from office as well should the Premier be removed). Requiring the support of a Cabinet Minister to pass a no confidence vote would serve to entrench the position of the Premier and the Cabinet, thus impeding the ability of elected legislators to remove the Premier's Government from

office. Not only is this a departure from the current Constitution, which provides for a lower threshold of nine out of fifteen elected members, but it also differs from the Constitutions of other British Overseas Territories including Bermuda, the British Virgin Islands and the Turks and Caicos Islands, all of which require only a simple majority in order to remove the Premier.

Governor and Cabinet

Currently, the Governor has the exclusive right to preside over Cabinet, to summon meetings of Cabinet, and to set Cabinet's agenda. Although there may be informal meetings of the elected Ministers to discuss policy issues, no formal Cabinet decisions may be taken unless the foregoing protocol has been observed. Cabinet currently includes the Chief Secretary, the Financial Secretary and the Attorney General, who are senior civil servants appointed by the Governor and are not accountable to the electorate, as full voting members.

Under the Draft Constitution, the Financial Secretary would be removed as a member of the Cabinet (and the legislature) and replaced by an elected Minister of Finance (whom the Financial Secretary would advise). The current office of Chief Secretary would also be superseded by a Deputy Governor (a senior Caymanian public servant appointed by Her Majesty). The Draft Constitution would also remove the voting rights of the Deputy Governor (formerly the Chief Secretary) and the Attorney General as members of Cabinet (and the legislature). Cabinet decisions would accordingly lie entirely in the hands of the elected Ministers. Together, these new provisions represent a move towards greater democracy and public accountability within Government.

It is important to note that the Draft Constitution does not provide for a high degree of internal self-government since either the Governor or the Premier may summon Cabinet, the Governor and the Premier may jointly set the agenda of Cabinet and the Governor would, so far as practicable, preside over Cabinet meetings. In the Governor's absence, the Premier (or, in the Premier's absence, the Deputy Premier) would preside over such meetings. Notwithstanding these express provisions, however, the definition of "Governor" under the Draft Constitution includes the Deputy Governor, duly appointed to carry out the Governor's functions in the event of his or her illness or absence from the Islands. If so appointed, the Deputy Governor, in his or her role as acting Governor, may have a prior right to the Premier to chair Cabinet meetings.

In comparison to other British Overseas Territories, the office of Premier under the Draft Constitution corresponds to that of the Premier under the BVI Constitution 2007 which contain similar provisions. Bermuda, and similarly Gibraltar, have almost complete internal self-government whilst retaining their Overseas Territory status with Britain. Under the Bermuda Constitution 1968 (as amended) for example, the Premier (or his appointee) has sole responsibility to summon and preside over meetings of Cabinet. The Bermuda model illustrates the final step in internal self-governance before independence is achieved.

Checks and Balances

Since it is clear that the Premier would possess greater power than the current Leader of Government Business, one must ask what checks are provided for under the Draft Constitution to monitor and regulate the exercise of such power. Whilst not providing a complete answer, the following may be relevant: (i) the Premier would be required to act in the best interests of the Islands. Unlike the Governor, there would be no constitutional provision exempting the functions of the Premier from inquiry in any court; (ii) as explained above, the legislature may remove the Premier from office by a vote of no confidence; (iii) the Premier may not serve for more than two consecutive parliamentary terms; and (iv) the Premier may only advise on the appointment or removal of Ministers from office. It is a matter for the Governor to act, or not act, in accordance with such advice.

With respect to checks on the Governor under the Draft Constitution, a relevant provision of at least symbolic importance is that, for the first time, the Governor would be required to endeavour to exercise his or her functions in the best interests of the Islands so far as such interests are consistent with the interests of the United Kingdom.

While the Draft Constitution provides that the courts do not have jurisdiction over the question of whether the Governor has complied with Royal Instructions, there are functions over which the courts may have jurisdiction. These include functions which the Governor is empowered to exercise in his or her own discretion. In both cases, the Governor would not be required to consult with Cabinet.

There are, however, a number of functions on which the Governor would be required under the Draft Constitution to either consult with or act upon the advice of Cabinet. As above, this is subject to the exceptions that the Governor may act against such advice if instructed to do so by the United Kingdom's Secretary of State, or if in his or her judgment such advice would adversely affect the Governor's special responsibilities. Where the Governor declines to follow the advice of Cabinet the reasons for so doing must be recorded in the Cabinet Minutes.

Under the Draft Constitution, where the Governor is required to act after consultation with, or on the recommendation or advice of any other person or body, whether the Governor has so exercised such function shall not be inquired into in any court. In other words, in the event that the Governor declines to follow such advice, or that there is a dispute as to whether the Governor has followed such advice, there would be no available redress. Responsibility-sharing with other bodies as a check on the exercise of the Governor's powers would therefore be limited in that it would depend upon the attitude and approach of the Governor rather than constitutional mechanisms to ensure accountability.

Currently, the Governor also retains special responsibility for external affairs. Under the Draft Constitution, however, certain matters relating to external affairs may be delegated

to the elected Ministers. These include tourism-related matters, taxation and the regulation of finance and financial services, European Union matters that directly affect the Cayman Islands and the Caribbean Community.

In addition, the Governor would be required under the Draft Constitution to obtain Cabinet's agreement before entering into any international agreement or treaty that would affect internal policy or require implementation by legislation in the Cayman Islands. However, ultimate authority would be reserved to Her Majesty in that the United Kingdom's Secretary of State may instruct the Governor that he or she does not require Cabinet's consent on a particular matter.

Conclusion

The Draft Constitution would provide greater scope for sharing of executive responsibilities between the Governor and our locally elected representatives. It would also require greater accountability of the Governor and the elected Government. The Draft Constitution does not appear to provide a fundamental change in the nature of the current relationship between the United Kingdom and the Cayman Islands or require the Islands to contemplate any further constitutional advancement. Ultimate executive authority would remain with Her Majesty. While the exercise of such authority is expressed to be carried out on her behalf by the Government, including both the Governor and the Cabinet, a close examination of the provisions reveals that such authority would still ultimately be exercised on her behalf by the Governor.