NATIONAL PARLIAMENT OF SOLOMON ISLANDS

BILLS AND LEGISLATION COMMITTEE

REPORT

ON

THE PRESCRIPTION OF MINISTERS (AMENDMENT) BILL 2007

National Parliament Paper No. 41 of 2007

CONTENTS

1. TERMS OF REFERENCE

To examine and report to Parliament on the Committee's observations and recommendations on:-

"The Prescription of Ministers (Amendment) Bill 2007"

2. FUNCTIONS

In accordance with Section 62 of the Constitution as read with Section 71 of the Standing Orders, the Bills and Legislation Committee's functions in addition to the provisions in Standing Orders 50 and 55, shall be to:-

(a) examine such matters as may be referred to it by Parliament or the Government;
(b) review all draft legislation prepared for introduction into Parliament;
(c) examine all subsidiary legislation made under any Act so as to ensure compliance with the Acts under which they are made;
(d) monitor all motions adopted by Parliament which require legislative action;
(e) review current or proposed legislative measures to the extent it deems necessary;
(f) examine such other matters in relation to legislation that, in the opinion of the Committee require examination; and
(g) make a written report to each Meeting of Parliament containing the observations and recommendations arising from the Committee's deliberations.

3. MEMBERSHIP

The Membership of the Bills & Legislation Committee comprises:

Hon. Edward J. Huniehu, MP (Chairman)
Hon. Peter Boyers, MP
Hon. Laurie Chan, MP
Hon. Seth Gukuna, MP
Hon. Fred Fono, MP
Hon. James Tora, MP

4. PURPOSE OF THE PRESCRIPTION OF MINISTERS (AMENDMENT) BILL 2007

The objects and reasons as stated in the Bill are as follows:

> "The Bill seeks to amend the Prescription of Ministers Act [Cap.91] ("the Principal Act') by increasing the prescribed number of Ministers from twenty to twenty three. The proposed increase to the number of Ministers is necessitated by the expansion of Government's constitutional responsibility, beyond the traditional domains of executive accountability, to ensure proper, efficient and effective administration for the better governance of the nation consistent with Government's policy initiatives, imperatives, priorities and directions"

5. OBSERVATIONS

The Bills and Legislation Committee met on Monday 20 August 2007 at 4:15pm to 4:50pm to examine and make its observations and recommendations on **"The Prescription of Ministers (Amendment) Bill 2007".**

The Committee noted that although the Bill appears to propose a minor amendment, the effect and implications of the amendment has in fact made it the most important Bill to come before Parliament in a considerable time.

The intention of the Bill is to increase the number of Ministers to 24 (including the Prime Minister), i.e. one less than half of the total number of Members of Parliament.

The Committee understands the motives for formulation of the Bill and notes that successive governments have used the mechanism to assist in stabilizing government in the Solomon Islands in the absence of a strong party system. However, the Committee emphasized that the pursuit of the political stability that every government works towards must be balanced with a desire to protect the democratic system of governance that is established by the Constitution of Solomon Islands. In so doing all governments must ensure that they do not take any action which has the potential to damage that system.

General - Separation of Power

The doctrine of separation of powers refers to the separation of the legislature, the executive and the judiciary in terms of powers and functions. The doctrine is founded upon the need to preserve and maintain the liberty of the individual. It

has been said that 'the British Constitution, though largely unwritten, is firmly based upon the separation of powers'[1].

The mechanism that the doctrine adopts is to divide and distribute the power of government so as to prevent tyranny and arbitrary rule. The basic control adopted is to vest the three branches of governmental power, namely legislative, executive and judicial in three separate and independent institutions, with the composition of each being different from and independent of each other. The strict doctrine must of course give way to realities of some inevitable overlap. Nevertheless, while permitting this overlap to occur, a system of checks and balances has developed and needs to be maintained and allowed to continue to develop.

Given that the Westminster system of government upon which the Solomon Islands is modeled does not create a complete separation of powers, such checks and balances have become very important in limiting one branch of government having undue power. For example, in the Solomon Islands, section 35(2) of the Constitution provides that the executive is made accountable to Parliament.

Separation of Powers in the Solomon Islands Constitution

In the Solomon Islands, the term "separation of powers" is not used in the Constitution but the Preamble does refer to it in providing that:

> *"...all power in Solomon Islands belongs to its people and is exercised on their behalf by the legislature, the executive and the judiciary established by this Constitution*[2]*."*

The Constitution distinguishes the three branches of government by making very distinct and separate provisions for each in different Chapters branch. The Chapters of the Constitution are headed respectively *"The Executive"*, *"The National Legislature"* and *"The Legal System"*, providing each with very distinct and separate powers and jurisdiction.

In respect of the judiciary, the Constitution provides for two superior courts and the judiciary therefore enjoys the protection of the written supreme law of the land. The High Court as the principal court in the Solomon Islands is given *unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law and such other jurisdictions and powers as may be conferred on it by this*

[1] *Duport Steel v Sirs* [1990] 1 WLR 142 at 157, per Lord Diplock.
[2] Preamble, Constitution

Constitution or by Parliament[3]. These words were interpreted by the Court of Appeal in *Kenilorea v Attorney General* to mean that the Constitution in its terms makes a clear separation of powers between the legislature, the executive and the judicature and the judicial power cannot be usurped or infringed by the legislature or executive without the Constitution being amended[4]. The same applies to the separation of powers between executive and the legislature.

Parliament is clearly given exclusive legislative authority in that only Parliament may make laws for the country (section 46 of the Constitution). The executive is responsible to Parliament for advice it gives to the Governor-General in his/her exercise of the executive authority under section 35 (2) of the Constitution.

Lack of restrictions on the number of Ministers

Section 33(2) of the Constitution provides that:

> *"There shall be, in addition to the office of Prime Minister, such other offices of Minister of the Government, not exceeding eleven or such greater number as Parliament may prescribe, as may be established by the Governor General, acting in accordance with the advice of the Prime Minister."*

Section 33 (2) **does** put an upper limit on the number of Ministers that a Prime Minister may appoint but then leaves the provision open to amendment in a way unfamiliar in other parts of the Constitution in that Parliament may, by prescription, increase that ceiling at any time. Other parts of the Constitution require a 2/3 or 3/4 majority to amend the provision. There is strong argument that the framers of the Constitution provided greater flexibility in relation to the capacity of Parliament to amend the number of Ministers, due to the expected increase in seats over time. However it is equally probable that the framers of the Constitution expected the proportion of 11 Ministers to 38 (31.5% of Members) adopted in the original Constitution to be maintained and did not predict the pressure to use the provision for the political necessity of maintaining government.

This means that a government of the day with its inherent voting advantage will always be able to increase this ceiling using an Act, which only requires a simple majority, instead of a constitutional amendment which requires the support of a two-thirds majority. In fact this has been done twice in the past – from 11 to 18

[3] Section 77 (1), Constitution
[4] [1984] SILR 179

then to 20 – and is about to be done yet again in the proposed Bill. This will take the number of Ministries to 23 plus the Prime Minister and will lift the proportion of Ministers to members to 48% or only one Member away from executive dominance over Parliament.

Analysis of the proposal of the Bill

The proposed increase is necessitated by in the third paragraph of the "Objects and Reasons" section of the Bill as due to:

> *"...the expansion Government's constitutional responsibility, beyond the traditional domains of executive accountability, to ensure proper, efficient and effective administration for the better governance of the nation consistent with Government's policy initiatives, imperatives, priorities and directions."*

This proposition has not appeared in the two (2) earlier Bills which effectively amended section 33 (2) of the Constitution. The Committee is not clear on the basis for this rationale for the Bill or in what ways there has been an "expansion of Government's constitutional responsibility beyond the traditional domains of executive accountability..." The traditional domains of executive accountability is provided for in section 35 (2) of the Constitution.

As previously stated the proposed increase, percentage of Ministers from 50 seats would be **48%** (being 23 Ministers and 1 Prime Minister). Undoubtedly, under this Bill, the executive would increasingly usurp or infringe the powers of the legislature, which would mean that the legislature's power would be absorbed by the executive and taken out of the hands of parliament. It is the duty of parliament to ensure that there is no erosion of the legislature's power. Members are elected to parliament not to the executive and should protect the institution of Parliament above any short term benefit to the executive or any short term inducement or other potential gain.

Accordingly, in respect of this proposal, the Committee believes that the Prime Minister must adequately indicate and explain:

(a) the extent and nature of the expansion of constitutional responsibility that the government claims to have experienced; and

(b) how this responsibility changes the responsibility that the executive has to parliament, particularly relating to the Section 35(1) and (2) of the Constitution;

(c) how this constitution responsibility differs from those experienced by the first government with 11 Ministers in a 38 seat Parliament;

(d) whether the Parliament should pass legislation that may be ultra virus the Constitutional provisions enunciated in the Preamble to the Constitution of Solomon Islands;

(e) Why the situation in the Solomon Islands is different to all other Westminster parliaments including all of our Pacific neighbors.

Ultimately, the Prime Minister must confirm whether the Government recognizes the executive's constitutional responsibility to be accountable to Parliament, and confirm how he sees such accountability to be observed under the proposal of the Bill.

Comparison with other jurisdictions

There are no other Pacific countries that have such a dangerously high ratio of Ministers to members of Parliament.

Papua New Guinea: Section 144 (1) of the Constitution of Papua New Guinea allows for a maximum of one quarter of the number of members of parliament, to be Ministers (other than the Prime Minister) in a 109 seat parliament. Only **25%** of Members can be Ministers.

The Republic of Kiribati: Section 40 of the Constitution of Kiribati allows a total of 10 Ministers (besides the Prime Minister) in a 35 seat Parliament. Only **31%** of Members can be Ministers.

Tuvalu: Section 62 (3) of the Constitution of Tuvalu provides: *The number of offices of Minister (other than the office of the Prime Minister) shall not exceed one third of the total membership of Parliament."* Only **33%** of Members can be Ministers.

Vanuatu: Section 40 (2) provides that the number of Ministers, including the Prime Minister, shall not exceed a quarter of the number of members of Parliament. Like Papua New Guinea, only **25%** of Members may become Ministers.

Other jurisdictions:

(a) ***Samoa:*** **25%** (s.32 (2) & s.44 – 47, Constitution of Samoa)
(b) ***Cook Islands:*** **32%** (s.13 (1) & s.27 (2), Cook Islands Constitution Act)
(c) ***Niue:*** **20%** (s.2 & s.16, Niue Act 1968)

(d) *Nauru:* 27% (s.28 & s.17 (1), Constitution of Nauru)

(e) *Marshall Islands:* 33% (Art. V, s.4 & Art IV, s.2, Constitution of Marshall Is)

6. RECOMMENDATIONS

On the basis of the above observations, the Committee strongly recommends as follows:

(a) that the Bill not proceed with; or

(b) that the Bill be referred to a Select Committee for further analysis and review; or

(c) that consideration of the Bill be set down to a future date to enable more time for consultation and feedback from all Members of Parliament.

Hon. Edward J. Huniehu

Chairman

Bills & Legislation Committee

21 August 2007