

Branches of Government: Existing and Proposed

By: The Caymanian Bar Association

This is the first, in a series of articles prepared by the Caymanian Bar Association (CBA) to consider the implications of various aspects of the proposed Cayman Islands Constitution Order 2009 (the 2009 Draft Constitution) that is to be the subject of Cayman's first referendum vote on 20 May 2009. This article will focus on the executive, the legislative and the judicial branches of government under the existing Cayman Islands (Constitution) Order 1972 (as amended) (the 1972 Constitution) and the 2009 Draft Constitution.

The Executive

Under the 2009 Draft Constitution, ultimate executive authority would remain with Her Majesty but is expressed to be exercised on her behalf by the Government, including both the Governor and the Cabinet.

The Governor

Under the 2009 Draft Constitution, the appointment of the Governor would remain with Her Majesty to serve at Her pleasure. The Governor would continue to have such powers and functions as are prescribed by the Constitution, by law, by assignment or by instructions from Her Majesty. The key roles of the Governor would remain the same. These include, administering the Cayman Islands on behalf of Her Majesty, presiding over Cabinet and explaining Her Majesty's policies to the Islands.

The 2009 Draft Constitution would impose an additional obligation on the Governor when exercising his or her functions. The Governor would be required to "endeavour to act in the best interests of the Cayman Islands so far as such interests are consistent with the interests of the United Kingdom."

There is, however, no express mechanism to (i) objectively determine whether the Governor has acted in accordance with this duty or (ii) provide any remedy for its breach. Further, the question of whether the Governor has complied with Royal Instructions by Her Majesty, or acted in accordance with the advice or recommendation or in consultation with any other body, where so required, would remain excluded from inquiry in any court. However, where the Governor is entitled to and has used his or her sole discretion or judgment in making a decision, for example the appointment of the Chairman of the Electoral Boundary Commission, such action may be the subject of an inquiry in the courts.

The Cabinet

Under the 1972 Constitution, elected members of the Legislative Assembly choose elected Ministers from among their own ranks. There is no direct election of a leader by voters. Instead, a simple majority of fifteen elected legislators elect five of their number by secret ballot to become elected Ministers, but such election may be revoked by the vote of nine elected legislators.

Under the 1972 Constitution, the Governor assigns ministerial responsibilities to the elected Ministers and appoints, as Leader of Government Business, the elected Minister whose party (or, if there is no such party, who otherwise) commands the support of a majority of the elected members of the Legislative Assembly. The Cabinet would be comprised of five elected Ministers along with the

Chief Secretary, Attorney General and Financial Secretary, who are three senior civil servants appointed by the Governor.

Under the 2009 Draft Constitution, the Governor would appoint as Premier the elected member of the Legislative Assembly who (i) is recommended by a majority of the elected members of the majority party in the Legislative Assembly or (ii) if there is no such recommendation, commands the support of a simple majority of all elected legislators.

Under the 2009 Draft Constitution, the Premier, after being appointed, would advise the Governor on the appointment of six other elected legislators as Ministers, one of whom would be designated as the Deputy Premier and another as a Minister charged with the new role of responsibility for finance. All elected Ministers are assigned their ministerial responsibilities by the Governor, acting after consultation with the Premier. The Cabinet would be comprised of the Premier, Deputy Premier and five other elected Ministers, together with the Deputy Governor and Attorney General as non-voting members. The Financial Secretary would no longer be a member of and, therefore, not accountable to the Cabinet or the legislature for matters relating to finance but would instead become the principal advisor to the elected Minister charged with the responsibility of finance. Cabinet decisions would, therefore, be determined exclusively by elected Ministers.

There are currently no term limits for elected legislators under the 1972 Constitution. Under the 2009 Draft Constitution, however, the office of Premier may only be held by the same person for two consecutive terms. Such person would not be eligible to hold the office of Premier again until one parliamentary term has passed since holding that office.

Under the 1972 Constitution, the Governor calls, sets the agenda and presides over Cabinet meetings and (in his or her absence), the Governor may designate the Chief Secretary to preside over such meetings. Under the 2009 Draft Constitution, however, certain of these powers would be shared with the Premier. Either the Governor or the Premier may call a Cabinet meeting. The agenda of such meeting would be jointly set by the Governor and the Premier.

The Governor would generally preside over Cabinet meetings. In the Governor's absence, the Premier (or, in the Premier's absence, the Deputy Premier) would preside over such meeting. Notwithstanding these express provisions, however, the definition of "Governor" under the 2009 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.

The Legislature

Under the 1972 Constitution, the legislature is comprised of fifteen elected legislators as voting members along with three Official Members who also have the right to vote but are bound by collective responsibility to vote with the five elected Ministers.

Under the 2009 Draft Constitution, the legislature would comprise eighteen elected legislators as voting members along with the Deputy Governor and Attorney General as non-voting members. The number of elected legislators may be further increased by the legislature in conjunction with the Governor and the Premier based on the findings of an Electoral Boundary Commission.

The Judiciary

Both the 1972 Constitution and the 2009 Draft Constitution makes provision for the Court of Appeal, Grand Court and subordinate courts for the Cayman Islands and establish procedures for appointing, disciplining and removing judges. The 2009 Draft Constitution would formally establish the Chief Justice as head of the judiciary. It would also establish the role and function of a Judicial and Legal Services Commission to advise the Governor regarding appointments to, and removals from, such offices.

Conclusion

The 2009 Draft Constitution provides for greater democratisation and accountability in the legislative and executive branches of Government by (i) removing the right to vote presently held by non-elected Official Members and (ii) establishing an elected Minister charged with the responsibility of finance who would be accountable to the legislature, and ultimately to the voters, for the finances of these Islands.