THE FIJI ISLANDS

TOWARDS A UNITED FUTURE

Report of the
Fiji Constitution Review Commission
1996

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MISTAKES and CORRECTIONS

Typographical corrections have been effected in the undermentioned pages during the reprinting of the Report.

Chapter 8	Page 229, para. 8.28 fifth line, seventh word "opportunites" amended to "opportunities"
	Page 237, para 8.56 "The Government of the Republic of the Fiji Islands shall establish programmes..." has been indented as amended.
	Page 238 reshuffle of page due to change.
Chapter 10	Page 335, Recommendations 269 fifth line, sixth word "nhabitnts" amended to "Inhabitants"
Chapter 12	Page 389, first line of second paragraph, para. number "21.2" corrected as "12.2"
	Page 389, 2 last lines taken to page 390.
	Page 421 para. 12.120 "Subject to the provisions of this Constitution ..... and terminate any such appointment." indented as amended.
Chapter 13	Page 440—Indentions for para. 13.49.
	Page 441 reshuffle of page due to change.
	Page 453, para. 13.100 sixth line first word "thereforepropose" changed to two words "therefore propose"
	Page 453, para 13.102 first line seventh word "maintainance" corrected as "maintenance"
	Page 456, Recommendation 446 third line, first word "maintainance" corrected to read as "maintenance"
Chapter 14	Page 495, space after first two lines on top of page, end of para. 14.105 and beginning of para. 14.106.
Chapter 17	Page 596 Recommendation 633 indentions "the Fijian Affairs Act; etc"in bold type
	Page 617 para. 17.123, two paragraphs indented after colon as amended.
	Page 622, unnecessary space on top of page before the words "Courts in Rotuma"
Chapter 19	The figure "9" on the Running head 19 is missed out on odd pages—635 to 653
	Page 642, para. 19.31, second line, third word "abe" corrected to read "able"
Appendix A	Page 751, Recommendation 683, second line, seventh word "een" corrected to read "been"
	Page 753, Reccomendations 695—697 missing in 1st printing and inserted. See Chapter 20 page 672.
Appendix H	Page 788, line 20, deleted "Programme" from "ProgrammeHenry"

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FIJI CONSTITUTION REVIEW COMMISSION

6 September 1996

His Excellency Ratu Sir Kamisese Kapaiwai Tuimacilai Mara, GCMG, KBE, CF, KSt.J, MSD

Your Excellency:

REPORT OF THE FIJI CONSTITUTION REVIEW COMMISSION

We have the honour to present to you this, our unanimous Report.

The Terms of Reference agreed to by Parliament and contained in Your Excellency's warrant to us represented a significant achievement in the political history of this country and set the tone for our work. It has been our privilege to work with them.

They required the Commission to review the 1990 Constitution of Fiji and produce a report recommending constitutional arrangements which would meet the present and future needs of the people of Fiji, promote racial harmony, national unity and the economic and social advancement of all communities.

Among other things, these arrangements had to take into account internationally recognised principles and standards of individual and group rights, guarantee full protection and promotion of the rights, interests and concerns of the indigenous Fijian and Rotuman people, and have full regard for the rights, interests and concerns of all ethnic groups in Fiji.

Our report entitled **The Fiji Islands: Towards a United Future** stresses that the unity of this nation is a continuous process of discovery and enrichment. In national as in our daily life, nothing remains fixed forever. Progress in a multi-ethnic society is achieved when its citizens realise that what is good for their neighbour must ultimately be good for them as well, when difference and diversity are seen not as sources of division and distrust but of strength and inspiration.

National Unity is a goal whose fulfillment will require an abundance of patience, good will and understanding among all the citizens of the Fiji Islands. It will require the nurturing of spiritual and human values which sustain people in times of need and help them adapt to situations of rapid change. It will require building on the already considerable human and material resources of these islands. And it will be the touchstone against which the people will measure progress towards a strong and united future for themselves and for generations to come.

Our signatures appear at the end of the report which now follows.

I

The Goals of Constitution-making

1

INTRODUCTION

1.1 The people of the Fiji Islands have unfinished constitutional business. The 1990 Constitution was promulgated to restore parliamentary government after the 1987 military *coups*. While its provisions reflected the immediate concerns of the Fijian people, there had been no opportunity for meaningful discussions with the leaders of the Indo-Fijian community.

1.2 Accordingly, the 1990 Constitution is not a product of consensus among the citizens of Fiji as a whole about a long-term basis for the structure of the country's government. Nor does it meet their widely-shared desire for a system of government that takes proper account of Fiji's multi-ethnic character. Instead, it has created an air of uncertainty which has affected the ability of every community to work for the economic and social benefit of all. This in turn affects Fiji's ability to attract overseas investment and compete successfully in the international economy.

1.3 By providing for its review before the end of seven years after the date of its promulgation, that is, before 25 July 1997, the authors of the 1990 Constitution themselves acknowledged its interim nature. By 1993, the Government was beginning to consider how the review should be undertaken. A Joint Parliamentary Committee was set up to make recommendations on the matter. As a result of the agreement reached within the Joint Committee, both Houses of Parliament in September 1993 unanimously resolved that a Commission of Inquiry should be set up to review the Constitution, with the Terms of Reference contained in the resolution.

THE COMMISSION AND ITS TERMS OF REFERENCE

1.4 By Commission dated 15 March 1995, His Excellency the President appointed The Right Reverend Sir Paul Reeves as Chairman of the Commission and Mr Tomasi Rayalu Vakatora and Dr Brij Vilash Lal to be its other members. By Commission dated 19 May 1995, His Excellency appointed Mrs Alison Quentin-Baxter and Mr Jon Apted as Counsel assisting the Commission and Mr Walter Gibson Rigamoto as its Secretary.

1.5 The Commission was initially required to submit its report to the President not later than 30 June 1996. By Commission dated 11 July 1996, His Excellency

extended this date to 30 September 1996. The full texts of the President's Commissions, including our Terms of Reference, are reproduced in Appendix B.

1.6 The members of the Commission first assembled in Suva at the beginning of June 1995. To assist us in pinpointing our task and in explaining it to the public, we adopted the following Mission Statement based on our Terms of Reference:

> The mission of the Constitution Review Commission, appointed in accordance with section 77 and 161 of the Constitution of the Sovereign Democratic Republic of Fiji, is to review the Constitution and produce a report by 30 June 1996, recommending constitutional arrangements which will meet the present and future needs of the people of Fiji, and promote racial harmony, national unity and the economic and social advancement of all communities.
>
> These arrangements must :
>
> - take into account internationally recognised principles and standards of individual and group rights;
> - guarantee full protection and promotion of the rights, interests and concerns of the indigenous Fijian and Rotuman people;
> - have full regard for the rights, interests and concerns of all ethnic groups in Fiji.
>
> In achieving its mission the Commission will have
>
> - scrutinised the Constitution;
> - facilitated the widest possible debate on the terms of the Constitution;
> - inquired into, and ascertained, the variety of views and opinions among Fiji citizens on how the provisions of the Constitution can be improved to meet the needs of Fiji as a multi-ethnic and multicultural society.

THE PURPOSE AND STRUCTURE OF THIS REPORT

1.7 The Commission has now completed its inquiry. The purpose of this report is to help the people of Fiji think anew about the way their country should be governed. The Constitution contains the machinery for this purpose. The nature of that machinery, and the way its component parts mesh together, have profound consequences for the interaction among Fiji's various ethnic communities.

1.8 In Part I, the Goals of Constitution-making, the Commission analyses some of the factors that have contributed to the perception that the different ethnic communities in Fiji have conflicting aspirations and interests. We seek to show that all communities have, in reality, a common interest in putting in place constitutional arrangements that bring them together, rather than pull them apart. In response to the directions in our Terms of Reference, we identify the important values which the Constitution should promote. We also describe the way in which the Commission went about its task.

1.9 In Part II, Review of the 1990 Constitution, the Commission sets out its findings on the provisions of the 1990 Constitution and its recommendations for new constitutional arrangements when those are required. The recommendations are included in bold type in the chapters where they are made. For ease of reference they are reproduced together in Appendix A. We have grouped the provisions of the Constitution dealt with in each chapter in a way that is intended to bring out clearly the main themes and issues. The chapters do not necessarily follow the order in which the various topics are dealt with in the Constitution.

THE COMMISSION'S APPROACH

1.10 In concluding this introduction, we should like to make two points. First we wish to emphasize that our recommendations took account of all available sources of information: the large number of submissions we received from the citizens of Fiji; the papers prepared for our use and the written and oral information supplied by departments, statutory bodies and other government agencies; the comparative material we gathered in the course of visits to other countries; and our own reading and careful study of the text of the Constitution. No one source has been preferred to any other.

1.11 Secondly, we wish to stress that the Commission's report should be considered as a whole. We have described Fiji's main institutions of government as a web. Its interwoven threads support one another. Parliament is at the centre of the web, because the arrangements for electing members of Parliament are basic to the identity and character of the Government. The Constitution also establishes the judicial branch of government and provides for other institutions and offices. Every part of the Constitution makes an essential contribution to the framework within which the Government and Parliament must operate. We urge that the recommended constitutional arrangements be seen in their totality. The entire report, large as it is, needs to be read and digested.

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2

STRENGTHENING THE CONSTITUTIONAL FOUNDATIONS

2.1 Under its Terms of Reference, the Commission is required to recommend constitutional arrangements that will promote racial harmony and national unity and the economic and social advancement of all communities. The arrangements must guarantee full protection of the rights of the indigenous Fijian and Rotuman people, promote their interests and take account of their concerns. As well, they must have full regard for the rights, interests and concerns of all other ethnic groups. They are also to take into account individual and group rights as recognised in the international standards.

OPPORTUNITY FOR A CHANGE OF DIRECTION

2.2 Already the people of Fiji are in substantial agreement about these broad objectives. Parliament's unanimous approval of our Terms of Reference was a significant first step. The objectives were also endorsed specifically or implicitly by most submissions to the Commission. There are, of course, different views about what these objectives entail, whether all of them are compatible, and how the Constitution can best help achieve them. The arguments, however, are essentially about means, not ends. For that reason, the Commission is convinced that all Fiji's citizens, irrespective of ethnicity, are capable of working together in reaching common ground about what their Constitution should provide.

2.3 In the Commission's view, Fiji's constitutional problems have not been caused by any insurmountable difficulty in achieving the mutual respect, trust and cooperation among ethnic communities necessary to join together in governing a multi-ethnic and multicultural country. When members of different ethnic groups come together in most areas of the nation's life, they are able to cooperate effectively. This can be seen in the workplace and the countryside, and increasingly in commerce and a wide range of cultural and sporting activities. People of different communities respect each other's cultural and religious traditions while enjoying the values and interests they have in common. There is genuine appreciation of the rich variety that the different ethnic groups bring to the life of Fiji. The members of other ethnic communities also respect the special place of Fijians and Rotumans as the indigenous people.

2.4 Only the country's constitutional arrangements seem to make people's individual ethnicity a barrier to effective cooperation. The Commission sees its review of the 1990 Constitution as the first step in giving the people of Fiji the opportunity to change direction, freeing themselves gradually but decisively from the constraints they have historically faced in governing their country.

2.5 In the remainder of this chapter, the Commission looks at the nature of the constraints imposed by the architecture of the 1990 Constitution and makes proposals about its future structure. Chapter 3 deals with the broader implications of the Constitution for the economic and social life of Fiji. We conclude that there is good reason for all communities in Fiji to re-think their approach to their constitutional arrangements.

THE DRIVING FORCES OF FIJI'S CONSTITUTIONAL MACHINERY

2.6 In the Commission's view, Fiji's constitutional problems reflect four features of the country's constitutional arrangements. Two were understandable responses to Fiji's multi-ethnic society: the principle that Fijian interests should be paramount and the communal system of representation in Parliament. Two reflected the Westminster system of government that Fiji inherited: the role of political parties and the principle that a government must command the support of a majority in Parliament.

2.7 Each was a feature of the 1970 Constitution under which Fiji became independent. Hopes were high for the gradual evolution of multiracial government, but these hopes were thwarted mainly by the interaction of the four features just mentioned. Their combination produced an impetus which pulled the country apart instead of bringing it together. All four remain features of the 1990 Constitution and their interaction is still potentially divisive and destructive.

2.8 The Commission believes that, unless the systemic nature of Fiji's constitutional problems is understood, there is little hope of devising constitutional arrangements which will not continue to give rise to the same problems. We will therefore look briefly at how the 1970 Constitution came to combine Fijian political paramountcy, communal representation, political parties and majority government. In the following sections we will look at the consequences of the interaction of these driving forces under both the 1970 Constitution and the 1990 Constitution which replaced it.

The paramountcy of Fijian interests

2.9 Throughout this century the colonial government enunciated the principle that the interests of Fijians must always remain paramount. In part, the assertion of this principle reflected genuine concern for the position of the indigenous Fijians in their own country. In part it served the interests of the colonisers themselves, especially in responding to Indo-Fijian pressure for elected representation on the Legislative Council. The principle that Fijian interests were paramount was widely accepted and became part of the political culture.

2.10 In the early 1960s, in the situation created by the British Government's commitment to a global policy of decolonisation, the paramountcy of Fijian interests became the main focus of the negotiations leading up to independence. In the new situation, Fijians saw the principle that their *interests* should always be paramount as requiring Fijian *political paramountcy*. In justification, they pointed out that other communities already dominated the economy: it was only fair that Fijians should predominate in government.

2.11 The Indo-Fijian leaders argued that Fijian interests, such as the place of the Bose Levu Vakaturaga and Fijian rights to their land, could be adequately protected in specially entrenched provisions of the independence Constitution. In due course a number of tangible Fijian interests were protected in this way (by requiring special majorities in the Senate for the amendment of the legislation dealing with native land and the Fijian administration). But this approach could not satisfy the less tangible interests and aspirations of Fijians. To a large extent these coincided or were compatible with the interests of Rotumans, the other Pacific Islanders in Fiji, and the European, part-European and Chinese communities. If it were possible to ensure that a political party representing Fijians and these other groups had the necessary majority in the legislature to be able to form the government, the interests of Fijians would be assured through their political paramountcy.

Communal representation

2.12 From the very beginning, the electoral system in Fiji has been communal. The seats have always been allocated among the various ethnic communities. This arrangement grew out of the colonial power's view that, in ethnically divided societies, the separate representation of different communities was natural and desirable. In part this reflected its own interests. In part it reflected the view that different races should be kept apart as far as possible.

2.13 There are two possible ways of electing the members of Parliament to fill each community's seats. One is by voting on communal rolls so that only the voters in each community elect the members belonging to that community. The other is by voting on a national roll. This allows the members belonging to each community to be elected by all voters. The theory behind such "cross-voting" is that all communities are represented by the communal members they have helped to elect, even though some of them will be of a different ethnicity to their own.

2.14 At independence in 1970, Fiji retained the mixture of the two systems of communal representation which had been introduced in 1966. This had been an attempted compromise between the Fijian desire for communal representation based on communal rolls and the Indo-Fijian commitment to a "common roll". Elections on a common roll basis would have meant that seats would not have been reserved for particular communities. Candidates would have been eligible for election regardless of their ethnicity.

2.15 The commitment of Indo-Fijian leaders to a common roll goes back to the late 1920s when they first pressed for elected representation on the basis of equal and universal franchise. The attachment to the common roll was ideological. Later, A D Patel, a tireless advocate of the common roll, argued with foresight not recognised at the time that communal representation would make success in politics depend on responding to communal interests and prejudices, and so make compromises difficult.

2.16 To Fijians and others, a common roll was simply a device to enable Indo-Fijians to obtain political power. As the number of Indo-Fijians in the population increased to eventually outnumber indigenous Fijians, the latter regarded the proposal for a common roll as a means of keeping them out of government. They saw people registered on a common roll as likely to continue voting on communal lines and forecast racial conflict if the two main communities pitted candidates against each other in an electoral contest.

2.17 Communal representation has remained the distinguishing feature of Fiji's constitutional arrangements. It has provided assured representation for each community and has seemed to protect the interests of indigenous Fijians, as well as those of smaller communities. We consider later whether its benefits are outweighed by its disadvantages.

Political parties

2.18 By 1959 it had become clear that Fiji's former leisurely progress towards a more representative Legislative Council would have to be accelerated. The

colonial power made rapid moves to give Fiji increasingly large instalments of self-government. By 1966, two distinct political groupings had emerged. The Federation Party (as it then was) had developed from a loose federation of cane growers' associations and represented mainly Indo-Fijians. The Governor, Sir Derek Jakeway, had urged the formation of a multiracial party, on the lines of the Alliance in Malaysia, as an umbrella organisation for the other smaller political groupings outside the Federation.

2.19 With this encouragement, the Alliance in Fiji eventually brought together a coalition consisting of the Fijian Association, which remained the dominant partner, the General Electors' Association and the Indian Alliance. Each retained its status as a separate ethnic party. It won the general election in 1966 and, with the concurrence of the Federation Party, took Fiji into independence.

Majority government

2.20 Under the Westminster system, the Prime Minister is the leader of the party or combination of parties that can command majority support in a Lower House. The Cabinet is drawn exclusively from that coalition or party. Through its direction of the departments and other government agencies, the Government of the day has the effective control of policy. Because of its majority in Parliament, it can secure the passage of its budget and other legislation. If the party in power is defeated in a general election, the control of government passes to the winning party.

2.21 The Indo-Fijian leaders had accepted the principle of parity of representation in the legislature with indigenous Fijians, although the 1946 census had shown that Indo-Fijians outnumbered Fijians in the total population. Other communities accepted the principle of parity, if only reluctantly. However, during the negotiations leading to independence, no final agreement could be reached on the method by which seats in the House of Representatives were to be filled.

2.22 As an " interim solution", the 1970 Constitution provided that, in a House of 52 members, 22 should be Fijian, 22 Indian and 8 should be allocated to those who were not classified as either Fijians or Indians - usually referred to as "general voters". In 1970 this group comprised mainly Europeans, part-Europeans and Chinese. Of the 22 Fijian and Indian members, 12 were to be elected by voting on the communal roll and 10 by cross-voting on a national roll. 3 general voter members were to be elected on the communal roll and 5 on the national roll.

THE GULF BETWEEN EXPECTATION AND REALITY

2.23 In the negotiations leading to independence, the paramountcy of Fijian interests had been recognised by all communities as a guiding policy principle. In terms of population numbers, the agreed allocation of communal seats had favoured Fijians at the expense of Indo-Fijians, and the small number of general electors at the expense of both. The independence Constitution was based on the need for the Prime Minister and Cabinet to command the confidence of the majority in the House of Representatives. The Alliance Government already had that confidence and continued in office after independence. It looked as if Fijians, with general elector and some Indo-Fijian support, would be able to carry on in government indefinitely if they remained politically united.

2.24 Events were to show, however, that, underlying the general acceptance of the principle that Fijian interests were paramount, there was a fundamental difference between perceptions of the two main communities about its application in practice. Indigenous Fijians had originally seen the principle as protective of their land, culture and way of life, based on chiefly leadership and a communal society. However, that society had come under increasing strain as it ceased to be wholly dependent on subsistence activities and adapted to the modern money economy. Fijians had an increasing sense that they were losing ground. In education, participation in the higher levels of government administration and private sector commercial activity, and in their income levels and general standard of living, they were out-performed, at least numerically, by other communities.

2.25 Fijian leaders saw "political paramountcy" as essential to redressing this imbalance. They took the view that only if they retained political control could they design and implement policies for improving the educational achievement and promoting the economic advancement of indigenous Fijians, enabling them to play an equal part in Fiji's modern economy. They believed that this goal, and the idea that it was to be attained by keeping a predominantly Fijian government in office, had been accepted by the other ethnic communities.

2.26 Indo-Fijians, on the other hand, had accepted more as a necessary political accommodation the 1970 interim constitutional arrangements for the distribution of seats in the House of Representatives which enabled a party representing mainly Fijians and general voters to remain in government for the time being. They continued to see the paramountcy of Fijian interests in its original protective role, assuring indigenous Fijians that there would be no interference with their land, their culture or their separate system of administration. Without being unsympathetic to Fijian aspirations for an improved social and economic status,

they did not see the paramountcy of Fijian interests as involving an ongoing commitment to secure the re-election of a predominantly Fijian government. Elections were keenly contested by both Government and Opposition parties. If the democratic process provided for in the Constitution gave them the opportunity, Indo-Fijian political leaders saw no reason why they should not join other groups, including some Fijians, in voting in a government in which they could participate.

2.27 At the beginning, hopes were high for the development of multiracial politics. In the 1972 election, both the Alliance and the National Federation Party (NFP) (as the Federation Party had become) won all the Fijian and Indian communal seats respectively, but the Alliance, with the support of the 24% of Indo-Fijian voters who had supported Alliance candidates for communal seats, won 7 of the 10 Indian national constituencies. The NFP won 3 of the 10 Fijian national constituencies.

2.28 It soon became apparent that each of the parties was affected by an element of disunity, within its own ranks or among its original supporters. From the beginning, there had been a certain number of floating voters in the Fijian community. When the main Fijian party seemed to be safely in power, they were willing to support other Fijian parties. When doubt arose about whether a Fijian government could remain in office, a majority of Fijians again gave the main Fijian party their support.

2.29 That tendency was demonstrated in 1977. At the general election in April of that year, the Fijian Nationalist Party (FNP), committed to promoting the exclusive interests of Fijians, was able to split the Fijian support for the Alliance. The FNP won a Fijian communal seat. Another went to an independent. As a result, the NFP won 26 seats in the House of Representatives, and the Alliance won 24.

2.30 It seemed that the NFP was in a position to form a government, but divisions over the party's leadership and, perhaps, diffidence about taking office, led to delay. By the time the party had confirmed its support for a leader, the Governor-General, acting in his own deliberate judgment, had already reappointed the leader of the Alliance party, Ratu Sir Kamisese Mara. He explained that he had taken this step because the people of Fiji had not given a clear mandate to either of the political parties. The Alliance Government subsequently put and failed to win a confidence motion in the House of Representatives. In the general election that followed, it was returned to power with a strong majority.

2.31 A decade later, the Fiji Labour Party (FLP), which had been formed in March 1985 as a multi-ethnic party under the leadership of Dr Timoci Bavadra, joined in a coalition with the NFP to contest the 1987 election. The outcome was that the coalition won 28 seats and the Alliance won 24. Dr Bavadra was sworn in as Prime Minister on 13 April. The coalition Members of Parliament included 7 Fijians and 2 part-Europeans, elected to national Fijian or general voter seats, and 19 members who were Indo-Fijians.

2.32 The fall of the Alliance Government provoked a strong reaction among its supporters. By late April the Taukei Movement had been formed with the apparent intention of destabilising the Government. Parliament met on 12 May, and on 14 May it was interrupted by armed soldiers. The first of the two 1987 military *coups* had occurred. No doubt many factors contributed to this violent sequel to the Alliance Government's defeat and the other events that followed the first *coup*. It is not the Commission's task to identify all of them. Nor does it wish to be seen as simplistic in any conclusions it draws.

THE CONSTITUTIONAL MACHINERY UNDER STRAIN

2.33 In Fiji's ethnically mixed society, communal seats have provided assured representation for each community. The cost has been the serious obstacles placed in the way of multi-ethnic government under the Westminster parliamentary system that Fiji inherited. The fault, we believe, does not lie in the Westminster system itself. It has shown its robustness in adapting to new political climates, specially in the Pacific region. The problems lie in trying to combine the Westminster system with exclusively or mainly communal representation.

2.34 As events in Fiji demonstrated, this sets off the following chain reaction. First, to get elected, candidates must appeal mainly to the hopes and concerns of their own ethnic community. There is little reason for either candidates or voters to concern themselves with the problems of other communities, or to take the view that the serious problems of one community are national problems which all communities have an interest in solving.

2.35 Secondly, the pull exerted by the communal voting system made people feel that members of their community elected by all voters to represent national constituencies were not really legitimate representatives of their own community. That is why the cross-voting system under the 1970 Constitution could not make any impact on the identification of party interests with those of a particular community. To a certain extent, it induced moderation. To get elected, a candidate for a national seat had to appeal to the voters of other communities. But, if the

appeal was successful, the member thus elected was often seen as not being a legitimate representative of the community to which he or she belonged.

2.36 Thirdly, in an ethnically divided society, political parties naturally tend to centre on the community whose interests they were formed to promote. The stress on communal voting means that the parties which make the greatest effort to appeal to other communities are seen as compromising the interests of their own. New parties appealing exclusively to a single ethnic community emerge to fill the perceived gap. In response, parties which were originally committed to multiracialism are sooner or later driven back to promoting mainly or only the perceived interests of the ethnic community from which, historically, they have derived their greatest support. This tendency particularly affects a government party, caught as it is between the duty to govern for the good of the whole country and its desire to secure re-election by its own community.

2.37 From this follows the fourth and most serious problem - the role of ethnic parties in forming a majority government. Because the political parties, responding to the communal system of representation, have drawn their support mainly from one community, government by one party is essentially ethnic government. The defeat in a general election of the governing party by another ethnic party, or by a coalition supported mainly if not exclusively by another ethnic group, means that government is seen as passing from one ethnic community to another.

2.38 At this point the chain of events takes us back to the question of Fijian political paramountcy. If political power passes from Fijians to other communities, Fijians are deprived of the political paramountcy that they see as safeguarding their interests. Because they have put so much weight on political paramountcy, their willingness to accept the outcome is in question. There were hints of this when, in 1977, the NFP won more seats than the Alliance. A decade later, in 1987, a large number of Fijians demonstrated decisively that they were not prepared to accept what they saw as an Indo-Fijian government.

2.39 As explained above, many Fijians thought that Indo-Fijians had tacitly accepted the maintenance of Fijian political paramountcy. They therefore saw it as a breach of faith that an Indo-Fijian party should join with a new multiracial party and overthrow the Fijian-dominated Alliance Government. Indo-Fijians, on the other hand, saw no inconsistency with their recognition of the principle that Fijian interests, as they understood them, would remain paramount. They would not be affected by a change of government. There was no reason why they should not join with the FLP in seeking to become the government.

2.40 The outcome of the 1987 general election was entirely consistent with the nature of the 1970 constitutional arrangements. Political alignments are necessarily in the hands of individual elected members and the voters who support them. The possibility that a government elected with majority support in the Lower House may be defeated by a vote of no confidence rests on this reality. So also do general elections. Otherwise there would be no point in holding them.

2.41 No constitution based on democratic principles can guarantee that a particular party will always remain in office. Nor can it guarantee that the party which wins a majority will always be one representing a particular ethnic community. The essence of a democratic system is the ability of elections to change the government. This is the most important way of making a government responsive and accountable to the people it serves. Over time, not only voter preferences but also the dynamics of policies and personalities lead to changes in the composition and fortunes of political parties. This process of change, which is both natural and inevitable, has been evident in Fiji.

2.42 Naturally, all political parties appeal to voters to unite in supporting their election or re-election. Under a communal system of voting, such an appeal is almost always directed to a particular ethnic community. Even so, the experience in Fiji, as in other ethnically divided societies, is that no ethnic community is likely to remain united indefinitely behind one party. A spread of political opinion within an ethnic community should be seen as a strength, not a weakness. If parties cease to be based mainly on ethnicity, elections will no longer be contests between communities.

THE 1990 REMEDY

2.43 The provisions of the 1990 Constitution show clearly what Fijians believed to be the remedy for the situation in which they had found themselves. There were significant departures from the 1970 Constitution. The size of the House of Representatives was increased to 70. There was no longer parity of representation between Fijians and Indo-Fijians.

2.44 The 37 seats for Fijians gave them an overall majority. Indo-Fijians had only 27 seats. Rotumans, formerly treated as part of the Fijian community, were given a separate seat. The number of seats for general voters was reduced to 5. Pacific Island voters were transferred from the Fijian roll to the general voters' roll. The Prime Minister was required to be a Fijian. All seats were to be filled by voting on communal rolls. There was no longer any provision for cross-voting. No ethnic community could affect the selection of members to represent any community but its own.

Testing the assumptions behind the 1990 Constitution

2.45 The 1990 Constitution was a drastic response to what had been seen as a drastic situation. The Commission will evaluate its provisions against the criteria in its Terms of Reference in the later chapters of its report. In this chapter it is concerned with their overall effect.

2.46 The underlying assumption was that, if Fijians had more than half the seats in the House of Representatives, they would be able to maintain their hold on political power. An indigenous Fijian party winning all or most of the 37 Fijian seats would have the necessary majority to form a government. If there was more than one Fijian party, there was a good chance that they would be able to come together for that purpose. Rotumans and the general voters were likely to maintain their support. A high degree of Fijian unity was still the cornerstone. The real implications of 1977 and 1987 had not yet been fully absorbed.

2.47 In fact, Fijian voters, like the members of other communities in Fiji, want to be able to make a choice among the parties which seek to represent them. What is more, parties representing the same ethnic community may not necessarily wish to join in forming a government. Their policies and values may be too different.

2.48 Following the 1992 election, the largest Fijian party, the Soqosoqo ni Vakavulewa ni Taukei (SVT), formed the government, in coalition with the General Voters Party, the Rotuman member and one independent member. Five Fijian Nationalists were in opposition, along with the NFP and the FLP. The budget crisis in 1993 led to a split in both the SVT and the GVP. The government was defeated on what it chose to regard as a confidence issue. After the ensuing general election in 1994, the SVT has continued to govern with the support of the GVP. The new Fijian Association Party and General Electors Association moved to the Opposition benches.

2.49 Even with the benefit of the disproportionate representation of Fijians under the 1990 Constitution, no Fijian party has been able to govern without the support of independent members and members of another party. Nor have the parties within the governing coalition maintained their own unity in all circumstances. That has been illustrated not only by the defeat of the SVT-led coalition government in 1993 but also by more recent political crises when the Government's majority has been in issue.

2.50 As we show in the following paragraphs, the political developments since 1992 suggest three things. First, the goal of permanent Fijian political unity is

unrealistic and the efforts to pursue it have a high cost for Fijians themselves. Secondly, in the absence of unity, even a constitution as heavily weighted in favour of Fijians as the 1990 Constitution may not prevent a minority of Fijians from joining with an Indo-Fijian party or parties to form a government. Thirdly, trying to keep a predominantly Fijian government in office in perpetuity may not be the best way of securing the paramountcy of Fijian interests. We develop each of these propositions in turn.

The goal of permanent Fijian political unity

2.51 The goal of permanent Fijian political unity puts strains on the Fijian community. In the past, the members of that community lived in villages, isolated from other communities and dependent on the subsistence economy. But the very success of the efforts to bring indigenous Fijians into both government and the mainstream of the money economy has created a divergence of interests across occupations and regions. It is difficult, if not impossible, for one party to accommodate the new multiplicity of interests.

2.52 The drive for unity has also put a strain on traditional institutions. Although the provincial councils and the Bose Levu Vakaturaga have long been involved in politics, in the sense of having an abiding concern for the well-being of Fijians and the nation as a whole, they are now identified with a particular political party. Some Fijians expressed concern about this development which they saw as detracting from the chiefly role in providing leadership to all Fijians irrespective of political affiliation.

2.53 The emphasis on Fijian unity also means that Fijians are not free to vote out a Fijian government if it does not deliver what they expect. Those expectations go beyond fulfilment of the government's election promises to improve the conditions of life for Fijians. The submissions showed that standards of integrity, efficiency and effectiveness are as important to Fijians as they are to other communities. The idea that a Fijian government must be maintained in office at all costs has grave consequences for political accountability. It requires setting aside the normal democratic controls on a government's performance in office. That is bad for the Fijian community as well as for the country as a whole.

Keeping a Fijian government in office

2.54 As mentioned, the parity of representation for Fijians and Indo-Fijians under the 1970 Constitution meant that Indo-Fijians, in proportion to their number in the population, were already under-represented. Most would not accept the even more disproportionate weighting in favour of Fijians in the 1990 Constitution.

2.55 That Constitution also removed the 1970 provision for cross-voting. Under what is now an exclusively communal voting system, no Indo-Fijian can cast a vote for a Fijian candidate. The object was to remove any Indo-Fijian influence on the selection of Fijian members. That had been seen as contributing to the election of Fijians who were not members of the Alliance. The effect has been further to alienate Indo-Fijians who have been deprived of any say in the composition of the government.

2.56 The increased number of Fijian seats under the 1990 Constitution was designed to keep a Fijian-dominated government in office. Even so, in the absence of unity among Fijian voters for the understandable reasons already described, no Fijian party has been able to govern alone without support from independents and general voters.

2.57 The 1970 Constitution had already made it impossible for Indo-Fijian voters to defeat a Fijian government on their own. The 1990 Constitution was presumably intended to prevent the recurrence of 1987. It made it more difficult for a coalition dominated numerically by Indo-Fijians but supported by members of other communities, including some Fijians, to become the government again.

2.58 However, in the absence of united Fijian support for a single party, the election of government which is not predominantly Fijian remains a possibility. No constitution can keep a Fijian government in office permanently unless the weighting for Fijians in the House of Representatives is even more extreme than it is now, or the House consists exclusively of Fijian members. Both solutions were put forward in submissions. Obviously, neither would meet the criteria in the Commission's Terms of Reference. Nor, of course, would they be acceptable to Indo-Fijians or to the international community.

RE-ASSESSING THE OBJECTIVES OF ALL COMMUNITIES

2.59 As has been seen, with the encouragement of the colonial government, Fijians came to believe that the paramountcy of their interests could be secured only by political paramountcy. This has led them to emphasise their representation in Parliament. Other communities have also seen this as the main issue. Because, under the Westminster system, the composition of the government flows from the number of seats the various parties have in Parliament, and parties have remained ethnic in character, everything seemed to rest on the allocation of the seats in Parliament among the ethnic communities.

2.60 We firmly believe that, in designing Fiji's future constitutional arrangements, the composition of the Lower House of Parliament should be seen

as a means to an end, not an end in itself. The first question is what kind of executive government people want to have. All communities need to focus on what they consider to be the desirable ethnic composition and other attributes of the Cabinet. If they can agree about that, the next question will be: what electoral arrangements are most likely to produce the kind of executive government that people want?

THE BROAD AGREEMENT ABOUT THE ADVANTAGES OF MULTI-ETHNIC GOVERNMENTS

2.61 The nature of the political executive was a matter on which the submissions revealed a striking degree of unanimity. There was wide support for the idea that all ethnic communities should have the opportunity to play a part in the Cabinet. The measure of agreement on this point presented a sharp contrast to the wide range of views about the desirable size and composition of Parliament's Lower House and the method of electing its members. Even so, almost all submissions stated that voters should be able to cast votes for at least some candidates belonging to communities other than their own.

2.62 Many submissions contained detailed arguments about the desirability of finding a way to achieve multi-ethnic governments. Among them were the submissions of all parliamentary political parties. Without wishing to suggest that we are giving these submissions undue weight, in comparison with the other submissions on the same matter, we think it is worth summarising them, to show that there is common ground even at the political level.

2.63 In its written submission the Soqosoqo ni Vakavulewa ni Taukei said that multiracial leadership of government could be achieved through a coalition of political partners if the parties so desired. In its oral presentation, the party noted that there was no constitutional provision preventing the National Federation Party and the Fiji Labour Party, as the two political parties representing the Indo-Fijian community, from entering into negotiations with other political parties with the object of forming a coalition government.

2.64 The joint NFP/FLP submission proposed power-sharing in the Cabinet by a constitutional provision which would provide for the representation of all parties which had won more than 20% of the seats in Parliament. Each party would have a number of Cabinet members proportionate to the number of its members in the House, with provision for the inclusion of representatives of minority groups if their party did not achieve the threshold.

2.65 The Fijian Association proposed that the Constitution should provide a mechanism for the Prime Minister to invite some members of other political parties to participate in the formation of government. This would mean that, without upsetting the balance of ethnic representation in Parliament, high quality members would be eligible to serve in the Cabinet irrespective of their ethnicity or party allegiance.

2.66 The General Voters Party thought the constitution should require the Prime Minister to appoint representatives of all ethnic groups to Cabinet. A multi-ethnic Cabinet would send a powerful signal of stability and confidence to outsiders thinking of investing in Fiji and promote a sense of participation and solidarity with government among all ethnic groups.

2.67 The General Electors Association suggested that the Prime Minister should be constitutionally bound to nominate ministers by drawing 44% from Taukei and Rotuman members, 44% from Indian members and 12% from the General Electors.

2.68 Although the detail of these approaches is different, they provide a firm basis for concentrating on how Fiji's Constitution could best encourage the formation of multi-ethnic governments.

FUTURE CONSTITUTIONAL DIRECTIONS

Multi-ethnic government

2.69 In the Commission's view, progress towards the sharing of executive power among all ethnic communities is the only solution to Fiji's constitutional problems. Constitutional arrangements which will encourage the emergence of multi-ethnic governments should be the primary goal. In Chapter 3 we show how progress towards this goal will promote racial harmony, national unity, the economic and social advancement of all communities and achieve consistency with the international human rights standards, the important values referred to in our Terms of Reference.

2.70 We also look there at how the goal of multi-ethnic government relates to the need for Fiji's constitutional arrangements to guarantee full protection of the rights of the indigenous Fijian and Rotuman people, promote their interests and take account of their concerns, as well as take account of the rights, interests and concerns of all other ethnic groups. All ethnic communities must be satisfied that their rights and interests will be adequately protected.

2.71 In reviewing the 1990 Constitution, the Commission makes detailed recommendations about constitutional arrangements for this purpose. In this section we sketch the main features of the supporting structure.

The governmental system

2.72 A first question is the nature of the governmental system. One or two submissions suggested that a separately elected President, whose position did not depend on the support of a majority in Parliament, would be free to invite members of all communities to serve in the Cabinet. That is the system in the United States.

2.73 Most submissions assumed that Fiji would retain its present parliamentary system, under which the Prime Minister must be able to command the support of a majority of the members of the Lower House. Some thought that the Westminster system was so deeply embedded in the political culture that it would be hard to move away from it, even if people wanted to. In fact there was no groundswell in that direction. The Commission therefore took as its starting point the general expectation that the Constitution should continue to be based on the Westminster system of parliamentary government.

The importance of political parties

2.74 Although there was strong support for a "government of national unity", meaning a government drawn from all political parties, there was little detailed analysis of how it could be achieved and made to work. Some saw such a government as based on a conscious decision to put party aside, under arrangements similar to those which had been a key feature of the move to democratic government in South Africa. As we show later, that experiment met a clear need at the time, but a government of national unity has not been retained as part of the country's permanent constitutional arrangements.

2.75 The Commission believes that, in Fiji, the party system is deeply embedded in the political culture. Power-sharing should be achieved through the voluntary cooperation of political parties, or increased support for a genuinely multi-ethnic party. The question is how such developments might be encouraged. As has been seen, the present identification of party with ethnicity and the difficulty of making political appeals across ethnic dividing lines are natural consequences of the communal system of representation that has always been used in Fiji. In these circumstances, government by the majority party is likely to remain ethnic government.

Incentives for cooperation

2.76 The Commission believes that multi-ethnic coalitions are not a realistic prospect unless there are strong incentives within the electoral system for cooperation between what, for the time being, will continue to be mainly ethnic parties. Even if some parties seek to become multiracial, their survival will similarly depend on such incentives. Fiji's constitutional history demonstrates that it is not possible for political parties to escape the pressures to act communally as long as members of Parliament are elected on an exclusively communal basis. That is why the idea of multiracial governments, frequently raised over the years and now a widely shared vision of how Fiji should be governed, has so far come to nothing.

2.77 To break down the barriers which force ethnic parties to take a narrow, communal view of their best interests, the people of Fiji must move gradually but decisively away from the communal system of representation. They must adopt electoral arrangements which encourage parties to seek the support of other communities as well as their own.

Multi-party participation in the parliamentary process

2.78 A system which encourages power-sharing among ethnically-based parties at the executive level needs to provide further reassurance to all communities by enabling their members in Parliament to influence executive decision-making. Backbench members of all parties should have the opportunity to take part in sector standing committees which cover every aspect of the government's responsibilities. These Committees should have the power to make an input into the content of all legislation. They should also have the power to monitor the administration of legislative programmes and government policies.

Individual and group rights

2.79 At the same time, there must be other strong constitutional controls over the powers of government in all areas, including the protection of individual human rights and the rights of groups. The protection of all rights to, and in, land and the important role of the Bose Levu Vakaturaga should continue to be the subject of express constitutional provisions. Similarly, the Government should be bound to propose to Parliament, and to implement, legislation authorising social justice and affirmative action programmes for the Fijian and Rotuman communities as well as for other disadvantaged communities and groups.

2.80 In these ways, indigenous Fijians can be assured that their interests are safeguarded even though they may be sharing government with other ethnic

communities. Their interests too, will be effectively protected. In Chapter 3 we discuss further the nature of Fijian interests, both tangible and intangible, along with the interests of other communities.

THE IMPLICATIONS OF MULTI-ETHNIC GOVERNMENT

2.81 By definition, multi-ethnic government excludes government solely or predominantly by any one ethnic group. This means that all communities must be willing to forego the idea of governing alone. The first step, therefore, is for all communities to decide whether they agree that multi-ethnic government is in their best interests as well as in the best interests of the whole nation.

2.82 The country's constitutional arrangements should be based on the principle that the interests of all communities must be recognised and protected. All communities should be invited to reaffirm their earlier recognition of the principle that Fijian interests are paramount, on the understanding that it does not justify any relegation of their own interests. If they are given such an assurance, indigenous Fijians should be willing to re-examine the assumption that the paramountcy of their interests requires political paramountcy.

2.83 We have already shown that political paramountcy cannot be guaranteed by a constitution. Although the 1990 Constitution is weighted in favour of Fijians, it does not regulate the distribution of political power among parties. For that reason it does not ensure that Fijians will always be able to form an exclusively or predominantly Fijian government. No constitution can do that unless it abandons all claim to be democratic.

2.84 The Commission considers that the principle of the paramountcy of Fijian interests should be allowed to resume its protective function, but with a wider field of application. It should be seen as securing Fijian participation in a multi-ethnic government, along with members of other communities. It should also back the commitment of all communities to the establishment of programmes for ethnic and social justice for Fijians and all other communities, based on a distribution of resources broadly acceptable to all.

2.85 In Chapter 3 we put forward more detailed proposals for explicitly recognising in the Constitution the principle that the interests of Fijians are paramount, in a way that is compatible with the need to respect the rights and interests of all communities. The object will be to avoid any subordination of Fijian interests to those of other communities. At first sight, that may not seem to be a powerful method of protecting Fijian interests. In fact, it will give Fijians a

better assurance than they have now that they will always be able to play a major part in the government of their country.

2.86 Fijian participation in a multi-ethnic government will rest on one of two possibilities. Fijians may join in a multi-ethnic party which commands wide support in all communities and can win a parliamentary majority. Alternatively, there may be an agreement for a coalition between a Fijian political party (or parties) and a party (or parties) supported by other ethnic communities.

2.87 Some people might think that Fijians should have weighted representation in Parliament to improve their political leverage in any negotiations for the formation of a multi-ethnic government. That would be counter-productive as well as undemocratic. As already explained, the Commission considers that multi-ethnic coalitions or parties must be firmly based on strong electoral incentives to seek voter support across the ethnic divide. These incentives will give Fijians the assurance that parties representing other communities will not be able successfully to pursue the interests of their own community at the expense of Fijian interests.

2.88 The best guarantee of the interests of all ethnic communities is a Constitution that gives all political parties a strong inducement not to espouse policies that favour the interests of one community over the interests of others. Instead, it should encourage them to see the important interests of each community as national interests which have to be met through a concerted effort by all.

RECOMMENDATIONS

1. **The primary goal of Fiji's constitutional arrangements should be to encourage the emergence of multi-ethnic governments.**
2. **The Constitution should continue to be based on the Westminster system of parliamentary government.**
3. **Power-sharing should be achieved through the voluntary cooperation of political parties, or increased support for a genuinely multi-ethnic party.**
4. **The people of Fiji should move gradually but decisively away from the communal system of representation. They should adopt electoral arrangements which encourage parties to seek the support of other communities as well as their own.**
5. **Backbench members of all parties should have the opportunity to take part in sector standing committees which monitor every aspect of the government's responsibilities.**

6. **The Constitution should**

   (a) **recognise the important role of the Bose Levu Vakaturaga;**

   (b) **protect individual human rights and the rights of groups, including rights to and in land;**

   (c) **require social justice and affirmative action programmes for the Fijian and Rotuman communities as well as for other disadvantaged communities and groups.**

7. **The Constitution should be based on the principle that the interests of all communities must be recognised and protected. It should explicitly recognise the protective function of the principle that the interests of the indigenous Fijians are paramount, on the understanding that it does not involve the relegation of the interests of other communities.**

3

THE CONSTITUTION: ITS PURPOSES AND UNDERLYING VALUES

3.1 In Chapter 1 we discussed what we see as the major constitutional issue for the people of the Fiji Islands: how they can best give themselves multi-ethnic governments. In this chapter we discuss a number of related issues centering on the nature of the Constitution itself. We look at its role, not only in establishing and controlling the operation of the main institutions of government, but also in setting the tone for the working relationships among individuals and groups within Fiji society. In particular, we look at the various ways in which the Constitution can reflect or promote the important values referred to in our Terms of Reference.

WHY COUNTRIES HAVE A CONSTITUTION

3.2 Why do countries feel the need for a constitution? The reasons are varied and inter-related. The following seem likely to be relevant in the Fiji Islands.

To make a fresh start

3.3 Often, people draw up a new constitution when they want their country to be governed in a new way. That was true of Fiji in 1970 and 1990. It may be true again. If the people of Fiji wish to embark in a new constitutional direction - one which will enable all ethnic communities to share in the country's government - they may also wish to set out their revised constitutional arrangements in a new document. It would be a way of signalling the change of course, as well as helping them to reach their destination.

To set out the conditions on which the people agree to be governed

3.4 Government should rest on the consent of the people. Consent was the basis of the Deed of Cession under which Fiji became a British colony. Today, it is the justification for government by the people's elected representatives.

3.5 A constitution should therefore be generally acceptable to all citizens. This does not mean that everyone must agree with every detail. If a constitution is the product of a democratic process, some disagreement is inevitable. But the process by which it is developed and adopted should be generally accepted, and disagreement about its terms should be kept within reasonable limits. Those who

would have preferred a different constitution must be able to accept the one actually adopted.

To control the actions of governments

3.6 Most constitutions are based on a belief that governments should have only limited powers. Sometimes those limitations affect the relationships between governmental institutions - *how* they must go about the business of governing. Sometimes they affect *what* the government is permitted to do. Rules about what a government may do and how it may do it provide the checks and balances that are a main purpose of requiring a country to be governed under a constitution.

To guarantee the rights of individuals and groups

Individual rights

3.7 Both the 1970 and the 1990 Constitutions contained a chapter on the protection of fundamental rights and freedoms of the individual. In many constitutions, such provisions are called a Bill of Rights. Their purpose is to prevent the state from interfering with individual rights and freedoms, either by the laws that it makes or by its administrative action. A number of submissions reaffirmed the need for Fiji's Constitution to contain a Bill of Rights, expressed in positive terms, without too many qualifications. Chapter 7 contains our recommendations for a new Bill of Rights which would set out rights clearly, with only such limitations as are justified.

Group rights

3.8 Our Terms of Reference require us to recommend constitutional arrangements which, among other things,

- guarantee full protection and promotion of the rights, interests and concerns of the indigenous Fijian and Rotuman people;
- have full regard for the rights, interests and concerns of all ethnic groups in Fiji.

We began a discussion of some of these rights, interests and concerns in Chapter 2 and continue it in this chapter. A constitution can guarantee group rights in various ways.

3.9 Some individual rights benefit the members of a group. Examples include a person's rights to manifest his or her religion in community with others, to assemble freely and associate with other persons, and not to be subjected to discriminatory treatment.

3.10 The rights of particular groups may be constitutionally protected. The legislation recognising the rights to land of Fijians, Rotumans and Banabans and providing for their governance as a community, and also the legislation protecting the rights of agricultural landlords and tenants, are entrenched by the Constitution. In each case the Act can be amended only with the consent of special majorities in Parliament.

3.11 In Chapter 2 we explained the need for Fiji to move away from a system of communal representation, but as long as any part of that system remains, it will continue to give rise to constitutionally-protected group rights. We return to that question in a later section of this chapter and make detailed recommendations in Chapters 9 and 10.

To promote important values

3.12 A constitution usually reflects the values that a people hold dear and wish to live by. Some of these values will reflect the country's own history and experience. Others are widely recognised as positive forces in most if not all countries' constitutional arrangements. We look briefly at the range of values likely to be important to the people of Fiji.

The values referred to in our Terms of Reference

3.13 In recommending constitutional arrangements, the Commission is required to

- promote racial harmony and national unity;
- promote the economic and social advancement of all communities;
- bear in mind internationally recognised principles and standards of individual and group rights.

In later sections of this chapter we look at how these values can be reflected in Fiji's Constitution.

Sovereignty, democracy and the rule of law

3.14 Both the 1970 and 1990 Constitutions described Fiji as "sovereign" and "democratic". The Preambles to both referred to the importance of maintaining "the rule of law". In Chapter 5 we make recommendations about the way in which the Constitution should continue to refer to and reflect these values.

The separation of powers

3.15 Again, both the 1970 and 1990 Constitutions were based on the constitutional principle of the separation of powers. This principle requires the functions of making the law, carrying out the law, and judging whether things have been done in accordance with the law, to be kept distinct. Generally speaking, they should be carried out by different bodies. Experience elsewhere has shown that, if the roles of the legislative, executive and judicial branches of government become confused, tyrannical government is likely to result.

3.16 In the Westminster parliamentary system, there are important connections between the three branches of government. For example, the individual and collective responsibility of ministers to Parliament is the only means of securing a democratically accountable executive. But the fact that some legislators are also ministers is offset by the duty of a politically neutral public service to administer the law and give ministers free and frank policy advice. That helps to reinforce the distinct role of the executive.

3.17 Another example of links between the three branches of government is the role that both the executive and Parliament may have in appointing - or if need be, dismissing - judges of the superior courts. However, in carrying out this role and all other aspects of the administration of the courts, the executive and the legislature must fully respect the independence of the judicial branch of government. This point is developed further in Chapter 13.

Other values

3.18 A constitution should reflect other, less specific values arising from the country's history and the identity of its people. We have in mind the spiritual and traditional values important to the various ethnic communities. Wherever possible, the Constitution should reflect not only the different values of particular communities but also those which all communities share. These can help bring them together. For example, the submissions showed clearly that, within the different spiritual traditions of the people of Fiji, there are universal elements such as the recognition of one God, the need to distinguish right from wrong, and to love your neighbour as yourself. Reconciling community values when they conflict, and recognising how often they are shared, are major themes of this report.

To act as an enduring basis for government

3.19 People make constitutions because they want the basis of their government to be enduring, outlasting the lives of particular parliaments or governments, just

as the rules of a game outlast a particular match. The procedure for amendment of the constitution should not allow it to be changed too easily. It must also be fair. In a country like Fiji it should not be possible to amend the Constitution without the participation of all ethnic communities.

To foster shared loyalty to the country and a sense of common purpose

3.20 The earliest written constitution - that of the United States of America - and the most recent - that of the Republic of South Africa - show that a constitution can capture people's imagination. If a constitution is to have the symbolic function of fostering a shared loyalty to the country and a sense of common purpose, it must be written in accessible language. Fiji's Constitution must be translated into Fijian and Hindi. It must not be too long or too technical, though it must be clear.

THE CONSTITUTION IN ITS WIDER SETTING

3.21 A constitution is not isolated, either from the country's legal system and political culture, or from the history and present circumstances of its people. We look briefly at some features of both.

The legal system and political culture

3.22 By itself, the Constitution can never give a complete picture of how a country is governed. Its provisions are often filled out by Acts of Parliament or regulations which deal with matters of detail. The Standing Orders of Parliament contain rules about the way the business of Parliament is carried out. The common law, as well as the words of the Constitution itself, guides the courts in interpreting and applying its provisions. Their rulings become law about the Constitution's meaning and effect.

3.23 Another set of unwritten rules, usually called constitutional conventions, may provide guidance about the way in which particular powers are to be exercised. In Fiji, some of the British constitutional conventions about the powers and duties of the Sovereign and the Prime Minister have been codified in the Constitution and now apply between the President and the Prime Minister. Others, though not codified, may still be relevant or may have been replaced by constitutional conventions specific to Fiji. In rather different contexts, guidance may be obtained from the traditional practices of the indigenous Fijians, for example those pertaining to the Bose Levu Vakaturaga. Finally, a great deal depends on whether the Constitution is respected and obeyed by all organs of government and the people themselves.

3.24 All of these sources contribute to the country's constitutional arrangements. The Constitution, however, is the key document. There is always a choice to be made about which rules should go into the Constitution and which should be made or recorded in some other way. Obviously, the Constitution should include the rules which the people regard as specially significant. For example, many countries leave the detail of the arrangements for electing members of Parliament to the ordinary law. In Fiji, however, the electoral arrangements have always been included.

3.25 Even though something is not dealt with in the Constitution, it may still need to be done. Sometimes, it can be made a requirement of the ordinary law. Sometimes it can be done as a matter of government policy. Sometimes, legislators or administrators or judges, or citizens generally, will need to be aware of the principles on which the Constitution is based and take account of them when they act. The Commission makes a number of recommendations that certain requirements or principles should be implemented in one or other of those ways instead of being written into the Constitution itself.

The people of Fiji

3.26 In Chapter 1 we examined the consequences of Fiji's constitutional arrangements from before independence to the present day. Here we refer briefly to the significant events in the life of the people. Some of them may call for specific mention in the Constitution. We also describe the present and projected demographic makeup of Fiji's population. That, too, will continue to influence the country's constitutional arrangements.

3.27 It seems likely that the first indigenous inhabitants of the Fiji Islands arrived about 4,000 years ago. The social and political organisation that evolved was based on ties of kinship, the emergence of a chiefly hierarchy and the people's sense of identification with the vanua. For most Fijians, as for other indigenous peoples in the Pacific, all three elements remain a strong motivating force.

3.28 Christian missionaries first arrived in 1835. Fijians soon afterwards embraced the gospel teachings. Most Fijians are Methodists, but other denominations also have their adherents. Other great spiritual traditions of the world, Hinduism and Islam, are also present in Fiji.

3.29 By the mid-nineteenth century, Fiji was beset by struggles for power among leading chiefs and by the impact of European traders and settlers. The

latter obtained land and began to exploit it with the help of labour from what are now Papua New Guinea, the Solomon Islands and Vanuatu. In their wake came the colonial powers vying for influence and territory. These pressures eventually led Cakobau, as Tui Viti, to cede Fiji to Her Majesty Queen Victoria and her successors on 10 October 1874.

3.30 In the language of the times, the English version of the Deed of Cession recited that Cakobau and other high chiefs were "desirous of securing the promotion of civilization and Christianity and of increasing trade and industry within the said islands". Accordingly, "relying upon the justice and generosity of Her said Majesty", they had agreed to cede to Queen Victoria "the possession of and full sovereignty and dominion over" the Fiji Islands. In return, Her Majesty promised, among other things, "that the rights and interests of the said Tui Viti and other high chiefs the ceding parties hereto shall be recognised so far as is and shall be consistent with British sovereignty and Colonial form of government".

3.31 The first resident colonial Governor, Sir Arthur Hamilton Gordon, came to Fiji in 1875, after service in Trinidad and Mauritius, where the sugar plantations were worked by Indian indentured labourers. Gordon persuaded the Australia-based Colonial Sugar Refining Company to extend its operations to Fiji. In May 1879 the first group of indentured workers arrived from India to work on its plantations.

3.32 They and those who followed them were a diverse group comprising people of different religions and social levels, coming first from North India and later from South India. They called themselves the 'girmitiya', after the agreement which bound them to indentured service. Under its terms, they became free labourers after five years' service. Later they were joined in Fiji by a small number of free immigrants from the Punjab and Gujarat.

3.33 The humanitarian objections to the importation of indentured labourers led to the cessation of the system in 1916. The last of those already in Fiji were freed in 1920. The immigrants from the Indian sub-continent were British subjects. They were recognised by the British government as having the right to make their permanent homes in Fiji, as in other colonies.

3.34 After Cession, other Europeans came to Fiji to settle or to work for the colonial administration and the various companies which established themselves in the new colony. A number of Chinese arrived to establish agricultural and commercial ventures. During the period of colonial administration the people of

Banaba and some from Tuvalu were re-settled in Fiji. Other Pacific Islanders were also attracted by Fiji's relative prosperity. Some of these people made their permanent homes in Fiji. Many intermarried. Their descendants, together with more recent immigrants from all over the world, make up what has come to be recognised as Fiji's third community.

3.35 In this way were sown the seeds of Fiji's multiracial and multicultural society. Even within Fiji's two main communities, people are not as homogeneous as our short account might suggest. We prefer to use the term "multi-ethnic society" to describe the many strands making up the fabric of Fiji's present-day population. The latest census was taken in 1986. The 1996 census is being taken at present. Its results will begin to become available early in 1997. Table A in Appendix J compares the total population and its distribution among the three main communities at the time of the 1986 census, with the total population and its distribution as estimated at 31 December 1995 by the Bureau of Statistics. Table B shows projections based on the 1986 census of the number and percentages of people aged 18 and over as at 30 June 1996 and 30 June 1999. The figures are broken down to show distribution among ethnic groups.

3.36 The most important demographic features are the changes in the proportions of the three main communities. In 1986, 46% were indigenous Fijians, 49% were Indo-Fijians and 5% were from other ethnic groups. The present distribution is estimated to be indigenous Fijians 50.7%, Indo-Fijians 43.5% and other ethnic groups 5.8%. The projections show the following trends:

- continued growth in the population but at a low rate;
- growth in the labour supply;
- an increase in the population share of indigenous Fijians;
- a slowing in the growth of the school age population;
- an increase in the average age of the population.

3.37 We look at the advantages Fiji derives from the makeup and other characteristics of its population, as well as its other circumstances, when we consider how the country's constitutional arrangements can promote the economic and social advancement of all communities.

THE CRITERIA IN THE COMMISSION'S TERMS OF REFERENCE

3.38 The Commission began its review of the 1990 Constitution by closely examining the criteria in its Terms of Reference unanimously approved by Parliament. While the language suggested differences in the weight to be given

to each, the Commission saw the question of weight as becoming important only if the application of the criteria were to lead it to conflicting conclusions. Happily, this has not been the case. Taken together, all the criteria point the Commission in the same direction.

3.39 In essence, the criteria set goals. We are required to ascertain whether these goals can be achieved under the 1990 Constitution as it stands or whether changes are necessary. As can readily be seen from their terms, many of the goals concern the attitudes or expectations of individuals and groups. The country's constitutional arrangements can affect attitudes and expectations, but cannot impose them. Therefore, in pointing out the need for change in people's hearts and minds, we do not restrict ourselves solely to changes which can be brought about by the Constitution. Ultimately, however, we are required to recommend constitutional arrangements that will promote the desired goals. Our recommendations about the nature of constitutional arrangements for this purpose are set out at the end of this chapter.

Fiji's communities

3.40 The Commission's Terms of Reference refer to Fiji's "communities" and "ethnic groups" and describe some communities or groups as a "people". We do not think that the use of the different terms is intended to convey subtle distinctions between the status of a "community", an "ethnic group" and a "people". In this report, we similarly use all three terms as they are popularly understood, and, in the light of that understanding, regard an "ethnic community" as perhaps including various ethnic or other groups.

3.41 The modern approach to the identification of different groups or communities within a society is to move away from the unscientific concept of "race". "Ethnicity" is the term usually employed to distinguish groups of people within the state who, by reason of their descent, religion, place of origin or other shared attributes or beliefs, regard themselves as having a common identity. This approach permits people to stress different aspects of their ethnicity in different contexts. Being a member of an ethnic group depends both on self-identification by the individual person concerned and also on acceptance by the group itself.

3.42 Membership of an ethnic community or group does not prevent a person from being, at the same time, a member of sub- or cross-cutting communities or groups that reflect different facets of his or her identity. For example a Fijian may be a Methodist, a soccer player and a mother. An Indo-Fijian may be a Catholic,

a public servant and a weight lifter. These different facets of a person's identity mean that his or her interests are not limited to those stemming from ethnicity. They are likely to include many interests shared by members of other ethnic groups.

3.43 We discuss later in this chapter the connection between membership of an ethnic community and communal representation in Parliament, to the extent that it remains part of Fiji's electoral system. For the moment, we simply make the point that all ethnic communities make a valuable contribution to the national life of Fiji. This must be recognised. Only then can Fiji achieve racial harmony and national unity, as we shall now explain.

Promoting racial harmony and national unity

3.44 Racial harmony and national unity are two sides of the same coin. Both depend on the relations among ethnic communities. Racial harmony focusses on people's interaction when their different community identities are to the fore. National unity focusses on people's awareness of their common identity as members of the wider community composed of all citizens. People are unlikely to have a sense of national unity unless, at the same time, they have self-respect and self-confidence as members of their own community.

3.45 Racial harmony is not merely an absence of conflict. It connotes a positive attitude by the members of each community towards those of other communities, based on mutual respect and trust, a sympathetic appreciation of one another's values and traditions, and tolerance of different beliefs, customs and cultural attitudes. Trust, however, has to be earned. To be trusted one must be trustworthy.

3.46 The members of every community should respond positively to opportunities to widen their knowledge and understanding of the values, traditions, customs and ceremonies of other communities. Every community should be willing to share knowledge about its values and traditions with members of other communities and encourage them to follow its customs and take part in its ceremonies in appropriate ways.

3.47 National unity connotes a willingness of all communities to work towards common goals. It must be built on the existing foundation of shared interests and values, including the loyalty and commitment to the country of all its citizens. The shared citizenship of the members of the indigenous and the non-indigenous communities alike gives all of them the right to participate in national life and the conduct of government.

3.48 A first step in promoting racial harmony and national unity should be a Constitution which treats all citizens equally. National symbols such as the flag and the national anthem should be a unifying force. They should recognise the unique history and character of Fiji. This principle applies to the office of Head of State which has symbolic significance. The Fijian, Hindi and English languages should be equally respected.

3.49 Racial harmony and national unity should be promoted by reducing or eliminating sources of tension between communities. Their shared interests, values and priorities should be recognised. All communities are interdependent. Every community should therefore regard the major concerns of another community as national concerns, whose solution is essential in their own interests, as well as the interests of the whole country.

3.50 Political, religious and other community leaders, together with individual community members, have a responsibility, both in public and in private, to show good sense, moderation and sensitivity in their comments on, and behaviour towards, members of other communities. They should refrain from attributing characteristics to the members of other communities on the basis of a stereotype or the behaviour of a particular person. They should also refrain from displaying racial prejudice themselves or attributing racial prejudice to others.

3.51 Different communities in Fiji have different cultural traditions about voicing criticism. This can lead to difficulties because, in public life, the conduct of individuals and institutions often comes under attack. Fijians make important decisions in a highly structured way, showing great deference to their elders and chiefs. The tradition of Indo-Fijians encourages the free and frank debate on which democracy depends. Members of both communities should be conscious of, and make allowances for, these differences, while seeking to develop further an acceptable mode of vigorous discussion about matters of public importance.

3.52 Civil society, comprising the churches, educational institutions, professional bodies, trade unions, sports and social clubs and other non-governmental organisations and groups, has a vital role to play in promoting racial harmony and national unity. It can provide opportunities for members of different communities to learn about one another, speak one another's languages, and develop shared values and interests.

3.53 Finally, everything possible should be done to encourage economic growth and promote social justice so that all citizens have sufficient opportunities and adequate access to resources. Then, the sense of competition between communities

will be reduced. The diversity of Fiji's population should be seen as enriching its social and cultural life and strengthening its ability to compete in the world economy. We now turn to these important goals.

Promoting the economic and social advancement of all communities

3.54 Among Pacific Island countries, Fiji is well-placed, both socially and economically. Its advantages include

- a comparatively large population and territory;
- an equable climate, except for occasional cyclones or droughts;
- abundant natural resources and exceptional scenic beauty;
- a well-educated, friendly population, including a workforce with a wide range of professional and trade skills;
- an entrepreneurial class;
- health standards that have shown a significant improvement over time;
- a good physical infrastructure;
- a position at the hub of Pacific Islands' transport routes, tourism and commercial activity.

3.55 Despite these advantages, various aspects of Fiji's economic performance and social well-being give rise to concern. This emerges from the submissions and also from the statements and reports of government and international bodies. On the crucial economic issues there is little disagreement. Even so, it would not be appropriate for us to attempt any appraisal of Fiji's overall economic and social situation or seek to evaluate government policies.

3.56 Therefore, in looking at how Fiji's constitutional arrangements could promote the economic and social advancement of all communities, we shall concentrate on the problem areas where the nature and content of the Constitution are likely to make a difference.

The low level of private investment

3.57 One is the low level of private investment in Fiji. Vigorous economic growth depends heavily on the substantial ploughing back of resources into the economy through investment. Only in that way is it possible to build up the country's productive capacity. Although Fiji's economic performance has improved in recent years, the level of investment is still comparatively low.

3.58 Unless a country has economic growth, living standards cannot improve. The level of growth also affects the ability of government to provide for the community. Greater investment is essential to help overcome the problems that people referred to in their submissions, or, if that is not possible, to reduce their adverse impact.

3.59 The growth in unemployment was one of the problems mentioned by many. Only about 1,000 new jobs are being created each year in the formal employment sector. The number of school leavers is about 13,000, of whom about 8,000 actively seek employment. It is reasonable to suppose that the large gap contributes to both increasing poverty and the rising crime rate - other concerns raised in the submissions. Families and young people come into the urban areas in search of work. Many do not find it. Squatter settlements are growing. Some people turn to crime to support themselves.

3.60 Total investment in Fiji fell from 20% of GDP in 1985 to 13.6% in 1995. It is now well below the regional average. Most of the reduction in total investment is accounted for by a fall in private investment, despite the fact that the level of private saving has remained stable. Most commentators attribute the low levels of both domestic and foreign private investment in Fiji to weak investor confidence. No doubt many factors affect the confidence of both local and overseas investors, but political uncertainty is seen as a main one. Another is the comparatively low productivity of the labour force. A third is uncertainty about the security of property rights and the enforcement of contracts. We have looked at whether any of these concerns could be met or lessened by changes in Fiji's constitutional arrangements.

3.61 The submissions left us in no doubt that Fiji's present constitutional arrangements do contribute to political uncertainty. The feeling that they are not a satisfactory long-term basis for the country's government has a pervasive, destabilising effect. There is also disquiet about particular aspects of the Constitution, including the weighting of political representation in the House of Representatives in favour of Fijians discussed in Chapter 2; the reservation of a minimum 50% of public service and judicial positions at all levels for indigenous Fijians and Rotumans; and the constitutional direction to the government to establish affirmative action programmes for indigenous Fijians and Rotumans, without mention of the need to assist the disadvantaged members of other communities.

3.62 Fiji's present constitutional arrangements have undermined the confidence of many Indo-Fijians about the future in Fiji for themselves and their children.

These arrangements prevent the country from making good use of all the talent available and discourage some Indo-Fijians from making a long-term commitment through the investment of their savings. A low level of local investment tends to undermine the confidence of overseas investors.

3.63 The electoral arrangements under the Constitution also put obstacles in the way of the Government's implementation of policies that would contribute to investor confidence. The arrangements for the election of Fijian members to the House of Representatives favour rural Fijians in comparison with Fijians in urban areas. The heavily populated Western provinces are under-represented in comparison with other provinces. Taken together, these factors mean that narrow, provincial interests tend to overshadow the wider national interests on which effective economic and social policies must be based.

3.64 The second factor we have identified as contributing to investor uncertainty is a drop in the overall productivity of the labour force. Again there are a number of contributory reasons, most of which are not directly attributable to Fiji's constitutional arrangements. However, one factor in low productivity has been the scale on which skilled workers have emigrated since the 1987 *coups*. Between January 1987 and December 1995, the net outflow of Fiji residents was 53,532. That figure includes only people who indicated an intention to emigrate on their departure card. In fact many who departed temporarily in search of other opportunities did not return. One estimate of *implied* emigration is that it is 58% higher than the official figures.

3.65 Many of those who left had significant entrepreneurial and technical skills. In the private sector, skill shortages are evident in the areas of finance, tourism, engineering, telecommunications and business services. Our discussions with public sector administrators showed that there, too, there is a shortage of well-trained, experienced personnel. This shortage affects the education, health, legal and police services, as well as the efficiency of departmental administration.

3.66 There are many reasons why people decide to emigrate, particularly those who have the skills to make them acceptable as permanent residents in other countries and are able to find jobs there. A steady outflow must be expected from among the best-qualified members of all ethnic communities.

3.67 In the period between 1987 and 1995, the official figures showed a net outflow of 2,501 Fijians, 40,113 Indo-Fijians and 2,401 from other communities. It is reasonable to suppose that many of the Indo-Fijians who left did so out of a sense of insecurity about their future in Fiji.

3.68 A country which loses a disproportionate number of its skilled people suffers a severe direct loss on the investment it has made in training them, as well as losing the benefit of their future input into the economy. If they have to be replaced by people from overseas, the cost is several times greater. If they are replaced by less-skilled, inexperienced workers, there is also a high cost in reduced productivity.

3.69 The third factor contributing to insecurity, both among citizens and also potential foreign investors, is uncertainty about property and contract rights, particularly as they relate to land. If land is a necessary ingredient of an investment, as it is for agriculture, including sugar production, forestry and tourist accommodation, investors need security of tenure, either through ownership of the freehold or secure, long term leases.

3.70 We do not think that the uncertainties for investors who need to lease land can be directly addressed in the Constitution. However, as a main concern of the Indo-Fijian community, we refer to it later in this chapter and make recommendations in Chapter 17 about the process that might be followed in seeking a solution. There is, of course, no question of dealing with the problems of lessees by interfering with the land rights of Fijians. Indo-Fijians, in particular, stressed that those rights were sacrosanct. They accepted that they and their descendants would always remain tenant-farmers of the land.

3.71 However, the Constitution can strengthen, as against the state, the rights of all persons who own or have an interest in land, whether they are Fijians with customary land rights, other owners of the freehold or lease-holders. At present the state has an unfettered power to take land compulsorily for a public purpose, subject to the payment of prompt and adequate compensation. We believe that this power should be severely limited. This will give greater security to all who own or lease land. It will reassure Fijians that their land is not at risk if governments become multi-ethnic. Our detailed recommendation is made in Chapter 7.

3.72 We consider that investor confidence would be increased if new constitutional arrangements provided greater political certainty, and gave those in a position to emigrate a greater sense of security about their future in Fiji. We also hope that, as explained in Chapter 2, our recommended changes to Fiji's constitutional arrangements will lead to the emergence of broadly-supported multi-ethnic governments. In itself that will enhance the government's credibility in implementing effective economic and social policies in all areas of concern.

The need for enhanced international competitiveness

3.73 We have dwelt on Fiji's need to improve levels of investment (among other ways of promoting economic growth) because the international terms of trade are likely to move against Fiji. Changing external conditions include the global trade liberalisation under the auspices of the World Trade Organisation, the effect on Fiji exporters of trade liberalisation in Australia and New Zealand, and, eventually, the likelihood of some reduction in the price Fiji receives for its sugar, nearly half of which is now sold at well above world market prices. Producers in Fiji will have to be more innovative and competitive to sell their products at a profit on world markets.

3.74 This makes it more important than ever for Fiji to put its own house in order by revising its constitutional arrangements. There are many things its people and government can do, working together in a constructive partnership, to take full advantage of the country's agriculture, fisheries, forestry, mining, tourism, manufacturing and business services potential. At the moment, however, we see the lack of cohesion among the ethnic communities in the institutions and operations of government as placing Fiji under a grave handicap - like a man working hard, but with one hand tied behind his back.

Bearing in mind internationally recognised principles and standards of individual and group rights

3.75 In reviewing the 1990 Constitution and recommending future constitutional arrangements for the people of Fiji, the Commission is required to bear in mind internationally recognised principles and standards of individual and group rights ("the international standards"). They are to be found mainly in the widely accepted international human rights instruments often called the *International Bill of Human Rights*. This name signifies that these instruments are regarded as setting out generally accepted principles of international law binding on all states whether or not they have accepted a particular treaty.

3.76 In addition, we have looked at the international instruments or draft instruments dealing with the rights of indigenous peoples although they do not yet form part of the *International Bill of Human Rights*.

3.77 The content of the international standards has to be ascertained by examining treaties and other instruments within the framework of international law. While the Commission paid close attention to the provisions of treaties to which Fiji is a contracting party (signified by an asterisk in the list below), it

concluded that it should give equal weights to treaties to which Fiji is not a party and provisions of treaties in respect of which Fiji has entered a reservation (signified by the # sign). To do otherwise would be inconsistent with the direction in its Terms of Reference and ignore the way in which the international community makes judgments about the human rights situation in particular countries.

3.78 The instruments studied by the Commission as sources of the international standards included the following:

General instruments

Charter of the United Nations*
Universal Declaration of Human Rights
International Covenant on Civil and Political Rights
International Covenant on Economic, Social and Cultural Rights
Apartheid Convention
Convention on the Elimination of All Forms of Racial Discrimination*#
Convention on the Elimination of All Forms of Discrimination against Women*#
Convention on the Rights of the Child*
Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities
ILO Convention No 169 on Indigenous and Tribal Peoples
Draft Declaration on the Rights of Indigenous Peoples

Regional Instruments

European Convention on Human Rights
American Convention on Human Rights
African Charter on Human and Peoples' Rights.

The Commission examined other international instruments where relevant in a particular context. It also took state practice into account, as showing whether or not a proclaimed international standard is in fact generally adhered to.

3.79 In reviewing the 1990 Constitution, the Commission has identified the provisions which appear to conflict with, or not to give adequate protection to, the international standards. In formulating its recommendations for changes, it has borne the international standards in mind. In fact, the Commission found that there was no significant area where the international standards appear to clash with what is in the best interests of Fiji.

3.80 The international standards are particularly relevant in the following contexts:

- the structure of the political system, with particular reference to communal representation;
- the affirmation of fundamental rights and freedoms, including
  - the question of which rights and freedoms should be constitutionally protected,
  - the grounds on which protected rights and freedoms may be limited,
  - the prohibited grounds of discrimination,
  - the authorisation of affirmative action, to the extent that it conflicts with freedom from discrimination, and
  - derogations from fundamental rights in time of emergency;
- any constitutional recognition of particular religions or languages;
- the protection of the special rights of indigenous Fijians and Rotumans and of minorities;
- the acquisition and loss of citizenship.

3.81 For the most part, we discuss the application of the international standards in the relevant context in the following chapters of the report. In this chapter, however, we look at the way in which the international standards bear on the political rights of individuals and groups. That issue is fundamental to our inquiry.

The political rights of individuals and groups

3.82 The international standards make it clear that political rights are human rights. A number of international human rights instruments expressly recognise political rights.

3.83 Article 21 of the *Universal Declaration of Human Rights* provides that

> (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. ...
>
> (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

3.84 Article 25 of the *International Covenant on Civil and Political Rights* provides as follows:

> Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 [discrimination on the listed grounds or other status] 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;

3.85 The *First Protocol* to the *European Convention on Human Rights* provides in Article 3:

> The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

3.86 Article 5 of the *International Convention on the Elimination of all forms of Racial Discrimination*, to which Fiji is a party, provides as follows:

> In compliance with the fundamental obligations laid down in article 2, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: ...
>
> c. Political rights, in particular the rights to participate in elections, to vote and to stand for election on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;

The Government of Fiji maintains the following reservation to the *Racial Discrimination Convention*:

> To the extent, if any, that any law relating to elections in Fiji may not fulfil the obligations referred to in Article 5(c) ... the Government of Fiji reserves the right not to implement the aforementioned provisions of the Convention.

3.87 Because some of the submissions laid considerable emphasis on the political rights of Fijians and Rotumans as the indigenous people, the Commission also carefully examined the provisions of both *ILO Convention No 169 on Indigenous and Tribal Peoples* and the draft *Declaration on the Rights of Indigenous Peoples*. The last-mentioned instrument is still under negotiation in

United Nations bodies. Therefore it cannot be regarded as an authoritative source of the international standards. Nevertheless, the Commission gave full weight to its provisions.

3.88 *ILO Convention No 169 on Indigenous and Tribal Peoples* was adopted in June 1989 as a revision of *ILO Convention No 107 on Indigenous and Tribal Populations*. The latter had addressed the living and working conditions of indigenous and tribal peoples but had assumed that all relevant decisions would be taken by the government and that indigenous and tribal peoples would eventually be assimilated into the wider community. When this approach became discredited, the ILO adopted *Convention No 169* which assumes that indigenous and tribal peoples will continue to have a separate identity within their national society. However, that *Convention*, too, has failed to attract wide support in the international community.

3.89 The draft *Declaration on the Rights of Indigenous Peoples* originated from a sub-commission of the United Nations Commission on Human Rights. The process of its negotiation has involved representatives of indigenous peoples themselves. Its focus is on recognising greater autonomy for such peoples within the states in which they and their lands are now situated. The draft is now under consideration by the United Nations Economic and Social Council.

3.90 The Commission took the provisions of each instrument into account in the following contexts dealt with elsewhere in this report:

- the protection of the land rights of the Fijian, Rotuman and Banaban peoples and provision for their separate governance, dealt with in Chapter 17;
- affirmative action programmes for the benefit of Fijians and Rotumans, dealt with in Chapter 8;
- rights in connection with the exploitation of natural resources such as minerals, dealt with in Chapter 17.

3.91 Neither instrument assumes that tribal and indigenous peoples will necessarily be a minority in the country where they live. However, they are concerned with situations in which the land, culture and separate identity of indigenous peoples may be at risk from situations comparable with those faced by Hawaiians, Maori and Australian aborigines as a result of colonisation. For that reason they are not wholly relevant to indigenous Fijians. During the colonial period, Fijian land and distinct identity were protected, and are still protected, by

the Native Lands Act and the Fijian Affairs Act. Since before independence, indigenous Fijians have had a full part in their country's government.

3.92 The two instruments focus on the special rights of indigenous peoples as a distinct community, but make it clear that indigenous people also enjoy equal rights with all other members of society. For example, Article 2 of *Convention 169* requires governments to take measures for

> ensuring that members of these peoples benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population.

Article 3(1) provides:

> Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. ...

Similarly, Article 1 of the draft *Declaration* provides:

> Indigenous peoples have the right to the full and effective enjoyment of all human rights and fundamental freedoms recognised in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

Article 4 provides:

> Indigenous peoples have the right to maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal systems, while retaining their rights to participate fully, if they so choose, in the political, social and cultural life of the State.

3.93 The clear inference is that, at the national level, the political and other rights of indigenous peoples are on exactly the same footing as those of other members of the national society. Both instruments see the special rights of indigenous peoples as distinct communities as supplementing the fundamental human rights and freedoms they already share with all other citizens. Nothing in either instrument gives an indigenous people superior or paramount rights in taking part in the government of their country.

3.94 Because of its importance, we considered the significance of a right of indigenous peoples to "self-determination". In drawing up *Convention No 169* on indigenous or tribal "peoples", the International Labour Organisation was careful expressly to exclude "any implications as regards the rights which may attach to the term [people] under international law". The draft *Declaration*, however, provides in Article 3:

> Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

The right of an indigenous people to "freely determine their political status" must be read in context. It refers to their political status in taking control over their own affairs, not to their political status as it affects their participation in the national government.

3.95 The reference to self-determination revives in the minds of some governments the battle they fought and lost in seeking to keep a reference to a right of self-determination of all peoples out of the *International Covenants*. Then, the emphasis was on the right of non-self-governing peoples to self-government or independence. Now, references to the right to self-determination of a distinct "people" within a national society create fears that the people may claim the right to secede and form a new state of their own. We think that, for indigenous peoples, self-determination has more positive connotations than a focus on the question of secession would suggest. The issue is still to be settled in United Nations forums.

3.96 "The principle of the equal rights and self-determination of peoples" is referred to in Article 1(2) of the *United Nations Charter*, and again in Article 55. It will always be invoked whenever a people wish to maintain their group identity and express it politically. However, nothing in United Nations doctrine supports a claim that a right to self-determination entitles a particular "people" within a country, whether or not indigenous, to exercise political domination over other "peoples" or citizens.

3.97 It is convenient to refer at this point to suggestions in the submissions that "sovereignty" still resides or ought to reside in the Fijian people or their chiefs by virtue of the Deed of Cession, and justifies constitutional provisions guaranteeing Fijian political paramountcy. People sought to draw analogies with the position of Maori under the *Treaty of Waitangi*.

3.98 Today, many New Zealanders would acknowledge that Maori deserve a special place and treatment within the legal system, both as the people of the land and by virtue of their *Treaty* rights. However, although some Maori often couch their claims to that special place and treatment in terms of their "sovereignty", neither the courts nor the Waitangi Tribunal have taken that approach. Two quotations will suffice, the first from a decision of the Court of Appeal, and the second from a report of the Waitangi Tribunal:

> On the Maori side it has to be understood that the Treaty gave the Queen government, Kawanatanga, and foresaw continuing immigration. The

> development of New Zealand as a nation has been largely due to that immigration. Maori must recognise that it flowed from the Treaty and both the history and the economy of the country rule out extravagant claims in the democracy now shared. (*Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513,530. Court of Appeal, Cooke P)
>
> From the Treaty as a whole it is obvious that it does not purport to describe a continuing relationship between sovereign states. Its purpose and effect was the reverse, to provide for the relinquishment by Maori of their sovereign status and to guarantee their protection upon becoming subjects of the Crown. In any event on reading the Maori text in the light of contemporary statements we are satisfied that sovereignty was ceded. Tino rangatiratanga [literally, full chieftainship] therefore refers not to separate sovereignty but to tribal self-management on lines similar to what we understand by local government. (*Muriwhenua Fishing Report* Wai 22,1988, 187.)

The Tribunal which produced the *Muriwhenua Report* comprised the Chairman, Chief Judge Durie, Bishop Manuhuia Bennett, the late Sir Monita Delamere, Georgina Te Heu Heu, M P K Sorrenson and W M Wilson.

3.99 The Commission does not go so far as to say that the concept of "sovereignty" can never legitimately be invoked to support the right of groups to form a political community. In this context it has a powerful symbolism. We are simply saying that no political community, by reference to either "self-determination" or "sovereignty", can legitimately claim that it has political rights which entitle it to a position of dominance over other groups forming part of the same national society.

3.100 After studying the international instruments and other material evidencing the international standards, the Commission reaches the following conclusions:

- The express recognition of individual political rights in an international instrument, without mention of group rights, does not necessarily mean that group political rights are unlawful at international law.
- The international focus of political rights is on the provision for the election of the legislature, as distinct from the executive, and on the main law-making body if there are two chambers. It is sufficient if persons appointed to political office in the second chamber or the executive are in some way accountable to the people's representatives elected on the basis of equal suffrage.

- The concept of "equal suffrage" means that, within reasonable limits, every vote is to be given the same weight. It does not imply that every vote must have the same effect in electing members of Parliament. Therefore it does not mandate a particular system for translating votes into seats.
- When the effect of votes is skewed by gerrymandering that discriminates against certain groups of voters or is otherwise void of all reasonable justification, this violates the principle of equal suffrage.
- In giving effect to the virtually universally recognised principles of equality of treatment and equal suffrage, voting arrangements based on group identity for which voluntary affiliation is possible, do not appear, in themselves, to be unlawful.
- International law allows to states a "margin of appreciation" in determining what constitutional arrangements are reasonable in a particular society, in the light of its cultural and other characteristics.
- In particular, the international standards appear to allow considerable latitude for national political systems to accommodate groups based on racial or ethnic factors as a way of ensuring their representation, as long as these arrangements
  - are not explicitly and permanently racially-based, and
  - do not have the intention and effect of reducing the voting power of a particular group.
- Short-term differentiations based on race and ethnicity may be lawful if, historically, they have been generally accepted as the basis of political representation. Constitutional or other legal regimes may not, however, be explicitly based on them or operate so as to segregate racially. Ultimately, the international legality of the arrangements will turn on their reasonableness in their unique context.

3.101 Some may wonder why the international standards are seen as relevant to the decisions that the people of Fiji must make for themselves about their own constitutional arrangements. The answer is that they are the standards by which the outside world will judge Fiji and also the standards by which the people of Fiji have chosen to judge themselves. The international human rights movement is based on the willingness of states to undertake obligations about the way in which

they will treat their own citizens, and the vigilance of the international community in holding states to their international human rights obligations.

3.102 In making decisions about aid and trade relationships, as well as political ties, other governments can be expected to take Fiji's human rights record into account. Human rights concerns can also affect private foreign investors, not only because they may affect the country's political stability, but also because individual shareholders increasingly focus on human rights and environmental issues in giving directions to management about investment portfolios.

3.103 However, the main reason why the people of Fiji should take the international standards into account is because they are themselves loyal members of the international community. Fiji has become a party to some of the main human rights instruments, although with some reservations. By its membership of the United Nations, Fiji has bound itself in general terms to promote and encourage respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. As an aspect of Fiji's United Nations membership, its people have taken a particular responsibility for peace-keeping operations, often in countries torn by racial strife, and at a cost to their own lives. Many of them have seen for themselves the terrible consequences of failing to respect the human rights of all a country's citizens. It would be strange if they did not take this lesson to heart by agreeing to apply human rights norms in governing their own country.

Rights, interests and concerns

3.104 As soon as the Commission began to discuss the kind of constitutional arrangements which seem likely to meet the needs of all people in Fiji, it was inevitably dealing with the rights, interests and concerns of indigenous Fijians and Rotumans, as well as those of other ethnic communities. Therefore this and the next section will be a stocktaking. How does the Commission see its broad approach as guaranteeing the rights, promoting the interests and meeting the concerns of Fijians and Rotumans as well as those of other communities ?

3.105 People sometimes speak of moral rights or natural rights, as well as legal rights. It is clear, however, that, in our terms of reference, "rights" mean legal rights. We have taken the term to mean existing rights under the Constitution or other law of Fiji, or rights recognised at international law. When we talk of recognising "new" rights, it is because there is a sound basis for protecting an interest by a legally enforceable right.

3.106 We have also thought about whether it is possible to draw a precise line between interests and concerns, but have concluded that it is not. We therefore propose to treat all concerns as giving rise to interests.

Guaranteeing full protection and promotion of the rights, interests and concerns of the indigenous Fijian and Rotuman people

3.107 What are Fijian rights? One is their right to their land guaranteed through the recognition in the Native Lands Act of customary title. The Native Land Trust Act provides that Fijians may not dispose of their land except to the government or through the Native Land Trust Board.

3.108 *ILO Convention No 169* and the draft *Declaration on the Rights of Indigenous Peoples* both recognise that the land rights of an indigenous people may need to be protected by restrictions on their right to dispose of their land. Otherwise there is a danger that people may part with their land for short-term gain, to the detriment of future generations. As we explain below, the mechanism of the Native Land Trust Board, devised by Ratu Sir Lala Sukuna, benefits all communities. Fijian traditional fishing rights are protected by the Fisheries Act. The 1990 Constitution gives all landowners, including indigenous Fijians, the right to a share of the royalties from the exploitation of minerals in the subsoil of their land or the seabed over which they have traditional fishing rights.

3.109 Fijians also have rights to their traditional chiefly institutions, including the Bose Levu Vakaturaga, and the other separate administrative systems set up for their governance under the Fijian Affairs Act. We propose that the Bose Levu Vakaturaga, and its membership and functions should be provided for in the Constitution itself. Otherwise the Fijian Affairs Act should be retained in its present form until Fijians wish to revise it. We mention in Chapter 17 some contexts in which review seems desirable. In the same chapter we also propose a voluntary dispute-settlement mechanism which will enable Fijians (and others) who so agree, to settle their relatively minor disputes in accordance with Fijian traditional practice.

3.110 Rotumans have similar rights to Fijians to the protection of their land and the arrangements for their government as a separate community. Again, review may be desirable, specially in the case of the legislation relating to Rotuma. Better communications have made some of the existing provisions thoroughly out of date. Chapter 17 deals in detail with the rights, interests and concerns specific to Rotumans.

3.111 Provision should be made to ensure that all entrenched legislation for the benefit of particular communities or groups may be amended only with the participation of their representatives. Our recommendations about the process are set out in Chapter 20.

3.112 The 1990 Constitution places on governments and Parliament a duty to implement affirmative action programmes for the benefit of Fijians and Rotumans. The purpose is to turn around their continuing inability to break into the commercial life of Fiji in significant numbers as entrepreneurs or proprietors. Any duty gives rise to rights for those whom it benefits. We think the duty on the part of governments and the corresponding rights for Fijians and Rotumans should remain, though the government should also be required to put in place social justice programmes for the benefit of disadvantaged individuals or groups in all communities. The allocation of resources among the different programmes should be one that all communities can accept as broadly fair. We spell out this approach in Chapters 5 and 8.

3.113 Foremost among Fijian and Rotuman interests are the propositions about Fijian paramountcy. Some submissions argued that Fijians have a *right* to the paramountcy of their interests, and specifically to political paramountcy. The arguments reflected the universal tendency, in a negotiating forum, to maintain that interests are backed by rights. We believe, however, that arguing for paramountcy as a right, not an interest, turns a strong case into a weak one.

3.114 We have found no basis on which the paramountcy of Fijian interests or Fijian political paramountcy can be elevated into a right. As explained in the last section of this chapter, the international standards, including the two instruments dealing with the rights of indigenous peoples and the concepts of "self-determination" and "sovereignty", give no support to that proposition. On the contrary, arrangements for the election of members of Parliament that involve a weighting in favour of Fijians conflict with the international standards. They are also inconsistent with the goals of promoting racial harmony and national unity, and the economic and social advancement of all communities. These findings strengthen the overwhelming interest of all communities in working towards genuinely multi-ethnic governments.

3.115 In Chapter 2 we looked at the context in which the paramountcy of Fijian interests was first articulated as a matter of principle. Fijians then formed the view that, to protect their interests, they needed to have political paramountcy. The Commission has suggested that, if the Constitution can give Fijians an

assurance that their *interests* will be treated as paramount, they will have a basis for reconsidering the question of *political paramountcy*. Because the principle that Fijian interests are paramount makes it clear that the interests of other communities must also be taken into account, we look at the means of reconciling the interests of all communities in a later section of this chapter.

3.116 We also recommended in Chapter 2 that the people of Fiji should move gradually but decisively away from the system of communal representation. We said "gradually", because it would be difficult to move immediately from Fiji's present electoral arrangements to a system which did not reserve any seats for communities. We propose that communal representation should be phased out as not being in the best interests of any ethnic community, including Fijians and Rotumans, or the country as a whole. However, to provide reassurance to all communities which at present have communal seats, some reserved seats should be retained as a transitional measure.

3.117 The allocation should be based on the proportions in which the community is represented in the population as a whole, but some account should be taken of historical and other factors, so far as relevant. In our view, the international standards are sufficiently flexible to accommodate such a process of adjustment. Our detailed proposals are set out in Chapter 9.

3.118 Fijians also have a special interest in the office of President. It was widely held among all communities that the holder of the office should be Fijian. We recommend in Chapter 9 that the Bose Levu Vakaturaga should nominate three to five candidates who are indigenous Fijians. The President, and a Vice-President from another community, should be elected by both Houses of Parliament coming together as an electoral college. In this way the President will be seen as representing all communities. The office should continue to carry with it the duties of Head of State and of providing moral leadership to the nation.

3.119 Fijians and Rotumans have an interest in making sure that they are proportionately represented in all aspects of state service. But, apart from the office of President, no positions or proportion of public offices should be reserved for the members of a particular community. Again, such reservations are contrary to the international standards. We propose, however, that proportionality of representation should be listed in the Constitution among the factors to be taken into account in appointing, promoting and managing the state services. If, after taking occupational preferences into account, a particular community is found not to be represented in any area of service to the state or at any level of service, in

proportion to its population share, its under-representation should be addressed by affirmative action.

3.120 The remaining special interest of Fijians and Rotumans that calls for comment is the proposal of some that the Constitution should declare Fiji to be a Christian state. This proposal said more about the Fijian sense of identity than about the constitutional effect of such a declaration.

3.121 Those who supported the proposal argued that it was unobjectionable because people of other faiths would retain their freedom to practise them. Those who opposed the proposal saw it as unnecessarily divisive. The argument on both sides was linked to arguments about the desirability or otherwise of continuing the so-called "Sunday ban". That was not a constitutional issue and has since been resolved.

3.122 We believe there are strong arguments for maintaining the separation of church and state. Such a separation avoids any suggestion that a community whose members mainly belong to a particular religion is entitled to political control of the state, or that the state should support that religion financially, in preference to other religions. Church and state should each be free to carry out their roles with integrity and without risk of being drawn into an exploitive relationship. The preamble to the Constitution should, however, continue to reflect the importance of Christianity in Fiji, as well as the universal love of God shared by people of all religious faiths.

Having full regard for the rights, interests and concerns of all other ethnic communities

3.123 Inevitably, the discussion of Fijian and Rotuman rights and interests just completed deals also with how those rights and interests should be reconciled with those of other communities. In fact we do not see any competing rights. Members of other communities are unanimous in agreeing that Fijian rights to land must be protected.

3.124 Members of all communities already have constitutionally protected rights as landlords or tenants under the Agricultural Landlord and Tenants Act. Some people have the impression that that Act itself expires along with the leases to which it applies. That is not the case. Landlords and tenants will remain entitled to its protection including the provision for compensation for improvements if a lease is not renewed. The Act should continue to be protected by constitutional entrenchment in a way that gives representatives of their interests a veto power.

3.125 As mentioned earlier, those seeking to renew or enter into leases of native land also have a strong interest in the maintenance of the Native Land Trust Act as long as that is the wish of indigenous Fijians. Under that Act, a state institution is empowered to negotiate on behalf of the landowners. This means that the interests of individual tenants as well as the overall effect on the economy can be taken into account along with the interests of landowners.

3.126 The government has announced that, as a matter of policy, it will not again extend the terms of leases globally, by statute. That policy reflects the provisions of the Native Land Trust Act which requires the land needs of the land-owning unit to be considered on an individual basis. We have already stated that security of tenure for tenants is not a constitutional question. Nevertheless, the need for greater security was a major issue raised in the submissions. We consider that an all-party process should be put in train for reaching agreement on governing principles that are acceptable both to landowners and tenants. We make detailed recommendations in Chapter 17.

3.127 Otherwise, the rights of members of other ethnic communities are essentially the rights of all citizens. In the final section of this paper we look briefly at why some Fijians find it difficult to accept that non-Fijians have the same rights as Fijians and Rotumans. We are in no doubt, however, that the Constitution must be based firmly on the equal rights of all citizens of Fiji.

3.128 The only justification for departing from this principle would be the need to put in place transitional arrangements for phasing out the present weighted communal representation. Even then, the principle of equal franchise should be adhered to as closely as possible.

3.129 Submissions from some minority groups stated that the way in which they are assigned to communities for voting purposes does not give them adequate opportunities for representation or, in some cases, accurately reflect their personal sense of ethnic identity. For its part, the Commission considers that a clear distinction should be made between a person's ethnic identity in the sense explained in an earlier section of this chapter, and his or her membership of a community for the purpose of communal representation in Parliament.

3.130 We have already explained our view that, to encourage the emergence of multi-ethnic governments, the people of Fiji must move gradually but decisively away from communal representation. Limited communal representation should remain for the time being, but only for the purpose of bringing about an acceptable

transition to a more open system for electing members of Parliament. In these circumstances, the Commission does not favour placing even greater stress on ethnic identity for representation purposes by allocating seats to groups which are not at present separately represented.

3.131 It considers, however, that, so long as an element of communal representation remains, an attempt should be made to ameliorate, so far as possible, any adverse consequences of the present definitions of communities for voting purposes. The remedial measures should include giving persons of mixed descent the same option that Rotumans already have to classify themselves by reference to the ethnicity of either their mother or their father. Pacific Islanders should again vote as part of the Fijian community. Six seats should be set aside in the Upper House of Parliament to be filled by the appointment of members of ethnic communities or other groups, including women, who do not obtain adequate representation through the electoral process. Our proposals are set out in detail in Chapter 10.

3.132 Just as Fijians and Rotumans should continue to have a right to the benefit of affirmative action programmes for the purpose of enhancing their participation in all aspects of the life of Fiji, so also should the disadvantaged members of all ethnic communities and groups have a right to programmes for social justice. We have made the point that the allocation of resources between different programmes must be one which all communities can accept. Our detailed proposals are spelt out in Chapters 5 and 8.

3.133 The interests of non-indigenous communities in the office of President, the need to maintain proportionality in the representation of all ethnic communities in all aspects of state service, and the separation of Church and State have already been referred to in discussing the rights and interests of Fijians and Rotumans.

Reconciling the interests of different communities

3.134 We now consider how the Commission's recommendation that the Constitution should recognise the principle that the interests of Fijians are paramount, would affect other communities. The object of the principle is to ensure that Fijian interests are not subordinated to the interests of any other community. We emphasise, however, that the thrust of the principle is protective. It can never justify ignoring or riding roughshod over other communities' interests.

3.135 For this reason it should be agreed that the interests of all communities will be protected by another principle - one that has emerged in both international law and domestic law as a means of dealing with the complex nature of competing

interests in the modern world. That is the principle that, if interests are seen to conflict, the interested parties must negotiate in good faith in an endeavour to reach agreement. We believe that this principle should apply to the resolution of any conflicts of interest among the ethnic communities in Fiji.

3.136 Negotiations are likely to be necessary about the formation of a multi-ethnic government. They may also be required on important or sensitive matters arising from a government's conduct of the affairs of the nation through the promotion of legislation or the implementation of its policies in other ways. In Chapter 5 we recommend a constitutional provision to deal with these and related matters. It takes the form of a *Compact* among all the people of Fiji. The principle that Fijian interests are paramount should operate in the context of the negotiations which the *Compact* would require.

3.137 Representatives of the General Voters community made the point in a submission that Fijian concerns about paramountcy, in whatever form they are expressed, are not manifestations of an ambition to be racially supreme but expressions of an indigenous people's yearning for survival. Seen in that light, the principle that Fijian interests are paramount, formulated as we have suggested and applying in the context of negotiations, is not contrary to the interests of other ethnic communities. We believe that other ethnic communities should reaffirm their acceptance of it.

The equal rights of all citizens

3.138 We have given much thought to how the different world views of Fijians and members of other communities can be brought together to create a shared vision of the future. Some Fijian interests, including those in their land, and the preservation of Fijian traditions and institutions, including the pre-eminent place of the Bose Levu Vakaturaga, are backed by rights and can easily be given constitutional protection. Other Fijian interests are intangible, especially their desire for their country to remain visibly Fijian in the face it presents to the world. The two are connected, because to many Fijians the ownership of their land in accordance with Fijian custom is what makes them Fijians.

3.139 Not surprisingly, therefore, some see the ownership of the land and ownership of the country as one and the same. They find it difficult to accept that those who do not own the land have the same rights of citizenship, including the right to take part in government, as those who do. Non-Fijians are seen as vulagi, to be treated hospitably, even generously. They should be given the right to make their homes permanently in Fiji, should be allowed to take part in its commercial life, but should not be admitted fully into its decision-making processes. Those

should be reserved for the indigenous people who are the owners of the land. Time and again Fijian submissions likened Fiji to a house. The owner will gladly invite his guests to join him in the living room but not to share the family's private quarters. How then can Indo-Fijians think they have a right to take part in the country's government?

3.140 This way of thinking is understandable in the cultural context in which it is expressed, hurtful though it is to third or fourth generation Indo-Fijians. They, too, see Fiji as their only home and give it their loyalty. Of course they retain many of their own cultural and religious traditions, but they are also adapting to the fact that they are citizens of a multi-ethnic country incorporating Fijian values and culture. Their labour, originally in conditions not far removed from slavery, helped to build this house of modern Fiji.

3.141 Certainly, the foundation of the house is the continuing Fijian ownership of most of the land. Indo-Fijians accept and respect that fact. But, building on that foundation, they have made an essential contribution to the house itself. That is not to dismiss the justified concern among Fijians that, in the commercial sector of the country's economy, Fijians have lagged behind. That gap must be narrowed. But its existence is not a justification for shutting the Indo-Fijian community out of participation in their country's government. Everyone who is a Fiji citizen must have equal rights.

3.142 Among Pacific Island nations, Fiji is uniquely blessed in its combination of natural and human resources. Its citizens can maximise the opportunities to improve the well-being of all communities only if the contribution of each community is equally valued and equally reflected in the country's constitutional arrangements.

RECOMMENDATIONS

8. The Constitution should:

- **(a) enable the people of Fiji to make a fresh start in providing for the government of their country;**
- **(b) be generally acceptable to all citizens;**
- **(c) control the actions of governments;**
- **(d) guarantee the rights of individuals and groups;**
- **(e) promote important values such as the rule of law and the separation of powers;**
- **(f) act as an enduring basis for government.**

(g) **be written in accessible language and translated into Fijian and Hindi.**

9. **In order to promote racial harmony and national unity and the economic and social advancement of all communities; take account of the international standards concerning individual and group rights; and guarantee the rights, protect the interests and meet the concerns of the indigenous Fijian and Rotuman people and those of all other communities and groups, the Constitution should:**

(a) **ensure that the office of Head of State and national symbols, such as the flag and the national anthem, have a unifying force: they should recognise the unique history and character of Fiji;**

(b) **provide a basis on which all citizens can describe themselves by a common name;**

(c) **encourage every community to regard the major concerns of other communities as national concerns;**

(d) **increase investor confidence by providing greater political certainty and reassuring all citizens that they and their children have a secure future in the Fiji Islands;**

(e) **provide for the election of the Lower House of Parliament on the basis of equal suffrage;**

(f) **retain some communal representation, based on the distribution of communities in the total population, as a transitional measure;**

(g) **maintain the separation of church and state, while reflecting the importance of Christianity and all other spiritual traditions present in Fiji;**

(h) **recognise the equal rights of all citizens.**

10. **The Constitution should recognise the principle that, in order to resolve any conflicts of interest among communities and groups in Fiji, the parties should negotiate in good faith in an endeavour to reach agreement. All communities should affirm their willingness, in such negotiations, to apply the paramountcy of Fijian interests as a protective principle, with the object of ensuring that those interests are not subordinated to the interests of other communities.**

4

HOW THE COMMISSION WENT ABOUT ITS TASK

PLAN OF WORK

4.1 The Commission decided to carry out its work in three phases: the first focussed on gathering and analysing information; the second on reviewing the Constitution and reaching policy decisions about whether, and if so how, it needed to be improved; and the third on writing its report. In accordance with that plan, it carried out the activities described in the remainder of this chapter.

MEETINGS WITH THE PRESIDENT, THE PRIME MINISTER AND THE LEADER OF THE OPPOSITION

4.2 The Chairman of the Commission, sometimes accompanied by its other members, made regular reports about the progress of the Commission's work to the Prime Minister, as Minister in charge of Constitutional Affairs. With his permission, there were occasional meetings for the same purpose with His Excellency the President and with the Leader of the Opposition. The Commission would like to express its appreciation to all of them for their courtesy and their encouragement in what has been a demanding task.

MEETING WITH THE JOINT PARLIAMENTARY COMMITTEE

4.3 On 16 June 1995, the Commission met with the members of the Joint Parliamentary Committee which had been instrumental in securing Parliament's agreement on its setting up, composition and Terms of Reference. The purpose of the meeting was to brief the Committee about the way in which the Commission planned to carry out its work.

PUBLIC HEARINGS

4.4 The Commission made an early decision to hold public hearings in all parts of Fiji so that all citizens would have the opportunity to inform it of their views on the 1990 Constitution in the light of the important considerations in its Terms of Reference. We considered it important that a public and open process should be followed in obtaining input from Fiji's citizens. A list of the places and dates of public hearings is set out in Appendix C. The Commission also held

closed meetings with the persons and groups that had asked for an opportunity to make submissions on a confidential basis.

SUBMISSIONS

4.5 In all, the Commission received some 852 submissions. The majority were in writing, but in most cases the persons or groups making the submission appeared in support of it at a public hearing. In addition, a number of people made oral submissions. We express our thanks to our interpreters who translated into English the oral and written submissions made in Fijian or Hindi.

4.6 The Commission is deeply appreciative of both the number and the variety of people who took the trouble to make their views known to it in this way. In some cases they incurred the expense of engaging counsel to help them in presenting their views.

4.7 For many who appeared in person it was perhaps the first occasion on which they had expressed their thoughts about their country's constitutional arrangements at a public gathering. Some came a long distance to do so. For most, making a submission involved a personal effort and sometimes a monetary cost. But from their words the Commission obtained a picture of the hopes and concerns of the people of Fiji about their country's future. It has tried to take these into full account in making its recommendations.

4.8 Appendix D lists the individuals and organisations that made submissions. It is impossible to reflect in the report the full range of views on every issue, but wherever possible we have referred to trends of opinion. Occasionally, we have dealt specifically with particular views or arguments. But whether or not our report contains a direct reference to it, we would like all those who made a submission to know that their comments and suggestions have been carefully considered. Their input enabled the Commission to carry out the direction in its Terms of Reference to inquire into, and ascertain, the variety of views and opinions among Fiji citizens on how the provisions of the Constitution can be improved to meet the needs of Fiji as a multi-ethnic and multicultural society.

PUBLIC DEBATE

4.9 The Commission regarded all written submissions made at public hearings or received at its office without any request for confidentiality as public documents which could be inspected on request. Many people, including media representatives, took advantage of the opportunity to learn what the people were saying. The

extensive press and television coverage of the public hearings helped the Commission to carry out the further direction in its Terms of Reference - to facilitate the widest possible debate on the terms of the Constitution.

4.10 Several groups of citizens came together specially for the purpose of carrying on that debate. In some cases they went to the trouble of inviting experts from other countries at considerable expense so that the people of Fiji could have access to a wider range of views and constitutional experience. They also held seminars in various parts of the country. Fiji's future constitutional arrangements have been under discussion in a wide range of existing organisations and groups. To all who have assisted us in this way we also express our appreciation.

RESEARCH PAPERS

4.11 Early in the first phase of its work, the Commission identified the matters on which it would need further information and research. It asked government departments and agencies to supply factual data and statistics. It also asked a number of academic and other specialists, both in Fiji and overseas, to prepare research papers. Those prepared in Fiji dealt with particular social, cultural and economic issues bearing on the country's constitutional arrangements. Those prepared overseas examined the constitutional experience of the author's own country in relevant contexts, often on the basis of wider-ranging comparisons. One paper dealt at length with the internationally recognised principles and standards of individual and group rights which the Commission was directed to take into account.

4.12 In writing their papers the authors were asked to draw conclusions and identify issues for the Commission's consideration. They were not asked to make recommendations. The Commission realised that, although much could be learnt from the constitutional arrangements in other countries, none of them would necessarily suit the circumstances of Fiji. It was also conscious that it alone had the responsibility of making recommendations which might help the people of Fiji to find the best solutions to their constitutional problems.

4.13 Appendix E lists the authors and titles of the papers prepared at the Commission's request. We would like to record our gratitude to all those who helped us in this way. In particular we should like to express our thanks to the Electoral Assistance Division of the United Nations Department of Political Affairs which enabled us to make contact with specialists in voting systems, particularly in multi-ethnic societies, and funded the writing of five papers on this subject.

COUNTRY VISITS

4.14 The Commission also decided that it needed to obtain first-hand experience of how people in a selection of other multi-ethnic countries had tailored their constitutional arrangements to the nature of their societies. It decided to visit Malaysia, Mauritius and South Africa. Each had something special to offer.

4.15 Parallels have often been drawn between Malaysia and Fiji because, in both countries, the indigenous people saw themselves disadvantaged in comparison with the educational and economic success achieved by an immigrant community and were anxious not to be dominated politically. Even so, the commitment to national unity is a strong one.

4.16 Mauritius, as another former British sugar colony, also has close ties with Fiji. Although there are no people who can be regarded as indigenous to Mauritius, the Creole community comprising the original French settlers and their former slaves from Africa, now inter-married, was later outnumbered by indentured labourers from India. After some difficulties in the early years of independence, they have now achieved a vigorous multi-ethnic society.

4.17 South Africa, though superficially having little in common with Fiji, has recently succeeded in freeing itself from apartheid. In 1995, its people, black, white, coloured and Indian, were engaged in one of the most intensive and innovative constitution-making exercises in recent times. As a transitional measure, they had put in place a government of national unity which we were keen to learn about.

4.18 The visits to all three countries were instructive. We were able to form impressions that could not have been gathered from books or papers. Each country, in its own very different way, had made, or was in the process of making, the accommodations necessary to take account of its multi-ethnic character and at the same time was deliberately seeking to foster a sense of national unity.

4.19 We were able to meet with a wide variety of non-governmental organisations and of political leaders, officials, judges and academics. They were generous in giving us their time, providing us with information and generally looking after us. Our thanks are due particularly to the Malaysian Prime Minister's Department, the Ministry of Foreign Affairs of Mauritius and Ida Cooper and her associates who organised our programme in South Africa.

4.20 On the way to Malaysia we visited Canberra for talks with members and officers of the Australian Electoral Commission, joined by officers of the Electoral Commissions of Tasmania and the Australian Capital Territory. The purpose was to make a close study of different voting systems. We were particularly interested in the Single Transferable Vote system (SVT) used for elections to the Australian Senate, the lower house in Tasmania and the single chamber legislature in the Australian Capital Territory, and the Alternative Vote system (AV) used for elections to the Australian House of Representatives and the Lower Houses of a number of Australian States.

4.21 An official of the Australian Electoral Commission visited Suva in April 1966 in order to help us further. In February 1996, we also met in Wellington with members of the New Zealand Electoral Commission and discussed the Mixed Member proportional system of representation recently adopted in that country. The Commission derived great benefit from this help in getting to grips with the technicalities and likely political consequences of the three voting systems mentioned.

4.22 We returned from Capetown to Suva via London, New York and Los Angeles, with a side-trip to San Diego. The purpose of these stopovers was to enable us to meet with many of the overseas experts who were writing papers for the Commission, and other specialists in the same fields. This gave the Commission the opportunity for valuable first-hand discussions. We also called on Mr Marrack Goulding, of the United Nations Department of Political Affairs, and members of its Electoral Division, to discuss their contribution to our work.

4.23 During the visit to San Diego and a later short visit to Wellington, the Commission was fortunate in being able to meet with the two acknowledged world experts on voting and other constitutional arrangements in divided societies, Professor Arend Lijphart, of the University of California at San Diego and Professor Donald Horowitz of Duke University (at the time a visiting fellow at Canterbury University). The Commission is particularly grateful for the generous help it has received from each of these leading authorities.

4.24 We set out in Appendix F a list of the individuals and groups that the Commission was able to meet in the course of its overseas travels. We are grateful to the Fiji Embassies in Canberra, London and Wellington and the Office of the Fiji Permanent Representative to the United Nations in New York for the considerable help they gave us during our visits to those places.

MEETINGS WITH HIGH OFFICERS OF STATE

4.25 On its return to Suva in mid-November the Commission initiated confidential and informal meetings with high officers of state in Fiji. These included Judges of the superior courts, Constitutional Officers, the Chairpersons of constitutional and statutory Commissions and Boards, and Heads of Departments and other services. These meetings enabled us to understand the strains under which some of the institutions of government are operating and the need for clear constitutional definitions of functions and relationships. We thank all those concerned for their contribution to our work. Appendix G contains a list of those with whom we consulted in this way.

REQUESTS FOR WRITTEN INFORMATION

4.26 The Commission also asked a number of public and private sector bodies, both in Fiji and overseas, for written information about matters relevant to its work and was grateful for the full and prompt responses. The names of those who assisted us in this way are set out in Appendix H.

SCRUTINISING THE CONSTITUTION

4.27 In the period from mid-January 1996 to mid-May, the Commission was engaged in phase 2 of its work, that is, in developing the policies which would guide its recommendations. Much of its time was taken up in scrutinising the 1990 Constitution, as required by our Terms of Reference.

WRITING THE REPORT

4.28 Phase 3 of our work, the writing of the report, began at the beginning of May and continued until its final adoption.

THE COMMISSION'S STAFF

4.29 The Commission would like to acknowledge the essential contribution of all members of its staff. Throughout the whole period, they worked loyally and hard, often late into the night and over weekends, to help it carry out its work. At times the Commission's own staff had to be supplemented by drawing on other resources, particularly Parliament's technicians, interpreters and Hansard reporters who assisted in the reporting of the public hearings. To them too, and to those who kindly agreed to make this extra help available, we express our thanks.

5

NATIONAL IDENTITY AND SHARED GOALS

5.1 In this Chapter the Commission begins its review of the 1990 Constitution. We discuss a small group of provisions that focus on the national identity of the people of Fiji and the commitments they make to one another as citizens of this country. The relevant sections of the Constitution comprise the *Preamble; section 1 (*the nature of the state); *section 66* (the official language of Parliament); and the *Oath or Affirmation of Allegiance to Fiji* in *Schedule 1.* The purpose of these provisions is to reflect the important values of the people and promote their shared goals.

5.2 To that end, we propose a number of changes to the existing provisions, and also the inclusion of new ones. The new provisions deal more fully with the name of the state and the right of all its citizens to describe themselves by a common name; they recognise the equal status of the three main languages, and give some directions about the way in which the Constitution should be interpreted. The preamble to the Constitution should remain, but in a shorter and simpler form. A new provision should set out shared understandings about the cooperation of all ethnic communities in the country's life and government. We describe it as a "Compact" among the people of Fiji.

5.3 We discuss these various matters not in the order in which they would appear in the Constitution, but in an order that shows how the various ideas are linked together.

THE NAME AND CHARACTERISTICS OF THE STATE

5.4 The first question is the name of the state. Section 1 of the 1990 Constitution provides as follows:

> Fiji shall be a Sovereign Democratic Republic.

Perhaps because of the use of capital letters, people sometimes see this provision as meaning that the name of the state is "The Sovereign Democratic Republic of Fiji", but we do not believe section 1 was intended to be read in this way. Like section 1 of the 1970 Constitution, its purpose is to describe the characteristics of the state, not to specify its name. In the Oath of Allegiance, in Schedule 1, those taking the oath are required to swear allegiance simply to "the people and the Republic of Fiji".

5.5 However, the Constitution should indicate clearly the formal name of the state. In the case of Fiji, the name should be one which all its citizens can use when they want to describe themselves as belonging to Fiji. The submissions emphasized the need for a common name. Some suggested "Fijians". Others suggested "Fiji Islanders". Others, while supporting the idea of a common name, refrained from suggesting what it might be.

5.6 "Fijian" is used in English to describe the indigenous people of Viti (as distinct from Rotuma). A number of Fijians believe it should continue to be used in this restrictive sense. We consider that "Fiji Islander" is a more appropriate common name. There are other Pacific peoples who similarly describe themselves as belonging to their island group. "Solomon Islanders" and "Cook Islanders" are two examples.

5.7 To provide a firm basis for the use of the name "Fiji Islander", we propose that the name of the state should be "the Republic of the Fiji Islands". This proposal revives a geographic name, "the Fiji Islands", which was once common and has never been wholly discarded. The name "Fiji" will still be used when commonly referring to the whole group. But when, in this report, we are describing the state in a formal way, we shall use the name "the Republic of the Fiji Islands" or "the Republic".

5.8 There is no need for the Constitution to authorise or require the use of the common name "Fiji Islander", but people may describe themselves in that way if they want to. They should be encouraged to do so.

5.9 In describing the Fiji Islands as a "Republic", it is implicit that the country will continue to have a President as its Head of State. Most submissions supported a republican form of government. Only a few argued that Fiji should seek once more to become a monarchy owing allegiance to Her Majesty the Queen. A number expressed the hope that Fiji would re-establish links with the Sovereign. We understood that to mean readmission to the Commonwealth, of which the Queen is the Head.

5.10 The Oath of Allegiance is more a symbolic than a legal commitment. All citizens owe allegiance to the state (as do all aliens in its territory) whether or not they have taken the Oath of Allegiance. The form of oath should be amended to reflect the new name of the state. It should also be prescribed in a separate section of the Constitution, potentially one of general application, not in the sections requiring the oath to be taken by particular officers named in the Constitution.

Then, if there is good reason for the taking of the Oath of Allegiance by persons not referred to in the Constitution, that requirement can be imposed by Act with a cross-reference to that general section. No one should be required to take an Oath of Allegiance except by or under a law.

5.11 It is unusual that the Oath in its present form should require the swearing of allegiance to "the people" as well as the state. Perhaps the focus was on the need for persons wishing to be naturalised as citizens to take the Oath. Allegiance to the state is a well-understood legal concept, but it is not clear what a duty of allegiance to the people would require. A duty to *serve* the people is already included in the Oath of Office of the President and the judges of the superior courts. The Oath of Allegiance should provide only for the swearing of allegiance to "the Republic of the Fiji Islands", not "the people".

5.12 Section 1 of the 1990 Constitution describes the state as "sovereign" and "democratic". In the context, "sovereign" means that Fiji is an independent state at international law, and, under its own constitutional law, is not subject to any outside law-making authority. More than 25 years after independence, a reference to the fact that the Republic of the Fiji Islands is "sovereign" is hardly needed, but it certainly does no harm and should remain.

5.13 The word "democratic" describes a country governed by the people through their elected representatives. It should mean that all citizens are represented on an equal basis and that the government is responsive to their wishes, subjecting itself to periodic, free elections. To describe the state as "democratic" also sets a standard by which to judge the content and the administration of the law.

5.14 That can be seen from the many provisions of Chapter II of the 1990 Constitution which forbid any limitation of a constitutionally-protected individual human right or fundamental freedom if the limitation is not "reasonably justifiable in a democratic society". This means that neither the law nor the government may impose requirements that are authoritarian or arbitrary. In Chapter 7 we look in more detail at the nature of the standard and propose that it should be applied in all cases where there are broad grounds for limiting rights and freedoms.

5.15 The description of Fiji as democratic reflects a widely shared aspiration among the people of Fiji. On the assumption that the people wish to reaffirm their commitment to democratic institutions of government and to shape those institutions accordingly, the Constitution should continue to describe the Republic of the Fiji Islands as "democratic".

RECOMMENDATIONS

11. The name of the state should be "The Republic of the Fiji Islands".

12. Readmission to the Commonwealth, of which the Queen is the Head, would reestablish links with Her Majesty.

13. The citizens of the state should have the right to use the common name of "Fiji Islanders" if they so wish, and should be encouraged to do so, but it is not necessary to make provision for this in the Constitution.

14. The Constitution should continue to describe the state as "sovereign". In the expectation that the people wish to put in place a fully democratic system of government, the Constitution should also describe the state as "democratic".

15. Section 1 of the 1990 Constitution should be redrafted to read as follows:

> **"The Republic of the Fiji Islands is a sovereign, democratic state."**

16. A separate section of the Constitution should prescribe the form of Oath of Allegiance. The form of Oath (or Affirmation) in Schedule 1 of the 1990 Constitution should be amended to provide for the swearing of allegiance to "the Republic of the Fiji Islands", without mention of "the people".

THE LANGUAGES OF THE FIJI ISLANDS

5.16 The languages of the Fiji Islands include all languages spoken by any group in Fiji, however small. Schools set up by some communities teach the language spoken by members of that community, though not to the exclusion of other languages spoken in Fiji. The *United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* provides that persons belonging to such minorities "have the right ... to use their own language, in private and in public, freely and without interference or any form of discrimination". In Chapter 7, we recommend that "language" be added to the list of the grounds on which discrimination is prohibited.

5.17 The right of the members of all communties to use their own languages does not deal with the question of how members of different communities should be encouraged to learn a language or languages that will enable them to converse

with one another. Nor does it address the question of whether people should be able to use their own language when communicating with government. In Fiji these questions are mainly concerned with the place that should be given to Fijian, Hindi and English.

5.18 The colonial government's approach was that English should become the common language of Fiji. This approach seems to have been based partly on convenience and partly on a conviction that people would derive great benefits from learning the world's most widely spoken language. However, it was believed that in order to promote the learning of English, it was necessary, from a child's early years of education, to use English as the sole language of instruction. It was also thought desirable to discourage the teaching of Fijian and Hindi at the secondary school level. In fact, experience shows that, to learn another language, people need to have a good knowledge of their own, and that the more languages people learn, the easier they find them.

5.19 The assumption that communities need to learn a language foreign to both of them in order to communicate is misguided. While most members of non-English speaking communities in Fiji speak enough English to permit basic cross-community communication, comparatively few speak it fluently enough to have a relaxed, unselfconscious conversation. This lack of fluency in a common language hinders real communication among members of different communities.

5.20 In contrast, we found that, in country areas where there is a lot of contact between Fijians and members of other communities, people were often fluent in each other's languages. This fluency is greatly appreciated not only for its practical benefits but also as an indication of goodwill. Many Indo-Fijians acknowledged that they could have done more to learn Fijian, and in that way acquire greater understanding of Fijian culture. The Commission considers that the members of all communities should be encouraged to learn one another's languages. This should not detract from the importance of learning English. Knowledge of that language gives the people of Fiji the means of ready communication with the world at large, as well as access to literature, the sciences and technology.

5.21 The only provision on the use of the three main languages in the 1990 Constitution is section 66 which reads as follows:

> The official language of Parliament shall be English, but any member of either House may address the Chair in the House of which he is a member in Fijian or Hindustani.

This provision gives English a status superior to Fijian or Hindi. It should be revised in the manner now proposed.

5.22 An early provision of the Constitution should state that Fijian, Hindi and English have equal status as the main languages spoken in the Fiji Islands. This would reflect the intrinsic value of each language and the way in which it expresses cultural values. So far as possible, people should learn one another's languages. In particular, all citizens should be encouraged to learn Fijian, but this should not be seen as detracting from the importance of learning English.

5.23 In keeping with this approach, people should be able to conduct their dealings with the state in Fijian, Hindi or English. As a matter of practicality, at least in the short term, it may not be possible to have fluent speakers of all three languages available at the public counters of every central and local government department or office throughout the country. Nor is there a need for this in areas where the population is largely made up of members of one community, or the service provided is mainly of interest to one community. The rights to communicate or receive services in Fijian, Hindi or English in divisional or district offices in Fiji should be qualified, not absolute. Service in a particular language should be provided if there is a significant demand for it in that language, or where, because of the nature of the service, it is reasonable to provide it in that language.

5.24 In addition, it should be provided that the services in the language of a person's choice may be made available through a competent interpreter. We also make specific recommendations in Chapter 7 about the availability of competent interpreters whenever a witness, a suspect or the defendant in a criminal trial may be unfairly prejudiced because of difficulties in speaking or understanding the language being used.

5.25 Section 66 itself should be amended to reflect the equal status of Fijian, Hindi and English. The records of parliamentary debates and committee proceedings should be kept in the language used by the member taking part, with a translation into English if the member spoke in Fijian or Hindi. Documents such as Bills, Acts, Resolutions and Reports should be in English unless the House or Committee resolves that they should also be in Fijian or Hindi or both, or in any other language spoken in Fiji.

5.26 The Constitution itself should be adopted in three versions, Fijian, Hindi and English. Following the standard international practice where treaties are adopted in a number of languages, the Constitution should provide that each version is equally authentic, but if there is any apparent discrepancy between one version of a provision and another version or versions, regard must be had to all the circumstances that tend to establish the true intent and meaning of that provision.

RECOMMENDATIONS

17. **The members of all communities should be encouraged to learn one another's languages, but this should not be seen as detracting from the importance of learning English.**

18. **An early provision of the Constitution should state that the Fijian, Hindi and English languages have equal status.**

19. **The Constitution should provide that members of the public dealing with government departments and other central or local government offices and statutory boards have the right, in the head office of the department, office or board, and in those divisional, district and local government offices where**

    (a) **there is a significant demand for communications with or services from that department or body in any one or more of those languages, or**

    (b) **because of the nature of the department or body, it is reasonable to provide for communications with or services from that department or body,**

    to conduct their transactions in Fijian, Hindi or English, either directly or though a competent interpreter.

20. **Section 66 of the 1990 Constitution should be amended to provide that the official languages of Parliament are Fijian, Hindi and English. A speech made in any one of those languages should be simultaneously translated into each of the other two. The records of parliamentary debates and committee proceedings should be kept in the language used by the member concerned, with a translation into English if the member spoke in Fijian or Hindi. Documents such as Bills, Acts, Resolutions and Reports should be in English unless the relevant House or Committee resolves that they should, in addition, be in Fijian or Hindi or both, or in any other language spoken in Fiji.**

21. **The Constitution itself should be adopted in three versions, Fijian, Hindi and English. It should provide that each version is equally authentic, but if there is any apparent discrepancy between one version of a provision and another version or versions, regard must be had to all the circumstances that tend to establish the true intent and meaning of that provision.**

EXPRESSING IMPORTANT VALUES

5.27 In Chapter 3, we referred to many of the values that are important to the people of Fiji. Among them are the significant events in its history, its multi-ethnic character, its spiritual values, the human rights and fundamental freedoms of individuals and groups, the promotion of racial harmony, national unity and the economic and social advancement of all communities, and constitutional principles like adherence to the rule of law. We have stressed the need to respect the interests of all communities, to reconcile interests of all communities by negotiations in good faith, and to respect the paramountcy of Fijian interests as a means of ensuring that those interests are not subordinated to the interests of other communities.

5.28 In many Constitutions, values of this kind are referred to in a *preamble* to the Constitution. A preamble is explanatory and in itself does not create rights or duties. However, so far as it expresses the people's expectations about what the Constitution is intended to do, the courts often take account of it in determining the meaning and effect of other provisions.

5.29 Some Constitutions, notably those of Ireland, India and Papua New Guinea, contain not only a preamble, but also *directive principles*. These are directions to the government of the day to follow policies designed to bring about certain desired outcomes. They generally relate to such things as the availability of education, the role of women, and the protection of the environment. Directive principles usually make it clear that they do not create duties which can be directly enforced by the courts. In this respect they are like preambles. Again, directive principles are often taken into account by the courts in applying other provisions. However, the real sanction for their enforcement is through the political process. The submissions included suggestions that Fiji's Constitution should contain directive principles.

5.30 Directive principles are to be contrasted with *Bills of Rights* under which individuals claiming that their rights have been infringed can seek a remedy from the courts. However, a Bill of Rights should also guide the executive and Parliament in framing legislation and designing and implementing policies. For that reason, some countries now express economic and social goals in the form, not of directive principles, but of rights. If so, they usually expect that the courts, in enforcing such rights, will not get too deeply involved in the question of whether adequate budgetary provision has been made to give effect to the right. Suggestions were made in the submissions about including rights of this kind in the Constitution of Fiji.

5.31 A fourth type of provision, for which there is little in the way of a model, is to set out in the Constitution a *Compact* among the people of Fiji. A number of submissions expressed the view that, overall, the 1970 Constitution had had the quality of a compact or covenant among the ethnic communities and suggested that, in Fiji's multi-ethnic society, the Constitution should again perform this function.

5.32 After considering these different types of provision, the Commission adopted the following guidelines:

- There should be a short preamble dealing mainly with the history of Fiji's multi-ethnic society, and its shared beliefs and aspirations.
- The present Bill of Rights should be updated and clarified, but should refer only to rights which can appropriately be enforced by the courts.
- There should be no statement of directive principles as such. Broad policy directives can be inspirational, but they may not have much practical effect on the policies followed by different governments. The nature of these should be left to the political process, except in areas of special concern, such as the duty to put in place affirmative action and social justice programmes (dealt with in Chapter 8) and to protect the environment when authorising the exploitation of natural resources such as minerals (dealt with in Chapter 17). The Constitution should in those cases lay certain duties upon the Government. The provisions should not exclude the jurisdiction of the courts, but should be cast in terms which make it clear that the allocation of resources for the specified purposes will be monitored primarily through the political process.
- It is our belief that there should also be a new provision constituting a *Compact* among the people of Fiji. It should set out their shared understandings about the future participation of all ethnic communities and groups in the country's life and government. Effect would be given to these understandings through the operation of other provisions of the Constitution and also in the day to day functioning of the political process. Therefore its provisions should not be judicially enforceable. However, the courts should be free to take account of the *Compact* in interpreting and applying other constitutional provisions.

5.33 The Commission also considered that these various types of provision should not duplicate one another, though both the *Preamble* and the *Compact* would

foreshadow in general terms some of the Constitution's later and more detailed provisions.

THE PREAMBLE

5.34 For maximum impact, a preamble to the Constitution should be brief and clearly expressed. Like the whole of the Constitution, it should be broadly acceptable to all citizens. This is especially important in the case of a preamble whose significance is largely symbolic. It should give all citizens a sense that their contribution to Fiji is recognized, and that all communities form one nation.

5.35 The *Preamble* should begin by stating, in an adaptation of the well-known opening words of the American Constitution, that the people of the Fiji Islands give themselves their Constitution. The use of the word "people" in the singular will emphasise that all ethnic communities are broadly united in their support for the Constitution and the state itself.

5.36 Any new Constitution would need to be put in place by the processes laid down for the amendment of the 1990 Constitution. Those processes are an adaptation of the ordinary law-making processes of Parliament. Special procedures and majorities are required, depending on the nature of the amendment. It would be possible to reflect these processes by stating that the people of the Fiji Islands give themselves their Constitution "through their elected representatives". However, such a statement is not necessary and would detract from the simplicity of the resounding words: "We, the people of the Fiji Islands, ... , give ourselves this Constitution"

5.37 Most preambles to constitutions refer to those aspects of a people's history and the shared values that they see as particularly important. Among all the people of Fiji, there is a shared reverence for God. The members of all communities often concluded their submissions with the words "God bless Fiji". The *Preamble* should therefore begin by expressing the desire of the people for the blessing of God in terms which are acceptable to the members of all religious faiths.

5.38 In Chapter 3, we explained the importance of maintaining the separation of church and state, specially in a country made up of people of different faiths. Therefore the Constitution should not declare Fiji to be a Christian state, but the *Preamble* should continue to record the coming of Christianity and its significance in the life of the country. It should do so in terms that reflect the importance of Christianity not only to the indigenous people and other Christians but to the cultural and spiritual life of Fiji as a whole. That life is further enriched by the

other faiths adhered to in Fiji, and the variety of traditions, languages and cultures among its people.

5.39 The Commission considers that the *Preamble* should also refer to other events in the history of Fiji that have made its people what they are today. Those events include the settlement about 4,000 years ago by the first inhabitants, the ancestors of the indigenous Fijian and Rotuman people; the separate cessions of Fiji and Rotuma to Queen Victoria; and the arrival of the forebears of subsequent settlers including Europeans, Pacific Islanders, Indo-Fijians, the Chinese and many others. They also include the development of Fiji's economy and political institutions, and its accession to independence.

5.40 We do not think the *Preamble* needs to recite the constitutional history of Fiji. It should convey a sense of renewal and recommitment to the shared goals of harmony, unity, the economic and social advancement of all communities, respect for their rights and interests and the strengthening of the institutions of government. These are the goals referred to in the Commission's Terms of Reference unanimously approved by Parliament.

5.41 Finally, the *Preamble* should reaffirm the people's recognition of human rights and fundamental freedoms, adherence to the rule of law and respect for human dignity and the importance of the family. These concepts are self-explanatory, except, perhaps, "the rule of law". This is a constitutional concept which today signifies:

- a preference for law and order within the community, as distinct from anarchy and strife;
- the conduct of government in accordance with the law;
- the need for the law to conform to standards of fairness and justice, both in its substantive content and in the procedures for its application by the courts.

These important ideas should serve as a reminder of the goals which the people desire to achieve through their Constitution.

RECOMMENDATIONS

22. The *Preamble* to the Constitution should be brief, clearly expressed and broadly acceptable to all citizens.

23. It should state that the people of the Fiji Islands give themselves their Constitution.

22. It should deal mainly with the history of Fiji's multi-ethnic society, and its shared beliefs and values.

23. The wording of the *Preamble* should be based on the following draft:

WE, THE PEOPLE OF THE FIJI ISLANDS,

Seeking the blessing of God who has always watched over these islands, Recalling the events in our history that have made us what we are: especially the settlement of these islands by the ancestors of the indigenous Fijian and Rotuman people; the arrival of forebears of subsequent settlers, including Pacific Islanders, Europeans, Indo-Fijians, Chinese and many others; the adoption and enduring influence of Christianity and its contribution, along with that of other faiths, to the spiritual life of Fiji; and the separate cession of these islands by the High Chiefs of Fiji and Rotuma to Her Majesty Queen Victoria,

Recognising that the descendants of all those who chose to make their homes in these islands now form our multi-ethnic society,

Acknowledging the contribution of all ethnic communities to the well-being of that society, and the rich variety of their faiths, traditions, languages and cultures,

Taking pride in the development of our economy and political institutions, our accession to independence and our common citizenship,

Committing ourselves anew to living in harmony and unity, promoting the economic and social advancement of all communities, respecting their rights and interests, and strengthening our institutions of government,

Reaffirming our recognition of the human rights and fundamental freedoms of all individuals and groups, safeguarded by adherence to the rule of law, and our respect for human dignity and the importance of the family,

GIVE OURSELVES THIS CONSTITUTION.

A COMPACT AMONG THE PEOPLE OF THE FIJI ISLANDS

5.42 In Chapters 2 and 3 the Commission set out at length the reasons why, in its view, Fiji's past and present constitutional arrangements have not provided a sound basis for multi-ethnic government. A main reason has been the nature of the country's electoral arrangements. Our detailed recommendations about these are set out in Chapters 8 and 9. Their object is to enable the people of Fiji to break away from the communal system of representation and to encourage government by multi-ethnic parties or coalitions.

5.43 Our proposals take account of the need for all ethnic communities to have adequate assurances that their rights and interests will still be protected. To this end, we believe explicit provisions should be included in the Constitution. We have therefore prepared the following draft Compact:

Compact among the people of the Fiji Islands

The people of the Fiji Islands recognise that, within the framework of this Constitution and the other laws of the Republic, the conduct of government is based on the following principles:

(1) The rights of all individuals, communities and groups must be fully respected.

(2) These rights include those protecting the ownership of Fijian land according to Fijian custom, the ownership of freehold land, and the observation of the rights and obligations of landlords and tenants under leases of agricultural land. They also include the rights of all persons to practise their religion freely and to retain their language, culture and traditions.

(3) The rights of the Fijian and Rotuman people include their right to governance through their separate administrative systems, as well as to take part in the government of the Republic along with all other citizens.

(4) As citizens, the members of all communities enjoy equal rights, including the right to make their permanent homes in the Fiji Islands.

(5) The rights of citizens include the right to form and join political parties, to take part in political campaigns, and to vote and be a candidate in free and fair elections of members of Parliament held by secret ballot and, ultimately, on the

basis of equal suffrage.

(6) The formation of a government that commands the support of a majority in the lower house of Parliament depends on the electoral support received by the various political parties or pre-election coalitions and if it is necessary or desirable to form a coalition government from among competing parties, depends on the compatibility of their policies and their willingness to come together to form or support a government.

(7) In forming a government, and in that government's conduct of the affairs of the nation through the promotion of legislation or the implementation of administrative policies, full account should be taken of the interests of all communities.

(8) To the extent that the interests of different communities are seen to conflict, all the interested parties should enter into negotiations in good faith in an endeavour to reach agreement.

(9) In such negotiations, the paramountcy of Fijian interests as a protective principle should continue to apply, so as to ensure that the interests of the Fijian community are not subordinated to the interests of other communities.

(10) Affirmative action and social justice programmes to secure effective equality of access to opportunities, amenities or services for the Fijian and Rotuman people, as well as for other communities, for women as well as men, and for all disadvantaged citizens or groups, should be based on an allocation of resources broadly acceptable to all ethnic communities.

Application of the Compact

(1) The application of the principles or recognition of the rights referred to in the *Compact* shall not, by virtue only of this section, be called in question before any court or other authority.

(2) The *Compact* may be taken into account in interpreting and applying any other provision of this Constitution or other law.

5.44 The operative provision at the beginning of the *Compact* records the recognition by the people of the Fiji Islands that the conduct of the country's government is based on the principles set out in the *Compact*. This recognition has moral, as distinct from legal, force. We hope that the principles will be recognised by all communities through their elected representatives and leaders. Such recognition will not prevent individuals within communities voicing their own views and casting their votes as they see fit.

5.45 The recognition of a broad consensus about the conduct of government is expressed as being "within the framework of this Constitution and the other laws of the Republic". The purpose of this phrase is to indicate that the principles and statements set out in the Compact do not in themselves give rise to legal rights or duties. In particular, the references to certain rights safeguarded in the Constitution are not a substitute for the rights themselves. They are mentioned only to reassure all communities that the need to take account of each other's interests will not affect the constitutional protection already given to their rights. See also the commentary below on the separate provision *Application of the Compact.*

5.46 Principle (1) states that the rights of all individuals and ethnic communities must be fully respected. If rights are not respected, they can be enforced through the courts, but rights also need to rest on the general willingness of the people to obey the Constitution and other laws of the land. That willingness needs to be reaffirmed.

5.47 Principles (2) to (5) refer to certain specific rights so people can see that rights they hold dear will remain constitutionally protected, no matter what kind of government takes office. The list is far from being comprehensive but the rights mentioned include

- the protection of all rights of individuals and communities to land, or in respect of land as well as other resources;
- the rights to freedom of religion and retention of language, culture and traditions;
- the rights of Fijians and Rotumans, as the indigenous people, to a system for their own governance;
- the equal citizenship rights held by the members of all communities.

The rights of citizens include the right to make their permanent homes in the Fiji Islands and to enjoy the full range of political rights, again on a basis of equality. The reference to an ultimate right to equal suffrage takes account of a possible

need for very minor departures from that principle in bringing about the transition from the present system of communal representation to a more open system.

5.48 Principle (6) of the draft Compact introduces for the first time in the Constitution the role of political parties in the formation of a government. In a Westminster written constitution, this role usually remains hidden behind the duty of the Head of State to appoint as Prime Minister the member of the Lower House who appears best able to command the support of the majority of the members of that House. It seems important to refer to political parties directly, because, in our view, the formation of a government must continue to depend on the party system.

5.49 The main thrust of this report is to encourage the emergence of multi-ethnic parties or coalitions. The electoral system can provide strong incentives, but no Constitution that claims to be democratic can predetermine the outcome of free and fair elections. While parties remain essentially ethnic, the responsibility will rest on them to find ways of cooperating with like-minded parties based in other communities.

5.50 A failure to make the necessary accommodations, or an unwillingness of voters to support candidates nominated by parties or coalitions on a multi-ethnic basis, could affect the opportunities for a particular community to share in government. Therefore we have set out several principles which could help to remedy such a situation, unless there is deliberate non-participation or withdrawal by a party representing a particular community.

5.51 Principle (7) states that, in forming a government and also in governing the country, full account should be taken of the interests of all communities. Only the first part of this principle is new.

5.52 The second part of the principle which refers to the need for a government once in office to take account of the interests of all sections of society, has always been an accepted part of democratic government. However, there is always a tension between a government's desire to respond to the interests of its supporters and its responsibility to govern in the interests of all. In Fiji, this tension is heightened by perceptions that a government formed mainly from members of one community might govern primarily in the interests of that community.

5.53 Principle (8) states that, if the interests of different communities are seen to conflict, either in forming a government or in governing the country, then all the interested parties should enter into negotiations in good faith in an endeavour

to reach agreement. In Chapter 3, we explained the origins of this important principle. Its force lies in the recognition that no controversial matter should be disposed of by one community acting alone, even if it has the political power to do so.

5.54 If agreement cannot be reached, the parties will remain in dispute. However, the obligation to enter into negotiations in good faith with the object of reaching agreement is not an empty one. The New Zealand courts have recognised that it applies to conflicts between the interests of Maori and those of the Crown, in such matters as, for example, access to the airwaves. The parties were required to negotiate an agreement that would allocate to Maori adequate frequencies and funding for the broadcasting of radio and television programmes in the Maori language.

5.55 Principle (9) states that, in negotiations involving a conflict of interests between or among communities, the principle that Fijian interests are paramount should continue to apply, so as to ensure that the interests of the Fijian community are not subordinated to the interests of other ethnic communities. Expressed in this way, the principle that Fijian interests are paramount resumes its original protective function and does not threaten the legitimate interests of other communities. Even so, it retains its full moral authority.

5.56 The Commission does not think it should try to spell out what recognition of the paramountcy of Fijian interests may require, nor the range of interests to which it may apply. However, it gives some indications below of how principles (7), (8) and (9) taken together might be relevant to the formation of a government. But the *Compact* itself should leave the content of the principle that Fijian interests are paramount to evolve. It will depend upon changing circumstances and on the good sense and goodwill of all community and political leaders.

5.57 The ability to govern rests on the ability of a party or parties, perhaps with the help of independent members of Parliament, to command the support of a majority in the Lower House. A majority party, or coalition of parties, will be able to form a Cabinet from among its own members. The elected members of the parties not in the government will then form the Opposition.

5.58 Against this background, principles (7)-(9) could affect the formation of a government in one of two ways. Under the first scenario, they will guide a multi-ethnic party or coalition with a majority in choosing a Prime Minister. They will also guide the Prime Minister in forming a Cabinet from the parliamentary

members of the party or coalition. The second scenario will arise if some communities are insufficiently represented within the party or parties that command a majority. Principles (7)-(9) will require the majority party or parties to consider whether the interests of an under-represented community need to be met by inviting what would otherwise be an Opposition party into the government.

5.59 This might not seem a very strong basis for the kind of cooperation on which coalition government depends. Nevertheless, government must, of necessity, be carried on through a coalition whenever no one party has an overall majority. It is not a large step to suggest that parties might also come together for reasons of political expediency rather than necessity. Such a development would certainly require the Government to obtain broadly-based support for its policy proposals. But the electoral arrangements we recommend will encourage parties to seek support among all communities. This should lead to a new political culture of greater cooperation.

5.60 For some time to come in Fiji, the ethnic composition of a governing party or coalition and of the Cabinet formed from among its members is likely to remain important. We hope that, through cooperation among mainstream parties, multi-ethnic governments will come about in the normal course of the electoral process. But if an election should result in a majority for a party or parties which are not seen as representing all communities, then principles (7)-(9) require the majority group to see if there is a basis upon which a government can be formed from among parties which, together, have broad, multi-ethnic support.

5.61 Principle (10) has already been mentioned more than once. It states that the allocation of resources among different affirmative action and social justice programmes should be one that is broadly acceptable to all ethnic communities. On this basis, no community will have good reason to oppose particular programmes that benefit only certain communities. As we have mentioned, the problems addressed by such programmes should be seen as national problems which all have an interest in solving.

5.62 In Chapter 8, we discuss further the reasons why it is necessary and justifiable to put in place programmes directed towards enlarging the participation in commerce of the Fijian and Rotuman people. We also propose safeguards to ensure that all affirmative action and social justice programmes are successful in achieving their desired objectives. Within such a framework, and through the application of principles (7)-(9), it should be possible to agree on an allocation of resources among all programmes, regardless of which community obtains the greatest benefit from any one of them.

5.63 The draft provision entitled *Application of the Compact* makes it clear that the courts are not empowered to enquire into the application of the principles or the recognition of the rights referred to, relying on the provisions of the *Compact* alone. All constitutionally-protected rights will be enforceable under other sections of the Constitution. Public opinion and the political process provide the sanctions for the application of the principles. The reference to any "other authority" makes it clear that no special tribunal can be set up to enquire into the application of the *Compact*. Nor will its application fall within the jurisdiction of an existing authority like the Ombudsman.

5.64 The purpose of the *Compact* is to act as a reassurance to all communities and to provide guidance to political leaders and parties. It will fail in those purposes if it is used as an every-day weapon in the rough and tumble of politics.

RECOMMENDATIONS

26. The Constitution should contain a section described as a *Compact* among the people of the Fiji Islands. It should reassure all ethnic communities that their rights and interests will still be protected, even if changes are made to the electoral arrangements. It should also provide guidance to political leaders and parties.

27. The *Compact* should record the people's recognition of the principles on which the conduct of government is based. It should also refer to the rights of ethnic communities and individuals under other provisions of the Constitution in the areas likely to be of greatest concern to them.

28. The courts should have no jurisdiction to enquire into the application of the principles or the recognition of the rights referred to in the *Compact*, except so far as these principles and rights are recognised by other provisions of the Constitution or other law.

29. The *Compact* should be based on the following draft:

Compact among the people of the Fiji Islands

The people of the Fiji Islands recognise that, within the framework of this Constitution and the other laws of the Republic, the conduct of government is based on the following principles:

(1) The rights of all individuals, communities and groups must be fully respected.

(2) These rights include those protecting the ownership of Fijian land according to Fijian custom, the ownership of freehold land, and the observation of the rights and obligations of landlords and tenants under leases of agricultural land. They also include the rights of all persons to practise their religion freely and to retain their language, culture and traditions.

(3) The rights of the Fijian and Rotuman people include their right to governance through their separate administrative systems, as well as to take part in the government of the Republic along with all other citizens.

(4) As citizens, the members of all communities enjoy equal rights, including the right to make their permanent homes in the Fiji Islands.

(5) The rights of citizens include the right to form and join political parties, to take part in political campaigns, and to vote and be a candidate in free and fair elections of members of Parliament held by secret ballot and, ultimately, on the basis of equal suffrage.

(6) The formation of a government that commands the support of a majority in the lower house of Parliament depends on the electoral support received by the various political parties or pre-election coalitions, and, if it is necessary or desirable to form a coalition government from among competing parties, depends on the compatibility of their policies and their willingness to come together to form or support a government.

(7) In forming a government, and in that government's conduct of the affairs of the nation through the promotion of legislation or the implementation of administrative policies, full account should be taken of the interests of all communities.

(8) To the extent that the interests of different communities are seen to conflict, all the interested parties should enter into negotiations in good faith in an endeavour to reach agreement.

(9) In such negotiations, the paramountcy of Fijian interests as a protective principle should continue to apply, so as to ensure that the interests of the Fijian community are not subordinated to the interests of other communities.

(10) Affirmative action and social justice programmes to secure effective equality of access to opportunities, amenities or services for the Fijian and Rotuman people, as well as for other communities, for women as well as men, and for all disadvantaged citizens or groups, should be based on an allocation of resources broadly acceptable to all ethnic communities.

Application of the *Compact*

(1) The application of the principles or recognition of the rights referred to in the Compact shall not, by virtue only of this section, be called in question before any court or other authority.

(2) The Compact may be taken into account in interpreting and applying any other provision of this Constitution or other law.

INTERPRETING THE CONSTITUTION

5.65 Some constitutions set out the matters to be taken into account in interpreting their provisions. Others leave the question of interpretation to the courts. They can be expected to apply the widely recognised principle that constitutions need to be looked at more broadly than ordinary Acts of Parliament or other legal documents. For example, an opinion of the Privy Council in 1930 in relation to Canada described that country's constitutional legislation as "a living tree capable of growth and expansion within its natural limits ....". (*Edwards v Attorney-General for Canada* [1930] AC 124, 136)

5.66 In the leading Privy Council case of *Minister of Home Affairs v Fisher*, Lord Wilberforce, speaking of the Constitution of Bermuda, and particularly of Chapter I on Fundamental Rights and Freedoms, said that "it is drafted in a broad and ample style which lays down principles of width and generality". The antecedents of the chapter in the European Convention on Human Rights and the Universal Declaration of Human Rights, as well as its form,

> call for a generous interpretation ... suitable to give individuals the full measure of the fundamental rights and freedoms referred to. ([1979] 3 All

ER 21)

That approach has been adopted and applied in a number of Pacific jurisdictions as well as in Britain itself.

5.67 Neither the 1970 nor 1990 Constitutions contained or incorporated by reference any general provision about the approach to be taken to its interpretation. In Chapter 7, we show that, in interpreting Fiji's constitutional provisions on fundamental rights and freedoms, the courts have sometimes placed too much stress on what appeared to be the literal meaning of the words used, without looking at the provision in its context and in the light of its purpose and in the spirit of the Constitution as a whole. We consider that it would be useful to include in the Constitution a reminder of the need to take account, not only of the words as written, but also of these wider factors.

5.68 Clearly, the Constitution must be applied to circumstances in Fiji as they arise. Another Canadian case explained this need in the following way:

> A Constitution ... is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or Charter of rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot be easily repealed or amended. It must therefore be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the Constitution and must, in interpreting its provisions, bear these conditions in mind. (*Hunter et al v Southam Ltd* (1948) 11 DLR (4th) 641 (SCC) 649)

5.69 As a reminder of the approach needed in interpreting the Constitution, we propose the inclusion of a provision on the following lines:

Interpretation of this Constitution

(1) This Constitution applies to circumstances as they arise from time to time in the Republic of the Fiji Islands.

(2) Its meaning is to be ascertained from the text, read in its context and in the light of its purpose, taking into account the spirit of the Constitution as a whole.

5.70 These directions are based on the accepted principle of interpretation that the text is the starting point. In referring to the need to read the text in its context and in the light of its purpose, while taking into account the spirit of the Constitution as a whole, we do not draw clear-cut distinctions between context,

purpose and spirit. Each shades into the other. Together they provide a framework for the task of determining what the provisions of the Constitution require and permit at the time of their application.

5.71 The Constitution should reflect the international standards of individual and group rights. These standards are likely to influence the drafting of the Bill of Rights and a number of other matters. Reading the relevant international instruments will often throw light on context, purpose and spirit. These criteria will also be illuminated by the values expressed in the Constitution itself. We have recommended that certain values important to the people of Fiji should be set out in the *Preamble* and also in the *Compact*, but other provisions may also have a normative quality.

5.72 We do not think that a provision on the interpretation of the Constitution should single out specific values or list the sources to be looked to in ascertaining what values may be relevant in establishing the context or purpose of a provision or the spirit of the Constitution as a whole. The task of interpreting the necessarily general provisions of the Constitution and applying them to a particular set of circumstances will often be a balancing one. There is a point at which judges will find that they are confined by the words of the Constitution and must not trespass into the realm of constitutional amendment. But before that point is reached, there will often be a need for a careful, well-reasoned analysis of context, purpose and spirit, all of which may colour the meaning of the words as they are written. Our draft provision is simply a reminder about the need for this wider focus.

RECOMMENDATIONS

30. The Constitution should contain a provision about its interpretation, based on the following draft:

Interpretation of this Constitution

(1) This Constitution applies to circumstances as they arise from time to time in the Republic of the Fiji Islands.

(2) Its meaning is to be ascertained from the text, read in its context and in the light of its purpose, taking into account the spirit of the Constitution as a whole.

31. Those charged with the task of interpretation should bear in mind that, in ascertaining context, purpose and spirit, regard should be paid to all relevant matters including any international instruments on which particular provisions are based, and the values expressed in the Constitution itself.

6

THE RIGHT TO BE OR BECOME A CITIZEN

THE SIGNIFICANCE OF CITIZENSHIP

6.1 In this chapter we review sections 22-30 of the 1990 Constitution which set out rules about who is, or may become, a citizen of Fiji, and about how Fiji citizenship may be lost on the acquisition of another. The submissions expressed concern about some aspects of these rules. We deal with them later in this chapter. They demonstrate the need for the rules about citizenship to be clear, to reflect people's expectations, to be technically sound and workable, and to contain sufficient flexibility so that anomalies can be put right fairly easily, while still safeguarding the citizenship rights people already have.

6.2 Citizens of the Republic of the Fiji Islands have rights not possessed by other people who happen to be in the country. We have already discussed the political rights of citizens. These include the right to vote and to be a candidate for election to Parliament, and the right to serve in the executive and judicial branches of government. We have also referred to the right of all citizens to make their permanent homes in Fiji. In Chapter 7 the components of that right are spelt out: they include the unqualified right to enter the country and remain in it.

6.3 Under international law a state is permitted, and may be required, to exercise rights and powers in respect of its citizens, usually referred to as its "nationals", even when they are outside the country. The international recognition of a person's nationality is the basis for the use of passports and the permission granted to their holders to enter other countries. A state also has the right to exercise diplomatic protection of its nationals when they are in the territory of another state. So Fiji citizenship or nationality remains important to people even when they are outside their own country, unless they acquire another country's citizenship.

6.4 The importance of a person's citizenship goes far beyond its tangible consequences. The citizens of a state are an essential component of the state itself. Citizenship has a highly symbolic significance, specially in a multi-ethnic country like the Republic of the Fiji Islands. We have recognised its unifying force already by recommending that all citizens should be entitled to describe themselves by a common name. We have also emphasised that the rights of all citizens must be equal.

Including rules about citizenship in the Constitution

6.5 Countries with written constitutions usually recognise both the symbolic and the practical importance of citizenship by including their basic citizenship rules in the constitution itself. In this way, people have a legal right to belong to the country that cannot be taken away by the ordinary law. On the other hand, aspects of citizenship law have to be relatively detailed and technical. But it would overload a constitution to include all matters of detail and would probably make the detailed rules too inflexible. Therefore, most countries provide in their constitutions that matters of detail, supplementing the basic citizenship rules in the constitution, can be dealt with in an Act of Parliament.

The international standards affecting the rules about citizenship

6.6 Under the international human rights instruments and other international instruments dealing specifically with nationality, everyone has a right to a nationality. The general principle is that a person who is closely connected with a particular state has the right to that state's nationality, unless he or she has a right to the nationality of some other state.

6.7 One purpose of this principle is to eliminate as far as possible cases of statelessness - where a person is not a citizen of any state. Statelessness arose on a large scale as a result of the transfers of territory during and after World War II. It can still arise in individual cases because states are free to base their citizenship laws on different principles. Where, in relation to a particular person, these principles conflict, that person can be left without the right to any nationality, unless care is taken to provide otherwise. The guidelines for avoiding statelessness are set out in the *Convention relating to the Status of Stateless Persons* (1954) and more particularly in the *Convention on the Reduction of Statelessness* (1961).

6.8 A second purpose of the international standards is to make sure that, on humanitarian grounds, a person has the right to acquire automatically, or to be granted, the nationality of the state with which he or she has a close connection, and not to be deprived of that nationality. The international standards also forbid the application of a state's nationality or citizenship laws on a discriminatory basis. These general principles are set out in the following instruments. Some of them combine the broad humanitarian considerations with the need to avoid statelessness.

6.9 Article 15 of the *Universal Declaration of Human Rights* provides:

> 1. Everyone has the right to a nationality.

2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 2 of the *Universal Declaration* provides that

> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

6.10 These standards are reflected in the *International Convention on the Elimination of All Forms of Racial Discrimination* (1965), to which Fiji is a party. Article 5(d) obliges states parties

> to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: ...
>
> (d) Other civil rights, in particular: ...
>
> (iii) The right to nationality.

6.11 In the *International Covenant on Civil and Political Rights*, the focus of the right to nationality is on the child. Article 24 (3) provides:

> Every child has the right to acquire a nationality.

Again, under Article 2, the right is to be accorded without distinction of any kind.

6.12 The rights of children are further spelled out in the *Convention of the Rights of the Child* to which Fiji is a party. Article 7 provides:

1. The child shall be registered immediately after birth and shall have the right from birth to a name, *the right to acquire a nationality* and, as far as possible, the right to know and be cared for by his or her parents.
2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, *in particular where the child would otherwise be stateless*.

Article 8 further provides -

1. States Parties undertake to respect the right of the child *to preserve his or her identity, including nationality*, name and family relations as recognised by law without unlawful interference.

> 2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

(Emphasis added.)

6.13 The *Convention on the Nationality of Married Women* (1957), to which Fiji is a party, was the first international instrument to address specifically the nationality problems that can arise for a married woman. The law of some countries used to provide that, on marriage, a foreign woman automatically acquired her husband's nationality. Sometimes she lost it again if the marriage was dissolved. If the husband changed his nationality during the marriage, his wife's nationality might change also. Articles 1 and 2 of the Convention recognise that a married woman should remain entitled to her nationality in her own right. They provide that a wife's nationality is not automatically changed either by her marriage or its dissolution, nor on the happening of any event during the marriage that changes her husband's nationality.

6.14 The Convention also recognised that, in many cases, a woman may wish to acquire her husband's nationality on marriage. The states parties undertook to allow foreign wives of their nationals to acquire their nationality either as of right or under privileged procedures, subject only to any limitations imposed in the interests of national security or public policy. This rule, to which Fiji gave effect in both the 1970 and 1990 Constitutions, has now been overtaken by a different approach that reflects a commitment to the equality of men and women and the greater mobility of both men and women between countries.

6.15 The most recent international instrument dealing with the citizenship rights of women is the *International Convention on the Elimination of All Forms of Discrimination Against Women* (1979). Fiji is a party, though with reservations, including one relevant to nationality, as explained below.

6.16 Under Article 2 of the Convention,

> States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women, and, to this end, undertake:
>
> (a) *To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation* if not yet incorporated therein and to ensure, through law and other appropriate means, the realization of this principle; (emphasis added).

Fiji is bound by this provision.

6.17 Article 9 sets out the specific standards applying to women in respect of nationality:

> 1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.
>
> 2. States Parties shall grant women equal rights with men with respect to the nationality of their children.

Because the provisions of the 1990 Constitution about the citizenship of children born overseas to female Fiji citizens, and possibly those about the acquisition of citizenship by foreign wives, as distinct from foreign husbands, are inconsistent with Article 9, the Fiji Government made a blanket reservation to that article. Nevertheless the Convention as a whole must be regarded as setting out the current international standards.

6.18 In effect, it recognises that, if citizens of different countries marry, the couple may wish to make their home in either the husband's country or the wife's country. They should not be prevented from doing so by citizenship laws that make it harder for a husband to acquire his wife's nationality than a wife her husband's. If descent from a male Fiji citizen is relevant to the acquisition of citizenship, then descent from a female citizen should also be recognised on the same basis.

THE FRAMEWORK FOR CITIZENSHIP RULES

6.19 In reviewing sections 22-30 of the 1990 Constitution and in making recommendations about future constitutional arrangements governing citizenship, the Commission recognised the need to

- retain in the Constitution the basic rules about the citizenship of Fiji ;
- ensure that those basic rules are supplemented in a new Citizenship Act which is consistent with the new constitutional provisions and enters into force at the same time;
- take full account of the submissions on matters affecting citizenship; and
- apply the international standards.

A brief history of Fiji's citizenship laws

6.20 The needs listed above are based in part on the history of Fiji's constitutional and legislative provisions about citizenship. Before 1970, the people of Fiji were citizens of the United Kingdom and Colonies. The status of "citizen of Fiji" was first recognised by the 1970 Constitution which contained rules about who would become a Fiji citizen on 10 October 1970, or would have the right to become a citizen on application, subject to certain conditions. It also made rules about which persons born after 9 October 1970 would automatically become citizens of Fiji. The 1970 Constitution empowered Parliament to fill out its provisions by laws for various purposes, including the acquisition of Fiji citizenship by persons not entitled to it under the Constitution. Parliament duly enacted the Fiji Citizenship Act 1971.

6.21 The 1970 Constitution was abrogated with effect from 28 September 1987. To fill the gap in the law about citizenship, the military government, on 30 October 1987, promulgated the Fiji Citizenship Decree 1987. The Decree was deemed to have come into effect on 6 October 1987, the date on which Fiji was declared a republic. No provision was made for persons born between 28 September and 6 October 1987. The Decree did not state whether it wholly repealed the Fiji Citizenship Act 1971, or only those parts of it that were inconsistent with the Decree or relied for meaning on a provision of the 1970 Constitution, since abrogated.

6.22 The citizenship provisions of the 1990 Constitution, like the rest of the Constitution, came into force on 25 July 1990, but some of these provisions were backdated to 6 October 1987. However, the status of persons born between 28 September and 6 October 1987 was still not provided for. To the extent of any inconsistency, the 1990 provisions overruled both the 1971 Act and the 1987 Decree. The Court of Appeal has recently held that citizenship cannot be granted in a way not provided for in the Constitution. The Commission will address the specific problems arising from this situation in later sections of this chapter.

RECOMMENDATIONS

32. The basic rules about acquisition and loss of Fiji citizenship should continue to be provided for in the Constitution.

33. The Constitution should provide explicitly for the making of laws by Parliament to give effect to the rules in the Constitution and to supplement them to the extent provided, in ways consistent with the Constitution.

34. A new and comprehensive Citizenship Act, consistent with the recommended new constitutional provisions, should be prepared at the same time as the constitutional provisions themselves, and should enter into force on the same date.

35. The new constitutional and statutory provisions should take full account of the international instruments designed to avoid statelessness and should be consistent with international human rights principles.

REVIEWING THE 1990 PROVISIONS

6.23 Any new rules about Fiji citizenship need to provide for the following matters:

- the date on which the new rules take effect ("the effective date");
- the fact that everyone who was a Fiji citizen immediately before the effective date remains a citizen on that date;
- which persons born after the effective date automatically become citizens at the date of birth;
- other rules governing the acquisition of citizenship;
- rules governing the loss of citizenship;
- transitional provisions to fill any existing gaps or take account of any anomalies.

We now make proposals about each of these matters.

RETENTION OF EXISTING CITIZENSHIP

6.24 The effective date of new constitutional rules about citizenship should be stated in the Constitution itself. Clearly, everyone already a citizen of Fiji immediately before the effective date should remain a citizen on that date, even if the rules about acquisition of citizenship are changed. That was the purpose of section 22 of the 1990 Constitution, even though its backdating to 6 October 1987 rather than 28 September 1987 failed to deal with some existing uncertainties and created new ones.

RECOMMENDATION

36. Any new constitutional provisions about citizenship should provide that every person who was a citizen of Fiji immediately before their effective date continues to be a citizen.

MANNER IN WHICH FIJI CITIZENSHIP MAY BE ACQUIRED

6.25 Section 23 of the 1990 Constitution provides that citizenship of Fiji may be acquired by birth, descent, naturalisation or registration. In itself, the section is a drafting device for easy reference in later sections to persons who became citizens in different ways, though this intention is imperfectly carried through. As an indication of how a person may become a citizen, the terminology itself is not self-explanatory.

6.26 Both a child who acquires citizenship by "birth" and one who acquires citizenship by "descent" automatically become citizens from the moment of birth, the difference being that, in the first case, the birth took place in Fiji and, in the second, the birth was outside Fiji to a father who is a Fiji citizen. The difference between "registration" and "naturalisation" is intended to convey the difference between a right to acquire citizenship, subject to fulfilment of certain conditions, and eligibility to benefit from a discretion to grant citizenship, applying the specified criteria. However, that distinction is not fully carried through in the substantive provisions themselves.

6.27 While the references to *how* a person may become a citizen have their uses, and will be maintained, we prefer to analyse the rules themselves by looking at *who* should become a citizen, by what means and with what consequences. The Commission leaves to the drafter the question of how effect should be given to its recommendations in the constitutional and statutory provisions themselves.

Persons born in Fiji after the effective date

6.28 Section 24 of the 1990 Constitution provides that a person born in Fiji after 6 October 1987 becomes a citizen only if that person's father or mother was a citizen at the time of the birth. In contrast, section 21 of the 1970 Constitution provided that everyone born in Fiji after 9 October 1970 would become a citizen, regardless of the citizenship of the parents. That rule was maintained by the 1987 Decree. The change of policy made by the 1990 Constitution presumably reflected the atmosphere of the times.

6.29 Because Fiji does not encourage large scale immigration, the change has probably had little practical effect. We received no submissions about it. Other countries, in the Pacific and elsewhere, apply the principle that their citizenship should be based on descent from a citizen, whether the child is born in the country or outside it.

6.30 However, most of those countries provide as an exception that a child born in their territory who would otherwise be stateless acquires the citizenship of the country at birth. Such cases are likely to be few in number, though important to those affected. Provision needs to be made for them.

6.31 The Commission considered whether, with an exception for children who would otherwise be stateless, it was desirable to maintain the provision restricting citizenship to children born in Fiji of a father or mother who was a citizen at the time of birth. It concluded that such a rule was not in the best interests of Fiji. The cases in which neither parent of a child born in Fiji has a real connection with the country are likely to be so few that they should not be regarded as a determining factor.

6.32 On the other hand, Fiji does grant the right to enter, reside and work in the country to the citizens of other countries who have a contribution to make. Some stay for long periods, even a lifetime, without becoming citizens. Their children born and raised in Fiji may know no other home. They are likely to be educated in Fiji (and often speak more than one of its languages). Even if their parents eventually leave, they may feel that they have permanent roots in Fiji. Their continuing presence is likely to be an asset.

6.33 We therefore consider that all children born in Fiji, except the children of diplomats, should automatically become citizens at birth. That rule will prevent any child born in Fiji from being stateless. It will also give citizenship to a small group with a contribution to make to Fiji. If a child born to foreign parents also has another citizenship, then, as we explain below, he or she will have to choose, at age 21, between that citizenship and Fiji citizenship. There is no question of opening the floodgates to citizens who do not want to maintain their connection with the country.

6.34 The provision in section 21 of the 1970 Constitution excluding from the general rule the children of male enemy aliens born in a place under occupation by the enemy should not be re-enacted. If that unlikely situation were ever to become a threat, it should be dealt with by emergency legislation made as recommended in Chapter 19. As required by Article 12 of the Convention on the Rights of the Child and as provided by section 2(2)(e) of the Fiji Citizenship Act 1971, a child found in Fiji should be regarded as having been born in Fiji in the absence of proof to the contrary.

Persons born outside Fiji after the effective date

6.35 Under section 25 of the 1990 Constitution, a person born outside Fiji after 6 October 1987 becomes a Fiji citizen if, at the time of the birth, the child's father was a Fiji citizen. If the child's parents are not married, then, under section 30(1), the child becomes a citizen if the mother was a citizen. The Commission received a number of submissions, particularly from women's groups, that this rule discriminates against women who are Fiji citizens, married to non-citizens, and give birth to a child overseas.

6.36 The rule is contrary to Article 9(2) of the *Convention on the Elimination of All Forms of Discrimination Against Women* which requires women to be granted equal rights with men with respect to the nationality of their children. Any departure from that principle inflicts hardship on the married female Fiji citizens involved. There is no reason why they should be treated less favourably than unmarried female Fiji citizens who give birth overseas.

6.37 In considering how effect should be given to this policy approach, the Commission evaluated two options. One was that every child born outside Fiji after the effective date should be a Fiji citizen at the date of birth, if, at that date, either parent was a citizen of Fiji. The other was that such a child should not become a citizen automatically but should be entitled to citizenship by registration. We consider that the second option is the better one. The right to citizenship by registration of a child born overseas to a Fiji citizen should remain open during that child's lifetime, subject to the rules for the avoidance of multiple citizenship. But it will require a conscious decision by the parent, or after reaching the age of 21, the child, to maintain the connection with Fiji.

6.38 A child born overseas of a parent who is a Fiji citizen is likely also to acquire at birth the citizenship of the country of birth. If so (as further discussed below) he or she will have to choose, at age 21, between Fiji citizenship and that other citizenship. So again, in providing that the child of any Fiji citizen born overseas should have the right to citizenship by registration, there is no question of opening up Fiji citizenship to persons who do not wish to maintain their connection with Fiji. The fact that there will be a record of children born overseas who have been registered as citizens will make it easier to determine whether or not they have renounced their other citizenships in due time, and thus continue to be Fiji citizens.

RECOMMENDATIONS

37. The Constitution should provide that every child born in Fiji after the effective date is a citizen of Fiji at the date of birth, unless, at that date, one of the child's parents possesses diplomatic immunity and neither parent is a citizen of Fiji.

38. A child found in Fiji should be taken as having been born in Fiji, in the absence of proof to the contrary.

39. The Constitution should provide that every child born outside Fiji after the effective date has the right to become a citizen of Fiji by registration, if, at that date, either parent was a citizen of Fiji.

THE AVOIDANCE OF MULTIPLE CITIZENSHIPS

6.39 Section 28 of the 1990 Constitution implements a clear policy that an adult should not be permitted to remain a Fiji citizen if he or she retains or acquires the citizenship of another state. It also continues the policy under the 1970 Constitution and the Citizenship Act 1971 that a person's registration or naturalisation as a Fiji citizen is of no effect unless that person renounces his or her existing citizenship.

6.40 Generally speaking, the submissions supported these policies, although some people thought them too restrictive in a world that was becoming more internationalised, with opportunities for Fiji citizens to work and reside in a variety of countries. Some people also thought it anomalous that indigenous Fijians who acquired another citizenship should cease to be Fiji citizens, although remaining registered in the Vola ni Kawa Bula.

6.41 The Commission considers that the Constitution should continue to be based on the principle that an adult citizen of Fiji should forego the right to citizenship if he or she *voluntarily* retains or acquires another. The acquisition of another citizenship by operation of law, through marriage or a change in the law of another country with which a person has a connection, should not deprive a person of his or her Fijian citizenship unless the person fails to renounce the other citizenship within 12 months of becoming aware of it, or of being required to do so by the Minister responsible for citizenship, whichever first occurs.

6.42 The 1990 Constitution contains provisions about the automatic loss of Fiji citizenship by operation of law, renunciation of Fiji citizenship and deprivation of Fiji citizenship, as well as provisions about renunciation of a foreign citizenship

in order to become registered or naturalised as a Fijian citizen. At the technical level, these provisions are far from clear. They should be clarified on a principled and workable basis. (Those about replacing the difficult concepts of "residence" or "continuous residence" in Fiji with references to "presence" in Fiji are expanded below. They affect all adult persons qualifying for citizenship either by registration or by naturalisation.)

6.43 One matter, in particular, needs to be provided for. Incorporating provisions of the Fiji Citizenship Act 1971, section 28(2) of the 1990 Constitution provides that a person's registration or naturalisation as a citizen of Fiji is conditional on the effective renunciation of that person's foreign citizenship within 12 months from the date of the registration or naturalisation. The rule seeks to take account of the fact that, to avoid statelessness, the laws of other countries usually prevent their citizens from renouncing that citizenship unless they have *already* become a citizen of another country. It should be clarified by providing that Fiji citizenship can be granted by registration or naturalisation before renunciation of other citizenships, but that the grant of citizenship will be forfeited, unless other citizenships are renounced within the specified period.

6.44 The underlying intention of section 28 is clear. The adult citizen of another country who wishes to be registered or naturalised as a citizen of Fiji must be prepared to renounce all other citizenships. The law of some countries, however, does not permit their citizens to renounce their citizenship. In such a case, a citizen of the country concerned who wishes to retain or acquire Fiji citizenship should be permitted to do so if he or she declares an intention not to exercise the benefits of that other citizenship. The Constitution should provide for the making of such a declaration under conditions provided by law.

A right to resume the citizenship of Fiji

6.45 The Commission considers that a former citizen of Fiji should have a constitutional right to resume his or her citizenship on certain conditions. Most persons who renounce their citizenship of Fiji, or lose it automatically, are likely to have done so, not only because they possessed or acquired another citizenship, but also because they were living outside Fiji. We consider that they should be able to resume their citizenship if they effectively demonstrate a desire to return to their former country. We therefore propose that former citizens should have the right to be registered as citizens of Fiji if they have been present in Fiji for 3 out of the 5 years immediately preceding the date of application for registration.

6.46 The three year period should not include time spent in Fiji before the loss or renunciation of Fiji citizenship. Former citizens who have not left Fiji but have lost their citizenship through their own inaction will have to spend 3 more years in the country to acquire the right to have their citizenship restored. This could, for example, be the situation of young adults who do not realise that, at birth, they acquired a second citizenship and do not renounce it in due time.

6.47 To permit former citizens no longer living in Fiji to take advantage of the right just proposed, they should also have a constitutional right to enter Fiji and to reside here. Already, under the Immigration Act, a former citizen *born in Fiji* has a statutory right to enter and reside in the country. Our proposal involves a constitutional extension of that right, so that *all* former citizens will be able to fulfil the requirement for an aggregate period of physical presence in Fiji before registration as a citizen. As well as being justified on humanitarian grounds, such a right is likely to bring back to Fiji some otherwise lost sources of expertise and potential capital investment.

Concern about the loss of citizenship by indigenous Fijians

6.48 We believe that a clear right for former citizens to resume Fiji citizenship after a qualifying period, and in the meantime to enter and reside in Fiji, would do much to ease the concerns of those who felt that indigenous Fijians, specially if registered in the Vola ni Kawa Bula, should not lose their Fijian citizenship on acquiring the citizenship of another country, or, if they did lose it, should be able to regain it promptly on renouncing the other citizenship.

6.49 These concerns must be examined in the context of changes of lifestyle that will continue to take some indigenous Fijians away from their country of origin. Inevitably, some will settle permanently in their adopted country and acquire its citizenship. Although they will remain registered in the Vola ni Kawa Bula, they will no longer have a need or justification for exercising rights as citizens.

6.50 In view of the widespread support for the view that multiple citizenship should not be permitted, we believe it would be wrong on grounds of policy as well as discrimination, to provide that indigenous Fijians, or persons registered in the Vola ni Kawa Bula, should be permitted to acquire or retain the citizenship of another country while still retaining their Fiji citizenship. For the same reasons, we also believe it would be wrong to give indigenous Fijians or persons registered in the Vola ni Kawa Bula preferential treatment in regaining Fiji citizenship.

6.51 If it is well understood that no adult Fiji citizen is entitled to multiple citizenship, few will voluntarily forego their Fiji citizenship without careful thought. If their circumstances should change, those who have lost their citizenship will be entitled to regain it after a qualifying period during which they will have a constitutional right to enter Fiji, and to live and work here.

RECOMMENDATIONS

40. **The Constitution should continue to provide that an adult citizen of Fiji automatically loses that citizenship if he or she voluntarily acquires another citizenship, or voluntarily retains another citizenship in the circumstances referred to in Recommendations 11 or 12.**

41. **An adult person's involuntary acquisition of another citizenship, through marriage or a change in the law of another country with which the person has a connection, should not deprive the person of his or her Fiji citizenship, unless the person fails to renounce the other citizenship within 12 months of becoming aware of it, or of being required to renounce it by the Minister responsible for citizenship, whichever first occurs.**

42. **A child who, at birth, or by the action of a parent or guardian before he or she attained the age of 21, acquired both Fiji citizenship and the citizenship of one or more other countries, should automatically lose his or her Fiji citizenship on attaining the age of 22, if he or she has not, after attaining the age of 21 and before attaining the age of 22, renounced all other citizenships.**

43. **The procedures for the grant of Fiji citizenship by registration or naturalisation should continue to require an adult applicant to renounce the applicant's existing citizenships, but it should be recognised that, under the law of the country concerned, the renunciation of a foreign citizenship may be permitted only after the actual grant of Fiji citizenship.**

44. **If, for the purpose of retaining or acquiring Fiji citizenship, a person is unable effectively to renounce the citizenship of another country under its law, the Constitution should permit that person to make a declaration of intention not to exercise any of the benefits of that citizenship under conditions provided by law.**

45. In view of the recommendations already made for the loss, by operation of the Constitution, of the Fiji citizenship of an adult person who remains or becomes a citizen of another country, it should not be possible, on that ground alone, to deprive such a person of his or her citizenship of Fiji.

46. The Constitution should entitle an adult person who was formerly a citizen of Fiji to be registered as a citizen if he or she has been lawfully present in Fiji for an aggregate of 3 out of the 5 years immediately preceding the application for registration.

47. A former citizen should have a constitutional right to enter Fiji and reside here, subject to compliance with the conditions applicable to other persons granted the right to enter and reside in Fiji.

48. A person should be permitted to renounce his or her Fiji citizenship only if he or she has attained the age of 21 years, and is a citizen of another country from the date of birth or has been granted the citizenship of another country by registration or naturalisation.

FOREIGN SPOUSES OF FIJI CITIZENS

6.52 Section 26(1) and (2) of the 1990 Constitution permit a woman who is or has been married to a citizen of Fiji to be registered as a citizen. As has been seen, Fiji was required by its adherence to the *Convention on the Nationality of Married Women* to allow a foreign woman who is or has been married to a Fiji citizen to become a citizen herself on a preferential basis.

6.53 The Commission received submissions from a number of people that the preferential treatment should be extended to the foreign husbands of women who are Fiji citizens. Such a change would be within the broad requirements of Article 2(a) of the *Convention on the Elimination of All Forms of Discrimination Against Women* which requires states parties to embody the principle of the equality of men and women in their national constitutions. However, some submissions opposed any such change, mainly on the ground that a woman who marries a foreigner is expected to make her home in her husband's country and perhaps to acquire his nationality.

6.54 The Commission considers that this expectation is no longer well-founded, at least as a universal rule. The women of Fiji now have many

opportunities of meeting and marrying foreign men. They should have the opportunity of making their home in Fiji. Otherwise Fiji is likely to be deprived of valuable sources of trained skills, usually acquired at Fiji's expense. We consider that all foreign spouses of Fiji citizens, husbands as well as wives, should be treated on an equal basis.

6.55 To allay any concerns, a spouse should spend a reasonable time in Fiji before becoming eligible for registration as a citizen. We think this period should be 3 years out of the 5 years immediately preceding the application for registration. Again, the three year period should not include time spent in Fiji before the marriage. During the period after the marriage and before registration as a citizen, the spouse should have a constitutional right to enter and reside in Fiji, subject to compliance with the ordinary conditions applying to other persons granted those rights.

6.56 As permitted by the *Convention on the Nationality of Married Women*, the registration of foreign wives as citizens has always been subject to such exceptions or qualifications as may be prescribed in the interests of national security or public policy. The requirement that a foreign spouse seeking registration as a citizen must renounce all foreign citizenships is within the permitted public policy exception and should remain. The Constitution should permit other conditions to be prescribed by Act in the interests of national security or public policy. For example, the foreign spouse should be required to produce evidence that the marriage is not one entered into solely for the purpose of obtaining Fiji citizenship.

6.57 The right to be registered as a Fiji citizen of any woman who is *or has been married* to a citizen of Fiji includes a woman married to a man who died before she was registered as a citizen or a woman who married to a Fiji citizen from whom she has since been divorced. As required by the *Convention on the Nationality of Married Women*, this approach should remain, though it should now apply to a former husband as well as a former wife. Even after death or divorce, a spouse may have good reason for seeking to become a citizen, especially if there are children of the marriage and the family home is in Fiji. As already discussed, the requirement to renounce other citizenships will provide a safeguard against abuse.

RECOMMENDATIONS

49. The Constitution should entitle a citizen of another country who is or has been married to a Fiji citizen to be registered as

a citizen, if he or she has been lawfully present in Fiji for an aggregate of 3 out of the 5 years immediately preceding the application for registration and complies with other conditions imposed by the Constitution or by Act in the interests of national security or public policy.

50. The foreign wife or husband of a Fiji citizen should have a constitutional right to enter and reside in Fiji, subject to compliance with the conditions applicable to other persons granted the right to enter, reside and work in Fiji.

OTHER PERSONS WHO SHOULD BE ENTITLED TO CITIZENSHIP BY REGISTRATION

Adopted children

6.58 Under the proviso to section 26(2) of the 1990 Constitution, a foreign child adopted by a citizen of Fiji has the right to registration as a citizen. The Constitution should maintain that right. It should apply to a child adopted either under the law of Fiji or under the law of another country prescribed by law. That requirement gives the Fiji authorities the opportunity to be satisfied that the foreign adoption is valid and took place under conditions safeguarding the rights of the child and its natural parents.

6.59 To avoid abuses, the right should be limited to children who were under 18 years of age when adopted, but the right itself should be of indefinite duration. If the adopted child is over the age of 21 at the date of the application for registration, the rules requiring a period of physical presence in Fiji and renunciation of other citizenships should apply. An adopted child registered as a Fiji citizen before attaining the age of 21 would lose that citizenship unless he or she renounces all other citizenships before attaining the age of 22.

Natural children of a Fiji citizen

6.60 The right to registration as a citizen should extend to the natural-born children of a Fiji citizen who are not already citizens of Fiji. The rule to that effect in the Fiji Citizenship Act 1971 has been implicitly repealed by the Fiji Citizenship Decree 1987 and the 1990 Constitution, although the provision for the registration of the grandchildren of Fiji citizens in section 26(2)(b) of the 1990 Constitution covers some of the ground. That provision should be consequentially repealed.

6.61 The beneficiaries of the proposed new right would include:

- children born outside Fiji before the effective date to a married woman who was a Fiji citizen at the date of the birth;
- children born outside Fiji before 6 October 1987 to a father who was a Fiji citizen at the date of the birth but who was himself born outside Fiji after 10 October 1970 (this category would be very small);
- the children of a person registered or naturalised as a citizen of Fiji at any time, whether before or after the effective date.

6.62 The essential purpose is to recognise that a Fiji citizen may have natural-born children who are not themselves citizens. These children should have a right to be registered as citizens on the initiative of their parents, or if, after becoming adults, they themselves so desire. In the last-mentioned case their right to registration should arise only if they were under the age of 21 at the time when their parent became a Fiji citizen. They should also be required to comply with the conditions applicable to the registration of other adult persons as citizens.

RECOMMENDATIONS

51. The Constitution should entitle a child adopted by a Fiji citizen when the child was under the age of 19 years to be registered as a citizen. Provision for the recognition in Fiji of an adoption under foreign law should be made by Act.

52. The Constitution should entitle a natural-born child of a Fiji citizen to be registered as a citizen if the child was under 21 when the parent first became a citizen.

53. The Constitution should provide that applications for registration under these provisions may be made by an adoptive or natural parent or a legal guardian, if the child is under 21 at the time of the application. If the child is 21 or over, he or she may make the application but will be entitled to registration only if he or she has been lawfully present in Fiji for an aggregate of 3 out of the 5 years immediately preceding the date of the application. Before registration as a citizen, the adopted or natural-born child of a Fiji citizen should have a constitutional right to enter and reside in Fiji, subject to compliance with the conditions applicable to other persons granted the same rights.

THE ACQUISITION OF CITIZENSHIP BY NATURALISATION

6.63 Section 27 of the 1990 Constitution provides the current basis for the acquisition of Fiji citizenship by naturalisation. As some of the submissions indicated, the grant of citizenship by naturalisation is closely linked with immigration policy. The most usual ground for a person's naturalisation is that the person has been allowed to settle in the country and make a permanent home there. Once new settlers have demonstrated an intention to stay indefinitely, and a capacity to become good, law-abiding citizens, it is in the interests both of the country of settlement and the settlers themselves that they should be granted citizenship.

6.64 As we have indicated, the difference between the grant of citizenship by registration and by naturalisation is that registration is a right: a person who fulfils the specified conditions is entitled to be registered. The duty to register can if necessary be enforced in the courts. Naturalisation is not a right. Nevertheless, states normally set out in their constitutions or other law the criteria by reference to which naturalisation will be granted. Persons settling in a country have a legitimate expectation that, if they meet the criteria, they will be granted naturalisation.

6.65 Some criteria will be factual - for example how long the person has lived in the country. Some may involve the exercise of judgment - for example, to quote from section 27(2), whether the person is "of good character" or whether he or she "has been assimilated into the way of life of the people of Fiji". Legally, naturalisation involves the exercise of a discretion. At present, section 27 of the 1990 Constitution vests that discretion in the Prime Minister.

6.66 As will be seen in Chapter 6, such a discretion must not be exercised on a discriminatory basis. In any event, its exercise is subject to the supervision of the courts by the process known as judicial review. A person refused naturalisation would be able to claim that no reasonable Prime Minister, applying the criteria set out in section 27, could, in the circumstances, have decided that the criteria had not been met. It follows that the criteria for naturalisation should be clear and not too subjective.

6.67 The Commission considers that provision for the grant of citizenship by naturalisation should continue to be made in the Constitution. The Constitution should also specify the period a foreign citizen needs to have spent in Fiji before becoming eligible for naturalisation. He or she should be required to have been lawfully present in Fiji for an aggregate period of five out of the ten years

immediately preceding the application for naturalisation. We explain below the reasons for requiring "presence" rather than "residence" in Fiji, and discuss the circumstances in which a person's physical presence in the country should not count towards the qualifying period. The Constitution should permit other reasonable criteria for the grant of citizenship by naturalisation to be specified by Act.

The link between immigration and naturalisation

6.68 At the time of the public hearings, the Government was apparently considering a scheme for large-scale immigration from Hong Kong. A number of submissions expressed opposition to the proposal, which may no longer be under active consideration. Immigration is not a matter dealt with in the Constitution. The Commission considers that it should remain a matter of government policy within the framework of the Immigration Act. However, it recognises that the crucial decisions affecting the question of who will eventually qualify for citizenship of Fiji by naturalisation are those made on applications for permits to work in Fiji, as well as to enter and reside here. The few difficult decisions that need to be made on applications for refugee status will have similar consequences.

6.69 The Commission considers that the Constitution should not specify the identity of the Minister responsible for either citizenship or immigration. Those responsibilities should flow in the normal way from the responsibility for administering a new Citizenship Act on the one hand and the Immigration Act on the other.

6.70 However, because of the close link between immigration and the grant of citizenship by naturalisation, the Commission considers that the Minister responsible for immigration should be assisted by an advisory body. All applications for the grant or extension of work permits and for refugee status, except those by a person who has a constitutional right to enter and reside in Fiji, should be referred to the advisory body for a recommendation. The Minister should also be entitled to seek the input of the advisory body on immigration policy.

6.71 The advisory body could be set up either by the Immigration Act or by administrative action. The Minister should not be bound to accept its recommendation but should disclose in his or her annual report to Parliament the number of cases in which the recommendation was not followed. The setting up of an advisory body should not affect the existing arrangements under which the immigration authorities consult with the relevant departments, and through them

with the private sector, about the specialised skills required in Fiji and whether there is a need to supplement them from overseas. Careful decisions made in these ways about the grant or extension of a person's work permits should ensure that there will be little difficulty, when the time comes, in making the decision that the person should be granted naturalisation.

6.72 The Commission's recommendations about the acquisition of citizenship, including those made below for transitional remedial measures, make it unlikely that there will be any cases where a person who has a genuine connection with Fiji is not entitled to, or eligible for, citizenship. It considers therefore that the provisions made in the Constitution for the grant of citizenship by registration or naturalisation should be exhaustive. Parliament should not be permitted to confer a right to citizenship by Act, either by direct grant or by the exercise of a discretion. Any provision for such a purpose would be open to abuse.

RECOMMENDATIONS

54. The Constitution should continue to make provision for the grant of citizenship by naturalisation.

55. It should specify that, to become eligible for naturalisation, a foreign citizen needs to have been lawfully present in Fiji for an aggregate period of five out of the ten years immediately preceding the application for naturalisation.

56. The Constitution should not specify which Minister should be responsible for decisions about citizenship. That should flow from the assigned responsibility for administration of the new citizenship legislation.

57. Immigration should not be dealt with in the Constitution but should remain a matter of government policy within the framework of the Immigration Act. In view, however, of the link between immigration policy and grants or extensions of work permits or refugee status, and a foreign citizen's eventual eligibility for citizenship by naturalisation, the Minister responsible for immigration should be assisted in these matters by an advisory body. The body could be set up under the Immigration Act or by administrative action. The Minister should not be bound to accept its recommendations, but his or her annual report to Parliament should disclose the number of cases in which its recommendations were not followed. The existing arrangements for consultation about whether people with special skills are needed from overseas should be retained.

58. The provisions of the Constitution about the ways in which Fiji citizenship can be acquired should be exhaustive. It should not permit Parliament to confer a right to citizenship by Act, either by direct grant or by the exercise of a discretion.

MATTERS INCIDENTAL TO REGISTRATION OR NATURALISATION AS A CITIZEN

6.73 We have already mentioned several matters of detail incidental to registration or naturalisation as a citizen. For convenience, we gather them together in this section. First, to avoid overloading the Constitution with detail, it should specify only the main conditions for registration and the main criteria for naturalisation. It should, however, permit the imposition, by Act, of other reasonable conditions or criteria. The additional conditions or criteria should not, of course, be so onerous as to negate a person's right to registration as a citizen or eligibility for naturalisation. If necessary, the reasonableness of particular conditions could be called in question in the courts.

6.74 Secondly, we have suggested that a person should have been "lawfully present in Fiji" for a specified aggregate period, as a condition precedent to registration as a citizen in certain cases, and also as the main criterion for naturalisation. We have done so because the existing references in section 27(2)(g) of the 1990 Constitution to a person who has "resided", "resided for a continuous period" or "resided continuously for a period" in Fiji are problematic. A person may in fact maintain a residence in more than one country. A person may also leave his or her country of residence temporarily, for purposes including study, business, family reunification or holiday. It is not clear whether the continuity of a period of residence is broken by such a temporary absence.

6.75 The modern approach to demonstrating that a person has such a real and lasting connection with a country as to justify the grant of its citizenship is to look at the aggregate period during which the person has been physically present in the country, during a longer period of elapsed time immediately before the date of the application for citizenship. If the person has been out of the country, periods of absence can be determined by looking at his or her passport. The aggregate period during which he or she was present in the country can easily be calculated by taking the period of elapsed time and deducting periods of absence.

6.76 These days, it is normal for people to come and go from the country of which they are, or would like to become, citizens. If, as the qualification for registration as a citizen, a person shows that he or she was physically present in

Fiji for a total period of 3 years in the immediately preceding 5 years, that will be a clear indication that the person has a real connection with Fiji. The same is true of a person who qualifies for naturalisation as a citizen by spending 5 out of the immediately preceding 10 years in Fiji.

6.77 It follows that, once registered or naturalised as a citizen, a person should not be liable to lose that citizenship however long he or she subsequently spends out of Fiji. Apart from cutting across a citizen's right to leave or return to Fiji, persons registered or naturalised as citizens will have no other citizenship. They should not be deprived of their citizenship if that would make them stateless. The automatic loss of Fiji citizenship on the acquisition of another is all that is needed to ensure that people who have lost all real connection with Fiji will no longer remain citizens.

6.78 The Constitution should, however, permit some further inquiry into the reasons for a person's presence in the country in order to see whether they should count for the purposes of entitlement to, or eligibility for, citizenship. It should allow appropriate provisions for this purpose to be put in place by Act. A period in prison should presumably be excluded, if indeed the commission of an offence punishable by imprisonment, or imprisonment for more than a specified period, is not in itself a bar to the grant of citizenship. A period spent as a student should also be excluded, at least for the purposes of eligibility for naturalisation. As a country with a regional university, Fiji could not afford to allow foreign students to qualify for its citizenship by virtue of a period of study in the country, and their home countries could not afford to lose them so easily.

RECOMMENDATIONS

59. The Constitution should specify only the main conditions for registration as a citizen and criteria for naturalisation. It should, however, permit other reasonable conditions or criteria to be imposed by Act.

60. In those cases where the Constitution requires a foreign citizen to spend an aggregate period of time in Fiji before becoming entitled to, or eligible for, citizenship, it should permit provision to be made by Act excluding periods during which the person was present in Fiji for reasons that conflict with the purpose of imposing the qualifying period in that case.

DEPRIVATION OF CITIZENSHIP

6.79 The brief statements in the Universal Declaration of Human Rights that "everyone has the right to a nationality" and that "no one shall be arbitrarily deprived of his nationality" make the point that, once conferred, citizenship gives rise to inalienable rights. Therefore, there is no question of depriving a citizen of his or her citizenship even for the gravest of crimes involving disloyalty to the state.

6.80 Under the 1970 Constitution and the Fiji Citizenship Act 1971, there was some departure from this principle in the case of persons who acquired citizenship by registration or naturalisation. However, the provisions had no practical effect because the Act provided that such a person could not be deprived of citizenship on grounds of disloyalty or residence for a continuous period of 5 years if he or she would thereby become stateless, and renunciation of foreign citizenships was a requirement for registration or naturalisation as a citizen.

6.81 Because those adult citizens who retain or acquire foreign citizenship are automatically deprived of their Fiji citizenship, there is no reason to confer a power to deprive any person of Fiji citizenship solely on the ground that he or she possesses another citizenship. The broad power conferred on Parliament by section 29(c) of the 1990 Constitution should therefore be repealed.

6.82 The only statutory power required to avoid the exercise of multiple citizenships relates to the few cases in which a citizen of another country cannot, under its law, renounce its citizenship. We have recommended that, in such a case, the person may instead declare his or her intention not to exercise any of the benefits of that citizenship. Some sanction for the observance of such a declaration is required. The Constitution should permit Parliament, by Act, to provide that the Minister may deprive of Fiji citizenship a person who has made such a declaration, if satisfied that he or she has exercised a right pertaining exclusively to the citizens of the country concerned.

6.83 The only other power to deprive a person of his or her Fiji citizenship that Parliament should be able to confer, concerns the situation where a person is found to have obtained citizenship by registration or naturalisation by means of fraud, false representation or the concealment of any material fact. A power to deprive a person of Fiji citizenship in these circumstances is needed as a deterrent. It may need to be exercised even if the person concerned would thereby become stateless.

6.84 The power to deprive a person of Fiji citizenship in either of the circumstances mentioned should be exercised only in accordance with procedures that are in conformity with the rules of natural justice. That is the purpose of section 12(5)-(9) of the Fiji Citizenship Act 1971. The committee of inquiry which the Minister may be required to establish under that section is a quasi-judicial body quite different in character from the advisory body that we have recommended to assist the Minister responsible for immigration in making decisions about the grant of the right of permits to work in Fiji.

RECOMMENDATIONS

61. The Constitution should provide that no person may be deprived of his or her Fiji citizenship otherwise than by operation of the Constitution itself, for the avoidance of multiple citizenship, or under a provision made by Act providing for deprivation on the grounds referred to in Recommendation 62.

62. The Constitution should authorise Parliament to provide by Act for a person to be deprived of citizenship in the following cases only:

(a) where citizenship by registration or naturalisation was obtained by fraud, false representation or the concealment of any material fact; or

(b) where, as a condition of retaining or acquiring Fiji citizenship, a person, who is a citizen of another country and is unable under its law to renounce its citizenship, has declared an intention not to exercise the benefits of that citizenship, but nevertheless exercises a right pertaining exclusively to the citizens of that country.

63. The Constitution should provide that an Act conferring power to deprive a person of his or her Fiji citizenship in the circumstances referred to in Recommendation 62 must provide for that power to be exercised through procedures which are in conformity with the rules of natural justice.

TRANSITIONAL PROVISIONS

6.85 Earlier in this chapter, we outlined the history of Fiji's constitutional and legislative provisions about citizenship, showing how the abrogation of the 1970 Constitution, the promulgation of the Fiji Citizenship Decree 1987 and later of

the 1990 Constitution gave rise to certain gaps or inconsistencies. The persons whose citizenship status is not clear are those born in Fiji in the period 28 September 1987 to 24 July 1990 (the day before the 1990 Constitution entered into force), and those born outside Fiji in the period 29 September to 6 October 1987. We noted also that no provision was made by the 1990 Constitution to avoid the possible statelessness of persons born in Fiji after 25 July 1990 to parents neither of whom were citizens of Fiji at the time of the birth. We deal with each of these groups in turn.

6.86 As already explained, neither the 1987 Decree nor the 1990 Constitution made any provision about the citizenship of persons born in or outside Fiji in the period 28 September 1987 to 6 October 1987. The Decree provided that a person born in Fiji after 7 October 1987 became a citizen at the date of birth. That rule applied whether or not a parent of that person was a citizen at the date of the birth. Section 24 of the 1990 Constitution, which came into force on 25 July 1990, purported to apply, as from 7 October 1987, the rule that a person born in Fiji became a citizen only if, at the time of the birth, the person's father or mother was a citizen of Fiji.

6.87 Taken literally, that provision would have retrospectively deprived of Fiji citizenship a person born in Fiji in the period 7 October 1987 to 24 July 1990, neither of whose parents were citizens. Those persons had become citizens at birth under the Fiji Citizenship Decree. The courts, however, are loath to attribute retrospective effect to a provision taking away a right as basic as that of citizenship unless the intention that it should operate retrospectively is unmistakable.

6.88 In our opinion it is not. The references to 6 October, the date on which Fiji became a Republic, were apparently included, first in the decree and later in the 1990 Constitution, for the purpose of reassuring people that their citizenship status had not changed by reason only of that fact. They did not signify an intention to bring about a retrospective policy change. We consider therefore that the proper course is to treat all persons born in Fiji in the period beginning on 28 September 1987 and ending on 24 July 1990 as having become citizens of Fiji at the date of their birth.

6.89 Section 25 of the 1990 Constitution provides that a person born outside Fiji after 6 October 1987 becomes a citizen of Fiji at the date of birth if at that date the person's father is a citizen. The effect of backdating that section to 7 October 1987 was to liberalise the rule under both the 1970 Constitution and the 1987 Decree that a person born outside Fiji of a father who was a citizen became a citizen at birth only if the father himself had not been born outside Fiji.

6.90 We think the courts would in a case of this kind be inclined to give an affected person the benefit of the apparently retrospective liberalisation. Therefore we conclude that there is no need to interfere with the citizenship of persons born outside Fiji after 6 October 1987. Remedial action should be limited to the persons born outside Fiji in the period beginning on 28 September 1987 and ending on 6 October 1987. For the avoidance of doubt, they should be made subject to the rule under both the 1970 Constitution and the 1987 Decree. They should become citizens by birth only if born to a father who was not himself born outside Fiji.

6.91 The final group are those born in Fiji on or after 25 July 1990, neither of whose parents was a citizen at the time of the birth. It should be provided that they became citizens of Fiji at birth if they would otherwise have been stateless.

6.92 The groups affected by these proposals are not large. Those who as a result acquire the citizenship of Fiji in addition to another citizenship will, like other multiple citizens, have to decide, in the year after attaining the age of 21, whether to renounce their other citizenships in order to retain their citizenship of Fiji. Their failure to do so will result in the loss of their Fiji citizenship by operation of law.

6.93 The provisions we propose should be included among the transitional provisions of the Constitution because they will become spent, once the people to whom they apply are no longer alive, or no longer citizens of Fiji. They should not be allowed to complicate new citizenship rules of general and indefinite application.

RECOMMENDATION

64. For the avoidance of doubt and possible statelessness, the transitional provisions of the Constitution should include declaratory provisions to the following effect:

Notwithstanding anything in Chapter IV of the 1990 Constitution,

(a) a person born in Fiji in the period beginning on 28 September 1987 and ending on 24 July 1990 is to be taken as having become a citizen of Fiji at the date of birth;

(b) a person born outside Fiji in the period beginning on 28 September 1987 and ending on 6 October 1987 is to be taken as having become a citizen of Fiji at the date of birth if his or her father was a citizen on that date and was not himself born outside Fiji;

(c) a person born in Fiji in the period beginning on 25 July 1990 and ending on the day before the effective date is to be taken as having become a citizen of Fiji at the date of birth if that person would otherwise be stateless.

7

THE BILL OF RIGHTS

7.1 In this chapter we review Chapter II of the 1990 Constitution entitled "Protection of Fundamental Rights and Freedoms of the Individual". We deal first with some general questions affecting the constitutional protection of fundamental rights and freedoms as a whole. Then we look in detail at particular rights and freedoms. Where aspects of these rights and freedoms are closely related to matters discussed in later chapters, we deal with them there, but with a cross-reference in this chapter.

THE ORIGINS AND SIGNIFICANCE OF THE BILL OF RIGHTS

7.2 In many constitutions, the chapter on fundamental rights and freedoms of the individual is called a "Bill of Rights" - the name of a 17th century declaration of rights by the English Parliament that has since been used in constitutions in many parts of the world. In discussing the provisions in Chapter II of the 1990 Constitution, we therefore speak of the Bill of Rights. We also propose that, in the Constitution itself, the chapter setting out fundamental rights and freedoms should be entitled "Bill of Rights".

7.3 Some people referred in their submissions to the need for Fiji to have a Bill of Rights, unaware that fundamental rights and freedoms have been guaranteed in the Fiji Islands since 1966. This illustrates that the country's constitutional documents have never become widely known, in spite of people's keen interest in the composition of their institutions of government.

7.4 There are other reasons why the Bill of Rights has not made a large impact. Many do not have easy access to the legal processes required to invoke it. Judges and lawyers have mostly been educated in countries which have not had a judicially enforceable Bill of Rights. The constitutional expression of people's fundamental rights and freedoms was imported, not home-grown. It was also the product of contradictory influences which affected both its content and its style, making it difficult to read and creating a generally negative impression.

7.5 The 1990 Constitution made few changes to the Bill of Rights in the 1970 Constitution. The 1970 text was in a form developed by the Foreign and Commonwealth Office and included, with only slight variations, in the constitutions

of most former British colonies. The model reflected, on the one hand, the United Nations and regional initiatives to strengthen the international protection of human rights. It was based on the *European Convention on Human Rights* (1950) to which Britain became a party, not only in respect of its metropolitan territory, but also in respect of its colonies. The European Convention was itself based on the *Universal Declaration of Human Rights* (1948).

7.6 On the other hand, the formulation of the Bill of Rights reflected British caution about including individual rights in a judicially enforceable constitution - a step that has not yet been taken in Britain itself. Individual rights and freedoms were seen as already enshrined in the common law. The emphasis is not on affirming their existence but on protecting them from unjustified interference by the state. The Commission considers that, wherever possible, the Constitution should affirm rights and freedoms in positive terms.

7.7 The present Bill of Rights gives prominence to the fact that a person's rights and freedoms are not absolute. It emphasises the need to limit them in order to permit respect for the rights and freedoms of others and for the public interest. While this is true, the grounds on which limitations may be permitted occupy considerably more space than the expression of the rights and freedoms themselves and are sometimes capable of curtailing them more than is necessary or justifiable.

7.8 Yet it would be wrong to give the impression that individual human rights and freedoms have not been protected in the constitutional law of Fiji. With the exception of some aspects of political rights, already discussed at length, effect has been given in Fiji to the individual rights and freedoms generally recognised by the international standards, even in the period between 1987 and 1990. This should not be overlooked.

7.9 What is lacking is a clear understanding among the people of the Fiji Islands of the safeguards provided by a Bill of Rights. If they were more aware of these safeguards, they would be likely to accept more readily the idea that government should be shared among all ethnic communities. To protect the rights and freedoms of all people in the Republic, the Constitution should continue to contain a judicially enforceable Bill of Rights. However, it should be one whose purpose, effect and content can be more readily understood by the people.

THE PURPOSE AND EFFECT OF THE BILL OF RIGHTS

7.10 A Bill of Rights is based on the idea that the powers of a government are limited by the Constitution. The purpose of the Bill of Rights is to protect the

rights and freedoms of individuals, and sometimes of groups, from undue interference by the state. It sets standards against which the executive and legislative branches of government should measure their policies, administrative action and legislation. The judicial branch has the responsibility of determining whether the other two branches have acted consistently with those standards. This means that the validity of both the laws made by Parliament and the government's administrative actions can be tested in the courts.

7.11 The Bill of Rights should provide clearly that it binds the legislative, executive and judicial branches of government at all levels: central, divisional, district and local; all bodies exercising legislative, executive or judicial powers in relation to a particular ethnic community; and all persons acting "in the performance of the functions of any public office or any public authority". The quotation is from section 16(1)(b) of the 1990 Constitution, the only context in which the present language of the Bill of Rights reveals the wide scope of its application.

Should the Bill of Rights apply to the actions of private persons?

7.12 Some people making submissions appeared to think that a Bill of Rights should also bind private persons, setting standards about the way citizens are required to treat one another. Historically, that has not been the purpose of a Bill of Rights, though the Fiji Bill of Rights does forbid discrimination in giving access to public facilities, even if they are privately owned.

7.13 In some countries, however, the courts, as in the United States, or the constitution-makers, as in South Africa, have sought to widen the focus of the Bill of Rights, to include private acts of discrimination. The justification for this approach is that discrimination has existed on a large scale; has curtailed the exercise of other rights, including political rights; has been recognised or supported by law; and has affected the composition of the legislature in ways that prevent it from effectively addressing the problem effectively through legislation.

7.14 The Commission believes the application of the Bill of Rights should not be expressly enlarged to require, permit or encourage its application to private persons in contexts where it does not apply to private persons already. On the other hand, nothing should be put into the Constitution to exclude its interpretation, through decisions of the courts, in ways that require private persons, as well as the state, to respect a particular right. The courts in the Fiji Islands should be free to take account of the evolving jurisprudence of United Nations bodies and court decisions in other countries with similar legal systems and values.

7.15 Although some individuals suffer from acts of private discrimination, not only on the ground of race or ethnicity, but also because they are women or members of other groups characterised by particular attributes, the Commission is aware of the long distance already travelled in Fiji. Most schools, clubs, and other institutions that once operated on a racially segregated basis have become multiracial. We consider that, if serious human rights abuses are found to exist in a particular field of private activity, the Government should address them by legislation. That has been done in countries like the United States, Australia and New Zealand.

What rights and freedoms should be included in the Bill of Rights?

7.16 As has been seen, the Bill of Rights had its origins in the international standards of individual and group rights going back to the *Universal Declaration of Human Rights*. In accordance with its Terms of Reference, and the need for Fiji to comply with its international obligations in relation to human rights, the Commission examined the Bill of Rights in the 1990 Constitution from two perspectives. First, it considered whether any of its provisions conflicted with the international standards. Secondly, it considered whether its provisions should be expanded to take account of standards not at present reflected, particularly those arising from instruments adopted since the Bill of Rights first came into force in 1970.

7.17 As long as nothing in the Bill of Rights - or elsewhere in the Constitution - prevents Fiji from giving effect to the international standards, it is not essential that *all* of those standards be spelt out in the Bill of Rights. Sometimes, particular rights may be included within larger, more general rights. For example, the right to form and join political parties is an aspect of the right to freedom of association. Sometimes it may be appropriate to give effect to rights of a specialised kind in legislation, rather than in the Constitution. An example would be the rights of the child. An Act could deal more comprehensively with all aspects of the care, upbringing and education of children. Sometimes the Government, through its administrative action, may be able to give effect to the standards as a matter of policy. In the last two cases, the right does not have the status of supreme or overriding law, but the Government's compliance will often be effectively secured through its obligations to report to the international human rights body concerned.

7.18 One must judge which rights and freedoms should be included in the Bill of Rights, and in how much detail. We have already referred to the need to include only those which can appropriately be enforced by the courts. The Commission favours clarifying the scope of the rights and freedoms already referred

to in the Bill of Rights, rather than seeking to broaden its coverage. However, as in some other countries, the Constitution should include a statement that the people retain all other rights and freedoms conferred by the law of the Republic, even though they are not referred to in the Bill of Rights. This will serve as a reminder of the need to respect rights under the ordinary law that protect important values. For example, the Criminal Procedure Code confers various rights on defendants, going beyond those expressly referred to in the Bill of Rights.

Who should be protected by the Bill of Rights?

7.19 The opening words of the Bill of Rights in section 4 of the 1990 Constitution recite that "every person in Fiji is entitled to the fundamental rights and freedoms of the individual". Under the Interpretation Act (Cap 7), a "person" includes any company or association or body of persons, corporate or unincorporate. This formula includes incorporated bodies like companies and registered societies. It also includes associations or bodies of persons that are not incorporated. So, for example, mataqali or other land-owning units would be treated as "persons" with the right to protection from deprivation of their property. The reference to the rights and freedoms of all "persons" should therefore be retained.

7.20 The Commission has already emphasised that, although rights and freedoms are expressed as being those of the individual, it is often through the exercise of individual rights that particular communities and groups can exercise their rights, for example, to meet freely for the practice of their religion and other purposes, to speak their own languages and retain their culture. In Chapter 7, the Commission looks at the interface between the right to freedom from discrimination, and the duty of the Government to put in place affirmative action and social justice programmes for the benefit of Fijians and Rotumans, other ethnic communities, women, and all other disadvantaged groups. In Chapter 17, the Commission explains how the Bill of Rights can continue to accommodate the rights of Fijians, Rotumans and members of the Banaban community to their land and their own separate systems of administration. Accordingly, people have no reason to think that individual rights are or might be recognised in the Constitution at the expense of the rights of groups.

7.21 "Persons" are not of course limited to persons who are citizens. Foreigners present in Fiji are equally entitled to the protection of the Bill of Rights. This includes even a person who has not lawfully "entered" the Fiji Islands. For example, the right to liberty of the person applies to someone arrested on a beach on suspicion of attempting to enter Fiji unlawfully. His or her arrest and detention must be within the permitted limitations of that right.

7.22 There are some rights that only citizens can or should enjoy. However, there should be no unjustified distinctions between citizens and non-citizens, specially in view of the Commission's recommendations about the various categories of non-citizens who should have a constitutional right to enter and live in Fiji while waiting to qualify for registration as citizens. The Commission scrutinised the present Bill of Rights from this viewpoint.

7.23 Section 4 states that the protected rights and freedoms are enjoyed by every person "in Fiji". This statement is probably not intended to have a limiting effect, but it should be made clear that the Bill of Rights applies in any circumstance in which the law of the Republic applies to persons outside the Fiji Islands.

THE LIMITATION OF RIGHTS AND FREEDOMS

7.24 The Bill of Rights in the 1990 Constitution sets out very fully the various ways in which particular rights may be limited. These permissible limitations take two forms. Sometimes the right or freedom itself is expressed in a qualified way. For example section 5(1) provides:

> No person shall be deprived of his life intentionally *save in the execution of the sentence of a court in respect of a criminal offence of which he has been convicted* (emphasis added).

Virtually all Bills of Rights (and the international instruments which they reflect) limit some rights and freedoms through the language in which they are expressed. However, the Commission considers that such internal limitations should be retained only where the interests of clarity require them.

7.25 The Fiji Bill of Rights also allows most (but not all) rights and freedoms to be limited by laws made for certain specified purposes. Sometimes, those purposes are clearly necessary, or at least justified. Sometimes, the drafter is simply anxious to make it clear that certain types of laws are quite unconnected with the right or freedom concerned. Sometimes, the purpose for which a right or freedom may be limited by law is highly questionable. The Commission considers that the Bill of Rights should permit rights and freedoms to be limited by law only where there is a clear need to do so.

Limitations reasonably justifiable in a democratic society

7.26 Where the Bill of Rights permits the making of laws limiting particular rights and freedoms on broad, general grounds, such as "in the interests of defence, public safety, public order , public morality or public health", or "for the purpose of protecting the rights or freedoms of other persons", it adds the qualification

that the law, or anything done under its authority, will be upheld, except so far as it "is shown not to be reasonably justifiable in a democratic society". Some submissions discussed this test, raising the question whether it is sufficiently precise to provide adequate protection against laws that limit rights or freedoms unnecessarily or unjustly.

7.27 The standard of what is permissible in a democratic society originated in the *European Convention on Human Rights*. Under that instrument, however, and also under the *International Covenant on Civil and Political Rights,* the limitation must be "*necessary* in a democratic society". In domestic law, that may be difficult to establish. Such a test may not adequately reflect the "margin of appreciation" that international law allows to each state in applying the international standards.

7.28 A requirement that any limitation of a right should be judged by the standard of what is reasonable in a democratic society is a feature of other national constitutions. In Canada, there is no power to limit particular rights on specified grounds. Section 1 of the *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in the *Charter* "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". The Canadian courts have developed considerable jurisprudence about the application of this test to laws limiting the rights and freedoms set out in the *Charter*. The *New Zealand Bill of Rights* (1990) adopted the same approach to limitations, and the same test. Although the instrument is not supreme law, the New Zealand courts, too, are developing case law about the application of the test.

Proposed approach

7.29 In comparing the different approaches, the Commission considered four questions. First, we looked at whether the Bill of Rights should continue to set out the specific purposes for which a *particular* right or freedom may be limited, or whether Fiji should follow Canada and New Zealand in moving to a general statement of the grounds upon which *all* rights and freedoms may be limited. We conclude that each statement of a right or freedom should continue to specify the particular purposes for which it can be limited by law. To do otherwise would make it even more difficult than it is now for departmental advisers and legislators to know whether a particular limitation is justified, and likely to be upheld by the courts.

7.30 Where limitations are permitted for particular purposes, those purposes should be described in general terms. This would avoid the need to include

excessive detail, and would help to make the language and structure of the Bill of Rights simpler and easier to read. We include below one or two examples of the drafting approach we have in mind.

7.31 Secondly, the Commission considered whether the test of what is reasonably justifiable in a democratic society should be retained. We have already recommended that the Constitution should continue to describe the Republic of Fiji as a democratic state. The test that any limitation of a right or freedom imposed by law must be one that is reasonably justifiable *in a democratic society* therefore remains appropriate.

7.32 The Commission concluded that the formulation of the test should not be changed to follow that used in Canada and New Zealand, or any of the variants adopted in other countries. It would be undesirable to make the test stricter than it is now, specially by using language that might suggest that what is appropriate in developed countries like Canada or New Zealand is necessarily appropriate in Fiji. The Commission recognised however that both those countries are multi-ethnic. In determining what is reasonably justifiable in a democratic society like Fiji, the courts are likely to get considerable help from looking at Canadian, New Zealand and other overseas jurisprudence, even if the language of the test in the Fiji Islands is a little different.

7.33 Thirdly, the Commission considered the extent to which the test needs to be applied. We conclude that it should be retained in all contexts where it is used now, and added in all other contexts where there is a need for the courts to look at the nature and extent, as well as the purpose, of limitations of rights and freedoms imposed by or under a law.

7.34 Fourthly, the Commission looked at the technical question of who has to prove that the limitation imposed by a law is consistent with the Constitution. Is it the complainant or the state? It concluded that the present formulation probably throws the burden of proving that the law is not reasonably justifiable in a democratic society on the person challenging the validity of that law. The formulation should be changed to make it clear that, if a law or a thing done under a law is found to limit a right or freedom, it should not be upheld unless the state discharges the burden of proving that the limitation is reasonably justifiable in a democratic society.

7.35 The question of permitting derogations from rights and freedoms in times of emergency is dealt with separately in Chapter 19.

THE INTERPRETATION OF THE BILL OF RIGHTS

7.36 The Commission's general approach to the limitation of rights and freedoms is that each section declaring a right or freedom should be self-contained. Any power to limit it should be conferred within the section itself. It found that the introductory reference in section 3 of the 1970 Constitution (section 4 of the 1990 Constitution) to the fact that a person's rights and freedoms are not absolute, but limited by the need for respect for the rights and freedoms of others and for the public interest, has been misinterpreted on some occasions by the courts in Fiji. As one of the submissions pointed out, it has been regarded as a source of *additional* grounds for limiting rights, if there is doubt about whether a particular law is authorised by a ground for limitation referred to in the relevant section itself. In our opinion, the approach taken by the courts is plainly wrong. The risk of continuing misinterpretation should be eliminated.

7.37 The Bill of Rights should be introduced by a simple statement affirming the rights and freedoms it sets out. The existing references to specific rights and freedoms, the nature of the grounds on which they may be limited and the need for the rights and freedoms to be accorded without distinction on the listed grounds should all be omitted. We later propose a reformulation of section 16 to recognise the right of everyone to equality under the law, without discrimination on any of the listed grounds. That right will require the Bill of Rights itself to be applied on the basis of equality, without distinction on any of the prohibited grounds.

7.38 The content of each right or freedom and the grounds on which it may be limited should be determined in accordance with our recommended approach to the interpretation of all provisions of the Constitution. The need to look at the text of the relevant provision in its context and in the light of its purpose, taking account of the spirit of the Constitution as a whole, should ensure that rights and freedoms in Fiji are well-protected, but without depriving the state of the powers it should properly have.

THE APPLICATION OF THE BILL OF RIGHTS TO ALL EXISTING LAW

7.39 In general, the Bills of Rights in the 1970 and 1990 Constitutions applied to all the law of the Fiji Islands already existing at the time of their entry into force. The one exception was that, under what is now section 16 (5)(a), the prohibition against discrimination did not apply to a law in force immediately before 23 September 1966 and continuing in force at all times since that date. In reviewing section 16, we examine the effect of that provision and make recommendations about the extent to which it should remain.

7.40 The Bill of Rights should continue to apply to all law, whether made before or after the date on which the Bill of Rights enters into force. This means that the Bill of Rights will continue to be the standard against which the validity of all the law of the Fiji Islands can be tested - whether that law is enacted after the effective date of the Bill of Rights, or was already in force, under the common law or statute, when the Bill of Rights took effect.

7.41 Even where we recommend changes to the present Bill of Rights, in most cases it should be feasible to make any necessary changes in the existing law by the date on which the new Bill of Rights takes effect. In one case, again affecting section 16, we recommend that Parliament should make provision for the progressive implementation of the right, taking account of what is reasonable in the light of available resources. If, in other cases, it should be found that there will be practical problems in giving effect to the changes, the new provision should itself set a date for its entry into force. The delay should not exceed two years.

THE ROLE OF THE COURTS

7.42 The courts have a key role in upholding the Bill of Rights. This requires the judges to exercise their independence fearlessly in giving decisions about the validity of the actions of the other branches of government. In Chapter 13 we make recommendations designed to recognise and promote the independence of the judicial branch in carrying out all aspects of its functions.

7.43 It is widely recognised that the task of interpreting and applying the Bill of Rights requires judges not only to adjudicate between the state and the individual as independently and objectively as possible, on the basis of an informed interpretation of the Constitution, but also to display political skills. By this we mean that, as in the application of other aspects of public law, it calls for the application of public policy considerations with sensitivity to the implications for the constitutional relationship between the courts and the people's elected representatives.

7.44 Individual judges, by their temperament, experience and training, must be suited to the exercise of such responsibilities. On-going in-service training, including attendance at overseas law conferences and other appropriate meetings, provides necessary opportunities for members of the judiciary to keep abreast of international thinking about the application of Bills of Rights. In Chapter 13, we make recommendations about aspects of judicial selection and training. Here, we make the point that the Bill of Rights places a special kind of responsibility on those appointed to judicial office.

A HUMAN RIGHTS COMMISSION

7.45 In many countries a Human Rights Commission, too, is charged with responsibilities for the promotion and protection of Human Rights. In view of the limited public awareness of the Bills of Rights in the 1970 and 1990 Constitutions, as well as the lack of in-depth understanding about the work of United Nations bodies in promoting human rights, the Commission considers that such a body could play a useful role in the Fiji Islands. The Constitution should therefore establish a Human Rights Commission.

7.46 Its work should in the first instance be directed to public education. Respect for the Bill of Rights requires understanding of its provisions and their origin in the international instruments, as well as understanding and acceptance of the promotional and supervisory role of United Nations bodies and their member states in the international protection of human rights.

7.47 The Human Rights Commission should also have an advisory function in alerting the government to matters affecting compliance with human rights norms. It should be empowered to make recommendations to the appropriate Minister on the desirability of legislative or administrative action to give better protection to human rights, and better compliance with the international standards. For example, the recommendations could relate to the desirability of Fiji becoming a party to a particular international instrument, or putting itself in a position to withdraw reservations to an instrument to which it is already a party.

7.48 The Commission could also be given the function of making recommendations on the implications of any proposed Act or regulations or other policy of the Government that the Commission considers may affect human rights. However, this is a role that needs to be exercised with extreme caution. Opinions may legitimately differ on whether a proposed way of dealing with a recognised evil is or is not consistent with human rights.

7.49 That question is properly a matter for public debate. But a body devoted to the protection of human rights should express its concerns only after undertaking adequate research and seeking to ensure that its recommendations will achieve a proper balance between human rights principles and the problem that the Government is trying to address. Otherwise its efforts could be counterproductive.

7.50 The functions of a Human Rights Commission under a Constitution that is supreme law must be compatible with the responsibility of the courts to determine whether or not a law passed by Parliament, or regulations made by the executive,

or administrative action taken by a department or other agency, comply with the Bill of Rights. It would be undesirable for the Human Rights Commission to purport to make a finding about what the Bill of Rights requires in a particular case that is within the jurisdiction of the courts. The role of the Commission and the role of the courts will need to be kept distinct.

7.51 We also looked at whether a Human Rights Commission should be empowered to assist individuals in bringing claims that their rights or freedoms under the Bill of Rights have been infringed by the state. However, such issues often arise in the course of existing proceedings, particularly criminal cases in which the state is the prosecutor. It may be undesirable, as well as impracticable, for another organ of the state to become involved. Direct assistance to individuals in enforcing their rights should therefore be given through legal aid, a matter on which we make recommendations below.

7.52 Under section 120 of the 1990 Constitution, the President, acting on the advice of Cabinet or a Minister, may seek the opinion of the Supreme Court on any question as to the effect of any provision of the Constitution. Because the courts normally develop the law by applying it in the context of the facts of particular cases, argued before them on an adversarial basis, the power to seek such opinions is one that should be used sparingly. However, situations could arise in which the Human Rights Commission could appropriately recommend to Government that a question about the legal effect of a provision of the Bill of Rights should be referred to the Supreme Court for an opinion. It should be so empowered.

7.53 Finally, in considering the functions of a Human Rights Commission, we revert to our suggestion that, if necessary, legislation could be enacted to address serious problems of discrimination between private citizens. These might include the denial of equal opportunities in the workplace for women and members of other disadvantaged groups or other human rights abuses such as sexual harassment. Under such legislation, complaints could be dealt with in the first instance by mediators or conciliators appointed under the auspices of the Human Rights Commission. Often, such situations yield more readily to relatively informal dispute settlement procedures.

7.54 Of course, a continuing dispute about whether a person's rights have been infringed must ultimately be a matter for a court or other judicial tribunal. However, the Human Rights Commission, or one of its members appointed as Proceedings Commissioner, could be given standing to bring a case on behalf of an individual

or group. We consider that, although the Constitution should set out the main functions of the Human Rights Commission, it should also empower Parliament to give it further functions by Act. This would allow an element of experimentation in working out how the new body can best contribute to the promotion of human rights in the Fiji Islands.

7.55 Taking account of the functions proposed above, we consider that the Human Rights Commission should consist of three members. One should be the Ombudsman, ex officio. Although the Ombudsman's powers of investigation do not normally extend to matters in respect of which the aggrieved person has a remedy before a court or tribunal, they do include questions of whether any of the provisions of the Bill of Rights have been contravened. One of the other two members should be a person who is, or is qualified to be, a judge of the High Court. We make recommendations about the other aspects of the appointment and tenure of office of members of the Human Rights Commission in Chapter 15.

REWRITING THE BILL OF RIGHTS

7.56 It is implicit in much of what we have said that the provisions of the Bill of Rights in the 1990 Constitution should be thoroughly revised, not only to take account of our recommended changes of substance, but also to make the Bill of Rights more readily accessible to the people of the Fiji Islands. The responsibility will rest with the members of Parliament who will have the task of putting in place any constitutional changes for this purpose. They should, however, have access to specialist advice.

7.57 During its visit to South Africa, the Commission was impressed with the way in which academics, judges and other experts were contributing to the process of constitutional reform. There could be benefit in obtaining comments on a draft of a new Bill of Rights in particular, from a panel of experts inside and outside the Republic.

RECOMMENDATIONS

65. The Constitution should continue to contain a statement of judicially enforceable individual rights and freedoms. It should be called the Bill of Rights.

66. Wherever possible, particular rights and freedoms should be affirmed in positive terms.

67. In view of its function of protecting the rights and freedoms of individuals and groups from undue interference by the state,

the Bill of Rights should expressly bind the legislative, executive and judicial branches of government at all levels: central, divisional, district and local, as well as all bodies exercising legislative, executive or judicial powers in relation to any ethnic community, and all persons acting in the performance of the functions of any public office or any public authority.

68. **The Bill of Rights should not expressly bind private persons to a greater extent than it does already. However, its terms should not exclude its possible application to other actions of private persons if appropriate. The courts should take account of the developing international jurisprudence on this question.**

69. **If serious human rights abuses by private persons are found to exist in the Fiji Islands, the Government should address them by ordinary legislation.**

70. **The Bill of Rights should not conflict with the international human rights standards and should give effect to them where appropriate.**

71. **The main emphasis should be on clarifying the scope of rights and freedoms already recognised. However, the Constitution should provide that the people retain all other rights and freedoms recognised by the law of the Republic, even though they are not set out in the Bill of Rights.**

72. **The Bill of Rights should continue to affirm the rights and freedoms of all "persons" (whether citizens or not), within the wide meaning of that term as defined in the Interpretation Act. This definition enables individual rights to be invoked by or for the benefit of groups.**

73. **In the few cases where rights are conferred on all "citizens" rather than all "persons", the exclusion of non-citizens should be evaluated in the light of the Commission's recommendations that certain categories of foreign citizens should have a constitutional right to enter and reside in Fiji while waiting to qualify for registration as citizens.**

74. **It should be made clear that the Bill of Rights applies, not only to persons "in Fiji", but also in any circumstance in which the law of the Republic of the Fiji Islands applies to persons outside the Republic.**

75. **Where the language in which a right or freedom is expressed limits its scope or application, the limitation should be retained only if essential for the purposes of clarity.**

76. **Where the Bill of Rights permits a right or freedom to be limited by law for a specified purpose, the power to impose limitations for that purpose should be retained only if clearly necessary.**

77. **Each statement of a right or freedom should continue to specify exhaustively all the purposes for which it can be limited by law. To avoid excessive detail, those purposes should, so far as possible, be described in general terms.**

78. **Where limitations can be imposed by law for purposes described in broad language, and in any other case where the courts should be required to look in a qualitative way at the nature and extent of limitations for a particular purpose, the Bill of Rights should continue to provide that the law and anything done under it will not be valid unless "reasonably justifiable in a democratic society".**

79. **That test should not be made stricter, as has been done in some developed countries. However, despite the lower standard of justification required in Fiji, the courts in Fiji should look to the developing jurisprudence of other countries for guidance about the methodology of applying the test in the circumstances of the Republic.**

80. **The formulation of the test should make it clear that, if a law or something done under it is found to limit a right or freedom, the state has the burden of proving that the limitation is reasonably justifiable in a democratic society.**

81. **To avoid the risk of misinterpretation, the Bill of Rights should be introduced by a simple statement affirming without description or qualification the rights and freedoms it sets out.**

82. **Unless otherwise provided for good reason, the Bill of Rights should continue to apply to all the law of Fiji, whether enacted before or after its entry into force. If, in a particular case, there are likely to be substantial problems in giving effect to recommended changes involving an expansion of a right or freedom, the entry into force of the new provision should be expressly deferred for a specified period not exceeding two years, to enable the existing law to be brought into compliance.**

83. **The responsibilities of the courts to apply and enforce the Bill of Rights should be taken into account in judicial selection and training.**

84. **Without trespassing on the responsibility of the courts to enforce the Bill of Rights, the Constitution should create a Human Rights Commission with the functions of**

(a) **educating the public about the nature and contents of the Bill of Rights, including its origins in the international instruments and the responsibilities of United Nations bodies and member states in promoting respect for human rights;**

(b) **making recommendations to Government about matters affecting compliance with human rights, including compliance with the international standards and the desirability, on occasions, of seeking an opinion from the Supreme Court on the effect of particular provisions of the Bill of Rights; and**

(c) **exercising such other functions in relation to human rights as may be conferred on the Human Rights Commission by Act. These might include functions under any legislation enacted to deal with serious abuses of human rights by private persons.**

85. **The Human Rights Commission should consist of three members, of whom one should be the Ombudsman, ex officio, and one should be a person who is, or is qualified to be, a judge of the High Court.**

86. **The Bill of Rights in the 1990 Constitution should be thoroughly revised to take account of the foregoing recommendations, as well as the recommendations on particular rights and freedoms set out below. It should have a clearer structure and be written in a simpler style, enabling it to be read and understood more easily by the people of the Fiji Islands. Consideration should be given to seeking comments on the draft of a new Bill of Rights from a panel of experts inside and outside the Republic, before its adoption by Parliament.**

THE RIGHT TO LIFE

7.58 Section 5 of the 1990 Constitution protects the right to life, a right recognised by all the main human rights instruments. The Constitution should continue to affirm in positive terms that everyone has the right to life.

7.59 In protecting the right to life, section 5(1) provides that except in the specified circumstances no person may be deprived of life intentionally. This formulation makes it clear that the state cannot itself deprive a person of life. It also implies that the state has a duty to deter murder and other crimes involving intentional killing by making them offences against the law and sentencing persons convicted of such offences to appropriate punishment.

7.60 In contrast, most international instruments and national constitutions provide that everyone has the right to life, without any further indication about the content of the right. Such a provision can give rise to difficult issues. For example, it is sometimes claimed that abortion or euthanasia should be outlawed as incompatible with the right to life. In a few countries, people have sought to spell out the right to life in the constitution in ways that would forbid any interference with the natural processes of conception, birth and death. The Commission believes that it would be unwise to contemplate any such initiative in Fiji.

7.61 Questions of this kind give rise to complex biological and moral issues on which people hold a variety of views. In the absence of substantial consensus, it would be wrong to impose a particular view by means of provisions in the Constitution. Nor did the submissions suggest such a course. Accordingly, the Commission considers that, in affirming everyone's right to life, the Constitution should not attempt to spell out the parameters of the right. If such questions were to come before them, the courts in the Fiji Islands could be expected to take a cautious approach, as the courts have done in most other countries.

The death penalty

7.62 Under the 1990 Constitution (which does not differ from the 1970 Constitution in this respect), a person's right to life is expressly qualified in various ways. As we have mentioned earlier, section 5(1) permits the execution of a person sentenced to death for committing a criminal offence. The question of whether the Constitution should continue to permit the imposition of the death penalty in Fiji was raised in the submissions and carefully considered by the Commission.

7.63 In 1979, Parliament abolished the death penalty for murder and substituted a mandatory sentence of life imprisonment. However, death is still the penalty for genocide and treason. It is a discretionary penalty for certain offences under military law. The debates in the House of Representatives and the Senate in 1979 discussed the reasons for and against abolishing the death penalty for murder very thoroughly. A number of members who had supported the retention of the death penalty in earlier debates acknowledged that they had come to a different view. On a conscience vote, the amending Bill was passed in both Houses without division.

7.64 The international standards reflect a strong preference for doing away with the death penalty. Although it is permitted for criminal offences by both the *European Convention on Human Rights* and the *International Covenant on Civil and Political Rights*, the *Covenant* provides, in the article on the right to life, that, "[i]n countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes ...", and, later in the article, that "[n]othing in this article shall be invoked to delay or to prevent the abolition of capital punishment ...". There is a special Second Optional Protocol to the *Covenant* through which individual states parties can assume the obligation to prohibit the death penalty. As at 1 July 1995, twenty-three states have done so.

7.65 Reflecting this trend, the constitutions of some countries, including several in the Pacific, prohibit capital punishment. Although section 5(1) of the 1990 Constitution authorises the imposition of the death penalty, section 99(6) requires every sentence of death imposed on a person, other than one imposed by a court martial, to be considered by the Commission on the Prerogative of Mercy. The Commission must then advise the President whether or not to exercise his powers of pardon or commutation. So, already in Fiji, there is constitutional recognition of the need to have very good reason for carrying out a sentence of death.

7.66 The Commission recognises that, in setting penal policy, the interests of victims and of society at large need to be considered. Those who commit crimes must be suitably punished, but account should be taken of the deterrent and reformative purposes of punishment, as well as its purpose of retribution. Studies of the deterrent effect of capital punishment have been inconclusive. If it is prescribed as the punishment for a particular crime, its mandatory nature excludes any consideration of extenuating circumstances. The 1979 decision arose from the need to consider the existing law under which the death penalty for murder had been made discretionary. It was accepted that Parliament, not the judges, should take the responsibility of deciding whether death was the appropriate penalty.

7.67 The Commission recognises that people's views on capital punishment are ultimately moral and personal views. One such view is that the potential for change is basic to a person's humanity. Capital punishment denies this potential, focuses only on the idea that an offender should pay for the crime committed, and excludes the possibility of reform.

7.68 After taking these various considerations into account, the Commission concludes that the qualification of the right to life permitting capital punishment should be repealed. The Constitution should prohibit the imposition of the death penalty by the law of the Republic. It noted, however, that such a step would not prevent the reintroduction of capital punishment, if the Constitution were to be amended for that purpose. Nevertheless, the need for a constitutional amendment would ensure that reintroduction would not occur hastily, but only after full consideration and debate.

7.69 The Commission also noted that a sentence of imprisonment, including imprisonment for life, is usually commuted after the offender has served a certain number of years. At the point when commutation is under consideration, account can be taken of the nature of the crime and the existence of aggravating or mitigating factors. The Commission is firmly of the opinion that the proportion of a sentence of imprisonment for life, or for a term of years, that an offender is actually required to serve should be commensurate with the nature of the crime committed. It does not suggest that the matter be dealt with in the Constitution.

Death as a result of the use of force

7.70 Section 5(2) of the 1990 Constitution provides that, in certain other situations, a person is not to be regarded as having been deprived of the right to life. These situations involve four elements:

- a person's death as the result of the use of force;
- the use of that force for one of the purposes specified in the subsection;
- the existence of a law permitting the use for that purpose of an amount of force that is reasonably justifiable in the circumstances; and
- a finding on the facts that, in the particular case, the amount of force actually used did not exceed that limit.

These are the elements of the normal test for excluding criminal liability when a person causes the death of another person as a result of using force. The specified

purposes for which force may be used are: the defence of any person against violence or the defence of property; effecting a lawful arrest or preventing the escape of a person lawfully detained; suppressing a riot, insurrection or mutiny; and preventing a person from committing a criminal offence.

7.71 The submissions expressed concerns about the scope of the exclusions, raising such questions as whether they permitted the killing of persons merely upon suspicion, whether they gave the police or prison officers a licence to kill escaping prisoners, and whether the use of force in defence of property, as distinct from the defence of a person, could ever be justified. The Commission notes, however, that not only the use of force, but also the amount of force actually used must be reasonably justifiable in the particular circumstances. While in some circumstances the use of force in defence of property might not be reasonable, in others, such as when a person's home is broken into in the middle of the night, the use of an amount of force that is reasonable in the circumstances might well be justifiable. We consider that, because they incorporate safeguards limiting the amount of force that may be used to what is reasonably justifiable in the particular circumstances, all of the existing exclusions should remain.

7.72 Section 5(2) also provides that the death of a person as a result of a lawful act of war is not a deprivation of the right to life. That exclusion should also remain, but with the substitution of a reference to "a lawful act in the course of armed conflict", reflecting the fact that formal declarations of war are seldom made now. It is better to use the terminology of the Geneva Conventions for the protection of the victims of armed conflict.

RECOMMENDATIONS

87. The Constitution should affirm in positive terms that everyone has the right to life, without spelling out the content of the right.

88. The present provision qualifying the right to life by permitting the execution of a person sentenced to death for committing a criminal offence should be repealed. The Constitution should prohibit the imposition of the death penalty under the law of the Republic. Section 99(6) should be consequentially amended.

89. Without including provision to that effect in the Constitution, the policy in relation to the commutation of sentences of imprisonment for life or for a term of years should ensure that an offender serves a proportion of the sentence commensurate with the nature of the crime committed.

90. The Constitution should continue to provide that the right to life is not infringed by a person's death as a result of the use of force for the purposes specified in section 5(2) of the 1990 Constitution, if a law permits the use of an amount of force that is reasonably justifiable in the circumstances and the amount of force actually used does not exceed that limit.

91. It should also provide that the right to life is not infringed by the death of a person as a result of "a lawful act in the course of armed conflict", rather than "a lawful act of war".

THE RIGHT TO PERSONAL LIBERTY

7.73 Section 6 of the 1990 Constitution protects the right to personal liberty. It does so by forbidding deprivation of a person's liberty, except on the specified grounds. The Constitution should affirm in positive terms that everyone has the right to personal liberty.

7.74 Section 6(1) sets out a comprehensive list of the grounds on which the law may authorise the deprivation of a person's liberty. A person cannot be deprived of liberty unless a law so provides. The Commission considers that the grounds on which a person may be deprived of liberty should continue to be listed comprehensively. We looked at whether all of the existing grounds were justified. With the exceptions, and subject to certain safeguards we conclude that they should be retained.

Imprisonment for debt

7.75 Under section 6(1)(c), the law may authorise a person to be deprived of liberty

> (c) in execution of the order of a court made to secure the fulfilment of any obligation imposed on him by law.

The Commission took note of the *Report of the Commission of Inquiry on the Courts of Fiji* (1994) which recommended as follows:

> Imprisonment as a sanction for unpaid accounts is an outmoded concept; it should be abolished. (Recommendation 256)

It also took note of a decision of the Fiji Court of Appeal that a simple contract debt is not "an obligation imposed by law".

7.76 The Commission considers that the Constitution should make clearer provision about whether, and if so when, the law should be able to provide that a

person may be imprisoned for failure to pay contract debt or unpaid fine, maintenance or tax, if a court has made an order that the amount owing should be paid. Its starting point is that a person entering into a contract under which another person is to pay money takes the risk that the other party may not do so. The processes of the state should be available to enforce payment, but most debtors fail to pay because they do not have the money. The state should not imprison them for this reason. The creditor should have resort to the other available remedies including attachment of property or income and bankruptcy proceedings.

7.77 Accordingly, the Constitution should expressly prohibit imprisonment for debt or failure to fulfil other contractual obligations. Its present provisions should not be widened to permit the arrest of absconding debtors. We stress, however, that a person who obtains credit by falsely representing that he or she has the money to pay will still be liable to criminal prosecution.

7.78 The Commission also considers that persons convicted of an offence should not be sentenced to pay a fine and, in default, to a period of imprisonment. This needlessly helps to fill the gaols and sometimes sets minor offenders on a path of crime. The Constitution should make it clear that no one can be sentenced to imprisonment for non-payment of a fine. In default, a sentence of community service should be substituted. This proposal does not affect laws under which the punishment for a particular offence is imprisonment or a fine, or both. The court will still have the discretion to impose all or any of those sentences. However, if a person fails to pay a fine, a sentence of community service, not one of imprisonment will be substituted.

7.79 The Commission believes that the Constitution should not permit the imprisonment of a person who fails to meet an obligation to pay tax or maintenance, except in cases of wilful default by a person who had the means to pay. Instead, the person should be required to undertake paid work. The obligation should be met by the attachment of all or part of the income from that employment.

Arrest or detention of a person suspected of being about to commit a crime

7.80 Section 6(1)(e) permits a law to provide that a person may be deprived of liberty upon reasonable suspicion of his having committed, *or being about to commit*, a criminal offence.(Emphasis added) The Commission notes that the concept of reasonable suspicion that a person is about to commit an offence appears to be wide enough to permit provision to be made by law for the preventive detention of persons who have not committed any offence. The Penal Code contains provisions which could be used for this purpose. The police need

reasonable powers to prevent crime, but, in view of the fact that an attempt or a conspiracy to commit an offence is itself an offence for which a person can be arrested, tried and punished, the preventive powers should not, except possibly in time of emergency, extend to the imprisonment of persons merely on reasonable suspicion that they may be about to commit offences. The provision in section 6(1)(e) authorising a law permitting a person to be deprived of liberty merely on reasonable suspicion of being about to commit a crime should be repealed. A consequential change should be made to the wording of section 6(3)(b).

Arrest or detention to enforce restrictions on freedom of movement

7.81 Section 6(1)(j) authorises a law to be made permitting a person to be deprived of liberty for the purpose of enforcing restrictions on his or her freedom of movement imposed in accordance with section 15. Later in this chapter we make proposals for narrowing the permitted restrictions of the right to freedom of movement. The recommended changes will need to be reflected in section 6(1)(j).

Deprivation of liberty in time of emergency

7.82 Section 6(7) authorises the right to personal liberty to be limited by law during a time of public emergency. Section 17 contains safeguards for persons detained under such a law, requiring, among other things, that the continuation of the detention be reviewed by an independent tribunal. We examine both provisions in Chapter 19.

Law to be reasonably justifiable in a democratic society

7.83 The Commission notes that there is no qualitative requirement concerning the nature of the restrictions on personal liberty which can be imposed by a law for any of the purposes listed in section 6(1). For the reasons explained earlier in this chapter, it considers that the state should be required to show that a law permitting a person to be deprived of personal liberty on any of the grounds referred to in section 6(1) is reasonably justifiable in a democratic society.

Rights of persons arrested or detained

7.84 Section 6(2) - (6) sets out the positive constitutional rights of a person who has been arrested or detained. These rights have long been reflected in the common law and are recognised in the international instruments and also in national constitutions, including those of most Pacific Island countries. The Commission considers that all the existing rights of arrested or detained persons should be retained, but that some should be spelt out or supplemented in the manner now proposed.

Right to be told of reasons for arrest or detention

7.85 Under subsection (2), a person who is arrested or detained must be informed as soon as reasonably practicable, of the reason for the arrest or detention, in a language that he or she understands. The Constitution should also give a person arrested or detained upon reasonable suspicion of having committed a criminal offence the right to be informed of the nature of any charges that the police decide to bring. The Constitution should also require such a person, if not charged, to be promptly released.

7.86 Subsection (2) entitles a person arrested or detained for the purpose of being brought before a court in execution of the order of a court, or on suspicion of having committed a criminal offence, to "reasonable facilities to consult a legal representative of his own choice". More modern constitutions considerably expand the statement of the circumstances in which a person should have the right to legal representation. They provide that the person should be informed of that right, should be given appropriate facilities for its exercise, and should have access to legal aid if he or she cannot afford to pay a lawyer.

Right to legal advice

7.87 The Commission considers any person arrested or detained should have the right to legal advice. So also should a person who is being questioned by the police in a coercive situation, for example at a police station, even though not arrested or detained.

7.88 A suspected person's access to legal advice is a central component in achieving a proper balance between the powers of the police to apprehend and secure the conviction of those who commit offences and a suspected person's rights, already recognised in the Constitution, not to be subjected to torture or to inhuman or degrading punishment or other treatment (section 8), to be presumed innocent until he is proved or has pleaded guilty (section 11(2)(a)), and not to give evidence at the trial (section 11(7)).

7.89 We believe that the disproportionate number of Fijians among persons sentenced to imprisonment is in part due to lack of access to legal advice when first arrested or questioned on suspicion of having committed an offence, as well as at the subsequent trial. The right of suspects to legal advice will not make the police less able to question them effectively. On the contrary, the greater the assurance that the police have acted within the limits of the law, the less likely it is that a statement by the defendant will be excluded because it was not voluntary or was otherwise improperly obtained.

7.90 Accordingly, the Constitution should make provision to the following effect:

(a) A person who is arrested or detained, or is being questioned by the police in a coercive situation on suspicion of having committed a criminal offence, or has been charged, should have a right to consult a lawyer, and to be informed of that right as soon as it arises.

(b) A person suspected of having committed a criminal offence, who wants to consult a lawyer, should not be questioned, or further questioned, until he or she has had a reasonable opportunity to exercise that right; should be entitled to consult the lawyer of his or her choice, subject to any reasonable restrictions as a condition of being granted legal aid; and should be afforded prompt and adequate opportunity to consult the lawyer in private, in the place where he or she is being detained or questioned.

Right to legal aid

7.91 Although, as has been seen, section 6(2) gives certain categories of arrested or detained persons a right to consult a legal representative of their choice, it makes no mention of any right to legal aid. It may be compared in that respect with section 11(2)(d) which gives a person a right, at a criminal trial, to defend himself "where so prescribed, by a legal representative provided at the public expense". The right to legal aid is conditional on the existence of a legal aid scheme. There is no constitutional obligation to put such a scheme in place. Even so, it is a reminder that legal aid may be a necessary condition of ensuring that suspects and defendants can avail themselves of other constitutional and legal rights.

7.92 The *Report of the Commission of Inquiry on the Courts of Fiji* (1994) made extensive recommendations about the reform of the existing legal aid system in Fiji. A new scheme is now in course of implementation. We consider that a person who is arrested or detained, or is being questioned by the police in a coercive situation on suspicion of having committed a criminal offence, or has been charged, should have a constitutional right to the services of a lawyer under a scheme for legal aid, where he or she does not have sufficient means to engage a lawyer and substantial injustice would otherwise result.

7.93 Such a right would allow the state considerable latitude in deciding how best to provide such a person with access to a lawyer on a legally aided basis, and to impose reasonable restrictions on the circumstances in which legal aid should be made available. A person should, of course, be informed of the right to legal aid at the time of being informed about the right to consult a lawyer.

Right to contact with family and other persons

7.94 The *United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, as well as some modern constitutions, contain guarantees that a person will not be held incommunicado, without opportunity to make contact even with his or her family. Accordingly, the Constitution should require that, if a person is arrested or detained, the police or other authority holding the person should inform a relative or friend of that person as soon as practicable. A detained person should have reasonable opportunities to receive visits from family members or friends, a religious counsellor or a social worker. He or she should be informed of that right as soon as practicable.

Right to be brought before a court

7.95 Subsection (3) requires that persons arrested on the order of a court or on suspicion of criminal activity "shall be brought without undue delay before a court". It is for the courts to decide on the particular facts whether or not there has been "undue delay". A number of constitutions set a maximum time within which a person must be brought before a court.

7.96 Although it was not suggested to the Commission that undue delays have occurred in Fiji, we consider that there would be advantages in stipulating a maximum period of 48 hours from the time of arrest, or, if this is not reasonably possible, as soon as possible thereafter. This provision would allow a longer time if a person is arrested on a Friday evening, and there is no court sitting until the following Monday. It would also take account of the unavoidable delays in bringing an arrested person from an outer island. However the maximum period should not be allowed to elapse as a matter of routine, if it is possible to bring a person before a court within a shorter period.

Right to test the legality of arrest or detention

7.97 The Constitution does not confer a right to seek a writ of habeas corpus or other specific means of challenging the legality of a detention of *all* arrested and detained persons. Habeas corpus, literally, is a court order to "produce the body

or person". It is the traditional common-law method of challenging the legality of a detention, and is regarded as one of the safeguards of civil liberties. It is usually sought by friends or relatives of the detainee. Although habeas corpus is available in Fiji, there is no constitutional guarantee preventing its curtailment or withdrawal.

7.98 The right to habeas corpus goes beyond existing constitutional rights in that it applies to *anyone* detained or arrested for *any reason*; enables the *legality* of, or the *reason* for, the detention to be challenged; and enables the detained or arrested person, or someone acting for him or her to take the initiative in bringing the matter before the court. Traditionally, a judge of the High Court may issue a writ of habeas corpus in any place (not necessarily a court) at any time of the day or night.

7.99 The right to habeas corpus is recognised in a number of international instruments and national constitutions. The Commission considers that the Constitution should provide that everyone who is arrested or detained has the right to have the validity of the arrest or detention determined by way of habeas corpus, and to be released if the arrest or detention is not lawful.

Right to release pending trial

7.100 The Constitution does not confer an express right to release pending trial for those arrested and charged with having committed a criminal offence. Subsection (4) requires persons to be brought before the court and then not to be held further without a court order. This recognises that they cannot be detained pending trial unless the court so orders. Subsection (5) goes on to provide that those who *are not tried* "within a reasonable time ... shall be released upon reasonable conditions ...". The wording of the provision suggest that release becomes a right only after a "reasonable time" has elapsed without trial.

7.101 Again, the international standards and many national constitutions recognise that, subject to reasonable bail conditions, a person should be released pending trial, unless there is good reason for keeping that person in custody. Good reason might include the probability of a person committing further serious offences, destroying evidence, intimidating witnesses or fleeing the country, but there should be reasonable grounds for believing that such eventualities are likely. Accordingly, the Constitution should provide that, when a person is first brought before a court after arrest, the court should order his or her release, on reasonable terms and conditions, pending trial, unless there is just cause for continued detention.

7.102 The international standards and a number of national constitutions also recognise that, so far as practicable, persons detained while awaiting trial should be kept apart from persons who have been convicted and are serving sentences of imprisonment. This separation is desirable both on grounds of principle, and because young offenders or first offenders should not be exposed to the influence of prisoners who may have a substantial criminal record.

The right of silence

7.103 Although as mentioned, section 11 of the 1990 Constitution dealing with rights during a criminal trial, presumes the defendant innocent until proved guilty, and gives him or her the right not to be compelled to give evidence at the trial, there is no constitutional right recognising that a suspected person has no duty to respond to questioning by the police during pre-trial investigations. Such a right is often referred to as a right of silence.

7.104 In common law countries there have long been rules excluding evidence of confessions obtained by undue pressure. Over time, these rules expanded into constitutional guarantees of the right of a person to remain silent during interrogation and to be informed of this right. This does not necessarily mean that it is in the interests of a suspect to remain silent. That is a matter for the person's judgment and that of a legal adviser. The person can still be convicted if the prosecution produces sufficient uncontradicted evidence to establish guilt beyond reasonable doubt. But the echoes of the enforced confessions elicited in England by the 16th century Star Chamber still ring strongly enough to require respect for an accused person's right to remain silent, and to place limits on the inferences that can be drawn at the trial from the decision to do so.

7.105 The right of silence is not one protected by the international instruments because it has no counterpart in the civil law system which permits pre-trial interrogation of a suspect by an examining magistrate. But, in common law countries, of which the Fiji Islands is one, it is often constitutionally protected. The Commission considers that the Constitution should provide that every person arrested, detained or questioned by the police in a coercive situation, on suspicion of having committed a criminal offence, has the right not to say anything and to be informed of that right.

Treatment of arrested persons and detainees

7.106 Although the Constitution recognises the right not to be subjected to torture or to inhuman or degrading punishment or other treatment (section 8),

there are no express minimum guarantees about the treatment of persons who have been arrested or detained. In accordance with the requirements of the *International Covenant on Civil and Political Rights,* reflected in several national constitutions, the Commission proposes that the Constitution should provide that every person deprived of liberty has the right to be treated with humanity and with respect for their inherent dignity.

7.107 The international standards also recognise that children who are detained need special protection. The *Convention on the Rights of the Child,* to which Fiji is a party, provides that a child deprived of liberty should be held separately from adults, unless the child's best interests require otherwise. Children are also required to be permitted regular contact with their family, as well as the other safeguards applying to all persons deprived of liberty. Under the *Convention,* a "child" is a person under eighteen years of age, unless national laws recognise an earlier age of majority. In Fiji, the protection given to children by the Juveniles Act (Cap. 56) applies only until they attain the age of 17 years. Although this does not infringe the *Convention,* consideration should be given to raising the age to 18. The Constitution should provide that children who are deprived of liberty should, so far as practicable, be detained separately from adults, unless that is not in the child's best interests.

RECOMMENDATIONS

92. The Constitution should affirm in positive terms, that everyone has the right to personal liberty.

93. To provide certainty, it should continue to list comprehensively the grounds on which a person may be deprived of liberty. The existing grounds should be retained, with the following exceptions:

(a) Arrest or imprisonment for debt or failure to fulfil contractual obligations should be expressly prohibited.

(b) Imprisonment for non-payment of a fine should be prohibited. In default, a sentence of community service should be substituted.

(c) Imprisonment for a failure to pay tax or maintenance should be prohibited, except in cases of wilful default by a person who had the means to pay.

(d) The provision in section 6(1)(e) authorising a law permitting a person to be deprived of liberty merely on

reasonable suspicion of being about to commit a crime should be repealed. A consequential change should be made to the wording of section 6(3)(b).

(e) The power to deprive a person of liberty in time of emergency in section 6(7) and the safeguards conferred on such a person by section 17 should be dealt with in a separate provision on emergency powers.

94. The Constitution should require the state to show that a law permitting a person to be deprived of personal liberty on any of the grounds referred to in section 6(1) is reasonably justifiable in a democratic society.

95. The Constitution should continue to recognise all the existing rights of arrested or detained persons, but some should be spelt out or supplemented as follows:

(a) A person arrested or detained upon reasonable suspicion of having committed a criminal offence should have the right to be informed of the nature of any charges against him. Such a person, if not charged, should have the right to be promptly released.

(b) A person who is arrested or detained, or questioned by the police in a coercive situation on suspicion of having committed a criminal offence, as well as a person who has been charged, should have a right to consult a lawyer, and to be informed of that right as soon as it arises, as well as of the right to legal aid, as formulated in paragraph (d) below.

(c) A person suspected of having committed a criminal offence who wishes to consult a lawyer should not be questioned, or further questioned, until he or she has had a reasonable opportunity to exercise that right; should be entitled to consult the lawyer of his or her choice, subject to any reasonable restrictions as a condition of being granted legal aid; and should be afforded prompt and adequate opportunity to consult the lawyer in private, in the place where he or she is being detained or questioned.

(d) A person who is arrested or detained, or is being questioned by the police in a coercive situation on

suspicion of having committed a criminal offence, or has been charged, should have the right to be provided with the services of a lawyer under a scheme for legal aid, if he or she does not have sufficient means to engage a lawyer and substantial injustice would otherwise result.

(e) **If a person is arrested or detained, the police or other authority holding the person should be required to inform a relative or friend of that person as soon as practicable. A detained person should have the right to reasonable opportunities to receive visits from family members or friends, a religious counsellor or a social worker. He or she should be informed of this right as soon as practicable.**

(f) **A person arrested on the order of a court or on suspicion of having committed a criminal offence should have the right to be brought before a court no later than 48 hours from the time of arrest, or, if that is not reasonably possible, as soon as possible thereafter.**

(g) **Everyone who is arrested or detained should have the right to have the validity of the arrest or detention determined by way of habeas corpus, and to be released if the arrest or detention is not lawful.**

(h) **When a person is first brought before a court after arrest, the court should be required to order his or her release on reasonable terms and conditions pending trial, unless there is just cause for continued detention. Persons ordered to be detained pending trial should, so far as practicable, be kept apart from persons who have been convicted and are serving sentences of imprisonment.**

(i) **Every person arrested, detained or questioned by the police in a coercive situation, on suspicion of having committed a criminal offence, should have the right to refrain from saying anything and to be informed of that right.**

(j) **Every person deprived of liberty should have the right to be treated with humanity and with respect for their**

inherent dignity. A child who is deprived of liberty should, so far as practicable, be detained separately from adults, unless that is not in the child's best interests.

FREEDOM FROM SLAVERY AND FORCED LABOUR

7.108 Section 7(1) and (2) of the 1990 Constitution provides that no person shall be held in slavery or servitude or be required to perform forced labour. By their nature, these are negative rights, and should continue to be expressed in the Constitution in their existing form. There is no power to limit the rights by law, but subsection (3) excludes from the meaning of "forced labour" certain types of labour that a person may lawfully be required to perform.

7.109 Section 7(3)(a) excludes any labour required in consequence of the sentence or order of a court. This is wide enough to cover orders for the specific performance of a contract for services or the performance of remedial work in civil cases as well as the imposition, in criminal cases, of sentences such as the performance of community service. Sentences of imprisonment "with hard labour" have been abolished in Fiji since 1957. The Commission considers it unnecessary for the Constitution expressly to forbid the reintroduction of this outdated form of punishment.

7.110 Section 7(3)(b) excludes from the definition of forced labour, labour required of a person lawfully detained which

> though not required in consequence of the sentence or order of a court, is reasonably necessary in the interests of hygiene or for the maintenance of the place at which he is detained.

We understand that prisoners in Fiji are regularly required to perform work that is not expressly authorised by this provision. Generally speaking, that work is welcomed by prisoners and is likely to have a rehabilitative effect. The Constitution should therefore expressly exclude from the definition of forced labour any work reasonably required of a person sentenced to imprisonment, whether or not related to the hygiene or maintenance of the prison.

7.111 The substance of section 7(3)(c), excluding the labour required of disciplined forces, or of persons who have a conscientious objection to military service and are required to perform other types of service instead, and of section 7(3)(e), excluding labour reasonably required as part of reasonable and normal communal or other civic obligations, should be retained. The last-mentioned provision applies to the communal obligations of

Fijians and Rotumans, a matter discussed further in Chapter 17. The substance of section 7(3)(d), concerning labour required in time of emergency, is discussed in Chapter 20.

RECOMMENDATIONS

96. The Constitution should continue to provide that no person shall be held in slavery or servitude or be required to perform forced labour.

97. It should expressly exclude from the definition of forced labour any work reasonably required of a person sentenced to imprisonment, whether or not related to the hygiene or maintenance of the prison.

98. The substance of section 7(3)(a), (c) and (e) should be retained but the power to require the use of labour in an emergency in paragraph (d) should be dealt with in a separate provision on emergency powers.

FREEDOM FROM INHUMAN TREATMENT

7.112 Section 8 of the 1990 Constitution states, without qualification or exception, that no person shall be subjected to torture or to inhuman or degrading punishment or other treatment. That negative right should be retained. We have dealt already with a concern expressed in a submission that section 4 might be read as permitting limitations of section 8 by recommending that section 4 itself should become no more than an affirmation of all the rights and freedoms referred to in the Bill of Rights and incapable of being read as permitting their limitation.

7.113 Some international instruments and national constitutions develop the principle underlying section 8 by spelling out further protections against the imposition of punishment or treatment contrary to generally accepted human rights standards. The Commission believes that first, the Constitution should expressly forbid "disproportionately severe" punishment or other treatment. This would provide a clear standard against which to judge the appropriateness of particular penalties, taking into account the nature of the offence for which they are imposed. It would also provide a constitutional basis for an appeal against a particular sentence claimed to be disproportionately severe, and help to promote consistency of sentencing policy between courts in different places.

7.114 Secondly, the Constitution should contain an express prohibition against scientific or medical experimentation without the informed consent of the person concerned. This is a necessary safeguard, especially in a developing country like the Fiji Islands, to safeguard people against medical or scientific experimentation for commercial purposes without full awareness and acceptance of any risks involved.

RECOMMENDATIONS

99. The Constitution should continue to provide that no person shall be subjected to torture or to inhuman or degrading punishment or other treatment.

100. It should expressly prohibit "disproportionately severe" punishment or other treatment.

101. It should also expressly prohibit scientific or medical experimentation on any person without that person's informed consent.

THE RIGHT NOT TO BE DEPRIVED OF PROPERTY

7.115 Section 9 of the 1990 Constitution protects people from having their property compulsorily taken by the state for a public purpose. It covers both the situation where the state takes possession of private property, or in other ways places restrictions on the use of the property, without affecting the owner's title. It also covers the case where the state acquires the title to the property.

7.116 For example, the section applies to everything from the temporary requisitioning of a ship to provide essential transport in time of emergency, to the acquisition of the ownership of land for the purpose of constructing a new road. It also applies if the state forbids the sale of certain types of shares formerly traded on the open market to persons who are not citizens, or not resident in the Fiji Islands, thus reducing their market value. All these actions can be broadly described as a "taking" of property. The Constitution should maintain the present protection against any such taking of property by the state.

7.117 It is necessary to make it clear that a taking is something directed to a particular property or type of property, because the state wishes to use that property itself, or control its use by its owner. It should not be regarded as including every circumstance in which the state may become involved in enforcing the general law against a particular person by measures which may result in depriving that

person of property. The grounds on which the protection afforded by the section may at present be limited indicate some confusion on this point.

7.118 When a state agency wishes to use or purchase certain private property for a particular purpose, the property-owner will, in many cases, be willing and able to reach agreement with the relevant agency. This approach should be encouraged. However, the rent or purchase price has to be paid from public funds. To prevent the acquiring authority from being held to ransom, negotiations must take place against the background of a power to take the property compulsorily if necessary, subject to proper safeguards.

7.119 The right affirmed in section 9 covers the case where agreement with the owner or other person entitled to the property has not been reached. It is proper, therefore, that the state's power in those circumstances to take the property compulsorily is subject to the following stringent conditions:

- Property may be taken only under an empowering law. The state cannot take property simply by administrative action.
- The acquiring authority must give reasonable notice to the owner and any other persons whose interests are affected of the intention to take the property.
- The High Court must authorise the taking.
- The taking must be for a purpose specified in the Constitution.
- If the taking is authorised, the acquiring authority must pay prompt and adequate compensation.
- If the acquiring authority is unable to reach agreement with the owner about the amount of compensation payable, the amount must be fixed by the High Court.
- The acquiring authority must pay the reasonable costs of the owner in connection with the High Court proceedings or any appeal to a higher court.

By requiring the application of these standards, the Constitution should continue to protect all persons against the compulsory taking of their property by an agency of the state.

The taking of land

7.120 The Commission considers that there is a need to narrow the grounds on which the state may take land compulsorily. At present the purposes for which

property of any kind may be taken are very wide. Section 9(1)(c) requires the High Court to be satisfied that the taking

> is necessary or expedient in the interests of defence, public safety, public order, public morality, public health, town and country planning or utilisation of any property in such a manner as to promote the public benefit.

7.121 In its application to land, this provision makes no distinction between the taking of a particular piece of land for the purpose of providing a public amenity, like the extension of an airport runway; and the nationalisation of land, or the implementation of some other general policy about land. Both kinds of taking are capable of being justified as necessary or expedient "in the interests of... utilisation of [the] property in such a manner as to promote the public benefit".

7.122 The extent to which the Constitution permits the compulsory taking of land has given rise to concern in Fiji. It allows the state undue freedom to take native land, or the tenant's interest in leases of land, or the owners' interests in the reversion. Although any such taking would have to be authorised by law, the prohibition on the sale, lease or other disposition of native land under section 7 of the Native Land Trust Act (Cap. 134), for example, is subject to the provisions of the State Acquisition of Lands Act (Cap. 135), among others. Section 3 of that Act allows an acquiring authority to acquire lands for any "public purpose". The definition of that term in section 2 of the Act reproduces the wide terms of section 9(1)(c) of the Constitution quoted above. The power to take land on a large scale is already conferred by law. The fears about the breadth of this power are well-based.

7.123 The Commission considers that the Constitution should not permit the state to take land compulsorily on the present wide ground that the taking is necessary or expedient "in the interests of its utilisation in such a manner as to promote the public benefit". The provision to that effect should be repealed. If a government desires to implement any change in land use policy, it should do so by amendment of the entrenched legislation in the required manner, after full consultation with all the affected communities. Any other large scale "taking" of land or other property should first require a constitutional amendment.

7.124 Repeal, in relation to land, of the wide formula just discussed would leave a gap, because there would no longer be provision for taking land for what is often described as a "public work". This would include the construction of roads, airports, harbours, dams, drains and all other public amenities involving the use of land. This is the most usual reason for the taking of land. Provision

permitting the taking of land for such a purpose should be substituted for the wider formula.

7.125 The definition of "public purposes" in section 2 of the State Acquisition of Lands Act will become inconsistent with the Constitution if it is amended in the manner proposed. However, it would be inconvenient simply to leave it to be challenged on that ground. The definition of "public purposes" should therefore be amended to bring it into line with the Constitution as amended.

Hardship to the owner of property

7.126 As well as narrowing the grounds on which land may be taken by the state, a further safeguard should be introduced which would require the particular public good to be served by taking any property to outweigh any hardship caused to the owner. There is provision to this effect in the Constitutions of both Mauritius and Papua New Guinea.

7.127 In the case of a taking of land, the balancing process would take account of such matters as whether the owner would be left without adequate land, whether land retained by the owner would be adversely affected, and whether there is another feasible way of achieving the purpose without taking the land in question. In some cases, a taking of land for improvements such as a drainage work or a road will improve the usability and value of adjoining land. That too should be taken into account, both in determining whether the taking should be approved and, if so, in fixing the amount of the compensation.

7.128 The Commission considered whether section 9 should be further amended by omitting the word "expedient" in section 9(1)(c) and requiring the acquiring authority to show that the taking is "necessary" for the desired purpose. This would, however, impose a high standard of proof that the acquiring authority may seldom be able to discharge. On balance, we consider that, if the grounds on which land may be taken are narrowed, it should be possible to take land or other property after satisfying the court that the taking is "necessary *or expedient*" for the purpose for which the property is required.

Preserving the national heritage

7.129 As explained, a taking of property by the state can include action that leaves a person's title to property unaffected, but reduces its value. That is why section 9(1)(c) of the Constitution refers to "town and country planning" as a justifiable ground for a taking. Changes in permitted uses of land under planning requirements affect the purposes for which the land may be used and therefore its

value. Sometimes, that value will increase, as when farmland becomes available for subdivision. Occasionally, however, the value may be reduced, for example where land in which there was formerly a mix of industrial and residential uses is re-zoned residential. In such cases the re-zoning would need the prior or subsequent approval of the court, and, if approved, compensation would be payable.

7.130 Section 9(5)(b)(v), introduced by the 1990 Constitution, cuts across this principle. It excludes from the protection of the section the "taking of possession or acquisition", under a law, of "property of national, archaeological, palaeontological, historical, cultural, architectural or scenic value for the purpose of its preservation". It is not clear from the context whether the provision permits the actual acquisition by the state of the property in question, or whether it provides only for the placing of a preservation order on the property, leaving the title to the property unaffected. In either case, the important interests of the state in securing the preservation of the property need to be balanced against any loss of the property or its value suffered by the owner.

7.131 This should be done by expanding the grounds on which property may be taken to include the case where a taking is necessary or expedient in the interests of preserving property of national, archaeological, palaeontological, historical, cultural, architectural or scenic value. There should be a further provision, modifying the right to prompt and adequate compensation in such cases. In deciding whether to authorise the taking, the High Court should be required to take account of the need to ensure the preservation of the heritage of the Republic of Fiji at a cost which the nation can afford, without placing an unjust burden on the owner of the property concerned. It should apply the same test in deciding whether compensation should be payable, and if so, the appropriate amount.

7.132 Such a provision would give a clear signal that any statutory scheme under which preservation orders may be made or other measures taken in respect of property having the described values, would need to include fair mechanisms under which the competing interests can be properly balanced. Guidance should be obtained from a study of comparable schemes for the preservation of the national heritage in both developed and developing countries. Section 9(5)(b)(v) should be consequentially repealed.

Extraction of minerals

7.133 The 1990 Constitution also introduced new provisions, section 9(6), (7), (8) and (11) about the need for the state to share with the owners of land or customary fishing rights any royalties received from the extraction of minerals

from the subsoil of the land or seabed. These provisions are not concerned with the protection of property against a taking by the state in the legal sense and would be better placed in a separate constitutional provision. We discuss them in Chapter 17.

7.134 Section 9(2), dealing with the taking of property in an emergency, should also be in a separate provision, as proposed in Chapter 19. Section 9(5)(a)(i) and (ii), and (vii), so far as they relate to the temporary holding of property for the purposes of an examination, investigation, trial or inquiry, do not concern a taking of property but are permissible limitations of the right to be protected against unreasonable searches or seizures. They should become part of a separate provision recognising that right.

Other matters

7.135 Even the remaining provisions of section 9 need considerable pruning. Their substance should be retained, except where they are the product of excessive legal caution about validating laws unconnected with the taking of property or the spelling out of matters of detail which should be left to implementing legislation. The safeguard at present found only in section 9(5)(a)(vii) should apply generally. The state should need to show that all laws limiting the right to protection against the deprivation of property, or administrative action taken under such laws, are reasonably justifiable in a democratic society.

7.136 Although section 9 protects property against a taking by the state, it is not concerned with the right to property itself. In Chapter 17 we discuss the application of that right to the land held by Fijians, Rotumans and the Banaban Islanders settled on Rabi Island, in accordance with their respective customs.

RECOMMENDATIONS

102. The Constitution should continue to protect all persons against the compulsory taking of their property by an agency of the state. However, it needs to be clarified that a "taking" is something directed to a particular property or type of property, because the state wishes to use that property itself, or control its use by its owner. A "taking" should not include every circumstance in which the state may become involved in enforcing the general law by measures which may result in depriving a person of property.

103. The Constitution should permit the taking of property only on the following conditions:

(a) It must be taken only under an empowering law.

(b) The acquiring authority must give reasonable notice to the owner and any other persons whose interests are affected of the intention to take the property.

(c) The High Court must authorise the taking.

(d) The taking must be for a purpose specified in the Constitution.

(e) If the taking is authorised, the acquiring authority must pay prompt and adequate compensation.

(f) If the acquiring authority is unable to reach agreement with the owner about the amount of compensation payable, the amount must be fixed by the High Court.

(g) The acquiring authority must pay the reasonable costs of the owner in connection with the High Court proceedings or any appeal to a higher court.

104. The present provision permitting the state to take property compulsorily on the ground that the taking is necessary or expedient "in the interests of its utilisation in such a manner as to promote the public benefit" should not apply to land. A provision permitting the taking of land for the more limited purpose of a public work or other public amenity should be substituted.

105. The definition of "public purposes" in section 2 of the State Acquisition of Lands Act should be amended to bring it into line with the permitted grounds for a taking of land under the Constitution as amended.

106. As a further safeguard, the Constitution should require the High Court to be satisfied that the particular public good to be served by taking the property in question outweighs any hardship caused to the owner.

107. The grounds on which property may be taken should include the case where a taking is necessary or expedient in the interests of preserving property of national, archaeological, palaeontological, historical, cultural, architectural or scenic

value. The right to prompt and adequate compensation should be modified in such cases by requiring the High Court to take account of the need to ensure the preservation of the heritage of the Republic of Fiji at a cost which the nation can afford, without placing an unjust burden on the owner of the property concerned. Section 9(5)(b)(v) should be consequentially repealed.

108. The need for the state to share with the owners of land or customary fishing rights any royalties received from the extraction of minerals from the subsoil of the land or seabed, and the taking of property in an emergency, should be the subject of separate constitutional provisions which do not form part of the Bill of Rights.

109. Section 9(5)(a)(i) and (ii), and (vii), so far as they relate to laws permitting the temporary holding of property for the purposes of an examination, investigation, trial or inquiry, should become permissible limitations of a separate right to be protected against unreasonable searches or seizures, so far as those laws are shown to be reasonably justifiable in a democratic society.

110. The substance of the remaining provisions of section 9 should be retained, unless they are the product of excessive legal caution about validating laws unconnected with the taking of property or the spelling out of matters of detail which can be left to implementing legislation.

111. All laws limiting the right to protection against the deprivation of property, or administrative action taken under such laws, should be shown to be reasonably justifiable in a democratic society.

THE RIGHT TO FREEDOM FROM UNREASONABLE SEARCHES AND SEIZURES

7.137 Although section 10 of the 1990 Constitution is entitled "Protection for privacy of home and other property", it also deals with searches of the person, and does not deal with privacy issues as such. The Commission considers that the Constitution should expressly recognise the right of everyone to freedom from unreasonable searches and seizures. The right to privacy should also be recognised, but in a separate provision.

7.138 The present formulation of section 10(1) appears to give a person an absolute right not to be subjected to the search of his person or his property, or the entry by others on his premises, and then allows that right to be qualified on a number of very wide grounds. The distinction proposed by the Commission between freedom from search and seizure on the one hand, and privacy on the other, requires all provisions about entry on premises for purposes other than a search or seizure, notably those provisions in section 10(2)(a), (b), (c) and (d) that do not relate to search or seizure, to become part of the separate provision recognizing the right to privacy.

7.139 The Commission considered whether the requirement that a search or seizure should not be "unreasonable" should be spelt out. We consider that, without affecting the generality of that provision, it should be provided that any search or seizure must be authorised by law. That law must provide for the obtaining of a search warrant on the ground that there is reasonable and probable cause to believe that the search will reveal evidence of the commission of a criminal offence. A law may also authorise a search or seizure without a warrant in the interests of defence, public safety, public order, public morality or public health, but only if it is shown to be reasonably justifiable in a democratic society.

7.140 As already recommended, the provisions in section 9 permitting a seizure should become permissible limitations of the right to freedom from unreasonable searches and seizures. They, too, should be shown to be reasonably justifiable in a democratic society.

RECOMMENDATIONS

112. The Constitution should expressly recognise the right of everyone to freedom from unreasonable searches and seizures.

113. Without affecting the generality of that provision, the Constitution should provide that any search or seizure must be authorised by law. Such a law should provide either for the obtaining of a search warrant on the ground that there is reasonable and probable cause to believe that the search will reveal evidence of the commission of a criminal offence, or, if the law permits search of a person or of property without obtaining a warrant, that law should be one in the interests of defence, public safety, public order, public morality or public health, and should be shown to be reasonably justifiable in a democratic society.

114. The substance of section 10(2)(a), (b),(c) and (d), so far as those provisions do not relate to search or seizure, should become part of a separate provision recognizing the right to privacy.

THE RIGHT TO REASONABLE PRIVACY OF PERSONAL AND FAMILY LIFE

7.141 The Commission considers that there should be a separate constitutional provision recognising the right of everyone to reasonable privacy of personal and family life. Such a right would reflect those recognised by both the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights* in the following terms:

> No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
> Everyone has the right to the protection of the law against such interference or attacks.

A right to privacy was not included in the Bills of Rights produced for adoption in former British colonies because the common law does not recognise a right to privacy as such, though it sustains it in various ways, for example through the law of defamation.

7.142 The Commission does not see a need to spell out the values protected by everyone's right to reasonable privacy of personal or family life, but considers that this right would, for instance, protect individuals against searches of the person that were unreasonably intrusive in the circumstances, and against other unreasonable measures on the part of the state which affect personal or family privacy. Recognition of the right may also encourage the state to give positive protection to personal privacy. Many countries have adopted statutory safeguards about the collection, holding and release of personal information, by the state itself and also by private persons.

7.143 The Commission considers that everyone's right to freedom from interference with their correspondence, at present recognised in section 13(1) as an aspect of the right to freedom of expression, is properly regarded as an aspect of the right to privacy and should be associated with it. The reference to "correspondence" should be expanded by adding a reference to "communications", to take account of modern technology. A person's right not to be subjected to the entry by others on his premises, at present recognised by section 10(1), should also be regarded as an aspect of the right to privacy.

7.144 It follows that the permitted limitations of a person's right to reasonable privacy of personal and family life, by or under a law, should be based on those at present set out in section 10(2) and also in section 13(2), in each case so far as relevant. The existing requirement that all such laws limiting the right, or things done under the authority of such a law, should be shown to be reasonably justifiable in a democratic society, should be retained.

7.145 The power to authorise "an officer or agent of the government, or of a local authority, or of a body corporate established by law for public purposes" to enter premises for the specified purposes should be extended to include private persons or corporations supplying public utilities to the premises under contract. If such a power cannot be conferred by law, there may be a tendency to include onerous clauses in the contract itself conferring a right of entry on private premises. If conferred by law, the power must be shown to be reasonably justifiable in a democratic society.

7.146 Because a person may exercise the right to freedom of expression in their form of communication, a permitted limitation of the right to freedom of expression may involve an interference with the privacy of communication. That question should be addressed in the redrafting of the provision. However, the principle is clear. The grounds on which the right to privacy should be capable of being limited by law should be kept to the minimum and the law or anything done under it should be shown to be reasonably justifiable in a democratic society.

RECOMMENDATIONS

The Commission recommends as follows:

115. The Constitution should affirm, as a separate right, that everyone has the right to reasonable privacy of personal and family life.

116. A person's right to freedom from interference with his correspondence, at present recognised in section 13(1) as an aspect of the right to freedom of expression, should be regarded as an aspect of this right to privacy. The reference to "correspondence" should be expanded by adding a reference to "communications".

117. A person's right not to be subjected to the entry by others on his premises, at present recognised by section 10(1), should also be regarded as an aspect of the right to privacy.

118. The permitted limitations of a person's right to reasonable privacy of personal and family life should be based on those at present set out in section 10(2) and also in section 13(2), in each case so far as relevant. All laws limiting the right to privacy, or administrative action taken under such laws, should be shown to be reasonably justifiable in a democratic society.

119. The power to authorise "an officer or agent of the government, or of a local authority, or of a body corporate established by law for public purposes" to enter on premises for the specified purposes should be extended to include private persons or corporations supplying public utilities to the premises under contract.

THE RIGHT TO A FAIR TRIAL

7.147 Section 11 of the 1990 Constitution is identical with the corresponding provision in the 1970 Constitution. It sets standards for the trial of both criminal and civil cases, though giving more emphasis to the first. For historical reasons arising from the way in which the international human rights instruments were developed, the statement of principle in subsection (1) that a "case shall be given a fair hearing within a reasonable time by an independent and impartial court established by law" applies only to criminal cases.

7.148 That statement is followed by a number of provisions spelling out aspects of the right to a fair trial. Some apply only to criminal cases. Some apply expressly to civil cases. Some might with advantage be applied to both. Finally, there are provisions making it clear that certain things done by or under law for certain relatively specific purposes do not infringe the section.

7.149 Overall, the arrangement of the section does not make it easy to see whether particular provisions apply to criminal cases, to civil cases or to both. The Commission considers that section 11 should be separated into two sections, one dealing with all trials, and one with the trial of criminal cases. The proposals that follow reflect this approach.

Provisions applying to the trial of civil and criminal cases

Equality before the law and fair trial

7.150 Submissions made to the Commission made the point that the Constitution contains no guarantee of equality before or under the law. A right to equality

before the law expresses the principle that people must be treated by both the criminal and civil courts on a basis of equality, without making distinctions between them on any ground, and that, in all cases, fair procedures must be followed. (Equality *under* the law expresses the principle that the substantive content of the law itself should be fair and not discriminatory. We discuss that principle below in dealing with the right to freedom from discrimination.)

7.151 The Commission proposes that the Constitution should affirm that all persons are equal before the law and have the right to a fair trial in terms which apply both to criminal and civil cases. The Constitution should refer expressly to the following essential elements of the right to a fair trial, already recognised, though not completely, in section 11(1) and (8):

- Everyone charged with a criminal offence or a party to a civil dispute about a legal right or obligation should have the right to have the case determined by an appropriate court or other tribunal.
- The court or tribunal should be established by law and be independent and impartial.
- The person should be given a fair hearing within a reasonable time.

This proposal fills a gap in the Constitution which does not at present give a person who is a party to a civil dispute a clear right to have that dispute determined by a court or other tribunal.

7.152 In proposing a constitutional right to this effect, the Commission recognises that people sometimes enter into arbitration agreements which give an arbitral tribunal exclusive jurisdiction to determine certain types of civil disputes. In such cases, the person concerned will no longer have the right to bring the dispute before a court. This reflects the broad principle that, so far as is consistent with public policy, constitutional rights may be waived, though in each case the courts will wish to be very sure that the waiver was made voluntarily and with full knowledge of its effect. Accordingly, the circumstances in which an arbitration agreement should be upheld are a matter for regulation by the law of Fiji. That matter should not be dealt with in the Constitution, though in enacting and enforcing an Arbitration Act, both the policy-makers and the courts will no doubt take full account of the constitutional standards.

Public hearings

7.153 There are two other matters which should be regarded as applying to all trials. The first is that the hearings of courts and tribunals established by law should in principle be open to members of the public, including media representatives. This is an essential safeguard of the quality of the administration of justice. The rule at present set out in section 11(9) should be retained, except the provision that, in civil cases, the parties may agree that the hearing should be held in private. This clearly refers to the fact, already mentioned, that people are free to agree that a civil dispute will be referred to an arbitral tribunal which will hear it in private. The procedure of private arbitral tribunals should not be dealt with in the Constitution. That document should apply only to the procedure of courts and to other tribunals established by law.

7.154 The discretion to exclude the public in both criminal and civil cases should continue to rest with the court or tribunal itself, exercising powers conferred by law. The purposes for which the law may make provision for closed hearings should be those referred to in section 11(10)(a) and (b), but with the addition of a requirement that the law and anything done under it should be shown to be reasonably justifiable in a democratic society.

Right to an interpreter

7.155 Secondly, in a multilingual country, we think that there should be clear constitutional rules about the right of the parties or other witnesses to be examined or cross-examined and to give evidence in a language that they adequately understand and are capable of using for the purpose of communication. Similarly, defendants in criminal cases and all the parties in civil cases, should be entitled to follow the proceedings in a language that they adequately understand. As well as applying to those whose knowledge of a particular language is not adequate for the purpose of understanding or communication, the rule should apply to persons who are deaf or whose hearing is impaired.

7.156 Again, this is a minimum condition for the fair administration of justice. At present, only the defendant in a criminal case is entitled, under section 11(2)(f), to have without payment the assistance of an interpreter if he cannot understand the language "used at the trial". It should be made clear that the right to an interpreter arises if the defendant or other parties do not adequately understand or cannot communicate in the language used in any part of the trial. Most people are unfamiliar with court proceedings and have little knowledge of the procedures. They should not have the added burden of trying to follow them in words which they cannot hear or in a language of which they do not have adequate knowledge.

7.157 In order to implement the right proposed above, the Constitution should provide that the services of competent interpreters, including persons able to communicate in sign language, should be available as required, without cost to the witnesses or parties. By "competent" we mean that the persons concerned should not merely know the language being spoken and the language into which it is being translated. So far as practicable, they should be fully trained in the skills of interpretation. Otherwise the right to the services of an interpreter will be an empty one.

Provisions applying to the trial of criminal cases

7.158 Our remaining proposals relate to the trial of criminal cases. The Constitution should make it clear that the procedural rights set out are the minimum standards necessary to safeguard the right of the defendant to a fair trial. They do not exclude the application of other safeguards which may be necessary for this purpose.

Presumption of innocence

7.159 Section 11(2)(a) gives constitutional force to the presumption of innocence, which places on the state the burden of proving guilt. Section 11(11)(a) makes it clear that the presumption of innocence does not prevent the law from casting on the defendant the burden of proving particular facts - as where a person found in possession of a certain quantity of dangerous drugs is presumed to be a dealer unless he or she proves otherwise. The Constitution should continue to make provision to this effect.

Standard of proof

7.160 It is well settled that guilt must be proved "beyond reasonable doubt", though there is at present no constitutional guarantee to this effect. In civil cases the standard of proof is lower. The court needs to be satisfied about a matter only "on the balance of probabilities". The Constitution should require the guilt of the defendant in a criminal case to be proved beyond reasonable doubt.

Unlawfully obtained evidence

7.161 An underlying reason for the protections accorded to persons suspected of, or charged with, a criminal offence under the right to personal liberty, and the right to freedom from unreasonable search and seizure, is the need to place limits on the way in which the state may obtain evidence of a person's guilt. Under the

common law as applied in Fiji, a court has a discretion to exclude evidence that has been unlawfully obtained. We consider that the constitutional protection of people's rights should go somewhat further, reflecting those recognised in countries that have had longer experience of what is required by a right to a fair trial under a Bill of Rights.

7.162 The Constitution should provide that unlawfully obtained evidence is inadmissible, unless the interests of justice require it to be admitted. For example, this gives the courts a discretion to admit evidence such as a murder weapon which was discovered only because its hiding place was disclosed by the suspected person in a statement obtained without being cautioned that he was not required to say anything. The court would probably still exclude the statement itself.

Pleading guilty

7.163 If the defendant pleads guilty, the prosecution no longer has to prove that he or she committed the offence. The court will be concerned only with passing sentence. Guilty pleas are sometimes entered by a defendant, perhaps without the benefit of legal advice, in circumstances where there is real doubt about the facts. Sometimes, too, the defendant may not understand the full significance of a plea of guilty. Therefore there should be some reference to the need for the court to be satisfied that, in the circumstances, the plea of guilty is acceptable.

Information about the nature of the offence

7.164 We have already recommended that, as soon as the police have decided to charge an arrested person, that person should be informed of the nature of the charges. However, there may be a considerable difference between the charges which seem appropriate to the police when they have carried the investigation far enough to decide that the person should be charged with some offence, and the charges as finally formulated by the prosecution when all the evidence has been assembled and assessed. A person required to stand trial needs to know in good time the charges on which he or she is to be tried, and on what allegations of fact they are based. Only then can that person make an informed decision about seeking legal advice and preparing a defence.

7.165 Section 11(2)(b) provides that every person who is charged with a criminal offence shall be informed as soon as reasonably practicable, in a language that he understands *and in detail, of the nature* of the offence. We consider that this rule should be written in a way that makes it clear that the defendant needs to be given, in writing, sufficient details of the offence with which he or she is charged, and also of the allegations of fact on which the charge is based, so as to be able to answer it.

Access to witness statements

7.166 The provisions of section 11(2)(c) requiring the person to be given adequate time and opportunities for the preparation of a defence should be retained. The Commission received a submission that, for this purpose, the defendant should have a constitutional right of access to all statements by witnesses held by the prosecution. In a recent case, the High Court, on appeal, found that no such right exists at present. The right is one recognised in neighbouring common law countries. It should be recognised by the Constitution in terms which require the prosecution to provide access to the statements on request, but not necessarily to provide copies. The right should extend to all statements, whether or not the person making the statement is to be called as a witness.

Right to legal representation and legal aid

7.167 Section 11(2)(d) provides that a person charged with an offence shall be permitted to defend himself in person or, at his own expense, by a legal representative of his own choice or, *where so prescribed*, by a legal representative provided at the public expense. The effect is that legal aid is available only if so provided by law. In examining the content of the right to personal liberty, we have already made a recommendation about the need of arrested or detained persons for a constitutional right to legal aid if the person concerned has insufficient means to engage a lawyer and the interests of justice so require. Our discussion of the policy issues relating to the provision of legal aid need not be repeated.

7.168 The Constitution should continue to provide that a person has the right to defend himself or herself in person, or at his own expense by a legal representative of his or her choice. The person should also have the right to be provided with the services of a lawyer under a legal aid scheme, if he or she does not have sufficient means to engage a lawyer and substantial injustice would otherwise result. The defendant should be informed of these rights at the time of being given written notice of the nature of and grounds of the charge.

Examination of witnesses

7.169 The substance of section 11(2)(e) about the examination and cross examination of witnesses by the defendant or his or her legal representative, should be retained. Section 11(11)(b) permits a law to place reasonable conditions on the right of a defendant to call witnesses at public expense.

Right of appeal

7.170 The right in section 11(3) of the defendant to have access to the record should be retained. One obvious purpose of this right is to enable a convicted defendant to consider or prepare an appeal. However, although the Constitution gives the High Court, the Court of Appeal and the Supreme Court jurisdiction to hear appeals, it does not give a convicted person any right to appeal against the conviction or to have it reviewed. This gap should be filled by providing that every person convicted of a criminal offence has the right to have recourse by way of appeal to, or review by, a higher court.

Trial in the presence of the defendant

7.171 The Constitution should also continue to provide that the trial must not take place in the absence of defendants, unless their conduct makes it impracticable to continue the trial in their presence, or the defendants consent to the trial in their absence. Section 11(12) provides that a person who has been served with a summons or other notice of the trial and does not appear is deemed to have consented to the trial taking place in his absence. This provision should be modified so as not to apply where the offence with which the person is charged is punishable by a sentence of imprisonment.

Retrospective punishment

7.172 The Constitution should retain the substance of the important provision in section 11(4) that a person may not be convicted of a criminal offence if the conduct was not an offence at the time it was committed, or be punished by a more severe penalty than that applying at the time of commission. Some constitutions provide that, if the penalty is reduced between the time of the commission of the offence and the time at which the offender is sentenced, the defendant should have the benefit of the lesser penalty. We consider that the Constitution of the Republic should make provision to this effect.

Double jeopardy

7.173 The Constitution should also retain the substance of the provision in section 11(5) that prevents a person being tried more than once for a criminal offence arising out of the same conduct. However, the provision in its present form allows the prosecution to appeal against a person's acquittal. Recommendation 33 of the *Report of the Commission of Inquiry on the Courts of Fiji* (1994) drew attention to the need to reconsider this power as it cuts across the practice in common law countries where there is a right to trial by jury in serious criminal cases. The jury's finding of "Not guilty" is accepted as final.

7.174 Although there is no right to trial by jury in the Fiji Islands, in the serious cases which must be heard in the High Court, there is a right to a trial with assessors. The *Report* just mentioned regarded this right as a safeguard for defendants in criminal cases which should be retained. As assessors, like juries, are not required to give reasons for their decisions, the Constitution should make it clear that the prosecution cannot appeal against an acquittal in a way which affects the outcome of the particular case. No such safeguard is written into the prosecution's existing right to appeal against an acquittal. We understand, however, that this right is rarely, if ever exercised. The Constitution should permit a right to appeal against an acquittal only for the limited purpose of seeking to clarify the state of the law, on the basis that, if the appeal succeeds, it will not affect the defendant's right to go free.

Person pardoned may not be tried

7.175 Section 11(6) provides that no person shall be tried for a criminal offence if it is shown that a competent authority has granted him a pardon for that offence. The provision goes beyond the scope of Section 99 of the 1990 Constitution which permits the President to pardon a person for an offence only after that person's conviction. A retrial in such circumstances is already prohibited by the rule preventing a person from being tried twice for the same offence. However, the Privy Council has recognised that a law may provide for a person to be granted a pardon even before conviction. The substance of the provision should therefore be retained.

Privilege against self-incrimination

7.176 The substance of section 11(7) which provides that no person who is tried for a criminal offence shall be compelled to give evidence at the trial should be retained. In discussing the right to personal liberty we have referred already to the fact that persons arrested or detained or being questioned by the police in a coercive situation have the right to remain silent. The principle that a person suspected of, or charged with, a criminal offence should not be required to say anything before the trial or give evidence at the trial is basic to the administration of justice in common law countries.

Treatment of children

7.177 The international instruments include provisions relating to juvenile justice. *The Convention on the Rights of the Child* entitles a child in conflict with the law to treatment which takes the child's age into account and aims at his or her re-integration into society. The emphasis is on avoiding judicial proceedings and placement in an institution wherever possible.

7.178 It is also becoming increasingly common in many countries to take special measures for the protection of children who are required to give evidence in criminal cases, specially if they are the victims of the alleged crime. Their evidence is increasingly given from behind a screen, or on closed circuit television, so they are not brought into direct contact with the defendant. These arrangements must not, of course, deprive the defendant of the right to be present during the whole of the trial and to cross-examine the prosecution witnesses.

7.179 The Commission therefore considers that the Constitution should require a child taking part in a criminal trial, either as defendant or as a witness, to be treated in a manner which takes the child's age into account. Such a provision would be broad enough to cover all aspects of the child's treatment during the trial.

RECOMMENDATIONS

120. Section 11, entitled "Provisions to secure protection of law" should be separated into two separate sections. The first section should affirm that all persons are equal before the law and have a right to the fair trial of both criminal and civil cases in which they may be involved. It should spell out certain requirements for a fair trial which apply in both criminal and civil cases. The second section should spell out the minimum guarantees required to secure a fair trial in criminal cases.

121. The section applying to all trials should refer expressly to the following essential elements of the right to a fair trial:

- **(a) Everyone who is charged with a criminal offence or is a party to a civil dispute about a legal right or obligation has the right to have the case determined by an appropriate court or other tribunal.**
- **(b) The court or tribunal should be established by law and be independent and impartial.**
- **(c) The persons concerned should be given a fair hearing within a reasonable time.**

122. The hearings of courts and tribunals established by law should be open to the public. The provision that, in civil cases, the parties may agree that the hearing should be held in private refers to private arbitral tribunals and should be repealed. The Constitution should apply only to courts, and to other tribunals established by law.

123. **The discretion to exclude the public in both criminal and civil cases should continue to rest with the court or tribunal itself, exercising powers conferred by law for the purposes referred to in section 11(10)(a) and (b), but with the addition of a requirement that the law and anything done under it should be shown to be reasonably justifiable in a democratic society.**

124. **The parties or other witnesses should have the right to give evidence and be questioned in a language that they can adequately understand and use for the purposes of communication. The defendant in a criminal case, and all the parties in a civil case, should have the right to follow the proceedings in a language that they adequately understand. The right should apply to persons who are unable to understand because their hearing is impaired. It should arise if the persons concerned cannot adequately understand or communicate in the language used in any part of the trial.**

125. **The Constitution should provide that the services of competent interpreters, including persons able to communicate in sign language, should be provided as required, without cost to the witnesses or parties.**

126. **The section applying to criminal trials should guarantee to the defendant the following minimum procedural rights:**

(a) **Every person who is charged with a criminal offence should be presumed to be innocent until proved guilty beyond reasonable doubt, or until he or she has pleaded guilty and the plea has been accepted by the court.**

(b) **The Constitution should provide that wrongfully obtained evidence is inadmissible, unless the interests of justice require it to be admitted.**

(c) **Everyone who is charged with a criminal offence should have the right to be informed as soon as reasonably practicable, in writing and in a language that they understand, of the nature of the offence with which they are charged and also of the allegations of fact on which the charge is based, in sufficient detail to be able to answer the charge.**

(d) **Every person who is charged with a criminal offence should be given adequate time and opportunities for**

the preparation of a defence. He or she should have a right of access, in person or through a legal representative, to all statements by witnesses held by the prosecution, whether or not the prosecution plans to call them. There should be no right to be provided with copies.

(e) The Constitution should continue to provide that everyone has the right to defend themselves in person, or at their own expense by a legal representative of their choice. They should also have the right to be provided with the services of a lawyer under a legal aid scheme if they do not have sufficient means to engage a lawyer and substantial injustice would otherwise result. Defendants should be informed of these rights at the time of being given written notice of the nature and grounds of the charge.

(f) The substance of section 11(2)(e) and (11)(b) about the right of the defendant or his or her legal representative to examine or cross-examine witnesses should be retained.

(g) The defendant's right of access to the record under section 11(3) should be retained.

(h) Every person convicted of a criminal offence should have a right of recourse by way of appeal to, or review by, a higher court.

(i) The Constitution should continue to provide that the trial must not take place in the absence of defendants, unless the conduct of the defendant makes it impracticable to continue the trial in their presence or the defendants consent to the trial in their absence, but the failure to appear of persons charged with an offence punishable by imprisonment should not be taken as consent to the trial taking place in their absence.

(j) The Constitution should retain the substance of the provision in section 11(4) that a person may not be convicted of a criminal offence if the conduct was not an offence at the time it was committed, or be punished by a more severe penalty than that applying at the time of its commission. If the penalty is reduced between the

time of the commission of the offence and the time at which offenders are sentenced, they should have the benefit of the lesser penalty.

(k) The Constitution should retain the substance of the provision in section 11(5) that prevents a person being tried more than once for a criminal offence arising out of the same conduct. However, the Constitution should make it clear that the prosecution cannot appeal against an acquittal, except for the purpose of clarifying the law for the future without affecting the outcome of the particular case.

(l) The substance of the provision in section 11(6) which provides that no person shall be tried for a criminal offence if it is shown that a competent authority has granted him a pardon for that offence should be retained.

(m) The substance of section 11(7) which provides that no person who is tried for a criminal offence shall be compelled to give evidence at the trial should be retained.

(n) The Constitution should require a child taking part in a criminal trial, either as defendant or as a witness, to be treated in a manner which takes the child's age into account.

THE RIGHT TO FREEDOM OF RELIGION, CONSCIENCE, THOUGHT AND BELIEF

7.180 Section 12 of the 1990 Constitution protects the right to what is described as "freedom of conscience". Its terms are identical with the corresponding provision in the 1970 Constitution. Freedom of conscience is regarded as including not only individual freedom of conscience, but also

- individual freedom of thought and of religion;
- individual freedom to change one's religion or belief;
- individual and group freedom ("alone or in community with others in public and in private") to manifest and propagate religion or belief in worship, teaching, practice or observance.

7.181 Although different opinions were expressed in the submissions about whether the Republic of the Fiji Islands should, or should not, be officially linked to the Christian religion - a matter already discussed in Chapters 3 and 5 - people were agreed about the need to respect the right to freedom of religion in this country. The Commission therefore concentrated on the best way of recognising and protecting this freedom in the Bill of Rights.

7.182 In contrast to the international instruments and many national constitutions, the 1990 Constitution treats freedom of religion, thought and belief as aspects of freedom of conscience. The Commission considers that the Constitution should positively affirm that everyone has the right to freedom of religion, conscience, thought and belief. Each object of the freedom should be regarded as separate and entitled to recognition and protection in its own right.

7.183 The freedom just described should be expressed as including a person's freedom to change his or her religion or beliefs. Some constitutions elaborate this idea by providing expressly that a person is free to have *no* religion or beliefs, and is also free to *adopt* or *maintain* a religion or beliefs. However, we do not think it necessary spell out in the Constitution these facets of what is already implicit in a person's freedom to "change" his or her religion or beliefs, an expression that is well-accepted and understood.

7.184 We consider that the Constitution should recognise separately from the individual freedoms just mentioned, the freedom of everyone, either alone or in community with others, and both in public and in private, to manifest and propagate their religion or belief in worship, teaching, practice and observance. One's right to *manifest* or *propagate* religion or beliefs should be subject to limitations. In that context the state might be justified in intervening to protect the public interest or the rights and freedoms of others.

7.185 We considered whether the freedom to "propagate" a religion or beliefs should be maintained, or whether a word like "disseminate" should be used instead. However, we think it better to retain the word "propagate" which is used in the international instruments and a number of national constitutions. The courts of the Republic will be able to look to the international jurisprudence if the meaning of the term "propagate" should ever be in issue.

Education and religious instruction

7.186 Section 12(2) protects the subsidiary right of religious communities to establish, maintain and manage places of education. The Commission considers

that this right should be expanded to apply also to ethnic, social, linguistic and other groups. We therefore propose that the Constitution should recognise a right to establish, maintain and manage institutions of education or training in a separate section of the Bill of Rights. The content of the proposed right is discussed below.

7.187 Section 12(3) protects the subsidiary right of religious communities to provide religious instruction as part of any education they provide, regardless of whether that course of education is wholly or partly funded by the State. Section 12(4) recognises the associated right of young persons not to be required to receive religious instruction or to participate in religious observance relating to a religion that is not their own.

7.188 The principle behind these provisions is well-suited to the Fiji Islands where many religious communities and other groups establish and maintain schools. Usually they receive some state aid. Most, if not all, are open to students of all ethnic groups and all faiths. The fact that an institution of education or training is partly or wholly funded by the state should not exclude the possibility of conducting prayers or other religious observances or giving religious instruction in any such institution. The Constitution should continue to recognise this freedom, along with the safeguards about the freedom not to participate recognised in section 12(4).

The taking of oaths

7.189 Section 12(5) recognises the right of any person not to be compelled to take an oath contrary to his religion or belief or to take an oath in a manner contrary to his religion and belief. It appears in the constitutions of common law countries where the practice is current of invoking God's help to keep a solemn promise intended to have legal consequences, while holding a bible or other religious book, or performing some other action symbolic of a belief in God. Historically, the form of oath required in England in the 18th and early 19th centuries was used to persecute Roman Catholics whose beliefs were inconsistent with its terms. That is why the freedom not to take an oath or a particular form of oath was later regarded as a constitutional right.

7.190 Its express protection is scarcely necessary in the Republic which recognises the right to make an affirmation, or solemn promise not involving an appeal to God, in all cases where the law formerly required the swearing of an oath. But because of the adverse inference that might be drawn from repealing the provision, its substance should be retained.

Limitation of the right to religious freedom

7.191 Finally, the Commission looked at the grounds on which the rights and freedoms recognised in this area might need to be limited. It considered that there should be no power to limit the right to individual freedom of religion, conscience, thought and belief. There is no valid reason why the state should attempt to control a person's individual thought processes and belief systems about religion or any other matter. The only activity that might conceivably call for control measures is the exercise of the freedom of everyone, either alone or in community with others, to manifest and propagate his or her religion or belief in worship, teaching, practice and observance. The Constitution should continue to confer power to limit that aspect of the protected rights and freedoms by laws, or action taken under laws, for specified purposes.

7.192 Those purposes should continue to include the protection of the rights and freedoms of other persons, including their right to observe and practise any religion without the unsolicited intervention of members of any other religion, as provided in section 12(6)(b). They should also continue to include the interests of public safety, public order, public morality or public health as provided in section 12(6)(a). There is no need to provide that the freedoms in question may be limited in the interests of "defence". In each case the law should continue to be one that can be shown to be reasonably justifiable in a democratic society.

RECOMMENDATIONS

127. Instead of regarding freedom of thought and of religion as aspects of freedom of conscience, the Constitution should treat each aspect separately. It should positively affirm that everyone has the right to freedom of religion, conscience, thought and belief, including the freedom to change their religion or beliefs.

128. The Constitution should continue to recognise, but separately from the individual freedoms just mentioned, the freedom of everyone, either alone or in community with others, and both in public and in private, to manifest and propagate their religion or belief through worship, teaching, practice and observance.

129. It should recognise the subsidiary right of any community or group maintaining an educational or training institution to hold religious observances, or to provide religious instruction as part

of any education or training they provide, whether or not that institution is wholly or partly funded by the state, and the associated right of young persons not to be required to receive religious instruction or to participate in religious observances relating to a religion that is not their own.

130. It should also continue to recognise the right of everyone not to be compelled to take an oath contrary to his or her religion or belief or to take an oath in a manner contrary to his or her religion or belief.

131. There should be no power to limit the right to individual freedom of religion, conscience, thought and belief.

132. The freedom of everyone, either alone or in community with others, to manifest and propagate his or her religion or belief in worship, teaching, practice and observance should be subject to limitation by a law, or action taken under a law, for the purpose of protecting the rights and freedoms of other persons, as provided in section 12(6)(b), and also in the interests of public safety, public order, public morality or public health, as provided in section 12(6)(a). The present power to impose limitations in the interests of "defence"should be repealed. In each case the law should be one that can be shown to be reasonably justifiable in a democratic society.

THE RIGHT TO ESTABLISH AND MAINTAIN INSTITUTIONS OF EDUCATION OR TRAINING

7.193 In discussing religious and related freedoms as set out in section 12 of the 1990 Constitution, the Commission expressed the view that the Constitution should recognise the separate right, not only of religious communities, but also of ethnic, social, linguistic or other communities to establish, maintain and manage educational or training institutions. This is an important right in the Fiji Islands. The majority of schools and institutions have been set up by religious and other groups. In contrast, however, to the present provision in section 12(2), the community or group which establishes a school should have the right to manage it, whether or not it receives aid from the state to assist in maintaining it.

Duty not to discriminate

7.194 The Commission also considers that, in principle, all educational or training institutions wholly or partly funded by the state should be expressly required to admit students without discrimination on any ground prohibited by

the Constitution; that is, on the ground of race, ethnic origin, sex or gender, birth, place of origin, political opinions, colour, religion, creed, language, economic status, age or disability. However, it recognises that a religious, ethnic, linguistic or other group often establishes a school or other teaching institution for the purpose of meeting a special need, such as instruction in a particular religion or language, or the fostering of the leadership qualities of young women or men belonging to a particular community.

7.195 The duty not to discriminate should therefore take second place to the object of maintaining the school's special character. But if the institution is in a position to admit students other than the category for whose benefit it was established, the admissions policy should not discriminate on any of the prohibited grounds. To allow some flexibility in taking account of the circumstances of different institutions, the Constitution should allow the general principle just proposed to be applied on conditions established by law.

Limitation of the right

7.196 The new right should be subject to limitation by law for the purposes referred to in section 12(6)(c), that is, for imposing standards or qualifications with regard to such matters as the curriculum, examination or accreditation, the qualifications of the teaching staff and other relevant matters, but only if the laws for this purpose can be shown to be reasonably justifiable in a democratic society.

RECOMMENDATIONS

133. The Constitution should recognise a new and separate right, not only of religious communities, but also of ethnic, social, linguistic and other communities, to establish, maintain and manage educational or training institutions.

134. The community or group which establishes such an institution should have the right to manage it, whether or not the cost of maintaining it is partly met by the state.

135. Except so far as may be necessary to maintain the special character of an educational or training institution, it should be open to all qualified students, without discrimination on any ground prohibited by section # (Right to equality under the law and freedom from discrimination), on such conditions as may be established by law.

136. The right to establish and maintain educational or training institutions should be subject to limitation by law for the purpose of imposing relevant standards or qualifications, but only so far as such laws can be shown to be reasonably justifiable in a democratic society.

THE RIGHT TO FREEDOM OF EXPRESSION

7.197 Section 13 of the 1990 Constitution begins with the words "Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression ...". The right to freedom of expression is intrinsic to human identity, including the identity of communities and groups. It has value for its own sake, and also because it is essential to the exercise of other rights and the promotion of important values. People cannot exercise their political rights freely unless they also have the right to freedom of expression. The exercise of that right also enables them to participate in local, provincial and central government decision-making processes. This enhances the legitimacy of the decisions reached and helps to promote unity and harmony.

7.198 For these reasons, great care must be taken both in formulating the content of the right to freedom of expression and in allowing it to be restricted by law for particular purposes. In the multi-ethnic and multicultural society of the Fiji Islands, where there are significant differences in the cultural approach of different communities to the expression of opinions, the terms in which the right to freedom of expression is affirmed, the power to limit it by law, and the way in which people choose to express themselves are all matters which call for the right balance between robustness and sensitivity.

7.199 At present, a person's right to freedom of expression is defined as comprising "freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence". We have already recommended that everyone's freedom from interference with their correspondence should become part of a right to reasonable personal and family privacy. We also consider that the Constitution should not refer to particular aspects of freedom of expression in a way that appears to exclude other aspects of that freedom. The international instruments and other national constitutions make it clear that the concept of freedom of expression is open-ended. The Constitution should therefore affirm the right of everyone to freedom of expression *including* the particular freedoms specifically mentioned. These should continue to include freedom to hold opinions and to receive and impart ideas and information without interference.

Freedom to seek ideas or information

7.200 Unlike the international instruments and many other constitutions, the 1990 Constitution makes no mention of the freedom to *seek* ideas or information. We consider that this aspect of freedom of expression should also be referred to expressly, because it supports the role of the news media in supplying information to the public and enabling people to exercise their political rights on a well-informed basis.

7.201 However, it should be clearly understood that the freedom to seek information does not mean that there is any right to be given the information sought, whether the request is directed to politicians, officers of the state or private individuals. That is a matter for the person to whom the request is made. Moreover, any exercise of the right to seek information will have to be balanced against the recommended right to reasonable personal and family privacy.

7.202 Some submissions did indeed suggest that, in the Fiji Islands, there should be a right to official information, as there is in some neighbouring countries. Such a right should be conferred by legislation, rather than by the Constitution. We explain our reasons for that view and make recommendations about the purpose, scope and implementation of such a right in Chapter 15.

Form of expression

7.203 The Commission considers that the Constitution should leave open the form in which people are free to express themselves. The use of language will always be a form of expression. The courts may, however, sometimes be required to consider whether other human activities also are forms of expression.

Freedom of the press

7.204 We received submissions that the Constitution should expressly recognise the freedom of the press and other news media, in view of the important responsibilities of the media in keeping the public informed. The constitutions of Papua New Guinea, Namibia, Canada and South Africa, among others, contain express references to this aspect of freedom of expression. We believe that the freedom of the press should also be explicitly recognised in the Fiji Islands, in terms that make it clear that the freedom extends to all media, but subject to the following condition.

7.205 The *American Convention on Human Rights* recognises the right of anyone injured by inaccurate or offensive statements or ideas disseminated to the

public in general by the news media to make a correction using the same communications outlet, under such conditions as the law may establish. The Papua New Guinea Constitution recognises a similar right of correction. The Commission considers that this Constitution should also provide for a right of correction under conditions established by law.

7.206 The intervention of the law is required because there must be a means of striking a proper balance between encouraging courageous investigative journalism on the one hand and, on the other, requiring the media to give the same publicity to corrections where these are warranted. The law of defamation already goes some way towards striking this balance, but legislation may also be required. The media must retain the responsibility of deciding whether or not to publish the correction, but at their peril. To indicate the need for this balance, the right of correction should be exercisable on reasonable conditions imposed by law.

7.207 The Constitution provides that the right to freedom of expression may be limited by law, or things done under the authority of a law, on both broad and relatively specific grounds. All such laws are subject to the important over-riding requirement of being reasonably justifiable in a democratic society. That safeguard should be retained. Section 13(2)(a) and (b) permit limitations on fairly general grounds for the purpose of protecting the interests or the rights and freedoms of others and also the public interest. For those purposes provision should continue to be made permitting the right to freedom of expression to be limited by law.

Public officers

7.208 Section 13(3)(e) allows a law to be made "for the imposition of restrictions upon public officers". The restrictions could be for any purpose and of any extent. The Commission considers that the provision should be amended to make it clear that the only justification for imposing restrictions on the freedom of expression of public officers (a term which is at present confusingly defined as including the judges), is to secure their impartial and confidential service, where confidentiality is required. Restrictions for that purpose should be required to be reasonable.

Preventing ill-will between communities

7.209 Section 13(2)(d) is a new provision appearing for the first time in the 1990 Constitution. It permits a law to be made limiting the right to freedom of expression

> for the purpose of protecting the reputation, the dignity and esteem of institutions and values of the Fijian people, in particular the Bose Levu

> Vakaturaga and the traditional Fijian system and titles or the reputation, dignity and esteem of institutions and values of other races in Fiji, in particular their traditional systems.

This new provision reflects the cultural sensitivity of indigenous Fijians to criticism of their traditional leaders and institutions, especially by persons whom they regard as outsiders, but it is even-handed in protecting also "the values of other races in Fiji, in particular their traditional systems". However, no law has ever been made for any of the purposes described, perhaps because they cast a potentially wide net that would be capable of catching all sorts of statements of fact or comment concerning the institutions and values of all groups and communities. A law to give effect to those purposes as they are written would restrict freedom of expression severely. It might be hard to show that it was reasonably justifiable in a democratic society.

7.210 The Commission considers that the only justification for restricting the freedom of expression to take account of the sensitivities to criticism among the various communities, is the ground already recognised in section 17 of the Public Order Act (Cap. 20). That section creates the offence of inciting racial antagonism. We consider that the Constitution should be amended to allow a law to be made restricting freedom of expression by forbidding improper attacks on the dignity of traditional offices or institutions, in order to prevent ill-will between different races or communities.

7.211 Accordingly, the Commission includes in its recommendations a suggested redraft of the present section 13(2). This indicates both its approach to the substance of the permissible limitations on freedom of expression and also the need to describe such limitations in more succinct and accessible language.

RECOMMENDATIONS

137. The Constitution should affirm that everyone has the right to freedom of expression including the freedom to hold opinions, to receive and impart ideas and information without interference and the freedom to seek ideas or information.

138. The Constitution should not make specific provision about the form in which people are free to express themselves.

139. It should be specifically provided that freedom of expression includes freedom of the press, in terms that make it clear that the freedom extends to all media, but subject to the right of persons injured by inaccurate or offensive media reports to

have a correction published on reasonable conditions established by law.

140. The Constitution should continue to require that all laws limiting the right to freedom of expression for a purpose authorised by the Constitution are reasonably justifiable in a democratic society.

141. The existing grounds on which laws may limit the right to freedom of expression for the purpose of protecting the rights and freedoms of others and the public interest should be retained.

142. The Constitution should be amended to permit the freedom of expression of public officers to be limited by law only for the purpose of imposing reasonable restrictions in order to secure their impartial and confidential service.

143. It should be further amended to permit the right of freedom of expression to be limited by laws forbidding improper criticism of traditional offices or institutions only for the purpose of preventing ill-will between different races or communities.

144. The permissible limitations of the right to freedom of expression should be expressed by a provision on the following lines:

> A law, or an executive or administrative action under the authority of a law, may limit the right to freedom of expression
>
> (a) in the interests of defence, public safety, public order, public morality or public health; or
>
> (b) for the purpose of protecting the reputations, privacy, or rights and freedoms of other persons, preventing the disclosure of information received in confidence, or improper attacks on the dignity of respected offices or institutions in a manner likely to promote ill will between different races or communities, maintaining the authority and independence of the courts, imposing reasonable restrictions on public officers in order to secure their impartial and confidential service or regulating the technical administration of communications;
>
> but only to the extent that the limitation is shown to be reasonably justifiable in a democratic society.

THE RIGHT TO FREEDOM OF PEACEFUL ASSEMBLY

7.212 Section 14 of the 1990 Constitution protects both freedom of assembly and freedom of association. Although people often exercise their rights to each of these freedoms simultaneously, by meeting together for a common purpose, the rights are distinct. Different policy considerations apply in considering the purposes for which each right may need to be limited. The Commission therefore considers that they should be affirmed in separate sections of the Constitution.

7.213 Historically, freedom to assemble was protected by the common law only by reason of the fact that everyone is free to do what is not prohibited. If a group of people decide to go to the same place at the same time, that is not unlawful, as long as, individually and as a group, they keep within the law. The constitutional protection of freedom of assembly provided by section 14(1) goes only a small distance in turning the common law liberty into a constitutional right. Following the terminology of the international instruments and a number of national constitutions, the Constitution should affirm in positive terms that everyone has the right to freedom of peaceful assembly.

Limitation of the right

7.214 The introduction of the word "peaceful" in itself suggests that the right to freedom of assembly is not unlimited. Section 14(2) permits the right to be limited by laws or things done under laws making provision

(a) in the interests of defence, public safety, public order, public morality or public health;

(b) for the purpose of protecting the rights and freedoms of others; or

(c) for the imposition of restrictions upon public officers.

The laws, or things done under laws, for any of these purposes must be reasonably justifiable in a democratic society.

7.215 The apparent brevity of the permitted limitations does not truly reflect the extent to which laws for the purposes mentioned might restrict the right to freedom of peaceful assembly. This is partly because succinct and seemingly innocuous words like "defence", "public safety" and "public order" have a very wide application and partly because, like freedom of expression, the right of people to assemble is fundamental to the exercise of political rights. The assembly may be for the purpose of discussing a public issue, rallying support for a political party or candidate, or exercising the right to protest peacefully against the policies of a government - in the Fiji Islands or in another country - on an issue of public concern.

Prior restraints on freedom of assembly

7.216 The right to assemble for such purposes is necessary to the functioning of a democratic society. However, the responsible authorities may sometimes wish to limit the exercise of the right, either because their policies or actions are under attack or because they fear that an assembly by one group may lead to a clash with an opposing group and consequent disorder. The Commission has therefore examined some of the laws of the Republic which are regularly used to control the exercise of the right to freedom of assembly in public places or otherwise.

7.217 The most widely invoked limitation on freedom of assembly is to be found in section 8 of the Public Order Act (Cap. 20). This requires "any person who wishes to organise or convene a meeting or procession *in a public place* to obtain a permit from the District Officer. The District Officer is entitled to refuse the permit *only* if he or she is satisfied for good reasons that the meeting or procession is likely to prejudice the maintenance of peace or good order. No permit is required for a "sporting, recreational or social event or fixture, private entertainment or any assembly for religious or charitable purposes" conducted with the permission of the person or body having control of the public place in which it is held.

7.218 Section 9 of the Public Order Act empowers the Minister to prohibit by order any assembly, whether public or not, or any meeting or procession in *any place other than a public place*. Before he can make such an order, the Minister must be satisfied that it is expedient to do so in the interests of public safety and the maintenance of public order. Police officers are empowered under section 10 to disperse processions or meetings for which no permit has been issued or which breach any condition of a permit. Maximum penalties range from imprisonment for 6 months to 12 months with or without fines of $200 to $400. The consent of the Director of Public Prosecutions is not required for prosecutions under these sections.

7.219 The Commission is satisfied that the offences under the Penal Code relating to unlawful assembly, riot, sedition and conspiracy provide ample means of dealing with actual or threatened breaches of the peace, whether by those who have assembled or by others, as well as persons who assemble for the purpose of breaking the law or inciting others to do so. Except possibly in time of emergency, the Minister should not have a power to prohibit an assembly in advance, on the wide grounds in section 9 of the Public Order Act. Such a power is too easily capable of being used to stifle legitimate public protest.

7.220 The only reason for which a prior permit to assemble should be required is to enable reasonable conditions as to time and place to be imposed on an assembly which may block the access of other members of the public to a public place or impede the flow of pedestrian or road traffic. A District Officer should not be required to anticipate any likely disturbance of the peace - except for the purpose of advising the police of the time and place of the assembly so that they can be present in adequate numbers. Again, it is too easy for the District Officer to suppose that he or she is required positively to approve the purpose of the assembly, and is ultimately answerable to Ministers for the decision. Any need for prior approval capable of being directed to the purpose for which people may assemble has a chilling effect on the exercise of the right to freedom of peaceful assembly itself.

Need for review of the law

7.221 The Commission therefore proposes that, although the Constitution itself should not be changed, the laws of the Republic bearing on the right to freedom of peaceful assembly should be reviewed. The Constitution should continue to confer a power to limit the right to freedom of peaceful assembly by a law, or administrative action under its authority, in the interests of defence, public safety, public order, public morality or public health, or for the purpose of protecting the rights and freedoms of others, to the extent that the law or the action taken under it can be shown to be reasonably justifiable in a democratic society. It would be possible for an aggrieved citizen to challenge the breadth of the existing laws imposing such limitations in the interests of public safety and public order, on the ground that they do not satisfy this last-mentioned requirement. However, it would be preferable for those laws to be re-examined by the responsible Minister.

7.222 Except possibly in time of emergency - a matter we consider in Chapter 19 - there should be no general power to prohibit an assembly in advance on the grounds of public order. The need for a prior permit should apply only to assemblies in a public place and should be confined to the imposition of reasonable conditions as to time and place, with the purpose of protecting the interests of other members of the public.

Public officers

7.223 The unfettered power to limit the right to freedom of peaceful assembly for the purpose of imposing restrictions on public officers duplicates similar limitations on other rights. Again, we think that the purpose of the restriction should be expressed. It is presumably to prevent public officers from taking part

in assemblies in ways which could compromise their political neutrality. The Constitution should therefore be amended to permit the right to be limited by laws imposing reasonable restrictions on public officers only for the purpose of securing their impartial service.

RECOMMENDATIONS

145. Freedom of assembly and freedom of association should no longer be linked for the purpose of affording them constitutional protection.

146. The Constitution should positively affirm that everyone has the right to freedom of peaceful assembly.

147. It should continue to confer a power to limit the right to freedom of peaceful assembly by a law, or administrative action under its authority, in the interests of defence, public safety, public order, public morality or public health or for the purpose of protecting the rights and freedoms of others, if the law or the action taken under it can be shown to be reasonably justifiable in a democratic society.

148. The existing laws imposing such limitations in the interests of public safety and public order should be reviewed, with a view to removing the power to prohibit an assembly in advance, on the grounds of public order. The need for a prior permit should be limited to assemblies in a public place. The only purpose of such a permit should be the imposition of reasonable conditions as to the time and place of the assembly, in order to protect the interests of other members of the public.

149. The Constitution should be amended to permit the right to freedom of peaceful assembly to be limited by laws imposing reasonable restrictions on public officers only for the purpose of securing their impartial service.

THE RIGHT TO FREEDOM OF ASSOCIATION

7.224 Like the freedom to assemble, the original common law concept of the freedom to associate with other persons for any lawful purpose is residual, in the sense of being a freedom to do anything which the law does not prohibit. The Constitution should affirm in positive terms that everyone has the right to freedom of association.

7.225 Section 14 of the 1990 Constitution, like the corresponding section of the 1970 Constitution, refers to a person's right to "associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his interests". Given the long history of the fight to obtain recognition of the right to form trade unions, it is perhaps not surprising that the right to form or belong to trade unions is given particular protection. However, we believe that the emphasis on trade unions tends to overshadow the all-encompassing purposes of the right to freedom of association. It is desirable to recognise the right to associate freely for a wider range of specific purposes, as well as other purposes not mentioned.

7.226 Drawing on the words of the *American Convention on Human Rights,* we propose that the Constitution should affirm that everyone has the right to freedom of association for political, economic, labour, cultural, sports or other purposes. Freedom of association for religious purposes is already recognised as an aspect of the right to freedom of religion.

7.227 The references to association for "economic" or "labour" purposes are wide enough to include the existing right to form or belong to trade unions or other associations for the protection of a person's interests in relation to the workplace, whether as employee or employer. Nevertheless, we propose that these aspects of the right to freedom of association should be spelt out in a separate right to organise and to bargain collectively. Therefore, nothing will be lost by the omission of the right to form and join trade unions from the list of the more widely-ranging purposes for which people may wish to exercise their right to freedom of association.

7.228 The Constitution should continue to confer a power to limit the right to freedom of association by a law, or administrative action under its authority, in the interests of defence, public safety, public order, public morality or public health or for the purpose of protecting the rights and freedoms of others, if the law or the action taken under it can be shown to be reasonably justifiable in a democratic society. The power to impose restrictions on the right of public officers to freedom of association under section 14(2)(c) should be amended to permit the imposition only of such reasonable restrictions as are necessary to secure their impartial service. We propose later a power to restrict the right of members of disciplined services to form and join trade unions or exercise the other new labour rights we recommend.

RECOMMENDATIONS

150. The Constitution should affirm in positive terms that everyone has the right to freedom of association. The right to associate

should be described as being "for political, economic, labour, cultural, sports or other purposes".

151. The right to form or belong to trade unions or other associations for the protection of a person's interests, already recognised as an aspect of the right to freedom of association, should become part of a separate right to organise and to bargain collectively.

152. The Constitution should continue to confer a power to limit the right to freedom of association by a law, or administrative action under its authority, in the interests of defence, public safety, public order, public morality or public health or for the purpose of protecting the rights and freedoms of others, if the law or the action under it can be shown to be reasonably justifiable in a democratic society.

153. The power to impose restrictions on the right of public officers to freedom of association under section 14(2)(c) should be amended to permit the imposition only of such reasonable restrictions as are necessary to secure their impartial service.

THE RIGHT TO ORGANISE AND BARGAIN COLLECTIVELY

7.229 Section 14 of the 1990 Constitution protects a person's right to "associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his interests". The wording of the provision is broad enough to confer rights on both workers and employers. However, the Constitution does not guarantee any further rights capable of being directly applied in the area of industrial relations.

7.230 In particular, the Constitution does not expressly recognise a right to bargain collectively nor a right to take industrial action. Furthermore, courts in Fiji and elsewhere in the world have consistently declined to interpret the right to form and join trade unions or any other constitutionally protected right in an expansive way so as to include rights of that kind.

7.231 Some submissions pointed out that a right merely to form or join trade unions can be meaningless without further rights which allow the purposes of trade union membership to be realised. They suggested that the Constitution should expressly guarantee the most important labour rights contained in the international human rights instruments.

The international standards

7.232 The main human rights instruments which protect labour rights are the *Universal Declaration of Human Rights*, the *International Covenant on Economic, Social and Cultural Rights* and various instruments negotiated within the International Labour Organisation. Fiji is a member of the Organisation, but is not a party to all of its conventions.

7.233 The international standards govern labour rights in two ways. First, some provisions confer individual rights applying in the workplace and setting standards for what might be broadly described as the terms and conditions of employment. Secondly, other provisions give rights relevant to the freedom of individuals to organise and if necessary take collective action to ensure that those standards are met. The Commission is directly concerned only with this second category of labour rights.

7.234 Article 8 of the *Covenant on Economic, Social and Cultural Rights* recognises the right of "everyone" to "form trade unions and join the trade union of his choice...". It also recognises a "right to strike, provided that it is exercised in conformity with the laws of the particular country". The Article also confers rights on "trade unions" in addition to individual persons. Unions are to enjoy the right to establish national federations or confederations and the right to form or join international trade union organisations. They also enjoy the right to function freely subject only to limitations which are prescribed by law and are necessary in a democratic society.

7.235 The most important International Labour Organisation Conventions in this area are *Convention 87: Freedom of Association and Protection of the Right to Organise*, and *Convention 95: Right to Organise and Collective Bargaining*. Although Fiji is not a party to these Conventions, we look to them as the authoritative source of the relevant international standards. *Convention 87* requires workers and employers, without any distinction whatsoever, to have the right to establish and join organisations of their own choosing, without previous authorisation, for furthering and defending the interests of workers or of employers. Article 3 gives workers' and employers' organisations "the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes". Paragraph (2) of the article prohibits public authorities from interfering with those activities in ways which would restrict the right or impede its *lawful* exercise. The wording clearly implies that, although some legal regulation by the State of the right to organise is permissible, this should not negate the content of the right.

7.236 Under *Convention 95*, states assume the obligation to protect workers from anti-union discrimination in respect of their employment. In particular, it outlaws conditions of employment which prohibit union membership or actions which penalise workers for union membership or legitimate union activity.

Constitutional recognition of labour rights

7.237 Fiji's statute law at present recognises and reflects many of the international standards, including the possibility of lawful strikes and lockouts, subject to certain conditions. Even so, as statutory rather than constitutional rights, these can be easily changed or withdrawn. The Commission believes that some labour rights are so fundamental to the realisation of social justice in a modern industrial society that they should be elevated to the level of constitutional rights. We are persuaded that the existing right to form and join trade unions can be an empty right unless the members of trade unions have the right to organise and bargain collectively for the purpose of securing reasonable terms and conditions of employment.

7.238 The Commission therefore proposes that the Constitution should recognise a separate right to organise and bargain collectively. The expression of that right should begin with an affirmation that the right of everyone to freedom of association includes the right to form or join trade unions or other associations for the protection of their interests as workers or employers. It should then spell out the right of workers and employers and their trade unions to organise and bargain collectively, but without implying that such rights are inherent in the right to freedom of association.

7.239 In Chapter 3, we recorded our view that the Bill of Rights should not include economic and social rights of a kind which cannot be implemented without the intervention of the state and the need to make budgetary provision for the purpose. One would be the right to fair and safe conditions of employment. Such a right would need to be implemented through a combination of legislative standards supported by state inspection and the exercise of the right to bargain collectively about the terms and conditions of employment. Recognising labour rights in the Constitution will therefore go some way towards ensuring the attainment of certain other rights which do not themselves have constitutional protection.

7.240 Among other national constitutions, that recently adopted in South Africa sets out labour rights most fully. The Republic of Fiji could with advantage adopt some though not all of the provisions carefully worked out there, first for inclusion in their interim constitution and more recently in the permanent constitution adopted

by the Constitutional Assembly. Accordingly, the Constitution should recognise that everyone has the right to fair labour practices. This is a useful way of balancing the freedom of unions to organise and the need for government to provide some legal framework for their operation. The Constitution should also recognise the right of both workers and employers to organise and bargain collectively.

A right to strike?

7.241 In South Africa, the interim constitution recognised that workers have the right to strike, but only "for the purpose of collective bargaining." It also guaranteed that "employers' recourse to the lockout for the purpose of collective bargaining should not be impaired". The lockout section of the labour rights provision proved politically controversial and was not included in the final constitution. Nor was the restriction on the purposes for which workers might exercise the right to strike.

7.242 The Commission considers that, in conferring labour rights, the Constitution should not expressly protect either a right to strike or a right to lockout. The existence of such rights has never been in issue in the Fiji Islands, but their exercise is controlled by statute, in the public interest and in the interests of affected citizens. We think that giving such rights a constitutional status might upset the reasonable balance among the competing interests which the law seeks to achieve. Any new legislation affecting the rights of workers or employers should be discussed by the Labour Advisory Board established under the Employment Act (Cap. 92) before enactment by Parliament.

A right not to join a trade union?

7.243 In debating and negotiating labour rights in international organisations and in other countries, "closed-shop agreements" and compulsory unionism have been controversial issues. The underlying questions of principle are sometimes expressed in an over-simplified form by asking whether a right to associate or to join a trade union includes a right *not* to do so. The Commission does not consider that the Bill of Rights needs to resolve this question. It should be left to the legislature and the courts, guided by the international standards.

A right to federate and confederate?

7.244 Some submissions sought a specific constitutional right for trade unions to federate and confederate, and to join international trade union organisations, as recognised in some international instruments. That right is already inherent in the right to freedom of association, of which the right to form and join trade unions is but one aspect. We have already proposed that the right to freedom of association

itself should recognise that the right may be exercised for "economic" and "labour" purposes, among others. There is no need for the Constitution expressly to recognise the rights in question.

Limiting the right to organise and bargain collectively

7.245 In recommending a new constitutional right to organise and bargain collectively, the Commission is acutely aware that the right should not be absolute. Some limitations will be necessary to ensure that it is exercised fairly and responsibly. Like the existing section protecting freedom of assembly and association, the new right should be subject to limitation by law, and administrative action under the authority of a law, in the interests of defence, public safety, public order, public morality or public health, or for the purpose of protecting the rights and freedoms of others. As with all other rights which may be limited for these broad purposes, the law or the action taken under it must be shown to be reasonably justifiable in a democratic society.

Interference with the conduct by trade unions of their own affairs

7.246 That last-mentioned requirement should be adequate to protect the freedom of trade unions to conduct their own affairs - another matter raised in submissions. We consider that the recognition of the new labour rights will provide a context within which any interference with that freedom can be put to the test. Regulation of the affairs of trade unions will be unconstitutional if it restricts unduly the exercise of the constitutionally recognised rights of trade unions and their members.

Public servants

7.247 At present, section 14(2)(c) limits the freedom of assembly and association by permitting "the imposition of restrictions upon public officers". In the context of a right to organise and bargain collectively, the Commission considers that this limitation is too wide. The existing law allows public servants, as distinct from members of the military and police forces, to organise, bargain collectively and to strike in the same way as other workers. Existing restrictions which apply to public servants do so by virtue of the *services* which particular public officers perform. These restrictions apply to all workers performing services deemed to be "essential" to public order, safety or health. They therefore find their authorisation in the general limitation contained in paragraphs 14(2)(a) and (b) and not in paragraph (c) which applies to "public officers".

7.248 The Commission is also mindful that fewer and fewer essential services are being provided by "public officers". For some time now, services like the

provision of electricity and the operation of civil aviation have been performed by employees of statutory bodies, rather than public officers. This trend will continue as corporatisation and privatisation proceed. The Commission therefore considers that there should be no express power to limit the right to organise and bargain collectively for the purpose of imposing restrictions on "public officers".

Members of the armed forces and the police

7.249 We recognise, however, that the military and the police, as disciplined services, are in a different situation. The Constitution should therefore include an express power to make laws imposing reasonable restrictions on members of the armed forces and the police in the exercise of the rights recognised by the new provision. All of the international instruments permit special limitations applying to the members of those forces.

The new rights to be an additional protection

7.250 Our recommendations for the separate and extended recognition of labour rights will confer on trade unions and their members constitutional protections additional to those they already enjoy under other provisions of the Bill of Rights. They will, for example, continue to have the rights to freedom of assembly and expression. Under the Bill of Rights, all rights are cumulative. The limitation of one right does not affect another, unless the limitation is lawfully imposed in respect of that right also, under its own terms.

RECOMMENDATIONS

154. The Constitution should recognise a separate right to organise and bargain collectively. The new right should continue to affirm that the right of everyone to freedom of association includes the right of everyone to form or join trade unions or other associations for the protection of their interests, whether as a worker or an employer.

155. The Constitution should recognise that everyone has the right to fair labour practices.

156. It should also recognise the right of both workers and employers to organise and to bargain collectively.

157. The Constitution should confer in respect of the new right the same powers to limit it by a law, or administrative action under the authority of a law, as already apply in respect of the right

to freedom of association. Limitations should be permitted in the interests of defence, public safety, public order, public morality or public health or for the purpose of protecting the rights and freedoms of others, if the law or the action taken under it can be shown to be reasonably justifiable in a democratic society.

158. The Constitution should also permit the limitation of the right for the purpose of imposing reasonable restrictions on members of the armed forces or the police force.

THE RIGHT TO FREEDOM OF MOVEMENT

7.251 Section 15 of the Constitution protects the right of all persons to freedom of movement. It reproduces the corresponding section of the 1970 Constitution without change. Freedom of movement is defined as meaning

- the right to move freely throughout Fiji;
- the right to reside in any part of Fiji;
- the right to enter Fiji;
- the right to leave Fiji; and
- immunity from expulsion from Fiji.

7.252 The international standards recognise that citizens and non-citizens may not always enjoy these various rights to the same extent. However, section 15 accords *all* of the rights to *all* persons, and makes distinctions between citizens and non-citizens only in prescribing the purposes for which the various rights may be limited by law. This technique makes it difficult to ascertain the rights to which different categories of persons are entitled. In keeping with its overall approach, the Commission considers that the Constitution should clearly affirm the rights of citizens, non-citizens and all persons, to those aspects of the right to freedom of movement appropriate in each case. This in turn will make it easier to see whether the rights of the different groups should be subject to limitation by law and if so on what grounds.

7.253 Accordingly, we propose that, under the heading of "Right to freedom of movement", the Constitution should affirm the various aspects of that right in the following way:

(1) Every citizen of the Republic of the Fiji Islands has the right to enter and reside in the Republic, and the right not to be expelled from the Republic.

(2) Every citizen, and every other person lawfully in the Republic of the Fiji Islands, has the right to move freely throughout the Republic and the right to leave the Republic.

(3) Every citizen, and every other person who has been granted a right to reside in the Republic of the Fiji Islands, has the right to reside in any part of the Republic.

(4) Every person who is not a citizen of the Republic of the Fiji Islands but is lawfully in the Republic has a right not to be expelled from the Republic except under a decision taken on grounds prescribed by law.

We comment in turn on each of these proposed provisions, and the extent to which they might be capable of limitation by law.

Freedom to enter, reside and not to be expelled

7.254 In a multi-ethnic country like the Republic of the Fiji Islands, it is important to provide a clear assurance that all citizens have the right to enter and reside in and the right not to be expelled from the country. This is the effect of the proposed right in paragraph (1) above. We have already recommended, in Chapter 5, that such a right should be assured as part of a *Compact* among the citizens of Fiji. Paragraph (1) implements that assurance.

Limitation of those freedoms

7.255 The only purpose for which the proposed right in paragraph (1) should be capable of being limited by law is to permit the execution of an order of a court that a person be removed to another country to answer to the legal processes of that country. That limitation should apply to citizens and non-citizens alike.

7.256 The most usual reason for removal is the making of an extradition order under which a person may be required to stand trial in another country for an offence against its laws and, if convicted, to undergo punishment. This possibility is already provided for in the first part of section 15(3)(g). However, the power in the second part of that provision to remove a person to serve a sentence of imprisonment in another country should not apply to Fiji citizens. Its purpose is to allow foreign citizens to serve in their own country all or part of a sentence of imprisonment imposed in Fiji.

7.257 The Constitution should also permit children, whether citizens or not, to be removed from Fiji for the purpose of restoring them to the custody of a parent

or lawful guardian, if they have been removed from another country contrary to the law of that country. Again it should be a requirement that an order for the child's return must be made by a court of the Republic. Such a provision would implement *The Hague Convention on International Child Abduction* which is an important weapon in preventing parents not awarded custody after a separation or divorce from abducting their children unlawfully.

Freedom to move freely and to leave

7.258 The rights proposed in paragraphs (2) and (3) above concern the right to move freely throughout the Republic, the right to reside in any part of the Republic, and the right to leave the Republic. The rights to move freely and to leave are accorded to citizens and all other persons lawfully in the Republic. The right to reside in any part of the Republic is accorded to citizens and other persons granted a right to reside in the Republic. There may be good reason to allow limitations to be imposed by law on each of those rights, but the limitations should not be oppressive.

Limitation of those freedoms

7.259 Section 15(2) permits restrictions on any aspect of a person's freedom of movement if that person is lawfully detained. Its purpose is simply to prevent a person from claiming that his or her detention is unlawful solely on the ground that detention restricts that person's freedom of movement. The provision does not affect the content of the right to freedom of movement itself. Its substance should be retained.

7.260 There is another consequential provision in section 12(3)(e) which permits the right to freedom of movement to be limited, so far as may be necessary to give effect to restrictions imposed under the law of the Republic on the acquisition or use by any person of any property in Fiji. This provision allows a person's right to move freely throughout Fiji and to reside in any part of Fiji to be restricted by such laws as those which prevent persons trespassing on the land of others, control the disposition of land by sale or lease or the purpose for which land may be used under zoning laws. The substance of the provision should be retained, but its purpose should be made clearer.

Restricting the freedoms of individuals

7.261 Section 15(3)(a) permits restrictions to be imposed by or under a law on the freedom of *a particular individual person* to move freely throughout Fiji, to reside in any part of Fiji or to leave Fiji. The restriction must be *reasonably required*

in the interests of defence, public safety or public order. There is no requirement that the law be reasonably justifiable in a democratic society. This is the classic power to restrict the freedom of movement of individuals who, for one reason or another, are regarded as endangering the security of the state.

7.262 Such a power has been used in some countries to impose house arrest on a particular political leader or in other ways to restrict the operation of the democratic process. In the Commission's view, it is a power which should not be capable of being exercised except in time of emergency. There should be no general power to limit *an individual person*'s right to freedom of movement. Section 15(3)(a) should be repealed.

Restricting the freedoms of members of a class

7.263 It may be desirable to restrict the right of persons generally, or any class of persons, whether citizens or not, to move freely throughout Fiji, to reside in any part of Fiji or to leave Fiji. A power to do so is conferred by section 12(3)(b). Such a restriction may be imposed by or under a law in the interests of defence, public safety and public order as well as public morality and public health. Limitations made under this paragraph must be reasonably justifiable in a democratic society. The power to limit the right to freedom of movement in this way should be retained.

7.264 For example, limitations on the right to move freely throughout Fiji might need to be imposed to check the spread of a particularly dangerous infectious disease. The limitations cannot, however, discriminate against any class of persons on a ground prohibited under section 16, unless they comply also with the conditions under which the right to freedom from discrimination can be limited. We return to the discussion of that point below.

New ground for restricting freedom

7.265 The Commission also believes that there is a need to widen the purposes for which such restrictions may be imposed. It has in mind the need to limit the access to areas where the ecosystem needs to be protected, or to which, under the customs of the indigenous people, outsiders should be admitted only with their consent. It therefore proposes that the purposes for which restrictions may be imposed under section 12(3)(b) should include "the protection of the economy, ecology or distinctive culture of a particular area". A necessary safeguard will be provided by the retention of the requirement that a law for any of these purposes must be shown to be reasonably justifiable in a democratic society.

Determination that person is a member of a restricted class

7.266 Where restrictions are placed by law on the right to the freedom of movement of a *class* of persons under the power just discussed, as distinct from persons generally, some authority within the state must be given the power to determine whether or not a particular person is a member of the restricted class. Such a determination is, of course, open to challenge in the courts, on the facts or the law, or both. A restricted person will also have the right to claim that the law imposing the restriction is contrary to the Bill of Rights. But as an extra safeguard against the *policy* of a restriction, rather than its *legality*, the Commission considers that there should be a requirement to set up a tribunal of the kind provided for in section 15(4).

7.267 At present the function of such a tribunal is to review restrictions placed on the freedom of movement of individual persons under section 15(3)(a). Although we propose the repeal of that provision, we think that the Constitution should retain provision for the setting up of a review tribunal at the request of a person whose freedom of movement has been restricted as a member of a class to which the restriction applies. The proposed Judicial Service Commission, rather than the Chief Justice, should be empowered to appoint its members.

7.268 The right of access to a review tribunal will also remain an important safeguard for individual persons whose freedom of movement is restricted in the exercise of emergency powers. We so propose in Chapter 19.

Classes based on prohibited grounds of discrimination

7.269 The power under section 15(3)(b) to restrict classes of persons in their freedom of movement within Fiji or freedom to leave Fiji allows restrictions to be imposed by a law for a particular purpose on some groups but not others. If the law makes distinctions among citizens on grounds prohibited by the Constitution, then those distinctions must be justifiable under the provisions which permit the limitation for certain purposes of the right to equality under the law and freedom from discrimination proposed below. We believe that the permitted limitations of that right will allow the drawing of justified distinctions when necessary.

Non-citizens

7.270 Citizenship or nationality is not a prohibited ground of discrimination, but in any case the draft provision we have put forward permits laws to be made for the purpose of imposing any disability or restriction or conferring any privilege or advantage on persons who are not citizens of the Republic. Accordingly, the

power to restrict the freedom of movement of non-citizens, or classes of non-citizens, within Fiji or the freedom to leave Fiji is also amply covered by section 15(3)(b).

7.271 Under the proposals made above, a non-citizen has no general constitutional right to enter Fiji. The constitutional right to enter Fiji recommended for non-citizens who are the spouses or the natural-born or adopted children of citizens will itself be subject to the normal immigration controls on persons granted permits to enter and reside in the country. It is therefore unnecessary for the constitution to authorise the making of laws controlling the entry of foreign citizens as a limitation on the right to freedom of movement. The only need to authorise laws applying to non-citizens is to permit their expulsion from Fiji on prescribed grounds. For example, most countries make laws empowering a court or a Minister to order the deportation of a non-citizen who has been convicted of a serious offence in that country. Section 15(3)(d) should be amended accordingly.

Court orders and other legal obligations

7.272 Two of the remaining powers to restrict freedom of movement are concerned with the enforcement of court orders or other legal obligations. Section 15(3)(c) authorises laws for restricting the freedom of movement of persons within Fiji or their freedom to leave Fiji to ensure that they appear before a court at a later date for trial, or proceedings preliminary to trial, or for the purpose of extradition or deportation proceedings. Provision to this effect should be retained but in a more general form to cover other possible reasons for appearances before a court.

7.273 Section 15(3)(c) also allows a person's freedom of movement to be similarly restricted "in consequence of his being found guilty of a criminal offence". This provision is wide enough to permit the making of a law under which certain types of offences, and certain classes of offenders, for example first offenders convicted of relatively minor offences, may be sentenced to reside for a certain period at a particular address or within a particular village, or otherwise have their freedom of movement restricted. Such a sentence may have a far greater rehabilitative effect than a custodial sentence. The provision should be retained.

7.274 Section 15(3)(h) allows the making of a law under which a person's right to leave Fiji may be restricted in order to secure the fulfilment of any obligation imposed on that person by law. The restrictions imposed must be reasonably required to secure the fulfilment of the obligation and both the enabling law and the action taken under that law must be reasonably justifiable in a democratic society.

7.275 As already mentioned, the courts in Fiji have held that a simple contract debt is not an obligation imposed by law. Accordingly, the provision would not allow a person to be prevented from leaving Fiji simply on the ground that he or she has unpaid debts. As proposed in relation to the deprivation of the personal liberty of a person who owes unpaid tax or maintenance, the power to prevent such a person from leaving Fiji should be limited to the case where there has been wilful default by a person who had the means to pay and a court has made an order restricting that person's freedom to leave Fiji until the amount owing has been paid. With an amendment to this effect, the substance of section 15(3)(h) should also be retained.

Public officers

7.276 Finally, as in the case of other rights, section 15(3)(f) allows an unfettered power to make laws for imposing restrictions on the freedom of movement or residence within Fiji or on the right to leave Fiji, of any public officer. The Commission considers that the only power to restrict the freedom of movement of public officers by law should be for the purpose of imposing and enforcing reasonable terms and conditions of employment. In judging reasonableness account should be taken of the nature of the particular public officer's employment.

RECOMMENDATIONS

159. Under the heading of "Right to freedom of movement", the Constitution should affirm the following rights:

(1) Every citizen of the Republic of the Fiji Islands has the right to enter and reside in the Republic, and the right not to be expelled from the Republic.

(2) Every citizen and every other person lawfully in the Republic of the Fiji Islands has the right to move freely throughout the Republic and the right to leave the Republic.

(3) Every citizen, and every other person who has been granted a right to reside in the Republic of the Fiji Islands has the right to reside in any part of the Republic.

(4) Every person who is not a citizen of the Republic of the Fiji Islands but is lawfully in the Republic has a right not to be expelled from the Republic except under a decision taken on grounds prescribed by law.

160. **The rights of citizens in paragraph (1) should be capable of being limited by law only for the purposes of permitting their extradition, or the removal of children who have been abducted from another country, for the purpose of restoring them to the lawful custody of a parent or guardian. In each case the removal should require the order of a court. The power of removal for these purposes should apply to non-citizens as well as citizens. The power to remove a person to serve a sentence of imprisonment in another country should apply only to non-citizens. With amendments to give effect to these recommendations, the substance of section 15(3)(g) should be retained.**

161. **The substance of section 15(2), permitting restrictions on any aspect of a person's freedom of movement if that person is lawfully detained, should be retained.**

162. **The substance of section 12(3)(e) which permits the right of freedom of movement to be limited, so far as may be necessary to give effect to restrictions imposed under the law of the Republic on the acquisition or use by any person of any property in Fiji, should be retained, but its purpose should be made clearer.**

163. **Section 15(3)(a), which permits restrictions to be imposed by or under a law on the freedom of any individual person to move freely throughout Fiji, to reside in any part of Fiji or to leave Fiji, if the restriction is reasonably required in the interests of defence, public safety or public order, should be repealed.**

164. **The Constitution should retain the power conferred by section 12(3)(b) to impose by or under a law restrictions on the right to move freely throughout Fiji, to reside in any part of Fiji or to leave Fiji of persons generally, or any class of persons, whether citizens or not, in the interests of defence, public safety and public order, public morality or public health, if the law can be shown to be reasonably justifiable in a democratic society.**

165. **The purposes for which such restrictions may be imposed should include the protection of the economy, ecology or distinctive culture of a particular area.**

166. As a way of challenging the *policy* of a restriction, rather than its *legality* (which can be challenged in the courts), the Constitution should include a requirement to set up a tribunal of the kind provided for in section 15(4) at the request of a person whose freedom of movement has been restricted as a member of a class to which the restriction applies. The proposed Judicial Service Commission, rather than the Chief Justice, should be empowered to appoint its members.

167. In view of the recommendation that a non-citizen should have no constitutional right to enter Fiji, the only special power required to deal with non-citizens is a power to make laws permitting their expulsion from Fiji on prescribed grounds. Section 15(3)(d) should be amended accordingly.

168. Section 15(3)(c), authorising laws restricting the freedom of movement within Fiji or the freedom to leave Fiji of any person, either to ensure that person's appearance before a court at a later date for trial or other proceedings, or in consequence of that person being found guilty of a criminal offence, should be retained.

169. The Constitution should retain the substance of section 15(3)(h), allowing the making of a law under which a person's right to leave Fiji may be restricted if reasonably required to secure the fulfilment of any obligation imposed on that person by law, so long as the enabling law and the action taken under it can be shown to be reasonably justifiable in a democratic society. The power to prevent a person who owes unpaid tax or maintenance from leaving Fiji should be limited to the case where there has been wilful default by a person who had the means to pay and an order restricting that person's freedom to leave Fiji has been made by a court.

170. Section 15(3)(f) should be amended to permit laws imposing restrictions on the freedom of movement of public officers only for the purpose of imposing and enforcing reasonable terms and conditions of their employment.

THE RIGHT TO EQUALITY UNDER THE LAW AND FREEDOM FROM DISCRIMINATION

Equality under the law

7.277 The purpose of section 16 of the 1990 Constitution is to protect persons from discrimination on any of the grounds referred to in the section. Again, the section does not express a positive right. Some submissions suggested that the Constitution should confer a right to equality in terms similar to those used in other constitutions. Various formulations were suggested, including a right to "the equal protection of the laws", originating in the *Constitution of the United States of America*, and expanded in the *Canadian Charter of Rights and Freedoms* to include also a specific right to "the equal benefit of the laws".

7.278 The Commission considers that it would be better not to use the North American formulas which might be regarded as bringing with them a wealth of case law, not all of it apposite in the legal system and social climate of the Fiji Islands. We have already recommended that people should be assured of equal treatment by the courts, by including in the Constitution a provision affirming that all persons are equal *before* the law and have a right to a fair trial. We now propose that the Constitution should affirm that all persons are equal *under* the law and have a right to freedom from discrimination on any of the listed grounds.

Meaning of "discrimination"

7.279 "Discriminate" is a word which has different meanings, depending on the context. It can mean "discern differences" in a neutral or even a complimentary sense. But in the context of human rights, it has come to mean "make unjustified differences" in a pejorative sense. Even then, it is not always easy, by reference to the word alone, to determine whether a law or an administrative action discriminates against a person in a way forbidden by the human rights norms.

7.280 Article 16(1) provides that a law may not be "discriminatory" of itself or in its effect, and also that no person may be treated in a discriminatory manner under a law or in the performance of the functions of a public office or public authority. Subsection (2) defines the term "discriminatory". Although the definition is not very easy to read, it does provide a reasonably clear test of when a law or action is discriminatory and when it is not. It has three elements:

- Some persons, described by reference to a prohibited ground of discrimination, are treated differently from others described by reference to the same ground, for example "Fijians" are treated

differently from members of other races, or "women" are treated differently from "men".

- The different treatment is attributable wholly or mainly to that ground, for example the fact that the persons concerned are "Fijians" or "women" is the sole or main reason for the different treatment.
- The different treatment places disabilities or restrictions on the persons concerned, or accords them privileges or advantages. For example "Fijians" are subject to restrictions that do not apply to members of other races, or "men" have privileges not accorded to "women".

7.281 Unless the second and third elements are present, as well as the first, the mere fact that some people are treated differently from others does not mean that either group has been treated in a discriminatory manner. In affirming the right of everyone to freedom from discrimination, the Constitution should retain the elements of the present test of what is discriminatory, but formulate it more simply and clearly. We recommend below a draft for this purpose.

Application of the right

7.282 The right to equality and freedom from discrimination on a prohibited ground should apply to the rights conferred by the Bill of Rights itself and to the application of all other provisions of the Constitution, unless, in the particular case, there is good reason to exclude its application. The present introductory words in section 16(1) making the right subject to all other provisions of the Constitution are too general and should be repealed. The right will also apply to all other law of the Republic and all administrative action taken by or on behalf of the state, whether or not under a law, unless that law or administrative action falls within a permitted limitation of the right.

Prohibited grounds of discrimination

7.283 The 1990 Constitution prohibits discriminatory treatment on the ground of race, sex, place of origin, political opinions, colour, religion, or creed. The Commission compared this list with the prohibited grounds of discrimination referred to in the international instruments and other national constitutions. Its conclusions are as follows:

- The term *race* is well understood in the Fiji Islands and should be retained, but a reference to *ethnic origin* should be added. This is a wider term which includes all the characteristics which a group

of people feel they have in common. People belonging to a particular race may have different ethnic origins.

- A person's *sex* refers to his or her biology. The term is well-understood and should be retained, but it should be accompanied by the word *gender*. This word signifies the attributes which society associates with men and women respectively. Its inclusion would prohibit discrimination against women by or under the law on the ground of the place in society accorded to them under a particular culture.
- A person's *place of origin* was originally a colonial concept used to distinguish an immigrant group, but it applies equally to persons originating from different places within the Fiji Islands and should be retained.
- The reference to *political opinions* should be retained. The term includes *beliefs*.
- Although outdated as a way of referring to persons of different ethnic origin, the word *colour* should also be retained.
- The reference to *religion* was inserted by the 1990 Constitution, apparently because of some doubt about the meaning of the word *creed*. The latter is not a common word, but includes both religious and non-religious beliefs. It too should be retained but should be regarded as separate from religion.
- At present discrimination on the ground of a person's *language* is not prohibited. A reference to language should be added.
- A reference to *birth* should be included. It would cover aspects of a person's family status.
- Taking account of submissions made to us, we propose the inclusion of three further grounds - *economic status*, *age* and *disability*, which, we believe, are factors that are at times taken into account in a discriminatory way in the Fiji Islands. There are some circumstances in which it is necessary or desirable to make a distinction on one or other of those grounds, but the onus should be on the state to show that the distinction is justifiable.

7.284 For example, a graduated income tax requires people who have a comparatively high income to pay tax at a higher rate than those who have a lower income. The imposition of a compulsory retiring age requires a balance between the continued employment of older people who have a contribution to make and would like to go on working and the need to give younger people employment

and opportunities for promotion. It is important to ensure that disabled people are provided with adequate facilities to enable them to lead as normal a life as possible, and are not discriminated against by or under law on account of their disability. But if they are unable to support themselves they may need access to a social security benefit.

7.285 We discuss below the way in which the onus should be placed on the state of showing that, in the circumstances, some people should be given more advantageous, or more onerous, treatment than others on a prohibited ground. The inclusion of additional grounds, especially the references to economic status, age and disability, will often make it necessary to enact laws limiting the right to equality under the law and freedom from discrimination on one or more of those grounds, but it should always be possible to question the constitutionality of such a law or administrative action under it in the particular circumstances.

7.286 The Commission considered whether the prohibited grounds now recommended should be further widened by including a reference to "any other ground". A few national constitutions so provide, as do a number of the international instruments. However, the latter are concerned only with ensuring freedom from discrimination in the enjoyment of other human rights or freedoms. The right of all persons in the Fiji Islands to freedom from discrimination will apply also to all the laws of the Republic and anything done under their authority. We believe that it is neither desirable nor practicable to make such a wide-ranging guarantee of freedom from discrimination open-ended.

Public facilities

7.287 Section 16(7) contains a subsidiary right to freedom from discrimination that binds not only the state but also private persons. It provides as follows:

> ... no person shall be treated in a discriminatory manner in respect of access to shops, hotels, lodging-houses, public restaurants, eating houses or places of public entertainment or in respect of access to places of public resort maintained wholly or partly out of public funds or dedicated to the use of the general public.

The Constitution should continue to affirm that right but in positive terms. To make it clearer that the final phrase, "maintained wholly or partly out of public funds or dedicated to the use of the general public" applies only to places of public resort and not to the other places referred to in the provision, a comma should be inserted after the word "entertainment".

7.288 The provision is very similar to one in the *Convention on the Elimination of All Forms of Racial Discrimination*, to which the Republic is a party. That provision, however, is a little wider. It includes any "service intended for use by the general public such as transport". The Commission considers that a right of access to public transport, by air, sea or land without discrimination should be specifically included, because public transport is often relied upon by the most disadvantaged section of the community.

7.289 The Commission also recognises that the inclusion of disability as a prohibited ground of discrimination is likely to have a substantial impact on the obligations of those who provide the public facilities mentioned. It will require them to install, at their own expense, the amenities and equipment that make it possible for disabled persons to use those facilities. This may not always be practicable, and, even if it is, access for the disabled cannot be achieved overnight. The duty to provide access has to be implemented progressively.

7.290 We therefore propose the inclusion of an additional provision to the effect that the proprietor of a place or service referred to in the provision is required to provide access for disabled persons to the extent provided by law. Such a requirement should encourage the imposition of a duty to provide access for the disabled when new facilities are constructed or acquired. It could also be used to bring about the gradual adaptation of existing facilities as resources permit. This need was urged upon us by submissions from organisations working with the disabled.

Limitation of the right

7.291 The protection of the right to freedom from discrimination afforded by section 16 is subject to a complex set of provisions enabling that right to be limited by law. Some of these provisions will continue to be required, though not necessarily in their existing form. Some are unnecessary or invidious and should be repealed or amended. We examine them in an order that highlights the applicable principles.

The standard test

7.292 Section 16(3)(e) has the widest potential application. It validates any law under which persons described by reference to a prohibited ground of discrimination may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons, or to other persons to whom the law does not apply, is reasonably justifiable in a democratic society.

7.293 This is a common-form provision in the constitutions of most other former British colonies. Its original purpose was probably to permit social justice or affirmative action programmes for a disadvantaged group identified by reference to a prohibited ground of discrimination. These are now provided for in other sections too. As we explain in Chapter 8, we propose that all programmes for those purposes should be brought within a single section.

7.294 However, a provision along the lines of section 16(3)(e) will still be needed. It will permit necessary limitations to the right to equality under the law and freedom from discrimination to be imposed when there is good reason to accord different treatment to people on one of the prohibited grounds. For example, a law about old age and sickness or invalids' benefits for low-income groups would require different treatment to be accorded to different people on all three of the grounds - *economic status*, *age* and *disability* - now recommended.

7.295 Section 16(3)(e) applies the test that the law or the thing done under its authority must be "reasonably justifiable in a democratic society". It also requires its reasonableness to be judged in the light of the nature of the limiting law and the existence of special circumstances relating to the persons affected by the law, or those excluded from its application. For this reason, the provision does not unduly limit the right to equality under the law and freedom from discrimination on the prohibited grounds. We propose that it should be retained and its terms regarded as the "standard" test for limiting the right.

7.296 We have evaluated the other purposes for which the right to freedom from discrimination may be limited by law. If that purpose is necessary, it should, if possible, be achieved by applying the standard test. If, however, the application of the test might lead to too much uncertainty about the validity of the limiting law, specific provision should continue to be made permitting the right to be limited for that purpose. We begin by looking at whether the particular purposes for which limitations may be imposed are in fact necessary at all.

Discrimination in limiting other rights

7.297 Section 6(8) permits laws to be discriminatory if they limit certain other rights protected by the Bill of Rights. The affected rights are as follows:

- Protection for privacy of home and other property: all limiting laws permitted under section 10(2);
- Protection of freedom of conscience: all limiting laws permitted under section 12(6) (the reference is to section 12(5) but this is an obvious mistake);

- Protection of freedom of expression: all limiting laws permitted under section 13(2);
- Protection of freedom of assembly and association: all limiting laws permitted under section 14(2);
- Protection of freedom of movement: restrictions on movement or residence within Fiji and the right to leave Fiji of any particular person, permitted under section 15(3)(a), and restrictions on movement or residence within Fiji and the right to leave Fiji of persons generally or of any class of persons, permitted under section 15(3)(b).

7.298 The provision reflects a policy view that, if it is necessary to limit a right or freedom for a permitted purpose, then it should be possible to do so on a discriminatory basis without the need for any further justification. This, however, would be contrary to the international standards. All the general international human rights instruments provide that those rights must be accorded without discrimination. If other constitutionally protected rights are limited by law and that law is discriminatory, it should be subject to the standard test for limiting the right to freedom from discrimination. Any discriminatory derogation from other rights in time of emergency should be authorised under the separate provision on emergency powers proposed in Chapter 19. The Commission is of the view that section 16(8) should be repealed.

Qualifications for office

7.299 Section 16(3)(f) does not allow laws setting standards or qualifications for office in the service of the state to discriminate expressly on a prohibited ground, but it does permit them to be discriminatory in their effect. For example it would authorise a law or administrative action setting a minimum height for recruits to the army that had the effect of discriminating against women or members of a particular community.

7.300 The Commission accepts that standards and qualifications must be set for most aspects of state service. In forbidding any express discrimination for this purpose, the Constitution applies a principle of great importance to women and to all members of the diverse society of the Fiji Islands. However, it should not permit what is expressly forbidden to be achieved indirectly. If standards or qualifications are set that might seem to discriminate on a prohibited ground, they should be subjected to the standard test. If the state can show that they serve a necessary purpose they are likely to be upheld. The Commission therefore considers that section 16(3)(f) should be repealed.

Discretions in relation to legal proceedings

7.301 Section 16(4)(b), again in common form, validates the exercise of a discretion relating to the institution, conduct or discontinuance of criminal or civil proceedings, whether or not that exercise is discriminatory. In the Fiji Islands, this provision serves the special purpose of allowing criminal proceedings to be discontinued if it appears that the defendant and the victim of the offence have become reconciled in accordance with traditional procedures for reconciliation, and the offence is one in respect of which discontinuance is permitted on that ground. In Chapter 17 we make proposals for the further recognition of these traditional processes of dispute settlement.

7.302 However, we believe that section 16(4)(b) should not remain in its present wide form excluding any claim that, in a particular case, the right to equality under the law and freedom from discrimination has been infringed. If the claim is unmeritorious, the courts are likely to be robust in dealing it. We consider that the provision should be reworded so as to permit the enactment of a law allowing the exercise of any discretion relating to the institution, conduct or discontinuance of civil or criminal proceedings in any court to take account of traditional procedures in the Fiji Islands for the settlement of disputes.

Protecting group rights

7.303 Several provisions of section 16 permit limitations to the right to equality under the law and freedom from discrimination on the prohibited grounds for the purpose of validating customary law and the separate administrative systems for Fijians, Rotumans and members of the Rabi Island community. They are:

- section 16(3)(d), validating the application of the customary law for any purpose;
- section 16(5), validating all law in force before 23 September 1996 and continuously in force ever since, and thus applying to the Fijian Affairs Act and other entrenched legislation; and
- section 16(6) inserted by the 1990 Constitution to protect any new regulations made under section 6 of the Fijian Affairs Act.

There is an ongoing need to limit the right to equality for these purposes, but, in some cases, further safeguards are also required. Our proposals to this end are explained in Chapter 17.

Pre-1966 law

7.304 That raises the question whether section 16(5) is needed to protect other pre-1966 legislation. This provision, too, is a variant of those which routinely protected the existing law of newly independent Commonwealth countries from inconsistency with the right to freedom from discrimination. However, the international instruments do not, generally speaking, excuse a state from the duty to bring its existing law into line with the obligation not to discriminate on a prohibited ground.

7.305 We are not aware of any particular pre-1966 law basic to the administration of Fiji that might be open to challenge on the ground that it is discriminatory. If such a law is identified, then it should be amended to conform with the right to freedom from discrimination or be capable of being upheld as a permitted limitation of that right, under the standard test. On this basis we propose that section 16(5) should be repealed.

New prohibited grounds of discrimination

7.306 However, we realise that, in proposing that the prohibited grounds of discrimination should for the first time include *language*, *birth*, *economic status*, *age* and *disability*, any existing law that discriminates on any one or more of those grounds would be open to challenge. We therefore propose that the Constitution should protect against challenge on any of those grounds law in force immediately before their introduction which remains in force continuously for up to two years after that date. This will give a breathing space during which all existing law can be examined by the administering department and amended if necessary. After the two-year period, any remaining provisions discriminating on any of those grounds will have to be capable of being upheld under the standard test.

Other limitations

7.307 Of the remaining provisions permitting limitations of the right, section 16(3)(g), which deals with measures taken during a public emergency, will be discussed in Chapter 19. Section 16(9) (which makes the protection from discrimination afforded by section 16 subject to section 21 (Protection and enhancement of Fijian and Rotuman interests) will be discussed in Chapter 8. That chapter will also discuss section 18 which overrides section 16. That leaves only three further provisions validating laws for the specified purposes and one provision of a definitional nature. We discuss them in turn.

Appropriations

7.308 Section 16(3)(a) puts beyond challenge laws "for the appropriation of revenues or other funds of Fiji". It reflects the view that the prohibition on discrimination should not be allowed to interfere with the budgetary process. The courts are normally very reluctant to get involved in such questions, but, even so, we think there are good policy reasons for maintaining the constitutional bar on court actions to set aside appropriations as discriminatory, perhaps years after the funds appropriated have been spent. In the areas likely to be most controversial, other processes will be available to protect the interests of all groups and communities.

7.309 We have proposed in Chapter 5 that the allocation of resources for social justice and affirmative action programmes should be broadly acceptable to all ethnic communities. In Chapter 8 we propose that such programmes should be authorised by Act and should be subject to stringent safeguards. Appropriation Bills for these and other purposes will always be open to challenge in Parliament. In the process, the criteria set by the Constitution are likely to be invoked.

Non-citizens

7.310 Section 16(3)(b) allows the right to freedom from discrimination to be limited by laws "with respect to persons who are not citizens of Fiji". It seems to have the purpose merely of reinforcing the point that a person's citizenship is not a prohibited ground of discrimination. For example, a law could require non-citizens to pay departure tax at a higher rate than citizens. The provision also allows the making of laws with respect to non-citizens that discriminate among them on one or more of the prohibited grounds. It could impose conditions on the grant of work permits to female non-citizens that are more onerous than those applying to the work permits granted to male non-citizens.

7.311 The provision should be retained, but in a revised form which makes its purpose clearer. The limitation should permit laws under which persons who are not citizens of the Republic may be subjected to a disability or restriction or entitled to a privilege or advantage not applying to citizens. Such a provision would not permit the other constitutional rights of foreign citizens to be limited, unless the limitation is one permitted by the Constitution in respect of the right in question.

Personal law

7.312 Section 16(3)(c) permits different personal law to be applied to different persons or members of different communities with respect to such matters as

adoption, marriage, divorce, burial and devolution of property on death. Again, it is a common-form provision reflecting the well-established practice of recognising personal law based on the religion and culture of the community concerned. The Constitution should continue to permit such laws in the Republic of the Fiji Islands. It should be noted, however, that the recognition of personal law will sometimes give rise to important policy issues, including, in particular, the way it treats women and children. For that reason, such law should be shown to be reasonably justifiable in a democratic society.

Suggested redraft

7.313 Finally, section 16(4)(a) makes it clear that, where a law is permitted for a certain purpose, anything done under the law is also permitted. Its substance should be retained. In our recommendations, we set out a suggested redraft of the whole of section 16. The provisions dealing with the separate systems governing the land, chiefly titles and administration of Fijians, Rotumans and the Rabi Island community under the entrenched legislation relating to those communities are fully discussed in Chapter 17 .

RECOMMENDATIONS

171. **The Constitution should affirm that all persons are equal under the law. It should continue to provide that they have a right to freedom from discrimination on any ground prohibited by the Constitution.**

172. **The Constitution should retain the elements of the present test of what is discriminatory, in section 16(1) and (2), but should express it more simply and clearly.**

173. **The right to equality and freedom from discrimination on a prohibited ground should apply to the rights conferred by the Bill of Rights itself and to the application of all other provisions of the Constitution, unless, in the particular case, there is good reason expressly to exclude its application. The present introductory words in section 16(1), making the right subject to all other provisions of the Constitution, should be repealed.**

174. **The Constitution should continue to prohibit discrimination on the grounds of race, sex, place of origin, political opinions, colour, religion, or creed. The new grounds of ethnic origin, gender, language, economic status, age and disability should be added. The right to freedom from discrimination should not be widened by adding a reference to "any other ground".**

175. The Constitution should continue to affirm, but in positive terms, the right of all persons under section 16(7) to freedom from discrimination in respect of access to the specified places of public resort, whether the proprietor of such places is the state or a private person. A right of access without discrimination to public services, such as transport, by air, sea or land should be included. The proprietor of a place or service for the use of the general public should be required to provide access for disabled persons to the extent provided by law.

176. The Constitution should retain the substance of section 16(3)(e) validating any law which limits the right to equality under the law and freedom from discrimination on a prohibited ground if, having regard to its nature and to special circumstances pertaining to persons affected by , or excluded from, the law, it is reasonably justifiable in a democratic society. That should be regarded as the "standard" test for limiting the right. The Constitution should permit limitations for specific purposes only if strictly necessary.

177. Section 16(8), which makes it possible to limit certain other rights and freedoms affirmed by the Constitution on a discriminatory basis, should be repealed.

178. Section 16(3)(f), which prohibits laws setting standards or qualifications for office in the service of the state from discriminating expressly on a prohibited ground, but permits them to be discriminatory in their effect, should be repealed.

179. Section 16(4)(b), which prohibits any challenge to the exercise of a discretion relating to the institution, conduct or discontinuance of criminal proceedings, on the ground that it is discriminatory, should be reworded to allow such a challenge but permit the enactment of a law authorising the exercise of the discretion to take account of traditional processes in the Fiji Islands for the settlement of disputes.

180. Section 16(5), validating all law in force before 23 September 1996 and continuously in force ever since, should be repealed. To the extent necessary, the section should separately and specifically protect against inconsistency with the right to freedom from discrimination the legislation entrenched by section 78 of the 1990 Constitution. Any other pre-1966 law basic to

the administration of Fiji should be amended to conform with the right to freedom from discrimination or be capable of being upheld as a permitted limitation of that right under the standard test.

181. During a period of two years after their introduction, the Constitution should protect against challenge for inconsistency with the recommended new, prohibited grounds of discrimination; ie, *language*, *birth*, *economic status*, *age* and *disability*, all law in force immediately before the date on which those grounds were introduced and remaining in force continuously after that date.

182. The substance of section 16(3)(a), barring challenges to Appropriation Bills on the ground that they are discriminatory, should be retained.

183. The substance of section 16(3)(b) should be retained in a revised form permitting the enactment of laws under which persons who are not citizens of the Republic may be subjected to a disability or restriction or entitled to a privilege or advantage not applying to citizens.

184. The substance of section 16(3)(c), permitting different personal law, with respect to such matters as adoption, marriage, divorce, burial, devolution of property on death, to apply to the members of different ethnic communities, should be retained. Such law should be shown to be reasonably justifiable in a democratic society.

185. Section 16 as a whole should be replaced by a provision on the following lines:

> **# Right to equality under the law and freedom from discrimination**
>
> (1) All persons are equal under the law, and have the right to freedom from discrimination on the ground of race, ethnic origin, sex or gender, birth, place of origin, political opinions, colour, religion, creed, language, economic status, age or disability.
>
> (2) Accordingly, no law, and no executive or administrative action of the state, may of itself

or in its effect, impose disabilities or restrictions, or confer privileges or advantages, on any person or the members of any group on a prohibited ground.

(3) Everyone has the right of access, without discrimination on a prohibited ground, to shops, hotels, lodging-houses, public restaurants, eating houses, places of public entertainment, services for the use of the general public such as transport, by air, sea or land, and places of public resort maintained wholly or partly out of public funds or dedicated to the use of the general public.

(4) The proprietor of a place or service referred to in subsection (3) is required to facilitate reasonable access for disabled persons to the extent provided by law.

(5) No law, or administrative action under the authority of a law, shall be held to be inconsistent with the right to freedom from discrimination on the grounds of language, birth, economic status, age or disability, during the period of two years after the date on which discrimination on those grounds was first prohibited by this Constitution, if the law was in force immediately before that date and has remained in force continuously after that date.

(6) Except as otherwise provided in subsections (8) and (9) or section # (Social Justice and Affirmative Action), a law, or an administrative action under the authority of a law, may limit the right affirmed in this section, for the purpose of imposing a disability or restriction or conferring a privilege or advantage on a person or group on a prohibited ground, but only if, having regard to its nature and to special circumstances pertaining to the person or group, the limitation is shown to be reasonably justifiable in a democratic society.

(7) A law, or administrative action under the authority of a law, is not to be taken as limiting the right affirmed in this section by reason only of the fact that it

(a) appropriates the revenues or other funds of the Republic of the Fiji Islands;

(b) imposes on persons who are not citizens of the Republic a disability or restriction, or confers on such persons a privilege or advantage, not imposed or conferred on persons who are citizens;

(c) permits any person who exercises a discretion vested in that person to institute, conduct, or discontinue civil or criminal proceedings in any court to take account of traditional procedures in the Fiji Islands for the settlement of disputes; or

(d) makes provision with respect to adoption, marriage, divorce, burial, devolution of property on death or other like matter as the personal law of any person or the members of any group, but only so far as that law is shown to be reasonably justifiable in a democratic society.

*(8) A law, or an administrative action under the authority of a law, may limit the right affirmed in this section, for the purpose of

(a) providing for the application of the customs of Fijians, Rotumans or the Banaban community to the holding, use, transmission, or distribution of the produce or proceeds of land, fishing rights or minerals, or to the entitlement of any person to any chiefly title or rank; or

(b) imposing any restriction on the alienation of land or fishing rights held in

accordance with Fijian, Rotuman or Banaban custom, or permitting the temporary alienation of such land or fishing rights without the consent of the owners;

*(9) To the extent permitted by subsection (10), a law, or an administrative action under the authority of a law, may limit the right affirmed in this section, for the purpose of providing for

(a) the governance of Fijians, the Rotuman community or the Banaban community and of other persons living as members of a Fijian community, the Rotuman community or the Banaban community, or

(b) the application to persons referred to in paragraph (a) of Fijian, Rotuman or Banaban custom respectively, in respect of any matter other than those referred to in subsection (8)(a) or (b).

*(10) A limitation for a purpose referred to in subsection (9) is valid only if it

(a) accords to every person to whom it applies the right to equality before the law without discrimination on any prohibited ground, other than the race or ethnic origin of that person or members of that community, and

(b) does not deny to any such person any other human right or fundamental freedom recognised by law.

* Gives effect to recommendations discussed and made in Chapter 17.

ENFORCEMENT OF THE BILL OF RIGHTS

7.314 Section 19 contains important provisions which ensure that everyone claiming that his or her constitutionally protected rights or freedoms have been, or are likely to be, infringed, has access to the courts for redress. Such claims may come before the courts in two ways. Often they arise in the course of existing

cases, particularly criminal cases. The defendant may allege that, by reason of some defect in the procedure followed, his or her right to a fair trial has been infringed. Or it may be claimed that the offence which the defendant is alleged to have committed is created by a law which is unconstitutional, and that the charge should be dismissed on that ground. A person may also wish to take the initiative in claiming that the state has acted unconstitutionally, for example by passing a law requiring the licensing of newspapers on conditions that infringe the right to freedom of the press.

7.315 Subsection (1) gives a person claiming that his or her rights or freedoms have been contravened, or are likely to be contravened, a direct right to apply to the High Court for redress. That right should be retained. Historically, the right to bring a claim of any kind before a court depended on showing that it came within a recognised cause of action, such as tort or contract. If this hurdle was overcome, claims against the state might be met by a plea of state immunity, another legacy of history reflecting the Crown's position as the personification of the state. These days, state immunity is usually substantially limited by statute, but the claimant still has to show that the claim is admissible under its provisions. Subsection (1) sweeps aside all of these potential barriers to enforcing individual rights and freedoms against the state.

Jurisdiction of High Court

7.316 Subsection (2) gives the High Court jurisdiction to hear claims of infringement of the Bill of Rights, made by application under subsection (1) or referred to it by a subordinate court. "Jurisdiction" is the term used to describe the kinds of cases that a particular court has power to hear and decide. We suggest in Chapter 13 that, as recommended by the *Report of the Commission of Inquiry on the Courts of Fiji* (1994), all provisions of the Constitution and other law dealing with the original jurisdiction of the High Court, as well as its jurisdiction on appeal from decisions of lower courts, should be reviewed, with a view to its expression in a modern way. The substance of the provisions about the jurisdiction of the High Court in subsection (2) should be retained, but their expression should take account of the outcome of that review. We note in passing that the jurisdiction of the High Court needs to be wide enough to enable it to take up issues concerning the Bill of Rights if they arise in the course of existing proceedings in the High Court. That must be implicit, but is not stated expressly.

7.317 Subsection (2) also gives the High Court wide powers to secure the enforcement of the rights and freedoms it protects, but freedom to decline to exercise its powers if the claimant is found already to have received, or had access

to, adequate redress. These powers should be retained. There is now a substantial body of international jurisprudence about the techniques available to the courts in upholding rights and freedoms. The courts of the Republic should, where appropriate, look to it for guidance.

7.318 If possible, the courts seek to avoid the substantial inconveniences likely to result from holding invalid and void everything done, since the time of its enactment, under every provision of a statute found to contravene the Bill of Rights. It may, for example, limit its relief to things done after the date of its decision. Among other forms of redress, the courts may direct the parties themselves to negotiate, under their supervision, agreed solutions that are in conformity with the Bill of Rights.

7.319 The Commission considers that the High Court's power to "make such orders, issue such writs and give such directions as it may consider appropriate" for the purpose of securing the enforcement of the Bill of Rights, does not need amplification. It should continue to be kept broadly in line with other constitutional provisions (at present to be found in section 113), about the jurisdiction and powers of the High Court in determining allegations that other provisions of the Constitution have been infringed. We make recommendations about that provision in Chapter 13.

References from lower courts

7.320 Under section 19(3), a lower court may refer a question as to the contravention of the Bill of Rights, arising in a case before it, to the High Court for determination, and must do so if either of the parties so requests. Under subsection (4), the lower court must dispose of the question in accordance with the decision of the High Court, or of the Court of Appeal or the Supreme Court if the question has been referred to either of them on appeal. The Commission received a submission that lower courts should be required to refer all questions concerning the Bill of Rights to the High Court for determination. We do not think that such a requirement is practicable, because such questions are likely to arise quite frequently in the course of criminal proceedings and should, where possible, be disposed of in the course of the trial, without the delay involved in a reference to the High Court, perhaps while the defendant remains in custody.

7.321 The measures recommended by the Commission of Inquiry on the Courts of Fiji to improve the qualifications and training of magistrates should ensure that they will exercise good judgment about when a question concerning the Bill of Rights should be referred to the High Court. If, however, a Magistrate should

dismiss a case because of a finding that the Bill of Rights has been infringed, and the state does not consider that finding to be sound in law, that is just the kind of matter which should, as we have suggested, be brought to the higher courts on appeal, without, however, affecting the outcome of the particular case itself. Defendants aggrieved by the decision of a lower court or the High Court on a question concerning the Bill of Rights, will, of course, be able to exercise their rights of appeal to the Court of Appeal and the Supreme Court, subject to compliance with the conditions about the grant of leave to appeal recommended in Chapter 13. The substance of section 19(3) and (4) should therefore be retained.

Attorney-General to have standing

7.322 If, however, a question concerning the Bill of Rights (or other provisions of the Constitution) should arise in a case before any court, whether or not the state is a party, it is important that the Attorney-General should have standing to intervene, in order to ensure that the constitutional issues are fully argued. For the same purpose, any court should have the power to join the Attorney-General as a party separately from any other officer or organ of the state.

Standing of interest groups and class actions

7.323 Some submissions suggested that, like the constitutions of such countries as Papua New Guinea, Namibia and South Africa, the Constitution of the Republic should enlarge the existing rules about standing and permit class actions so that questions concerning compliance with the Bill of Rights can more readily be brought before the courts. The rules of standing are designed to ensure that only those who have a substantial interest in a particular matter are entitled to bring a case about that matter before the courts. These days, however, non-governmental organisations and other interest groups are increasingly being recognised as having standing to bring cases about matters in which there is a clear public interest - the degradation of the environment, for example.

7.324 Class actions are a way of enabling harm suffered on a large scale to be remedied by the courts, even if the individuals concerned are not parties to the case. For example, class actions were brought on behalf of the thousands of deformed children whose mothers were prescribed the drug thalidomide during pregnancy. This meant that all of them had a right to share in the global amount of damages awarded by the court, even though they had not been named as parties. The practical effect was to give compensation to many who would otherwise have been denied it.

7.325 Rules about standing and class actions have potential application to claims of any kind. The Commission considers that it would not be appropriate to include in the Constitution special provisions about these matters in relation only to cases concerning the enforcement of the Bill of Rights. If any changes in the existing rules about either standing or class actions should appear desirable, they should occur either through the development of the law by the courts, or by appropriate amendments to the relevant substantive and procedural rules.

7.326 The Constitution should be framed in terms which continue to allow any changes in the general law of the Republic, in relation to standing or class actions, to apply to applications for redress made under the Constitution, on the ground of an alleged contravention of the Bill of Rights. This approach is consistent with the provisions in section 19(6) and (7) about the subsidiary powers and the rules of practice and procedure of the High Court, for the purpose of enabling it more effectively to exercise its jurisdiction to enforce the Bill of Rights. The substance of those provisions should be retained.

RECOMMENDATIONS

186. The Constitution should continue to give a person claiming that his or her rights or freedoms under the Bill of Rights have been contravened, or are likely to be contravened, a direct right to apply to the High Court for redress.

187. The High Court should continue to have original jurisdiction, and jurisdiction on a reference from a lower court, to determine claims that the Bill of Rights has been contravened. In conferring that jurisdiction, regard should be had to the outcome of the review recommended by the Commission of Inquiry on the Courts of Fiji (1994), about how the jurisdiction of the High Court should be defined.

188. The Constitution should continue to allow a lower court to refer a question as to the contravention of the Bill of Rights, arising in a case before it, to the High Court for determination, and require it to do so if either of the parties so requests.

189. The Attorney-General should be given standing to intervene in a case before any court in which a question concerning the Bill of Rights (or other provisions of the Constitution) arises, whether or not some other officer or organ of the state is a party, in order to ensure that the constitutional issues are fully argued. The court should also have the power in those circumstances to join the Attorney-General as a party.

190. The Constitution should not include special provisions about standing or class actions in relation only to cases concerning the enforcement of the Bill of Rights, but should be framed in terms which continue to allow those cases to be disposed of, taking account of any changes in the general law of the Republic on those matters.

DRAFTING QUESTIONS

7.327 Section 20 of the 1990 Constitution contains definitions and other provisions about the interpretation of the Bill of Rights. In revising the Bill of Rights in accordance with the Commission's recommendations, the drafter should consider to what extent the substance of these provisions remains relevant, and, if so, the manner in which it should be dealt with in the Constitution.

8

ETHNIC AND SOCIAL JUSTICE

8.1 This chapter reviews sections 18 and 21 of the 1990 Constitution, dealing with affirmative action generally and with the protection and enhancement of Fijian and Rotuman interests. It also reviews certain other provisions about the representation of the various communities in the public service, the judicial and legal service, and on the Police Service Commission.

8.2 These matters were frequently raised in submissions. Few other topics gave rise to such a complex interplay of differing perceptions about

- the present circumstances of the different communities,
- the philosophy of giving state assistance to individuals by reason of their membership of a particular community or other group,
- the principles on which appointments should be made to the public service and other aspects of the service of the state,
- how programmes for the benefit of particular communities or groups are to be reconciled with the right to equality before the law and freedom from discrimination on the constitutionally prohibited grounds,
- the desirable balance between the resources used for those purposes and other social justice programmes for the needy members of all communities,
- the question of whether the assistance given to enhance the position of particular communities and groups achieves the desired purpose,
- what non-governmental organisations could do on a voluntary basis to increase the equality of access for members of all communities to all sectors of the economy.

8.3 Some submissions, specially by groups representing women, also drew attention to inequalities between the economic and social status of women and men. They urged that these inequalities, which give rise to much the same issue as ethnic inequalities, should also be addressed in the Constitution. We therefore look at how the Constitution can give women, as well as communities, greater access to economic and social justice.

8.4 In the following sections of this chapter, the Commission describes the relevant provisions of the 1990 Constitution and analyses the perceptions and principles just mentioned. It then sets out its conclusions, and its recommendations for meeting the following needs:

- programmes to assist all communities and groups in the diverse society of the Fiji Islands to fulfil their aspirations for social justice and opportunities for participation in all sectors of the economy;
- measures to ensure that these programmes are as effective and as widely-acceptable as possible;
- efficient public and other state services, in which appointments and promotions are based on individual merit;
- corrective mechanisms, should the decisions on individual appointments and promotions result in overall imbalances;
- support on a voluntary basis from non-governmental organisations in partnership with Government.

In these ways, and through the further provisions recommended in Chapter 14, the Constitution should still provide fully for all the needs of communities now being addressed through the provisions of the 1990 Constitution providing for racial quotas and affirmative action.

THE 1990 PROVISIONS

8.5 Two new sections dealing explicitly with affirmative action were included in the 1990 Constitution. Section 21, entitled *Protection and enhancement of Fijian and Rotuman interests*, authorises and directs Parliament to put in place affirmative action programmes for the benefit of Fijians and Rotumans. The authorisation arises from the fact that the section overrides everything in Chapter II, including the right to freedom from discrimination in section 16 already discussed in Chapter 7.

8.6 The directive takes the form of the requirement in section 21(1) that "Parliament *shall,* with the object of promoting and safeguarding the economic, social, educational, cultural, traditional and other interests of the Fijian and Rotuman people, *enact laws* for those objects and *shall direct the Government* to adopt any programme or activity for the attainment of the said objects" (emphasis added). A duty is laid on the government to comply with those directions. It is not clear whether any such directions can be given in the absence of a law.

8.7 The remaining provisions of section 21 authorise the Cabinet, in carrying out any direction of Parliament given under subsection (1), to give directions to Departments, Commissions or public authorities for the reservation of scholarships and other training opportunities and business permits or licences, and generally for the attainment of the objects of the section. The Cabinet is to act in consultation with the Bose Levu Vakaturaga or the Council of Rotuma, as appropriate. The section is based on Article 153 of the Malaysian Constitution, but does not contain the safeguards for non-indigenous groups provided for in that article.

8.8 Section 18 was also inserted, presumably with the object of making it clear that affirmative action programmes for groups other than Fijians and Rotumans were not precluded. It reads as follows:

> Nothing contained in section 16 of this Constitution shall preclude the enactment of any law or any programme or activity that has as its object and purpose the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, sex, place of origin, political opinions, colour, religion or creed.

The section follows, almost word for word, section 15(2) of the *Canadian Charter of Rights*. Section 18 authorises laws, programmes and activities that would otherwise be discriminatory and unconstitutional under section 16.

8.9 The 1990 Constitution also contains specific provisions which seek to secure a minimum 50% representation of Fijians and Rotumans in departments and among the holders of judicial and legal offices - a sharply focussed form of affirmative action. Section 127(10)(b) reproduced the provision in the 1970 Constitution which had required the Public Service Commission to

> ensure that, so far as possible each community in Fiji receives fair treatment in the number and distribution of offices to which candidates of that community are appointed on entry.

A corresponding provision, section 124(3)(b), was inserted, requiring the Judicial and Legal Services Commission to observe the same duty in selecting candidates for entry into the public service. These provisions required the principle of proportionality - the representation of each community in proportion to its share of the total population - to be applied at entry level in the legal services of the state.

8.10 However, under the 1990 Constitution, the two Commissions had also to apply another, potentially conflicting rule. Sections 124(4) and (5) and 127(11) and (12) require each Commission respectively to ensure that, at each level of

department or office, including judicial office, those holding office should comprise not less than 50% Fijians and Rotumans and not less than 40% members of other communities. Where either Commission cannot comply with this requirement, it may, with the Prime Minister's concurrence, appoint other suitably qualified persons. The provisions are expressed to override Chapter 2 (the Bill of Rights).

8.11 The Constitution lays down no requirements as to the ethnicity of the members of the Judicial and Legal Services Commission or the Public Service Commission. In contrast, another new provision, section 128(2), requires the Chairman and at least one other member of the Police Service Commission to be Fijian. There are, however, no constitutional requirements about the ethnic composition of the Police Force. The need for the Chairperson and at least one other member of the Police Service Commission to be Fijian is presumably designed to make sure that Fijians and Rotumans are adequately represented in the Police Force also.

THE PERCEPTIONS OF INJUSTICE AMONG COMMUNITIES AND GROUPS

Indigenous Fijians and Rotumans

8.12 The introduction of the provisions just described into the 1990 Constitution was a response to indigenous Fijians who perceived that they were lagging behind other communities in terms of their achievements in some sectors, notably education, commerce and participation at the higher levels of the public service. They were well-represented in the Police Force and had always predominated in the Military Forces. There was a strong feeling that special measures were required to help them catch up in those areas in which they were under-represented.

8.13 In discussing how the Constitution should take account of that perception, the Commission would like to stress that indigenous Fijians and Rotumans, like other Pacific Island peoples and indigenous peoples in other parts of the world, have been faced with the need to make great adjustments as they move from their traditional subsistence economy to the money economy. In saying this, we do not undervalue the many admirable qualities engendered by the traditional way of life. They include the shared commitment to the community as a whole, the leadership given by the chiefs at all levels and their desire to secure the well-being of their people, and the capacity to work cooperatively.

8.14 We are not suggesting that these community-centered values necessarily stand in the way of the individual enterprise often thought to be the mainspring of

the money economy. We are confident that Fijians and Rotumans will develop their ability to harness their collective, as well as their individual, energies so they can play a full part in the social and economic life of the Fiji Islands.

8.15 A 1994 analysis of Fiji Pine Limited's working relationship with landowners in the pine industry discussed the techniques which had been successfully adopted to bridge gaps between the expectations of the landowners and the realities of commercial profitability. In commending the model for possible application to other development projects, the following key elements were identified:

- the existence of a firm legal base for landowner participation in the commercial enterprise;
- use of the Fijian traditional system, bringing together land ownership, respect for and allegiance to chiefs, the existence of blood ties and traditional methods of dispute resolution, for the purpose of expanding pine plantations and resolving disputes;
- the Government's commitment and assistance;
- the company's innovative approach;
- the ability of the Native Land Trust Board to provide security of tenure of the native lands required for pine plantations on terms and conditions tailored to the requirements of the industry.

8.16 This analysis illustrates that there are tensions between the desire to hold on to all that is good in the old way of life and also to enjoy fully the benefits of the new. It shows that, with imagination and goodwill, these tensions can be accommodated constructively. We wish to stress, however, that the tensions would be present, even if the Fiji Islands had not become the home of other ethnic communities, and Fijians and Rotumans were seeking, on their own, to make their way in the modern world.

8.17 It is hard to envisage the Fiji Islands without the variety of human resources and productive assets now contributing to its economic, social and cultural life. At the material level, the country would have less capacity to generate wealth, a smaller range of available goods and services, and government would have considerably reduced revenue from which to provide the infrastructure, the development capital and the social services which people have come to expect. As it is, the Republic has many advantages stemming from the diversity of its society.

8.18 Some indigenous Fijians perceive the visible signs of the success of some members of other communities as proof that the different communities have been treated unequally. The tangible assets, like houses and cars, of some Indo-Fijians and general voters , and their access to disposable income, as well as their educational achievements, and the Indo-Fijian dominance of the locally-owned retail sector, present a contrast with the qualifications, life-style and access to sources of cash income of most, though by no means all, indigenous Fijians and Rotumans.

8.19 Increasingly, however, there are indications that the standard of living of these communities is improving. This shows that the traffic in income- and wealth-generating activity is not all one way. It is human nature for people to undervalue their own assets and advantages and overvalue what they do not have but see others as enjoying. The different ways in which landowners and tenants look at the value of land ownership and of the right to use the land is a good example. Each group tends to think that the right they do not enjoy is more valuable than the right they possess.

8.20 The nature and relative size of the economic contributions made by the different communities and the distribution of wealth among them, has never been fully analysed, but it is much more complex than is often realised. No community has good reason to feel that its own contribution is either less significant or more significant than that of other communities. The fact is that all communities in Fiji are economically interdependent.

8.21 People fail to take account of the long time it takes to build up a successful business. Most of today's relatively large and profitable commercial enterprises started several generations ago as small family businesses. And of those small businesses, only a handful have expanded to become nationwide concerns. However, new patterns of commercial activity are emerging, sometimes through Fijian entrepreneurial activity, sometimes through their participation in joint ventures and sometimes through their equity investment in existing companies. That said, it is still important to consider how the remaining inequalities of indigenous Fijians and Rotumans in the commercial and other sectors can best be tackled. We return to that question below.

Indo-Fijians

8.22 Indo-Fijians have their special concerns. We have already discussed the impact of the electoral arrangements under the 1990 Constitution on the self-confidence and self-respect of that community. In Chapter 16 we discuss the

concerns arising from the uncertainty about whether the agricultural leases soon to expire will be renewed.

8.23 Here, we refer to other concerns of the Indo-Fijian community. One is the growing ethnic imbalance in the public service and other aspects of the service of the state. Historically, Indo-Fijians have been well-represented in the public service and the police and barely represented in the armed forces. Since 1987, their numbers in all three services have decreased markedly. In 1985, Fijians made up 46.4% of established public servants, Indo-Fijians 48% and general voters and expatriates 5.6%. The corresponding figures as at 27 October 1995 were Fijians, 57.32%, Indo-Fijians 38.57% and general voters and expatriates 4.11%. In 1995, of the 31 permanent secretaries, 22 were Fijians, 6 were Indo-Fijians and 3 were general voters.

8.24 It is not clear whether the significant drop in the number of Indo-Fijians, specially at the higher levels, is directly attributable to the constitutional provisions, or flows from them by affecting the attitudes of the employing authority and potential candidates alike. The employing authority has the duty of promoting Fijians to equip them to hold senior positions. As a result, some Indo-Fijians may consider that their former opportunities for advancement in the public service are now restricted. Therefore they may seek other types of employment. Another factor, at least in the armed services, appears to be the occupational preferences of Indo-Fijians as a group, although we were assured that the few Indo-Fijians serving in the Republic of Fiji Military Forces are fine soldiers. Yet another factor is the outflow of well-qualified Indo-Fijians who emigrate to other countries.

8.25 The police and the armed forces are, of course, the agencies through which the state is permitted to use force to ensure the enforcement of the law. In addition to raising questions about whether Indo-Fijians have the opportunity to be fairly represented in those services, the present ethnic imbalance gives rise to natural, though not well-founded concerns about their impartiality. In a multi-ethnic country it is desirable that, in the interests of both equity and reassurance to all communities, all branches of the state services should be broadly representative of the population as a whole.

8.26 The submissions of Indo-Fijians also expressed concern about the growing poverty among sections of the Indo-Fijian community. We have already mentioned that the latest study of income levels and poverty shows that, among Fijian and Indo-Fijian households, each group has a roughly comparable percentage living in poverty, though there are some differences, depending on what measure

of poverty is used and whether the household is urban, or in a village or settlement. Although Indo-Fijian households had higher incomes than did Fijian households, incomes were significantly less equally distributed among Indo-Fijian households. Ethnic differences in incomes are attributable, at least in part, to the differences between the incomes of *all* households in urban, as compared with rural, areas. However, since 1977, when the previous survey was made, the margin of advantage for households in urban areas has declined.

8.27 The submissions referred to the impact of poverty among Indo-Fijians evident in the growing number living in the squatter settlements in peri-urban areas. They also brought out the bitter disappointment suffered by able Indo-Fijian students from poor families who are not awarded one of the relatively few scholarships available for that community, but see Fijian students who have obtained lower marks receive scholarships, without regard to whether or not their families could afford to give them tertiary education.

General voters

8.28 Submissions from members of the general voters community emphasised its artificial nature, consisting as it does of the Pacific Islands communities in Fiji as well as all other communities and groups that are not Fijian, Rotuman or Indo-Fijian. Within the community there is great diversity in the educational and living standards of its members and their opportunities for advancement. Some groups in this community do not have security of tenure over the land on which they are living. They are among the most disadvantaged in the Fiji Islands.

Women

8.29 On the whole, submissions by and about women concentrated on the gender inequality inherent in the present provisions about citizenship, some inadequacies in the laws affecting women, and cultural factors that affect the ability of women to play a full part in family, community and national decision-making. There was little emphasis on the need for affirmative action and social justice programmes for the benefit of women, but some submissions identified gender inequalities which needed to be addressed in this way.

8.30 Reference was made to the inadequacy of maternity leave, and the absence of paternity leave and also of family support benefits, particularly for women as the heads of single-parent families. There was a need for education programmes so that men, in particular, would have a greater awareness of the role and needs of women. It was also suggested that the matrimonial laws should provide adequate

protection for divorced women and their children and a more equal sharing of matrimonial property on a basis that recognised the monetary value of women's domestic contribution to the household - a topic, it was suggested, that deserved separate consideration by a suitable body.

8.31 Other submissions stressed the need to recognise the equality of women at all stages of education and to discourage the stereotyping of men and women by thinking of them as suited to some vocations but not others. Indo-Fijian girls and women were said to be doubly discriminated against in the award of scholarships because they faced both gender bias and racial discrimination. It was urged upon us that women and men should have equal remuneration and treatment, particularly in terms of access to promotion to senior positions in the public and the private sector.

8.32 The remedies were seen as including changes in government policies as well as the strengthening of the Ministry of Women's Affairs to bring it into closer touch with women at the grass roots level. It was suggested that special schemes should be implemented to enhance women's social and economic well-being and support the work of the voluntary organisations already working on behalf of women. There should be equal pay for work of equal value, for both men and women. There was also a need to ensure that the health and strength of workers are not abused, and that people are not forced by economic necessity to do work unsuitable to their physical capacity.

THE JUSTIFICATION FOR SOCIAL JUSTICE AND AFFIRMATIVE ACTION PROGRAMMES

8.33 In this section we seek to show why it is in the interests of all communities to deal with these perceived problems and imbalances in the Fiji Islands. Governments in most parts of the world have long accepted that social inequalities among their populations need to be redressed by state-funded programmes. Such programmes are directed to securing for everyone adequate access to education, health care and housing, as well as to a minimum cash income. This applies specially to the poor in urban areas who do not have ready access to the produce of the land and the sea. Some programmes, such as basic education and health care, are often available to all, irrespective of individual income levels. Others are likely to be means-tested, and available only to those whose need is greatest.

8.34 It is only comparatively recently that governments have also become concerned about ethnic inequalities. In all multi-ethnic societies, there is a tendency for different ethnic groups to engage in different occupations, have different levels

of education, and receive different incomes. Commentators have identified as one explanation for these differences the different cultural attitudes of ethnic groups, whether to education, or the performance of particular types of work, or to the ambition to venture forth from the community or into new occupations. Another explanation has sometimes been the existence of barriers imposed by the dominant group in society to the economic and social mobility of the less dominant group. In some countries those barriers have been the result of racial discrimination.

8.35 The concern with ethnic inequalities is a reflection of the broad concern most governments have about social inequalities. However, social scientists have identified at least two reasons why ethnic inequalities may be more dangerous:

- Differences among ethnic groups tend to be seen as an indication of differences in opportunities, proof that society has allocated *access* to education, employment and other opportunities unfairly.
- When ethnic differences lead to ethnic conflict, the result is often more disruptive to the social order than conflicts between the wealthy and the poor.

8.36 The conclusion of one commentator is that:

> no democratic political system can long tolerate a social order in which the major educational, income and occupational divisions are along ethnic lines. The question is not whether but how these divisions can be bridged.

That statement is a generalisation of the more explicit comments in a paper on Malaysia that was prepared for the Commission's use:

> A threat to national stability arises when one group, especially a racial group, perceives itself to be economically disadvantaged, and another group, especially a racial group, is perceived to dominate the economic life of the nation. This threat is made more pronounced when the disadvantaged group regards itself as the rightful "owners" of the country. ... [I]f the economic imbalances had been left unrectified, the threat to national stability would have been very real and serious. The need to restructure the Malaysian society is an imperative which most fair-minded Malaysians will not dispute.

8.37 The Commission concludes that there is an equally strong need for the Government of the Republic of the Fiji Islands to put in place programmes which aim to reduce inequalities between different ethnic communities. These inequalities relate especially to the educational qualifications and participation at all levels of commercial activity by indigenous Fijians and Rotumans. However, there are areas in which other ethnic communities are disadvantaged. All communities have their rich and their poor.

8.38 For this reason, social inequalities should not be neglected. The point was made many times in the submissions that poverty is not distributed on the basis of ethnicity. Nor are the disadvantages suffered by women, the disabled and the elderly. Some submissions expressed this by urging that affirmative action programmes should be based on need, not race. But this is to overlook the reasons why it is necesary to achieve ethnic justice, as well as social justice, in the Fiji Islands. The focus of the discussion should not be whether one purpose is more meritorious than the other, but what proportion of the total available resources should be devoted to each.

8.39 The Commission therefore proposes that the Constitution should place on Government the duty to put in place affirmative action programmes not only for the benefit of the Fijian and Rotuman people, but also for other ethnic communities, and for women, and for all other disadvantaged citizens or groups in the Republic of the Fiji Islands. In the next section we look at how such a provision can be made consistent with the international standards. Guidance is also obtainable from the terms in which some other countries have made provision for affirmative action and social justice programmes in their constitutions.

ETHNIC AND SOCIAL JUSTICE AND FREEDOM FROM DISCRIMINATION

8.40 Constitutions authorise and sometimes require programmes for the benefit of particular groups for two reasons. First, it may be desired to place on government a clear duty to develop and fund the programmes in question. Secondly, programmes to improve the economic and social status of a particular community or group, as distinct from individual members of society who are disadvantaged, need to be authorised as an exception to the general rule that there must be no discrimination on the grounds of race, ethnic origin, sex or gender, or other prohibited ground of discrimination.

The international standards

8.41 The international community has taken a very cautious approach to affirmative action as a departure from the principle of equality. It is not mentioned at all in the *Universal Declaration of Human Rights* or the *International Covenant on Civil and Political Rights*. As well as requiring equality in according human rights and fundamental freedoms to all members of society, those instruments specifically recognise the right of everyone to equal access to public service in their country. This confirms that any action in the Republic of the Fiji Islands ensuring that the representation of ethnic communities in the various aspects of

state service is in proportion to their numbers in the total population would indeed be a form of affirmative action based on race or ethnicity.

8.42 The *Convention on the Elimination of All Forms of Racial Discrimination*, to which the Republic of Fiji is a party, not only permits, but also requires "special measures" to secure the adequate advancement, development and protection of "certain racial groups and individuals belonging to them", but only for the purpose of securing them the equal enjoyment of "human rights and fundamental freedoms". Such measures "shall not be deemed racial discrimination" if they do not lead to the maintenance of unequal or separate rights for different racial groups "after the objectives for which they were taken have been achieved".

8.43 The *Convention on the Elimination of All Forms of Discrimination Against Women*, to which Fiji is also a party, makes a distinction between "special measures ... aimed at protecting maternity" which are not to be considered discriminatory and are not subject to a time limit, and "temporary special measures aimed at accelerating *de facto* equality between men and women". These are not to be considered discrimination as defined in the *Convention* so long as they do not entail the maintenance of unequal or separate standards. They are to be discontinued when the objectives of equality of opportunity and treatment have been achieved.

8.44 The provision just mentioned is based on the corresponding provision in the *Convention on the Elimination of All Forms of Racial Discrimination*, but in its different setting it has an entirely different effect. The temporary special treatment of women in a manner different from men is not to be considered discrimination *against women* if it is aimed at accelerating *de facto* equality. The *Convention* fails, however, to deal with the question of whether it is discrimination *against men*, though the intention must be that it is not.

8.45 Both *ILO Convention 169 on Indigenous and Tribal Peoples* and the draft *Declaration on the Rights of Indigenous Peoples* require states to take "special measures" for the benefit of such peoples in certain specified contexts. The question of whether these special measures are to be temporary or permanent, and how they are to be justified in relation to the equality rights of the population as a whole, is not addressed. Certainly, the benefits or rights referred to are seen as those of the group rather than of its individual members.

8.46 There is an implication that indigenous peoples are vulnerable groups who need special measures to be able to enjoy access to the rights and benefits already enjoyed by other members of society (as well as having the right to preserve their own culture as far as consistent with human rights norms). The assumption

appears to be that these special measures will not involve discrimination against other members of the society. Overall, neither instrument attempts to address the situation where there is a marked disparity between the levels of education, occupation and income of an indigenous people, in comparison with those of other ethnic groups, and the indigenous people wish to become full participants in the economy.

National constitutions

8.47 The Constitutions of Malaysia, India and Papua New Guinea direct the state to take certain types of action for the benefit of particular groups. Rather than merely authorising it, these provisions *require* appropriate remedial action to be taken by the state.

8.48 Article 153 of the *Malaysian Constitution* charges the Yang di-Pertuan Agong [the Head of State], acting on the advice of the Cabinet, with the responsibility of safeguarding "the special position of the Malays and natives of any of the States of Sabah and Sarawak and the legitimate interests of other communities". The article provides for the indigenous peoples to be given access to a reasonable proportion of publicly funded scholarships and training opportunities and business permits and licences where these are required. The article also provides explicitly for the reservation of a reasonable proportion of places in the public service and by inference authorises general programmes benefiting Malays. However, the awards to Malays and members of other indigenous communities in Malaysia are not to deprive any person of any public office, scholarship or other educational opportunity, or licence or permit to which that person is already entitled.

8.49 Section 46 of the *Indian Constitution* provides that the State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, the Scheduled Castes and the Scheduled tribes, and shall protect them from social injustice and all forms of exploitation. Section 335 requires the claims of members of the Scheduled Castes and the Scheduled Tribes to be taken into consideration, consistently with the maintenance of efficiency of administration, when making appointments to services and posts in connection with the affairs of the Union or of a State.

8.50 Directive Principle 2, *Equality and participation*, in the *Constitution of Papua New Guinea* calls, among other things, for all persons and governmental bodies of Papua New Guinea to ensure that, as far as possible, political and official bodies are broadly representative of citizens from the various areas of the country.

8.51 Both the interim and final constitutions in South Africa, the *Canadian Charter of Rights* and the *New Zealand Bill of Rights Act* authorise, rather than require, special measures for disadvantaged individuals and groups, and do so in much less specific terms that the provisions just summarised. All three formulations seem to have been influenced by the United States jurisprudence. In the face of a constitutional requirement that all people shall be entitled to "the equal protection of the laws" without exception, the courts there have justified different treatment for African Americans, Hispanics and women, on the ground that it is a remedy for past discrimination.

8.52 None of the constitutional formulations is very specific about the relationship of affirmative action to the right to freedom from discrimination or to equality. The majority simply state, expressly or by implication, that those rights do not prevent or preclude the special measures. The New Zealand formula states that the measures "do not constitute discrimination", presumably meaning discrimination against any non-benefiting person or group.

8.53 Finally, all the constitutions referred to specify the purposes of affirmative action in general terms. Only the South African formula, which describes the object of affirmative action as the full and equal enjoyment of all rights and freedoms, appears to provide a basis for an eventual determination that affirmative action measures for a particular group are no longer justified because equality has been achieved.

THE NEED FOR NEW CONSTITUTIONAL PROVISIONS IN FIJI

8.54 On the basis of its analysis of the need for affirmative action and social justice programmes in Fiji, and the way in which these questions have been dealt with in the international instruments and the constitutions of comparable countries, the Commission considers that the Constitution should include new provisions for this purpose. Sections 18 and 21 should be repealed, but their thrust should be retained and amplified in a single, comprehensive provision.

8.55 We put forward the following draft as a basis for discussion:

 # Social justice and affirmative action

(1) The Government of the Republic of the Fiji Islands shall establish programmes which are reasonable and necessary to ensure for the Fijian and Rotuman people and other ethnic communities, and for women as well as men, and for all other disadvantaged citizens or groups of citizens, effective equality of access to

(a) education and training,

(b) land and housing,

(c) participation in commerce and all aspects of service of the Republic of the Fiji Islands at all levels, and

(d) other opportunities, amenities or services essential to an adequate standard of living.

(2) A programme for the purposes of this section is valid notwithstanding the fact that it confers privileges or advantages on persons or members of a group on one or more of the grounds on which discrimination is prohibited by section # (Right to equality under the law and freedom from discrimination), if the programme complies with subsections (3) and (4).

(3) The programme must be authorised by an Act of Parliament which specifies:

(a) the goals of the programme and the identity of the persons or groups it is intended to benefit;

(b) the means by which those persons or members of the benefited group are to be assisted to achieve the goals;

(c) the performance indicators for judging the efficacy of the programme in achieving its goals;

(d) if the programme is for the benefit of a group, the criteria for the selection of the members of the group who will be entitled to participate in the programme.

(4) The participants in a programme for the benefit of a group must be selected without discrimination on any ground referred to in section #, other than a ground relevant to their membership of the group or the application of the selection criteria.

(5) The administering department or other agency must monitor the efficacy of the programme by reference to the specified performance indicators. The responsible Minister must make an annual report to Parliament on the results revealed by the monitoring.

(6) Unless it has sooner expired in accordance with its terms or has been repealed, an Act authorising a programme for the purposes of this section expires on the tenth anniversary of its entry into force, but the programme may be reenacted, subject to compliance with subsection (2), unless the benefited persons or groups have demonstrably ceased to be in need of such a programme.

(7) No programme for the purposes of this section shall, of itself or in its effect, deprive any person not entitled to its benefits of any position or seniority in any aspect of the service of the Republic; place in an educational or training institution, scholarship or other financial support; right to carry on any business or profession; or to enjoy any other opportunity, amenity or service to which that person has already become, and would otherwise remain, entitled.

Definitions

In this Chapter, "service of the Republic of the Fiji Islands" means service in any capacity on appointment by the President, the Cabinet, a Minister, a Commission or any public officer, or by resolution of Parliament or any Committee of Parliament, or by or on behalf of any local authority, whether or not the appointee is remunerated wholly or partly by public money, but does not include service as a member or employee of a body provided for in an Act referred to in section # (*Entrenched legislation*).

We now comment on the purpose and effect of these provisions.

Subsection (1): Duty to establish programmes

8.56 The first point to note is the mandatory nature of the direction in subsection (1):

> "The Government of the Republic of the Fiji Islands shall establish programmes ...".

In this respect it maintains the duty at present laid on Parliament and the Cabinet by section 21 of the 1990 Constitution. We have not mentioned Parliament because the parliamentary system of government is based on the expectation that the government of the day will command the necessary majority both to enact the required legislation establishing a particular programme and to secure approval for its funding in each financial year.

8.57 A "programme" means a particular scheme of assistance for a targeted group, like scholarships for tertiary education, access to subsidised housing or "soft" loans, or subsidisation of school fees, to mention a few examples. It includes all facets of the particular scheme and its funding.

Programmes to be reasonable and necessary

8.58 The programmes concerned are required to be "reasonable and necessary" for the purposes mentioned. The word "reasonable" gives the government the responsibility of determining what kinds of programmes will achieve the desired

purposes, and how much the state can afford to spend on them. As part of the Constitution, the section will become supreme law. Its application will therefore be capable of being tested in the courts. However, the use of the word "reasonable" does not invite the courts to become closely involved in supervising the exercise of the government's judgment about the merits of a particular programme or the amount of funding it receives.

8.59 The word "necessary" focuses on the link between particular programmes and the purposes they are to achieve. It suggests a requirement to address all needs, and, if need be, to set priorities among them, but without giving preference to some purposes and ignoring others. Again, the association of the word "necessary" with the word "reasonable" suggests that it is not the role of the courts to second-guess the government's judgment about whether or not a particular programme is "necessary". The provision as a whole is susceptible to political rather than judicial supervision. Only a failure by a government to address a manifest need of a particular community or group would be likely to invite the remedial intervention of the courts by way of a direction to government to reconsider its policies.

Global budgeting

8.60 As foreshadowed, subsection (1) treats programmes for the benefit of "the Fijian and Rotuman people and other ethnic communities" on exactly the same basis as programmes for the benefit of "women" and of "other disadvantaged citizens or groups of citizens". This has the practical advantage of ensuring that, when the government is preparing its budget, it will look first at the total resources available for all these purposes. The second step will be to make decisions about the amounts to be devoted to programmes for each purpose. The third step will be to allocate those amounts among the particular programmes - if there is more than one - for that purpose. Such a procedure should help the Government to comply with the duty under the recommended *Compact* to take full account of the interests of all communities and base affirmative action and social justice programmes on an allocation of resources that is broadly acceptable to all ethnic communities.

Limitation of the right to freedom from discrimination

8.61 There is also a technical reason for dealing with the needs of all the groups mentioned in the same way. Programmes for ethnic communities or groups and for women must be authorised as justified limitations of the recommended right to equality under the law and freedom from discrimination on a prohibited ground. Those prohibited grounds include "race", "ethnic origin" and "sex or gender". The Commission has also recommended that discrimination be prohibited on the

grounds of "economic status", "age" and "disability". It is scarcely possible to think of a social justice programme whose beneficiaries would not be described by reference to one or more of those characteristics.

8.62 For all practical purposes, the effect is to do away with the distinction, between "affirmative action" for ethnic communities and women and "social justice" for disadvantaged groups. However, it will still be necessary to take account of the basis on which it is justifiable to give privileges or advantages to individuals as members of a disadvantaged group, as distinct from giving them to disadvantaged individuals. We come back to that question below.

Achieving effective equality of access

8.63 Subsection (1) describes as the purpose of the required programmes the need to ensure for all the groups mentioned "effective equality of access" to the opportunities, amenities and services described. That short expression is intended to convey several ideas.

8.64 The term "effective equality" indicates that the object is equality of result, not equality of opportunity. For example, all children may in theory be entitled to receive secondary education, but children from the remoter rural areas often have considerable practical difficulties in attending secondary school. Programmes to make sure that qualified children from the remoter areas are in fact, as well as theory, able to receive and profit from secondary education would achieve their "effective equality of access" to that social good.

8.65 By "access" we are not thinking merely of the initial entry into an educational institution, a job or a commercial venture. We have in mind the ongoing support, financial and otherwise, that is necessary to achieve the equality of result already mentioned. The special, state-funded help should cease when it has achieved its intended purpose. The individual concerned has achieved the objectives and is now able to compete on equal terms with everyone else.

8.66 The help given to particular individuals should also cease if it is misused, or it becomes evident that, despite the help, the individual is not going to achieve the desired objectives. Selection for a particular programme does not guarantee success. (This should not be seen as wholly negative because even the opportunity to participate may provide reassurance to the individual and community concerned that access is not being unfairly denied.) The guidelines for measuring success should be set beforehand and made clear to the recipient, but, inevitably, it will often be necessary to exercise a discretion, and perhaps to make a hard decision.

The integrity of the programme will depend on the ability to administer it properly. We discuss later the need to evaluate the programme itself.

The objectives of the programme

8.67 Subsection (1) refers specifically to some of the objectives most likely to require affirmative action programmes. " Education and training" obviously deserve special mention. So do "land and housing", and "participation in commerce and all aspects of service of the Republic of the Fiji Islands at all levels". The list is not exhaustive. Programmes may also be necessary to ensure effective equality of access to "other opportunities, amenities or services essential to an adequate standard of living". What those might be is essentially a matter for political judgment.

8.68 The Government's duty to ensure effective equality of access for a particular community to the things mentioned does not mean that every individual member of that community will necessarily be entitled to that access. Nor does it mean that one community will be entitled to that access in exactly the same way as another community. For example, effective equality of access to land does not mean that all communities should become land owners. The objective will have been achieved even if most Fijians are landowners and most Indo-Fijians are tenants, as long as Indo-Fijians, as a community, are not excluded from reasonable, though not necessarily proportionate, participation in land-based activities.

8.69 The inclusion of a reference to "land" as well as to "participation in commerce" signals that the need of the Indo-Fijian community for reasonable access to land is as much a national issue as the need of the Fijian and Rotuman communities for reasonable access to participation in commercial activity. Both may need to be the object of affirmative action programmes.

Service of the Republic of the Fiji Islands

8.70 The expression "service of the Republic of the Fiji Islands" has been separately defined. As well as including appointments to the public service, the police and the armed forces, it includes Government appointments to state-owned enterprises and statutory bodies, except as a member or employee of bodies established by or under the entrenched Acts. This means, for example, that it does not apply to appointments to the Fijian Affairs Board or the Native Lands Trust Board, or the employees of Provincial Councils. The definition includes the service of local authorities. We discuss below the policy which should govern the access of all communities and other groups, such as women, to the service of the state in the various capacities coming within the definition.

Subsection (2): Need to fulfil conditions

8.71 This provision makes the necessary link between the authorisation of affirmative action and the right to equality under the law, and freedom from discrimination on a prohibited ground. It authorises the limitation of that right for the purpose of putting in place affirmative action and social justice programmes. These may benefit certain persons, communities and groups, identified by reference to a characteristic, such as their race or ethnic origin, their sex or gender, or their economic status, which is normally a prohibited ground for conferring privileges or advantages. However, as in other cases where a constitutionally protected right may be limited, conditions are imposed. Those conditions are laid down in subsections (3) and (4).

Subsection (3): Authorisation by Act

8.72 The first condition for the validity of a programme is that it be authorised by an Act of Parliament. In principle, all limitations of rights must be authorised by "law". Here we specify "an Act", rather than a regulation or order under an Act, because the thrust of our recommendations about affirmative action is that the necessary programmes should be regarded as addressing national issues and problems. Therefore, Parliament should have the opportunity to approve particular programmes as well as to make sure that there is an overall balance among the various purposes for which affirmative action programmes are put in place.

Goals and means of achieving them

8.73 Subsection (3) sets out the things for which the authorising Act must provide. Paragraph (a) concerns the goals to be achieved by the programme and the persons or groups it is intended to benefit. For example, its purpose may be to enable indigenous Fijians to undertake small business enterprises, generally, or in relation to a particular activity, say fishing. This must be specified. Paragraph (b) requires the Act to specify the means through which the goals are to be achieved. They might include access to loan finance for the purchase of boats, access to market research about the species which can be sold at a profit on the local or overseas market, training both in marketing and in business management, and access to ongoing business advice.

Performance indicators

8.74 Paragraph (c) requires the Act to set out the performance indicators for judging the efficacy of the programme in achieving its goals. The term "performance indicators" describes the standards by which the success or otherwise

of non-commercial public sector activities may be judged. It is a substitute for "profitability", the basic test for judging the success of commercial activities. Specifying performance indicators has the advantage of allowing those designing and administering the programme themselves to decide on appropriate criteria for judging the efficacy of the programme.

8.75 Because the application of performance indicators should be capable of being audited, to see if the results claimed are "true and fair", performance indicators should be as objective as possible. They often focus on the *number* of successful outcomes achieved within a certain period of *time*. There is a danger, however, in pursuing objectivity at the expense of over-simplification. We do not suggest that performance indicators should be mechanistic or always quantifiable. Rather, they should provide as fair and consistent a way as possible of judging the success or otherwise of the programme, remembering always that its beneficiaries are *people*, and what people consider to be of benefit to them can be regarded as successful.

Selection criteria

8.76 Paragraph (d) applies only to programmes under which disadvantaged *groups*, as distinct from disadvantaged *individuals*, are to benefit. It touches on one of the most difficult issues of all in designing affirmative action programmes. How are the members of the targeted group to be selected? It is here that a sense of conflict between individual and group rights sometimes emerges.

8.77 If individuals are the beneficiaries, it is usually assumed that the benefits should go to the most disadvantaged. If groups are the beneficiaries, then the most disadvantaged members of the group are not necessarily those who will be in the best position to profit from the assistance available to the group. In the case of business enterprise, or access to land for sugar cane growing, for example, the individuals most likely to succeed are probably those with the best education, training or experience, and some capital of their own to invest - the "proven track record" as it is often called. If the goal is success for the group as a whole, it may sometimes be best to concentrate on those most likely to achieve that success without regard to the fact that, as individuals, they already have advantages.

8.78 The Commission considers that the Constitution should not seek to predetermine the answers to these difficult questions about eligibility. It should do only two things: make sure that the selection criteria under a particular programme are specifically addressed, and require them to be applied in a non-discriminatory way, among members of the eligible group. That requirement is laid down in subsection (4).

Subsection (4): No discrimination in selecting participants

8.79 This subsection allows the identity of the benefited group to be specified by reference to prohibited grounds of discrimination, and also the identity of the individuals who will be eligible to benefit from the programme. However, it forbids discrimination in the application of the selection criteria themselves. To some extent, the grounds on which it is permissible to discriminate will be a matter of definition. If the Act provides that the programme is to benefit "Fijians" wishing to go into business, then, in selecting the Fijians who are to receive assistance under the programme, there must be no discrimination between male and female Fijian applicants. If, however, the programme is to benefit "Fijian women", then it will apply only to female Fijians, but there may be no discrimination among that group on the grounds of "age" or "place of origin".

8.80 Similarly, if the selection criteria include, say, "a minimum cash contribution of $F5,000, then a person's "economic status" will be relevant to the application of this requirement. So will "age", if the programme is for persons "over 30", or "under 70". The purpose is not to prevent prohibited grounds of discrimination from being taken into account when relevant. It is to reassure all individuals and communities that, once Parliament has determined the targeted group and the criteria for selecting the members of the group who are to benefit, there will be no discrimination behind the scenes in the process of selecting the individuals who become entitled to assistance.

Subsection (5): Monitoring and reporting

8.81 This subsection sets constitutional requirements for monitoring the efficacy of affirmative action and social justice programmes. Initially, the duty is laid on the administering department or other government agency. It must keep and analyse relevant data on the basis of the specified performance indicators. The analysis should lead to useful information about the efficacy of the programme. The responsible Minister must include this analysis in his or her annual report to Parliament.

8.82 Such a report should provide a firm basis for future policy decisions about whether the particular programme is sound and how other programmes should be designed. It will be important for politicians not to gild the lily in presenting the results, or make political capital out of apparent failures, particularly in the short term. Programmes to achieve what is, in effect, social engineering, usually need to run for a long period before their utility can be gauged. The objective is to help Government and Parliament to put in place effective and widely supported programmes.

Subsection (6): Sunset clause

8.83 This subsection provides that the Act authorising a particular programme will automatically lapse after 10 years, unless it has already expired or been repealed. The programme may be re-enacted, with or without amendment. The purpose is to enable Government and Parliament to assess the results achieved by the programme during the previous 10 years, and make a deliberate decision on whether or not it should be renewed.

8.84 Renewal is permitted "unless the benefited persons or groups have demonstrably ceased to be in need of such a programme". That will obviously be a matter for political judgment, taking into account the duty laid on Government by subsection (1). The test is whether the programme continues to be "necessary" for one or more of the specified purposes. The submissions urged that the Constitution should make provision for both the monitoring and the automatic expiry of affirmative action programmes so that they cannot be "captured", either by the bureaucracy or the targeted group.

Subsection (7): Existing rights not affected

8.85 This subsection provides the reassurance to persons not entitled to benefit from a particular programme that its application to others will not deprive them of any right to which they have already become entitled. It refers specifically to any position or seniority in any aspect of the service of the Republic, place in an educational or training institution, scholarship or other financial support, right to carry on any business or profession or to enjoy any other opportunity, amenity or service to which that person has already become, and would otherwise remain, entitled.

Corresponding provision is included in the section of the *Malaysian Constitution* that was the model for section 21 of the 1990 Constitution but was omitted from section 21 itself. Again, some of those making submissions sought the inclusion of such a guarantee.

Equality of access to the service of the Republic of the Fiji Islands

8.86 The Commission received a number of submissions about the basis on which persons should be selected to serve the state in all its various aspects. Some supported the existing allocations as between Fijians and other ethnic communities. A number wished to go further in specifying that certain senior positions should always be held by Fijians. Other submissions considered that the overriding objective was the efficiency of all departments, services, and other

bodies. They supported appointments and promotions on the basis of merit. But some of them, too, thought that equity required positions at all levels to be distributed roughly in proportion to the representation of the particular community in the population as a whole. The Commission has weighed the various arguments.

8.87 First, we understand that the present requirement in section 127(11) of the 1990 Constitution that

> each level of each department in the public service shall comprise not less than fifty percent Fijians and Rotumans and not less than forty percent of the members of other communities

is impracticable in its application. Presumably the Prime Minister has to exercise his dispensing power under section 127(12) on many occasions.

8.88 Secondly, any provision about the ethnic composition of the public service or other aspects of the service of the state, or about the ethnicity of the holders of particular offices, cuts across the right of all citizens to have access, on general terms of equality, to public service in their country, clearly stated in the international instruments. No provision about the ethnicity of particular office-holders, or the proportions in which ethnic communities are to be represented in the various branches of the public service would be consistent with the international standards. However, the absence of proportionality is likely to be a good indication that temporary remedial measures are required for the purpose of achieving effective equality of access.

8.89 In any event, the requirement of proportionality gives an almost impossible task to those responsible for making appointments. How is the appointing authority to decide whether to choose one, rather than the other, of two candidates of different ethnicity who have comparable qualifications? And if their qualifications are not comparable, when is it required to pass over the better qualified, and appoint the person who is clearly a second choice, in order to help maintain proportionality? Even if entry-level proportionality can be achieved, that will be of little comfort if differences in qualifications mean that the appointees from one ethnic community are more likely to be promoted than the members of another.

8.90 The responsibility of recruiting and promoting staff is always a difficult one, whether in the public or the private sector. Attempts in both sectors in recent years to base the decisions on objective performance measures have largely come to nothing. The modern approach in the state sector as well as the private sector is to make the selection on the basis of merit, but with conscious regard for the need to provide equal opportunities for men and women, and members of all ethnic communities.

8.91 For that reason the question of whether there should be a right of appeal against decisions about appointments or promotions in the public sector is controversial. We discuss that question further in Chapter 13. In any event, we are satisfied, for the reasons just explained, that the appeal procedure is not the correct avenue through which to pursue the goal of ethnic proportionality. The issue should be tackled in a different way.

8.92 To achieve efficiency, public service managers and those responsible for the recruitment and promotion of the members of other state services need to be free to make appointments and promotions on merit and without discrimination on a prohibited ground. This means that there should be no reservation of particular positions for members of a particular ethnic community. Nor should there be provisions specifying the proportions in which particular ethnic communities should be represented. However, the Constitution should require the need for broad proportionality, along with other factors, to be taken into account in recruiting and promoting the members of all state services and in managing those services. In Chapter 14 we make proposals to give effect to this approach.

Redressing imbalances

8.93 Here we emphasise that if, in the public service and other state services, there is a significant imbalance in the distribution of positions, at the various levels, among the different communities, it will be necessary to look at the reasons. Similarly, it will be necessary to look at the reasons for imbalances as between men and women. No society can afford to make any section of its population feel that they are unfairly excluded from access to positions in the service of the state.

8.94 One reason for imbalances may be occupational preferences. Some groups or communities, generally speaking, may have a preference for some types of work and not others. This should be accepted, but should not be allowed to become a stereotype, effectively excluding individual members of a community or group who, contrary to the general trend, seek employment in a particular type of work.

8.95 Another possible reason may be discrimination on a prohibited ground. This is an allegation that is easy to make and difficult to prove. It should not be made lightly, because the very making of it is likely to exacerbate race relations. But if there is good reason to think that discrimination is taking place, the matter can be tackled through negotiations at the industrial relations level, questions or debate in Parliament, and, if necessary, action in the courts.

8.96 A third reason for imbalances, and we believe the most likely, may be a

lack of suitably qualified applicants from all communities and groups. Among Fijians, the causes are likely to lie in their levels of education, training and experience: matters which are already being remedied through affirmative action measures to bring their performance levels up to those of other communities. Among Indo-Fijians, the causes may lie in the absence of access to tertiary education for the children of families who cannot afford to fund it, as well as a lack of confidence about being welcome, and doubts about the long-term career prospects, including opportunities for promotion to the highest levels.

8.97 These last-mentioned causes should be dealt with through affirmative action programmes. These should be aimed at ensuring that members of all communities and groups will be well-equipped to compete on a basis of equality for state sector employment and promotion. The focus should be on increasing the pool of well-qualified applicants of both sexes and from all communities. We propose the inclusion in the Constitution of a provision that will point to the need to take appropriate affirmative action in respect of particular ethnic communities if they are found to be under-represented in any aspect of the service of the state, or at any level of that service.

8.98 The proposed provision takes the form of an interpretation section which would accompany the provision on affirmative action. Our draft reads as follows:

> **# Equality of access to the service of the Republic of the Fiji Islands**
>
> An ethnic community is to be taken as having effective equality of access to an aspect of the service of the Republic of the Fiji Islands, or any level of that service, only if it is represented there in a number broadly proportionate to its number in the adult population as a whole, unless its under-representation is demonstrably due to the community's occupational preferences.

8.99 Although we do not think it feasible to make similar constitutional provision concerning the under-representation of women, the question of whether there is a need to establish affirmative action programmes to equip more women for appointment and promotion in the service of the state should be kept under constant review. All employing authorities should be alert to the existence or development of ethnic or gender imbalances in the services for which they are responsible. Although individual appointments and promotions should be on merit, employing authorities should take all reasonable steps to make sure that there is a good supply of applicants from all communities. Recruitment campaigns can legitimately target particular communities or groups, though without excluding other applicants.

SUPPORT FROM CIVIL SOCIETY

8.100 The Commission received submissions from a number of non-governmental organisations on the question of affirmative action for disadvantaged communities and groups. Many of them would be willing and able to enter into useful arrangements with Government to support particular affirmative action programmes. For example the Chambers of Commerce and Industries in the main cities recognised the need for greater Fijian participation in commercial activity, and made it clear that they were ready to help if asked.

8.101 Non-governmental organisations are, of course, already fully involved in efforts to help the disadvantaged members of all communities. There are opportunities for Government to enter into fruitful partnerships with a variety of organisations, as a way of implementing effective affirmative action and social justice programmes. These programmes require human input as well as money. Through such organisations, it should be possible to find ways of harnessing the energies of people who are willing to share with others the benefit of their practical experience, particularly in the field of commerce. We accept that it may take time to build the sense of mutual confidence that will enable practical help to be given and accepted freely across racial lines.

8.102 Women's groups, too, are a necessary stimulus and conduit for bringing to women of all communities the sense that they have the ability to make an all-important contribution to changing their conditions of life and those of their communities, as well as to the life of the nation. We believe there are ways in which Government could work with a variety of women's organisations in delivering programmes to improve material conditions and equal outcomes for women in comparison with men.

RECOMMENDATIONS

191. The Constitution should require the Government to put in place not only affirmative action programmes for the benefit of the Fijian and Rotuman people, but also similar programmes for other ethnic communities, and for women, and for all other disadvantaged citizens or groups in the Republic of the Fiji Islands.

192. The Constitution should include new provisions for this purpose. Sections 18 and 21 should be repealed.

193. **The new provisions should treat on exactly the same basis, programmes for affirmative action for the benefit of communities or groups identified by their *race*, *ethnic origin* or *gender*, and individuals who need assistance on account of their *economic status*, *age* or *disability* - all of which are recommended as prohibited grounds of discrimination under the Bill of Rights.**

194. **The programmes for the purposes mentioned should be required to be "reasonable and necessary" for securing "effective equality of access" to education and training, land and housing, participation in commerce and all aspects of service of the Republic of the Fiji Islands, at all levels, and to other opportunities, amenities and services essential to an adequate standard of living.**

195. **The Constitution should authorise the limitation of the right to equality under the law and freedom from discrimination on a prohibited ground for the purpose of putting in place affirmative action and social justice programmes on the condition that each programme is authorised by an Act of Parliament.**

196. **Such an Act must specify the goals to be achieved by the programme, the persons or groups it is intended to benefit, and the means through which the goals are to be achieved. The Act must also set out the performance indicators for judging the efficacy of the programme in achieving its goals, and the criteria for selecting the individuals who will be entitled to the privileges or advantages. The selection criteria must be applied without discrimination on a prohibited ground not relevant to the identity of the benefited group or the application of the selection criteria.**

197. **The Constitution should lay down monitoring and reporting requirements enabling the Government and Parliament to assess the efficacy of each programme.**

198. **An Act authorising a particular programme will lapse automatically after 10 years (if it has not sooner been repealed or expired), but the programme may be re-enacted, with or without amendment, unless the benefited persons or groups have demonstrably ceased to be in need of such a programme.**

199. The Constitution should provide that no programme may directly or in its effect deprive any person not entitled to its benefits of a position, place in an educational or training institution or right to carry on a business or profession or any other opportunity, amenity or service to which he or she has already become entitled.

200. The Constitution should not reserve particular appointive positions in the service of the state for members of a particular ethnic community. Nor should it specify the proportions in which particular ethnic communities should be represented in the public service or other state services.

201. The Constitution should include a provision that will point to the need to take appropriate affirmative action to improve the qualifications and training of members of particular ethnic communities so as to enlarge the pool of eligible candidates if those communities are found to be under-represented in any aspect of the service of the state, or at any level of that service.

202. The question of whether there is a need to establish affirmative action programmes to equip more women for appointment and promotion in the service of the state should be kept under constant review.

203. Government should explore the possibilities for entering into fruitful partnerships with a range of non-governmental organisations, as a way of implementing effective affirmative action and social justice programmes, with the object of encouraging practical help to be given and accepted freely, across racial lines.

204. The recommended constitutional provisions should be based on the following draft:

Social justice and affirmative action

(1) The Government of the Republic of the Fiji Islands shall establish programmes which are reasonable and necessary to ensure for the Fijian and Rotuman people and other ethnic communities, and for women as well as men, and for all other disadvantaged citizens or groups of citizens, effective equality of access to

(a) education and training,

(b) land and housing,

(c) participation in commerce and all aspects of service of the Republic of the Fiji Islands at all levels, and

(d) other opportunities, amenities or services essential to an adequate standard of living.

(2) A programme for the purposes of this section is valid notwithstanding the fact that it confers privileges or advantages on persons or members of a group on one or more of the grounds on which discrimination is prohibited by section # (Right to equality under the law and freedom from discrimination), if the programme complies with subsections (3) and (4).

(3) The programme must be authorised by an Act which specifies:

(a) the goals of the programme and the identity of the persons or groups it is intended to benefit;

(b) the means by which those persons or members of the benefited group are to be assisted to achieve the goals;

(c) the performance indicators for judging the efficacy of the programme in achieving its goals;

(d) if the programme is for the benefit of a group, the criteria for the selection of the members of the group who will be entitled to participate in the programme.

(4) The participants in a programme for the benefit of a group must be selected without discrimination on any ground referred to in section #, other than a ground relevant to their membership of the group or the application of the selection criteria.

(5) The administering department or other agency must monitor the efficacy of the programme by reference to the specified performance indicators. The responsible Minister must make an annual report to Parliament on the results revealed by the monitoring.

(6) Unless it has sooner expired in accordance with its terms or has been repealed, an Act authorising a programme for the purposes of this section expires on the tenth anniversary of its entry into force, but the programme may be re-enacted, subject to compliance with subsection (2), unless the benefited persons or groups have demonstrably ceased to be in need of such a programme.

(7) No programme for the purposes of this section shall, of itself or in its effect, deprive any person not entitled to its benefits of any position or seniority in any aspect of the service of the Republic, place in an educational or training institution, scholarship or other financial support, right to carry on any business or profession or to enjoy any other opportunity, amenity or service to which that person has already become, and would otherwise remain, entitled.

Definitions

In this Chapter, "service of the Republic of the Fiji Islands" means service in any capacity on appointment by the President, the Cabinet, a Minister, a Commission or any public officer, or by resolution of Parliament or any Committee of Parliament, or by or on behalf of any local authority, whether or not the appointee is remunerated wholly or partly by public money, but does not include service as a member or employee of a body provided for in an Act referred to in section # (Entrenched legislation).

9

MAKING LAW AND POLICY: THE INSTITUTIONS OF GOVERNMENT

9.1 In this chapter the Commission sets out its proposals about the main institutions of government through which political power is exercised. We discuss the roles, and the consequent arrangements for the appointment or election, of the following bodies and offices:

- the Bose Levu Vakaturaga
- the President
- the Prime Minister and Cabinet
- the Opposition
- Parliament, consisting of
  - the Bose Lawa (at present known as the House of Representatives), and
  - the Bose e Cake (at present known as the Senate),

as well as the President.

We also outline the system which should be used for the election of all candidates for elected office, and other aspects of the arrangements for the election of Members of Parliament. These are fully discussed in Chapter 10.

LINKAGES AND WIDER IMPLICATIONS

9.2 Before discussing each of the institutions mentioned, we should like to make three points. The first is that, as the organs through which the state makes policy and laws, the composition and functions of all of these main institutions of government are interwoven. It is not possible to think about the arrangements for any one of them, without focussing on the implications for the others. We acknowledged this inter-relationship early in our own discussions by describing it as a "web". Our proposals about the functions and composition of each institution link them to one another in ways that will, we believe, create a viable, coherent and enduring constitutional structure. For that reason, we urge that the institutions be considered as a whole, not in isolation. A significant modification of the proposals for any one of them would risk weakening the tensile strength of the whole structure, and make it incapable of serving its intended purposes.

9.3 Secondly, it is important to focus on what those purposes are. In Chapters 2, 3 and 5, the Commission explained why, in the interests of all communities, political power should be shared among them. We recommended that the encouragement of multi-ethnic government should be the main objective of new constitutional arrangements.

9.4 We have also recommended the continuing recognition of the principle that Fijian interests are paramount, with the object of ensuring that, in the formation of a multi-ethnic government and its conduct of the affairs of the nation, the interests of the Fijian community are not subordinated to the interests of other ethnic communities. Fijian interests can and should be safeguarded in the context of the duty of all governments, whatever their ethnic makeup or political orientation, to take full account of the interests of all communities. If those interests appear to conflict, all parties should have a duty to enter into negotiations in good faith in order to reach agreement. We have recommended that these principles should be set out in the Constitution in the form of a Compact among all the people of the Fiji Islands.

9.5 We have also recommended that, in the light of these and other safeguards for the interests of the Fijian and Rotuman people, the electoral arrangements for the Bose Lawa can and should be based on the principle of equal suffrage. That principle should be departed from only to the extent necessary for the purpose of bringing about a transition from the present system of communal representation to a more open system. Even then, the departure should be kept as small as possible.

9.6 The Commission has also recommended that the Constitution should encourage the emergence of multi-ethnic governments by

- continuing to provide for the parliamentary form of government, under which the Prime Minister and Cabinet are chosen from among members of Parliament;
- recognising the role of political parties in forming governments that can command the support of a majority in Parliament's Lower House;
- providing incentives for cooperation among ethnic communities in forming and supporting political parties;
- phasing out communal representation, but still providing reasonable assurances to all communities that they will continue to be adequately represented in Parliament;

- imposing controls on the exercise of governmental powers so that, if multi-ethnic governments take office, all communities can be confident that their rights and interests will still be fully protected.

9.7 That leads to the third point. The proposals put forward in this chapter about the composition, election and powers of the country's political institutions must be looked at in the context of the safeguards provided by the Constitution as a whole. We have already described the purpose and content of the recommended Compact among all the people of the Fiji Islands.

9.8 We have also shown that the Bill of Rights provides strong guarantees to individuals and groups that their fundamental rights and freedoms, including their rights to land, cannot be interfered with by any government. In upholding these rights, the courts play their part, along with the executive and legislative branches, in protecting citizens against the power of the state. We have also proposed that the Constitution should place on governments a clear duty to take reasonable and necessary measures to promote ethnic and gender equality and social justice for all citizens.

9.9 In later chapters we discuss other constitutional safeguards, including arrangements for giving backbench members of all parties in Parliament the opportunity to influence executive decision-making; the protection of the independence of the courts; and arrangements to ensure efficient and politically neutral state services and ethical and accountable government. The Constitution will also protect the existing rights of all communities and groups. These include the rights of landowners under the 1990 Constitution in respect of natural resources and all rights under the entrenched legislation relating to Fijians, Rotumans and Rabi Islanders as well as to agricultural landlords and tenants.

9.10 The proposed arrangements for the institutions dealt with in this chapter should be evaluated in this wider setting. Only then can the people of the Fiji Islands make decisions about their future constitutional arrangements that will enable them to overcome the negative aspects of their constitutional inheritance. We have described this in Chapter 2 as the divisive and destructive interaction of the Westminster system of government on the one hand, and communal representation on the other, especially coupled with the perception that the protection of Fijian interests required the perpetuation of a predominantly Fijian government.

9.11 The following proposals put in concrete form constitutional arrangements that involve significant changes from the 1990 Constitution, and indeed the 1970 Constitution. The Commission believes that these changes are essential, if all communities are to live in unity and harmony in these islands and join together in governing them. We urge all citizens to consider not only the proposals themselves, but the reasons why the Commission has put them forward. It is time for all individuals and communities to reassess many of their existing assumptions about the structure of the main institutions of government.

THE BOSE LEVU VAKATURAGA

Need for greater recognition in the Constitution

9.12 Submissions from members of all communities expressed their respect for the Bose Levu Vakaturaga and its pre-eminent role in Fijian affairs. They recognised its beneficial influence in promoting not only the well-being of indigenous Fijians, but also that of the nation as a whole. There was wide support for the idea that the Constitution should not merely "recognise" the Bose Levu Vakaturaga as it does now, but also specify its composition, functions and powers.

9.13 The Commission endorses this view. The constitutions of a number of other Pacific Island countries embody aspects of their traditional chiefly systems and combine them successfully with democratically elected legislatures and governments. The Constitution should therefore provide that the chiefly council, known as the Bose Levu Vakaturaga, shall continue to exist, and have the composition, functions and powers provided for in the Constitution.

Membership

9.14 The submissions expressed a variety of views about the desirable composition of the Bose Levu Vakaturaga. Members of other communities recognised that this was largely a matter for Fijians. Among Fijians, there was emphasis on recognising the position of the paramount chiefs, but also on the need to include persons with the education and experience to contribute to the discussion of important issues. Some favoured a mixture of hereditary and elected members.

9.15 Interest was expressed in recognising the special place of the recognised successors to those chiefs who signed the Deed of Cession. The Commission's researches revealed, however, that the composition of the group who actually signed the Deed of Cession on 10 October 1874 was partly a matter of chance. It did not include some chiefs who were senior in rank or who had been involved in

earlier negotiations about cession. It also included more than one member of some families. Nor does the composition of the signatory group at that time reflect arrangements that have since become well-accepted. For these reasons, the Commission considers that the Deed of Cession should not be used as a reference point for determining the present-day composition of the Bose Levu Vakaturaga (also referred to as the BLV).

9.16 The composition of the BLV should take account of its contemporary role. We consider that it should continue to be essentially an advisory body, though with the important functions of nominating candidates for the office of President and exercising a veto power over amendments of the entrenched legislation relating to Fijians, Rotumans and the Rabi Island community. As we explain below, it should be more independent of government than it is now.

9.17 The Commission considers that the Bose Levu Vakaturaga should consist of 46 members, and be made up as follows:

Ex officio members:	The President; The heads of the traditionally recognised confederacies of Kubuna, Burebasaga and Tovata; The minister responsible for Fijian affairs;
Appointed members:	Twenty members selected by the heads of the three confederacies jointly; Five members, being persons of wide knowledge and experience in business, the professions, or other fields, nominated by the Chairperson of the BLV and confirmed by the BLV as a whole;
Elected members:	Fourteen members elected by the Provincial Councils, one by each; One member elected by the Council of Rotuma; A person elected by the Rabi Island Council should be invited to attend when matters relating to the Banaban Land Act or the Banaban Settlement Act are under discussion.

9.18 Under this proposal, the BLV will be slightly smaller that its present size of 56. The Commission envisages that provincial interests will be reflected not only through the members elected by the Provincial Councils, but also through

those appointed by the heads of the confederacies. We see this mechanism as taking into account traditional territorial subdivisions and chiefly responsibilities in a more flexible way than is permitted by the direct representation of the provinces themselves.

9.19 There will no longer be any political input into the process of selecting members. However, the Minister responsible for Fijian Affairs will remain the main link between the BLV and Government. The Prime Minister will no longer be a member in that capacity, but can be invited to attend meetings. Members of Parliament who are not Ministers or Deputy Ministers should be eligible for appointment or election as members of the BLV, but their seats should become vacant if they accept appointment as a Minister or Deputy Minister.

9.20 The term of appointed and elected members should be three years. There should be no formal qualifications for membership, apart from those of the members to be nominated by the Chairperson. The concept of a "chiefly council" does not preclude the membership of persons who are not chiefs, but appointments by the heads of the three confederacies and elections by the Provincial Councils are likely to ensure adequate representation of persons of chiefly descent.

9.21 On the death of a head of a confederacy, the successor to that office will become a member of the BLV. If a head of a confederacy should be elected as President, or to any other political office, he or she should be entitled to designate a person to sit in the Bose Levu Vakaturaga for the time being as the representative of that confederacy. Other casual vacancies in the BLV's membership should be filled by appointment or election, as applicable to the member whose seat has become vacant. New members appointed or elected should serve for the balance of the term of their predecessors but should be eligible for re-appointment or re-election.

Procedure

9.22 The BLV should elect one of its members to be its Chairperson as the first item of business at its first meeting after the regular election of members by the Provincial Councils. The Secretary of the BLV should preside for this purpose. The members nominated by the Chairperson should be confirmed as the first item of business at the next following meeting and, if confirmed, invited to take their seats. Otherwise, the BLV should be free to regulate its own procedure. We assume most decisions would continue to be taken by consensus, but the possibility of a vote should not be excluded.

9.23 Consistently with our proposals for the Bose Levu Vakaturaga to be more independent in the exercise of its functions, it should be free to convene at times of its own choosing, as well as at the request of the Minister. It should meet not less frequently than once a year. It may need to convene at short notice if the office of President should become vacant, or there is a need to consider a Bill over of which it has a veto power. At any meeting, the Bose Levu Vakaturaga should be entitled to take up any matter relevant to its functions.

Functions

9.24 The Constitution should provide that the functions of the Bose Levu Vakaturaga are to advise the Government of the Republic of the Fiji Islands principally on any matter relating to the well-being of the Fijian people, but also on matters affecting the nation as a whole, whether referred to it by the Minister or the Fijian Affairs Board, or taken up by the Bose Levu Vakaturaga on its own initiative. Such a provision would reproduce the substance of section 3(2) of the Fijian Affairs Act, but go beyond it in giving the Bose Levu Vakaturaga a mandate to consider any matter of national concern, whether or not it particularly affects the well-being of the Fijian people. The Government can be expected to give due weight to the Bose Levu Vakaturaga's views.

9.25 The Bose Levu Vakaturaga should also have the functions concerning the nomination of candidates for the office of President proposed later in this chapter, and the responsibility of approving Bills altering the entrenched legislation relating to Fijians, Rotumans and the Banaban community settled on Rabi Island, or any other Bill certified by the Attorney-General as affecting Fijian land or customary rights. That responsibility is fully discussed in Chapter 20.

9.26 The Bose Levu Vakaturaga will thus take direct responsibility for approving Bills in the circumstances where section 78 of the 1990 Constitution now requires the approval of not less than eighteen of the twenty-four nominees of the Bose Levu Vakaturaga in the Senate. This change is proposed for two reasons.

9.27 First, many submissions urged that alterations to the entrenched legislation and other matters affecting Fijian land or other customary rights should be taken out of the hands of Parliament, so that they no longer appear to be at the mercy of the political process. The Commission agrees with this approach. Parliament will still need to be involved in any proposals to change the existing law, but, as proposed in Chapter 20, the Bose Levu Vakaturaga will have a veto power. This should reassure indigenous Fijians that the proposed changes in the composition

of Parliament and the encouragement of multi-ethnic governments will not put their land or other customary rights at risk.

9.28 Secondly, the proposed arrangements for the membership of the Bose e Cake provide for a largely elected body. For the reasons explained below, Fijian members are likely to predominate. We therefore propose that the only power to appoint members of the Bose e Cake should reside in the President, for the purpose of taking account of ethnic or gender imbalances in the composition of Parliament as a whole. For these reasons, there will no longer be a need for the Bose Levu Vakaturaga to nominate members of the Bose e Cake.

9.29 The Constitution should authorise Parliament to confer additional functions on the BLV by Act. Any such functions should be required to be compatible with the duty to act independently.

Duty to act independently

9.30 In view of the important functions of the Bose Levu Vakaturaga just described, specially those concerning the nomination of candidates for the office of President and the approval of changes to the entrenched legislation, the Constitution should protect its independence from the Government. As in the case of the constitutional officers and Commissions whose independence is already recognised, it should provide that the Bose Levu Vakaturaga shall not be subject to the direction or control of any other person or authority in the exercise of its functions.

9.31 This implies an independence not only from Government, but also from any political party. Submissions from some Fijians expressed concern about the identification of the Bose Levu Vakaturaga with party politics. That development was a product of its time. The conferment of additional constitutional responsibilities on the Bose Levu Vakaturaga and explicit recognition of its duty to act independently will give it the opportunity to distance itself from party politics, though the BLV will continue to be involved in politics in the broader sense.

9.32 The Commission considers that, as a facet of its independence from Government, arrangements should be made for the Bose Levu Vakaturaga to have reasonable autonomy in matters relating to its secretariat and its funding. Because the BLV meets only at intervals, it might be necessary for both to continue to be provided through the Ministry of Fijian Affairs or the Fijian Affairs Board. However, the BLV should have delegated authority to approve expenditure within the limits of the amount appropriated for its use by Parliament, and the members

of the secretariat should be answerable to the BLV and its Chairperson in the exercise of their duties.

Not a substitute for the Senate

9.33 Some submissions favoured giving greater powers to the Bose Levu Vakaturaga so that it could replace the Senate. The Commission believes that the Bose e Cake, as we suggest that body be called, can continue to serve a useful purpose as a House of review. That purpose can be enhanced by the new arrangements governing its membership, as proposed below. Accordingly, our proposals about the Bose Levu Vakaturaga should be considered in the light of our later recommendation for the retention of an Upper House.

RECOMMENDATIONS

205. **The Constitution should provide that the chiefly council, known as the Bose Levu Vakaturaga, shall continue to exist, with the composition, functions and powers provided for in the Constitution.**

206. **The Bose Levu Vakaturaga should consist of 46 members, made up as follows:**

Ex officio members:	**The President;** **The heads of the traditionally recognised confederacies of Kubuna, Burebasaga and Tovata;** **The minister responsible for Fijian affairs;**
Appointed members:	**Twenty members selected by the heads of the three confederacies jointly;** **Five members, being persons of wide knowledge and experience in business, the professions, or other fields, nominated by the Chairperson of the Council and confirmed by the BLV as a whole;**
Elected members:	**Fourteen members, each of whom shall be separately elected by each Provincial Council;** **One member elected by the Council of Rotuma;**

A person elected by the Rabi Island Council should be invited to attend when matters relating to the Banaban Land Act or the Banaban Settlement Act are under discussion.

207. **The terms of appointed and elected members should be three years. There should be no formal qualifications for membership, apart from those of the members to be nominated by the Chairperson. Other aspects of membership should be dealt with as proposed in paragraphs 9.19 - 9.21.**

208. **The BLV should elect one of its members as Chairperson as the first item of business at its first meeting after the regular election of members by the Provincial Councils. Other aspects of its procedure should be provided for as proposed in paragraphs 9.22 - 9.23.**

209. **The Constitution should provide that the functions of the Bose Levu Vakaturaga are to advise the Government of the Republic of the Fiji Islands principally on any matter relating to the well-being of the Fijian people but also matters affecting the nation as a whole, whether referred to it by the Minister or the Fijian Affairs Board, or taken up by the Bose Levu Vakaturaga on its own initiative.**

210. **The Bose Levu Vakaturaga should also have the functions later recommended concerning the nomination of candidates for the office of President, and the approval of Bills altering the entrenched legislation relating to Fijians, Rotumans and the Banaban community, or any other Bill certified by the Attorney-General as affecting Fijian land or customary rights.**

211. **The Constitution should authorise Parliament to confer additional functions on the Bose Levu Vakaturaga by Act, so far as those functions are consistent with its recommended duty to act independently.**

212. **The Constitution should provide that the Bose Levu Vakaturaga shall not be subject to the direction or control of any other person or authority in the exercise of its functions.**

213. **As a facet of its independence from government, arrangements should be made for the Bose Levu Vakaturaga to have reasonable autonomy in matters relating to its secretariat and funding.**

AN INDO-FIJIAN COUNCIL

9.34 The Commission received submissions that the Indo-Fijian community should have the possibility of being consulted or expressing its views to Government, through a body which would bring together its religious and other community leaders on a widely representative basis. We endorse the principle behind this suggestion, but think that, initially, it should be taken up informally by the Indo-Fijian community. If there is agreement about the basis for the selection of the members of such a body, and it is able to meet and work in a way that demonstrates broad support for its composition and role, consideration should then be given to providing it with a statutory or constitutional base.

9.35 In the meantime, the Minister responsible for Ethnic affairs should be supportive of any initiative to form such a body. As a community-based, non-governmental organisation, it may be eligible for some financial support.

RECOMMENDATION

214. The Indo-Fijian community should be encouraged to explore informally the possibility of forming a body to bring together its religious and other community leaders on a widely representative basis for the purpose of regular consultations with Government. If such a body proves to be broadly supported, consideration should be given to providing it with a statutory or constitutional base.

THE PRESIDENT

9.36 The Commission's recommendation that the name of the state should be the Republic of the Fiji Islands implied that the Constitution should continue to provide for a republican form of government. In keeping with this recommendation, we also propose that the Head of State should continue to be described as the President. A recent Australian comparative study of Heads of State makes the point that, logically, the method of selection of the President, the qualifications for appointment and the tenure of office should depend on the role which the holder of that office is expected to perform. That might not be wholly true in the Fiji Islands, where there are firmly held views about the identity and method of selection of the President. Even so, it is useful to evaluate those views in the light of the President's constitutional functions.

The President's role and functions

Head of State

9.37 The 1990 Constitution made the minimum changes to the 1970 provisions about the office of Governor-General. The existence of that office implied that the Sovereign was the Head of State. Similarly, the creation of the office of President in 1987 implied that the holder of that office would assume that role. We consider, however, that the Constitution should provide expressly that the President is the Head of State of the Republic of the Fiji Islands.

Commander-in-Chief

9.38 Section 31 of the 1990 Constitution describes the office as that of "President and Commander in Chief". Again, that is a reflection of fact that the 1970 Constitution constituted the office of "Governor-General and Commander in Chief". The title reflects, in part, the modern role of the British monarch as nominally the supreme commander of the armed forces and also the fact that colonial Governors were usually authorised to exercise some of the prerogative powers of the Crown to organise and dispose of the armed forces in the colony.

9.39 It must be assumed that any residual common law powers of the Crown in this and other fields are to be regarded as part of "the executive authority of Fiji" vested in the President by section 82(1) and exercisable mainly through ministers. Moreover, in countries comparable with Fiji, most if not all aspects of the governance of the armed forces are now comprehensively provided for by statute. That is presumably a matter which will be looked at closely in the current Defence Review.

9.40 In any event, it is clear that, in contrast to the position in the United States of America, the coupling of the office of Commander-in-Chief with that of President does not confer legal powers in relation to the armed forces on the holder of the office. The title of Commander-in-Chief is purely honorary. It is well-understood that it conveys no power of actual command over the military forces. We understand that there is a general desire to continue to designate the President as Commander-in Chief. The Constitution should so provide.

The role of the President under a parliamentary system of government

9.41 The President's role and functions are greatly affected by another of the Commission's early recommendations: that the Fiji Islands should retain the parliamentary system of government. This means that most executive power will

continue to rest with the Cabinet. For the most part, the President will be bound to act on the advice of ministers. The holder of the office will not be what is sometimes called an "executive President" who combines the role of Head of State with that of head of the government. In consequence, the President's office closely resembles that of the former Governor-General.

The symbolic value of the office of President

9.42 Like many who made submissions, the Commission attaches importance to the symbolic value of the office of President. In a multi-ethnic society like that of Fiji, the office of President should be seen as exemplifying the unity of the nation. The holder of the office should not be involved in party politics and should be able to command the loyalty of the members of all communities. Although the office of President has been in existence only since 1987, such an expectation is already strong. The question is whether the Constitution should refer expressly to the symbolism of the office of President of the Republic.

9.43 There are two examples of such provisions among Pacific constitutions. The Constitution of Vanuatu provides that "the head of the Republic shall be known as the President and shall symbolise the unity of the nation". Similarly, although Tuvalu is a monarchy, its constitution provides that "... the office of Head of State is a symbol of the unity and identity of Tuvalu, and the Head of State is entitled to proper respect accordingly".

9.44 The Commission considers that, in view of the proposals made below about eligibility to be President, the Constitution should provide expressly that the office of President symbolises the unity of the Republic. Such a provision will be an important signal not only to the people of the Fiji Islands and the person elected to fill the office, but also to the Government, about the advice it might tender on the way in which the President should carry out the duties of the office.

The President as the personification of the state

9.45 In most countries the Head of State performs formal functions reflecting the fact that this is the highest constitutional office in the land. The President attends all state occasions, receives foreign dignitaries and makes state visits to other countries. He or she signs the credentials of the Republic's ambassadors and receives those of ambassadors accredited to the Fiji Islands, and may also perform other formal actions in relation to the conduct of foreign affairs. As the fount of honour, the President confers decorations on citizens who have made a notable contribution to the country.

9.46 In exercising these formal functions, the President acts generally in accordance with the advice of ministers, but within the constraints inherent in the office, is likely to be left considerable latitude, for example in the content of speeches. The exception is the President's speech at the beginning of a new session of Parliament. That document is produced under the direction of the Cabinet to outline the Government's policies and proposals for the coming year.

9.47 The presidential functions arise from the nature of the office of Head of State. They do not need to be provided for specifically in the Constitution, unless it is desired to make provision about how they will be exercised. Other functions will be discussed in later chapters. They include assent to legislation; the appointment of the Prime Minister, other Ministers, judges and other high officers; the summoning, prorogation and dissolution of Parliament and the issue of writs for elections; the exercise of the prerogative of mercy and the power to refer questions as to the effect of the Constitution to the Supreme Court. In exercising most, but not all, of these powers, the President is again required to act in accordance with the advice of ministers, or another constitutional body.

9.48 In Chapter 12, we discuss the matters on which the President acts in his or her "own deliberate judgment". Even then, the President takes account of conventions about the way in which the parliamentary system works in practice. The essence of the President's "reserve" powers is that they are a backstop - there only to ensure that the Prime Minister and other political leaders themselves act constitutionally.

9.49 Under the Constitution, the Prime Minister is required to keep the President informed concerning the general conduct of the government of Fiji, a duty corresponding to that owed to the Sovereign in Britain. The reference to this duty implies that, in his or her confidential discussions with the Prime Minister, the President has the right "to be consulted ... to encourage ... to warn", to quote the well-known words of the 19th century commentator, Walter Bagehot. The President is in a position to exercise considerable influence, rather than power.

9.50 In the Fiji Islands, as in most other countries with a parliamentary system of government, the President's functions are influenced by the way in which the office of Head of State has evolved historically. The role of the President under the Constitution should continue to parallel closely the former role of the holder of the office of Governor-General. In exercising that role, the President should take account of the express constitutional provision already recommended, that the office of President symbolises the unity of the nation. The nature of the President's role should be reflected in the arrangements for choosing the holder of the office.

Choosing a President

Ethnicity

9.51 The majority of those making submissions expressed views about who should be eligible to be President and how the holder of that office should be selected. There was very wide support among all communities for the idea that the President should continue to be an indigenous Fijian. Some thought that, as is the case under the 1990 Constitution, this should not be provided for expressly, but should continue to flow from the manner of choosing the President - a process which should continue to involve the Bose Levu Vakaturaga. This would leave open the possibility that, some day, a member of another community might be acceptable as President of the Republic.

9.52 Others thought that the Constitution should stipulate that the President should be an indigenous Fijian. This group included a number of Indo-Fijians and members of other communities who wished to make it clear that they recognise the special place of Fijians as the indigenous inhabitants of these islands.

9.53 The Commission believes that the office of President should be filled by an indigenous Fijian. That symbolic recognition of Fijians as the indigenous people should be balanced by making constitutional provision for a Vice-President. The holder of that office should be required to be a member of another community. The Constitution should make provision to this effect. Our proposals for the selection of both the President and the Vice-President are set out below.

Qualifications for office

9.54 Some submissions expressed the view that the President should not only be a Fijian, but should also be of chiefly descent. Others took the view that eligibility should focus more on personal qualities, such as integrity, wide experience and ability to provide leadership, regardless of whether the person concerned was a chief or not.

9.55 The Commission shares this last-mentioned view. Apart from the proposed provision about the ethnicity of the President and the Vice-President, we consider that the Constitution should set the same qualifications for the holders of both offices. Reflecting the criteria already established by the Bose Levu Vakaturaga, candidates should be citizens of the Republic who have had a distinguished career in any aspect of national or international life, whether in the public or the private sector.

9.56 Otherwise, the qualifications should be the same as those required of candidates for election as members of Parliament. Although the offices of President and Vice-President require political neutrality, persons who hold, or have held, political office, or other offices in the service of the state, should not be excluded. In Fiji as in other countries, distinguished political figures have demonstrated that they can move without difficulty from membership of Parliament to a constitutional role as Head of State.

9.57 A person holding another public office should not be required to resign from it before accepting nomination for the office of President or Vice-President, but election to either office should automatically terminate his or her service in any other public capacity. Private activities should be governed by the conflict of interest rules applicable to Ministers under an integrity.

Selection

9.58 A number of submissions suggested that the Bose Levu Vakaturaga should be involved in selecting the President. Some thought it should continue to make the actual appointments, but others thought that, because the President is the Head of State of the whole country, the process should involve all communities. Some thought that the President should be elected by all voters. Others suggested that the choice should be entrusted to the people's representatives in Parliament.

9.59 The Commission considers that, in view of the fact that the President's role will be largely ceremonial, despite the important duties associated with the formation or replacement of a government, it would not be desirable for the office to be filled by popular vote. That might lead to the politicisation of the office. A President with a mandate from the majority of voters might have difficulty in accepting that responsibility for the conduct of government remains in the hands of the Prime Minister and other members of the Cabinet.

9.60 We consider that the President should be indirectly elected by the people's representatives in Parliament. For this purpose, the members of the Bose Lawa and the Bose e Cake should sit together as an Electoral College. The presiding officer should be provided for in the standing orders of Parliament.

9.61 On each occasion when the election of a President is required, the Bose Levu Vakaturaga should be required to nominate not fewer than three and not more than five candidates. Though this might appear to involve making invidious decisions, it is a less onerous task than making the appointment itself. Although a member of the Bose Levu Vakaturaga, the President should not be present during

the nomination process. A President completing a first term in office should be eligible for nomination and re-election.

9.62 Once the indigenous Fijians nominated by the Bose Levu Vakaturaga have signified their willingness to be candidates, they should each be required to nominate as their choice of candidate for Vice-President an eligible person belonging to another community. Candidates for the office of President and Vice-President will thus be running mates, standing together on a single ticket. This system should make it easier for them to work together if elected.

9.63 As in the case of the election of the President of Mauritius by the members of Parliament in that country, the election of the President and the Vice-President by the Electoral College should be held without prior debate about the merits of the candidates. The election itself should be by secret ballot conducted under the general supervision of the Electoral Commission.

9.64 Like the elections of the members of Parliament themselves, the election should be conducted under the preferential system known as the alternative vote. That system is described briefly in this chapter, and more fully in Chapter 10.

9.65 To be elected, the paired candidates will need to obtain the support of more than 50% of the members of the Electoral College taking part in the vote, when first and, if necessary, subsequent preferences are counted. That will usually mean that the successful candidates will have significantly more support than would be required if the elections were held under the system known as "first past the post". In that case, the winners would be the candidates with the greatest number of votes on the first count, but they would not necessarily have the support of the majority of the members taking part.

9.66 The President and the Vice-President should hold office for terms of 5 years from the date of taking office. Before taking office, they should each take the Oath of Allegiance and an Oath for the due execution of their respective offices before the Chief Justice, the President of the Court of Appeal or another judge. New nominations should be called for and elections held not more than three months, and not less than one month, before the expiry of the term of the President and Vice-President, and also within three months of the date of any vacancy in the office of President.

9.67 The Vice-President should be empowered to discharge all or any of the functions of the office of President whenever the office of President is vacant, or the President for any reason is unable to discharge that function. There will no

longer be an Acting President. As one submission pointed out, this will mean that, if the President is discharging one of the functions of the office by making an official visit to another country, the Vice-President will be able to discharge other functions at home. In practice, the Vice- President is likely to have a busy calendar of engagements in his or her own right.

9.68 If the office of President becomes vacant, the Vice-President will not succeed to the office of President. He or she will simply discharge the functions of the office until a new President and Vice-President are elected. If, on any occasion, neither the President nor the Vice-President is available to act, the function should be performed by the Speaker.

9.69 If the office of Vice-President becomes vacant during the term of a President, the President should be required to nominate another person eligible to be Vice-President. The nomination should be confirmed by the positive votes of more than 50% of the members of the Electoral College taking part in the vote. If the candidate is not confirmed, the President must put forward another.

Removal

9.70 The Electoral College should also have the responsibility of removing a President or Vice-President. Infirmity of body or mind making it impossible to carry out the functions of the office, or gross misconduct in or affecting the performance of the functions of the office, should be grounds for removal. The reference to gross misconduct *affecting* the performance of the functions of the office is new. It would include conviction for a serious offence, even if not related to the conduct of the office. The Prime Minister should continue to have the responsibility of setting in train the processes for investigation and removal if he or she has or is given reason to believe that either ground may apply.

9.71 Allegations of gross misconduct should continue to be investigated by a Tribunal whose members are appointed by the Chief Justice. It should consist of three persons who are, or are eligible to be, judges of a superior court of the Republic. Allegations of infirmity should continue to be investigated by a Medical Board appointed by the Chief Justice. It should consist of not fewer than three persons qualified as medical practitioners under the law of the Republic. From the time at which a Tribunal or a Medical Board is appointed, the President should be taken as unable to perform the functions of the office.

9.72 On receiving the report of the Tribunal, the Chief Justice should submit it to the Prime Minister, with recommendations. The Chief Justice should forward

the Medical Board's report to the Prime Minister without comment. In either case, the Prime Minister should decide whether there is good reason to submit the report to the Electoral College for its consideration. The Electoral College should be free to debate the report. Removal should require the positive vote of three fourths of the members of the Electoral College present and voting.

Incidental matters

9.73 Parliament should be empowered to make provision by Act for any matter incidental to the nomination, election, terms and conditions of office or removal of the President or Vice-President.

The President's Council

9.74 Section 32 of the 1990 Constitution makes provision for a President's Council. It is to be composed of the President as Chairman and such citizens of Fiji as the President may appoint in his own deliberate judgment. The President may convene the Council to advise him on any matters of national importance. The Report of the *Manueli Commission* indicates that provision was made for such a Council as a means of enabling both the paramount chiefs and distinguished citizens to have an influential role in national affairs. However, no one has ever been appointed to the Council.

9.75 The Commission considers that the idea behind the provision for a President's Council remains valid. We have already proposed that the need for the guidance of the paramount chiefs and other members of the Bose Levu Vakaturaga should be expressly recognised by giving that body an advisory role under the Constitution. The Council should therefore be the vehicle through which the President can derive information and ideas from a wider range of sources.

9.76 However, such a function is capable of putting it on a collision course with the Prime Minister and Cabinet who, under the Constitution, are the President's responsible advisers. There are few national issues on which the Council could express a view publicly without risk of being seen as critical of government policies in the relevant area. This could make it difficult for the President to work constructively with Ministers on the normal confidential basis. Perhaps one reason why the Council has never been convened is the absence of any clear understanding about its relationship with the Cabinet. Another may be lack of provision for its funding. We consider that, if the constitutional provision for a President's Council is to have any significance, these potential difficulties need to be overcome.

9.77 The kind of Council we have in mind would be quite different from the Privy Council in Jamaica, which makes recommendations about the exercise of some of the President's formal executive functions like the exercise of the prerogative of mercy. Nor would it be a body like the presidential councils in Singapore and Portugal which advise a popularly-elected President in the exercise of functions designed to impose constitutional constraints on the actions of the Cabinet.

9.78 We see the Council as a forum in which the President can discuss issues of national importance with a group of distinguished citizens. The Council should not have a formal advisory status, but should function as a non-political think-tank. Its purpose should be to enable the President to bring to bear well-informed views about issues of national importance in the confidential discussions with the Prime Minister and other members of the Cabinet, and also in public speeches and other activities within the bounds of the normal conventions about responsible government.

9.79 In keeping with this purpose, the Constitution should provide that the Council meet with the President in private and keep its proceedings confidential, unless the President, with the concurrence of the Prime Minister, decides otherwise. This means that, with the Prime Minister's agreement, a meeting on a particular topic could be open to the news media and the public, or a report of its proceedings subsequently released. We hope that a convention will emerge under which the Prime Minister will agree that the Council's proceedings should be made available to the public whenever it discusses broad strategies for the long-term solution of issues of national importance.

9.80 The Council should be a standing body of 10 to 15 citizens who have achieved distinction in the professions, commerce, industry, agriculture, cultural activities, social service, religion or the service of the state. There should be a balance in terms of gender, ethnicity, age and regional origin. Serving members of Parliament or other persons holding public office should not be eligible. The President should appoint its members for a term of two years. They should be eligible for reappointment, but care should be taken not to make the Council the preserve of a few. All members should cease to hold office when the office of President becomes vacant.

9.81 The Council should meet as and when convened by the President, but at least once a year. The appropriation for the Office of the President should include reasonable funding for its operation.

RECOMMENDATIONS

215. The Constitution should provide expressly that the President is the Head of State of the Republic of the Fiji Islands.

216. It should continue to give the President the title of Commander-in Chief (which does not confer any powers of actual command).

217. The Constitution should provide expressly that the office of President symbolises the unity of the Republic.

218. The role of the President under the Constitution should continue to parallel the former role of the holder of the office of Governor-General, as proposed in later recommendations.

219. The Constitution should make provision for the office of Vice-President.

220. It should provide that the office of President shall be held by an indigenous Fijian and the office of Vice-President shall be held by a member of another ethnic community.

221. Candidates for each office should be required to be citizens of the Republic who have had a distinguished career in any aspect of national or international life, whether in the public or the private sector, and have the other qualifications required of candidates for election as members of Parliament. However, a person holding another public office should not be required to resign from it before accepting nomination for the office of President or Vice-President, but election to either office should automatically terminate his or her service in any other public capacity.

222. On each occasion when the election of a President is necessary, the Bose Levu Vakaturaga should be required to nominate not fewer than three and not more than five candidates.

223. Each candidate accepting nomination by the Bose Levu Vakaturaga should be required to nominate, as his or her choice of candidate for Vice-President, an eligible person belonging to another community.

224. The Constitution should provide that the members of the Bose Lawa and the Bose e Cake should sit together as an Electoral College for the purpose of electing, as President and Vice-President, one of the pairs of candidates nominated for those offices.

225. **The election should be by secret ballot, held without prior debate, and conducted under the preferential system known as the alternative vote, under the general supervision of the Electoral Commission.**

226. **The President and the Vice-President should hold office for a term of 5 years. Before taking office, they should each take the Oath of Allegiance and an Oath for the due execution of their respective offices. Each should be eligible for election for a second term but not more.**

227. **The Vice-President should be empowered to discharge all or any of the functions of the office of President whenever the office of President is vacant, or the President is for any reason unable to discharge that function. If neither the President nor the Vice-President is available to discharge a function of the President, it should be performed by the Speaker.**

228. **If the office of President becomes vacant, the Vice-President will not succeed to that office, but will discharge the functions of the office until a new President and Vice-President are elected.**

229. **If the office of Vice-President becomes vacant, the President should be required to nominate another eligible person to be Vice-President. The nomination should be required to be confirmed by the positive votes of not less than 51% of the members of the Electoral College taking part in the vote.**

230. **The Constitution should provide for the removal of the President or Vice-President by the Electoral College, on the grounds of infirmity of body or mind making it impossible to carry out the functions of the office, or gross misconduct in or affecting the performance of the functions of the office. The Prime Minister should continue to have the responsibility of setting the processes for investigation and removal in train, if he or she has reason to believe that either ground may apply.**

231. **Allegations of gross misconduct should continue to be investigated by a Tribunal and allegations of infirmity should continue to be investigated by a Medical Board, as proposed in paragraphs 9.70 - 9.71. From the time at which a Tribunal or a Medical Board is appointed, the President should be taken as unable to perform the functions of the office.**

232. The Prime Minister should be required to decide whether there is good reason to submit the report of the Tribunal or Medical Board to the Electoral College for its consideration. If so, the Electoral College should be free to debate the report. Removal should require the positive vote of three fourths of the members of the Electoral College present and voting.

233. Parliament should be empowered to make provision by Act for any matter incidental to the nomination, election, terms and conditions of office or removal of the President or Vice-President.

234. The Constitution should continue to make provision for a President's Council as a forum in which the President can discuss issues of national importance with a group of distinguished citizens.

235. It should provide that the Council will meet with the President in private and keep its proceedings confidential, unless the President, with the concurrence of the Prime Minister, decides otherwise.

236. The Council should be a standing body consisting of 10 to 15 citizens who have achieved distinction in the professions, commerce, industry, agriculture, cultural activities, social service, religion or the service of the state, but should not include serving members of Parliament or state servants. It should meet as and when convened by the President, but not less than once a year. The appropriation for the Office of the President should include reasonable funding for its operation.

THE PRIME MINISTER AND CABINET

The goal of multi-ethnic government

9.82 In a parliamentary democracy, the Cabinet is the institution which has overall authority and responsibility for the exercise of executive government. This is well-understood in the Fiji Islands, though, as a reflection of the legal position of the Sovereign in Britain and other Commonwealth monarchies, the Constitution formally vests the executive authority of the Republic in the President. We leave until Chapter 12 a discussion about the way in which the Constitution should formulate legal rules about the situation and exercise of executive power. Here

we wish to concentrate on how the Constitution can best promote the goal of multi-ethnic government. This means that, ideally, the Cabinet should consist of members who belong to different ethnic communities.

9.83 In Chapter 2, we referred to the wide support for this goal, not only among political parties but also among other citizens who put forward views either as individuals or members of representative groups. It is fair to say, however, that the proposals for achieving the desired goal did not look deeply into how it was to be achieved in a manner compatible with the principles of parliamentary government. Not surprisingly in the present circumstances of the Fiji Islands, there was ambiguity about whether, in forming a Cabinet from among members of the Lower House of Parliament, the emphasis should be placed on their ethnicity, or on the extent of the electoral support received by the party to which they belong. Some proposals called for regard to be paid to both, though it was not always clear exactly how this should be done.

The role of political parties

9.84 In Chapter 2, the Commission recommended that the Constitution should expressly recognise the role of political parties in the formation of a government. Majority rule, as it is sometimes called, is not the product of any theory about the allocation of political power. It was born out of the actual experience of the English House of Commons in the nineteenth century, at a time when the introduction of universal suffrage transformed the House from a body controlled by royal patronage to one controlled by the people. The only way in which this popular participation could provide opportunities for coherent choices was by organising political parties and seeking the support of voters for their different philosophies and policies.

9.85 Among the submissions, there was general acceptance of the idea that, in appointing the Prime Minister, account should continue to be taken of the electoral support received by the party of which he or she is the leader. It was assumed that the Prime Minister would be the leader of the largest party in Parliament. That is likely to be the case under the parliamentary system if there are two main parties, of which one has a clear majority of the seats in the Lower House. However, the emergence of a number of parties in Parliament may mean that no single party has the necessary majority to form a government on its own.

9.86 In those circumstances, a government will have to be formed either by a coalition among two or more parties, or by the willingness of other parties to support a minority government, at least on issues of confidence and supply, even

though they are not taking part in the Cabinet. The leader of the largest party is still likely to be Prime Minister, but the possibility of another choice in the interests of achieving a coalition or support for a minority government cannot be excluded.

A government of national unity?

9.87 One submission proposed that the Prime Minister should be the leader of the largest party in the Lower House of Parliament, but that the formation of the Cabinet should not depend on that party's majority in that House, either alone or with the support of independent members or other parties. Instead, Cabinet should be formed from all parties, in proportion to their representation in the Lower House but subject to a minimum threshold. The leader of the second largest party should be the Deputy Prime Minister, instead of being the Leader of the Opposition, as is usually the case.

9.88 It was suggested that this arrangement should be supported by electoral arrangements under which all communities could expect representation in proportion to their number in the population, that is if parties continued to be communally based and voters continued to support candidates on the basis of their ethnicity. We believe, however, that such arrangements are likely to perpetuate the divisive effect of those which have been in operation in the Fiji Islands since before independence. The cooperation in Cabinet which might result from the requirement for a government of national unity would be unlikely to lead to any change of outlook among parties or voters.

9.89 The proposal itself was very closely based on the arrangements for elections and a government of national unity in force under the interim constitution of South Africa. Our visit to that country was largely for the purpose of finding out how the government of national unity was operating in practice. It quickly became clear that the requirement for a government of national unity had been an essential element in achieving a peaceful transition from the former constitutional arrangements. These had permitted a small minority of white South Africans to rule the entire country through a Parliament in which the coloured community was separately represented and black South Africans not at all. The assurance that the National Party would continue to be represented in the Cabinet, no matter what share of support it received from the electorate, was a key element in enabling it to persuade its supporters to accept a democratic constitution.

9.90 We also found that the Cabinet had worked reasonably smoothly. Among the positive consequences, the participation of the National Party had led to major modifications of the ANU's economic policies in ways that have made South

Africa more attractive to overseas investors. Although Chief Buthelezi's Inkatha Freedom Party was participating only sporadically in the negotiations for the final constitution, he himself was an effective minister. There was a good working relationship between ministers and the still largely white civil service. On the negative side, the ANC, although the party with an overwhelming majority, had experienced frustrations in reaching a consensus with other parties about some important aspects of its policies. Education was mentioned as an example.

9.91 However, the real sticking point appeared to be the absence of what might be described as a "Parliament of national unity". Backbenchers were anxious to make their influence felt. They had the opportunity to do so through the vigorous parliamentary committee system to which we refer in Chapter 11. No party felt bound to support the policies and legislative proposals originating in the Cabinet. The government could not be sure how its proposals would be received in Parliament. The choice for the ANC in the negotiations about a final constitution was whether to persist with the existing arrangements for a government of national unity or put itself in a position to exercise the mandate to govern that would otherwise flow from its decisive majority.

9.92 By the time of our visit, it had become clear that arrangements for a government of national unity would not be a feature of the final constitution. With the subsequent adoption of that constitution, the National Party has withdrawn from the government of national unity. It has assumed the role of Opposition, and is reported to be seeking to broaden its support among the non-white communities.

9.93 We mention the South African situation in some detail, because we considered carefully whether provision for a government of national unity in the Fiji Islands could facilitate the participation in government of members of all communities. However, we are satisfied that, for the reasons which have prevented it from becoming a permanent part of the constitutional machinery in South Africa, it does not hold out the promise of succeeding here.

9.94 We also considered whether constitutional provision for a government of national unity in the Fiji Islands for an interim period could be a useful short term measure providing reassurance to all communities until longer-term measures can be put in place and become effective. We concluded, however, that, in contrast to the position in South Africa, such provision is not an essential precondition for reaching agreement on new, long-term constitutional arrangements.

9.95 We do not exclude informal ways of achieving cooperation among the parties for the purpose of putting new constitutional arrangements in place. That

cooperation will be essential, but it should flow from agreement, not from a constitutional requirement. Although interim constitutional arrangements can provide reassurance, they can also set up tensions about what will happen when they are due to be replaced. They may also create incentives running counter to those intended to be provided by the longer-term measures.

Promoting multi-ethnic government

9.96 In the Fiji Islands, the participation of all communities in governing the country should be encouraged, not by attempting to move away from the concept of the winning party or coalition being the government but by seeking to alter the character of some or all of the political parties themselves. This should be done through the incentives to seek multi-ethnic support created by the arrangements for the election of members of the Bose Lawa. Our proposals are set out later in this chapter.

9.97 These proposals result from our finding in Chapter 2 that the communal system of representation is an obstacle to the emergence of a multi-ethnic political culture and the formation of governments consisting of members of all communities. It does not protect Fijian interests or those of other communities. We see the nature of the electoral system and the nature of government by the people's elected representatives as inextricably linked. Multi-ethnic government is unlikely unless the electoral arrangements lead to the creation of multi-ethnic parties or coalitions. If the people of Fiji want to encourage the emergence of broadly-supported multiracial governments, the arrangements for electing the members of the Bose Lawa need to be changed.

9.98 The Commission proposes that the Constitution should maintain the present system under which a government must have the support of a majority in the Bose Lawa. It should do so in the expectation that the proposed changes in the electoral arrangements will encourage the emergence of multi-ethnic parties or coalitions that will be in a position to form a government.

9.99 This approach has the advantage of ensuring that, in normal circumstances, a united government will be in a position to secure the implementation of its policies. The concept of "winner take all", condemned in a number of submissions, will still apply, but it should no longer have its present effect of allocating government and opposition, not only between parties, but also between ethnic communities. We discuss below the way in which an opposition party or parties will fit into our proposals for multi-ethnic government. In Chapter 11, we also describe our proposals for ensuring that all members of Parliament who are not

ministers, whether from the Government or Opposition parties, have the opportunity to influence the content of legislation.

Choosing a Prime Minister

9.100 The mechanism for appointing a Prime Minister is set out in section 83(2) of the 1990 Constitution. In words which are standard in written Westminster constitutions, the President "acting in his own deliberate judgment" is required to decide which member of the House of Representatives "appears to him best able to command the support of the majority of the members of that House". Although, in law, the provision gives the President a discretion, it is one that should be exercised after taking due account of the parliamentary situation.

9.101 In countries like Fiji with a well-developed party system, there is a constitutional convention that, in appointing a Prime Minister, the President has to consider the electoral support received by the various parties and any other factors which may affect their ability to form a government, alone or in coalition. Under the parliamentary system, this is the mechanism for obtaining a democratic government elected by the people.

9.102 The 1990 provision introduced a further requirement that the President must choose the Prime Minister from among the Fijian members of the House of Representatives. This requirement may cut across the principle that the choice of the Prime Minister must depend on the political situation arising from the representation of the various parties in the House. It is also incompatible with the international standards. These require every citizen to have the right and the opportunity, without distinctions on a forbidden ground, including race, and without unreasonable restrictions, to take part in the conduct of public affairs, directly or through freely chosen representatives.

9.103 For these reasons, the Constitution should not require the Prime Minister to be of a particular ethnicity. As we now explain, other ways should be found of meeting the concerns of all communities about the choice of the person who should hold that office.

Negotiations about the formation of a government

9.104 In discussing the draft *Compact* proposed in Chapter 5, we set out in detail how the interests of indigenous Fijians, as well as those of other communities, can and should be taken into account in the negotiations among parties which may need to precede the formation of a government. Such negotiations, before or

after an election, are likely to focus, among other things, on the identity of the person who should be Prime Minister.

9.105 The negotiations about the formation of a government are likely to lead to agreement about the ethnic composition of the Cabinet. They will be concerned with its party make-up, especially if there is to be a coalition government, rather than a government formed by a multi-ethnic party. This approach provides a basis for protecting the interests of all communities in the identity of the Prime Minister and the composition of the Cabinet. It is sounder in principle and also likely to be more acceptable than any mandatory constitutional requirement.

9.106 The President's confidential discussions with the Prime Minister in office immediately before an election, and if necessary with the leaders of other parties, will ensure that he or she is kept well-informed about the progress and outcome of any negotiations about the formation of a government. It should be understood and accepted by all concerned that any agreement reached will be reflected in the exercise of the President's power to appoint the Prime Minister and the Prime Minister's own recommendations about the composition of the Cabinet.

RECOMMENDATIONS

237. The Constitution should maintain the present system under which a government must have the support of a majority in the Bose Lawa. It should do so in the expectation that the proposed changes in the arrangements for the election of the members of the Bose Lawa will encourage the emergence of multi-ethnic parties or coalitions with the necessary support to form a government.

238. The Constitution should continue to require the President, acting in his or her own deliberate judgment, to appoint as Prime Minister the member of the Bose Lawa who appears to the President best able to command the support of the majority of the members of that House. There should be no stipulation about that member's ethnicity.

239. The Constitution should also continue to provide that the President appoints the other members of the Cabinet on the advice of the Prime Minister.

240. The Constitution should not make any express provision about the ethnicity of either the Prime Minister or the other members of the Cabinet.

241. It should be clearly understood that, in exercising the power to appoint a Prime Minister, the President will take account of the electoral support received by the various parties and other relevant factors, including the outcome of negotiations about the formation of a government, the identity of the Prime Minister and the composition of the Cabinet.

THE OPPOSITION

The nature of the Opposition

9.107 In this report we have placed much emphasis on the need for multi-ethnic government. It follows that, just as government should not be the preserve of particular communities, so also, no community should be cast in the role of perpetual opposition. We believe that our proposals for the election of members of the Bose Lawa are likely to increase the extent to which the Opposition, as well as the Government, is multi-ethnic.

9.108 That is a necessary evolution if the Opposition is to have an effective role in debating government policies and proposals. Submissions made the point that critical analysis cannot be penetrating nor effective if it is possible to portray it as racially based. Fijians need to be in the Opposition as well as in Government, so that they can hold the Government to account for those matters affecting Fijians that Opposition members from other communities would be hesitant to raise.

9.109 Before looking further at the likely nature of the opposition party or parties, it is worth discussing the role of the Opposition under the Westminster system. Democratic government is based on electoral contests for political power. The idea that the people should have a choice about who is to govern them is fundamental.

9.110 Not all democratic systems assign the same constitutional significance to the role of opposition. Under the Westminster system, the proceedings of Parliament are organised on the assumption that its procedures should facilitate the questioning of the Government's policies and proposals by the members of Parliament not in government - "Her Majesty's Opposition" as they are officially called in the British Parliament. A leading authority on constitutions has pointed out that this description is no mere flourish.

> It means much more than that opposition is permitted or even that it is legal. It means that it is constitutional; that it is "loyal"; that although the Opposition may disagree with the government on important matters, it

> agrees with it on the rules of the game. It means that some fundamental questions are outside the party fight. There is agreement about the regime, about the form of government.

The Leader of the Opposition

9.111 Section 97 of the 1990 Constitution makes provision for the appointment of the Leader of the Opposition by the President. It provides for the appointment in this capacity of the leader of the opposition party which has greater numerical strength in the House of Representatives than any other opposition party. If the two largest opposition parties have the same number of seats, the President is required to appoint the member of the House whose appointment would, in the President's judgment, be most acceptable to the leaders in the House of all opposition parties. There is a fall-back provision designed to encourage agreement by providing that the President need not appoint a Leader of the Opposition if satisfied that there is no member of the House who would be acceptable to such parties in that capacity.

9.112 The Constitution should continue to provide for the office of Leader of the Opposition. We received no submissions about the method of choosing the holder of that office, and assume that the substance of section 97 is generally acceptable. It should therefore be retained, unless it emerges that opposition parties would rather choose a leader by a vote, or by drawing lots, in the event that the two largest opposition parties should have the same number of members in the House. The essential point is that the Leader of the Opposition should be chosen independently of the Government.

9.113 In most countries, the responsibilities of the Leader of the Opposition are recognised by making special provision for the salary and other allowances and benefits payable to the holder of the office. Section 64 of the 1990 Constitution sets up an Independent Parliamentary Emoluments and Benefits Committee. However, section 64(2), which lists those whose salaries the Committee has the responsibility of reviewing, does not refer specifically to the Leader of the Opposition. The provision treats the holder of the office simply as a Member of Parliament. We understand that, in principle, the Leader of the Opposition receives the same salary, allowances and benefits as a Cabinet Minister.

9.114 In Chapter 11 we make certain proposals about the mechanism set up by section 64. Here we propose that the special responsibilities of the Leader of the Opposition should be recognised explicitly by referring to that office in the list of those whose salaries, allowances and benefits ought to be set through the constitutionally prescribed process.

The role of the Opposition in relation to that of Government

9.115 From the nature of the Opposition it follows that its role ought to be recognised in a number of ways. For example, the need for a non-partisan approach to constitutional issues should be reflected in those provisions of the Constitution concerned with the appointment of high officers and other bodies intended to function independently of government. It should also be recognised in the provisions for the amendment of the Constitution or the entrenched legislation. Proposals for these purposes are made in subsequent chapters. They are based on the assumption that, if there is more than one opposition party, the Leader of the Opposition will in turn consult the other leaders.

9.116 We think that a bipartisan or multipartisan approach should also be taken in other areas. They include ceremonial state occasions on which it is appropriate for the Leader of the Opposition to appear in public alongside the Prime Minister. This in an important way of demonstrating the legitimacy and value of the Opposition's role.

9.117 Some substantive issues should not be allowed to become "political footballs". They are those on which, for the sake of certainty and continuity, it is important to reach agreement among all parties about the policies which ought to be followed. Major issues of foreign policy are one such area, but there may also be significant domestic issues on which the aim should be to achieve long-term consistency of policy, no matter which party or parties are in government.

9.118 In Parliament itself, the members of the Opposition are charged with the duty of examining what the government has done or proposes to do. Traditionally, the members of the Government caucus will have made their views known privately. Occasionally they complain publicly, but the main task of promoting public debate falls to the Opposition. While we do not wish to downgrade this role, it is important that the making of counter-proposals by the Opposition should not degenerate into a dialogue of the deaf. In Chapter 11 we propose a constructive role for all backbench members working through strong, parliamentary sector standing committees.

9.119 This proposal will give all members of Parliament the opportunity to work within a framework that allows maximum concentration on the substance of issues and less temptation to use them as a means of making political capital. Yet it must not be forgotten that, in theory at least, the Opposition offers itself to the country as an alternative government. The Opposition must be allowed to indicate what it would do if it were in office. Therefore, so the argument runs, it is

encouraged to be responsible in its criticism. If it succeeds in defeating the Government at the polls, it will have the opportunity to become the Government and put its proposals into effect.

9.120 The reality is that, in a multi-ethnic country in particular, the nature of the opposition parties depends a great deal on the nature of the political polity as a whole. This point can be illustrated by comparing the Opposition in two other countries we visited: Malaysia and Mauritius.

9.121 In Malaysia, the ruling National Front, formerly known as the Alliance, has been in power since before independence. It is a coalition of ethnic parties, dominated numerically and in influence by UMNO, the main Malay party. The primary opposition is from the Chinese-based Democratic Action Party and the fundamentalist Malay party, the PAS. Realistically, neither of these parties has a chance of becoming the government as long as the National Front and UMNO maintain their unity. Even so, ethnically based parties on the fringes of a broadly based multi-ethnic coalition serve the useful purpose of requiring the coalition to pay adequate attention to the special concerns of particular communities.

9.122 Mauritius provided a contrasting example of the role of opposition. Parties are mainly ethnically-based, but the electoral arrangements, providing for the election of three members by ethnically-mixed constituencies, encourage them to come together in multi-ethnic coalitions for the purpose of fighting elections. The alliances among parties appear to be fluid. They are based on political philosophy and sometimes on personalities.

9.123 The effect of the first-past-the post electoral system in Mauritius is that comparatively small movements in the support for a particular coalition can not only result in the government's defeat, but virtually wipe out its electoral representation. On two occasions, the second being late in 1995, no Opposition members were elected at a general election. However, if past experience is a guide, the opposition forces will revive, perhaps on the basis of new political alignments, so that, at the next general election, two multi-ethnic coalitions will again contest the right to govern.

9.124 We mention these examples, not because we favour one approach rather than the other, or wish to use either as a model. We do so to show that it is hard to predict the impact on opposition parties in the Fiji Islands of greater electoral inducements for ethnically based parties to cooperate or reorganise on a multi-ethnic basis. It is an open question whether opposition will remain ethnically

based, on the fringes of a broadly-based multi-ethnic coalition or party that has sufficient support to govern, or whether, as in Mauritius, elections will eventually become a contest between multi-ethnic coalitions or parties. In either case, the role of the Opposition, in Parliament and on the hustings, will remain significant. It deserves respect for its essential contribution to a democratic system of government.

RECOMMENDATIONS

242. The constitutional role of the Opposition should be respected for its essential contribution to democratic government. The emergence of multi-ethnic Oppositions, as well as multi-ethnic Governments, should be encouraged.

243. The Constitution should continue to provide for the office of Leader of the Opposition. On the assumption that the provision under which the President chooses and appoints the Leader of the Opposition under section 97 of the 1990 Constitution is generally acceptable, its substance should be retained.

244. The special responsibilities of the Leader of the Opposition should be recognised explicitly by including that office in the list of office-holders whose salaries, allowances and benefits ought to be set through constitutionally prescribed processes.

245. The need for broad agreement with the Opposition in decisions of a constitutional nature should be reflected in those provisions of the Constitution concerned with the appointment of high officers of state and other institutions intended to function independently of government, as well as the special majorities required to amend the Constitution or the entrenched legislation.

246. The Opposition should be represented at ceremonial state occasions. The possibility of achieving a multi-partisan approach to important issues on which it is important to achieve long-term consistency of policy should be explored.

A BICAMERAL PARLIAMENT

9.125 Submissions to the Commission showed that people are in no doubt about the importance of the House of Representatives. The election of the members of that House serves the dual purpose of deciding who should represent a particular constituency, and also of deciding which political party or parties should form the

government. In general, it was accepted that the parties in government were entitled to use their majority support in the Lower House for the purpose of securing the passage of their budgets and the enactment of their legislative programmes without being blocked by the Upper House.

9.126 Not surprisingly, a number of submissions saw little need for the Senate. In their view, its only useful purpose was to provide a group whose support was required for the amendment of the entrenched legislation relating to Fijians, Rotumans, and the Banaban community. They suggested that the Bose Levu Vakaturaga, instead of advising on the appointment of Fijian members of the Senate to discharge this responsibility, should itself be given the power to protect the entrenched legislation. In their view the Senate should be abolished.

9.127 Others were of the opinion that the Senate served a useful purpose as a House of review with the power to delay the passage of legislation. However, some who favoured its retention criticised the lack of ethnic balance, and made the point that the President's nomination of persons from communities other than Fijians did not necessarily give them a mandate to act in a representative capacity.

9.128 The Commission evaluated these arguments by reference to the purposes of a second chamber. One is to secure better legislation by giving it the power to block or delay the passage of Bills passed by the Lower House. Another is to allow the representation of different interests within the country, such as ethnicity or territorial identity. We look briefly at how a second chamber could serve each of these purposes.

9.129 There is general agreement that it is hard to devise a basis for the appointment or election of a second chamber *solely* for the purpose of improving the quality of legislation. If the Upper House is elected, it may come into conflict with the Lower House that provides the government. The use of the Upper House to block legislation is likely to be seen as the attempt of the minority to overrule the majority. If the Government has control of both Houses, then presumably its legislative proposals will be allowed to pass in the Upper House as well. Therefore, it may be asked, does the second chamber really help to produce better laws? Many commentators conclude that there are other, more effective ways of making sure that laws are enacted in a workable and coherent form. One way is the use which we propose of sector standing committees in the Lower House.

9.130 Although there are limits to the Senate's effectiveness in improving the quality of legislation, in our opinion an Upper House can serve a valuable purpose. In a multi-ethnic society, it can provide a way of representing a wider variety of

interests, or allowing those interests to be represented in different ways, so that each is given greater opportunity to exert its influence on the political process. Upper Houses are usually designed to represent interests that are inherent and permanent. Lower Houses are designed to reflect the ebb and flow of more transient interests that seek to make a more immediate impact on laws and policies.

9.131 In many countries, the representation of particular geographical subdivisions of the country in the Upper House is seen as a way of recognising not only the sense of territorial identity of its inhabitants, but also the ethnic identity and shared values of the communities which happen to predominate in the whole or parts of the subdivision concerned. Generally speaking, territorial representation is seen as less problematic than the representation of particular ethnic communities. The neutrality of belonging to a particular territorial subdivision serves as a basis for bridging differences between communities in a multi-ethnic society. As has been seen, representation on the basis of ethnicity tends to draw communities apart and sharpen the differences between them.

9.132 The Commission concluded that there would be considerable value in retaining a bicameral Parliament in the Fiji Islands if citizens were represented on a different basis in each of the two Houses. That would provide better opportunities for all interests to be taken into account.

9.133 We therefore propose that the Upper House should become a mainly elected body in which the 14 provinces should be represented on a basis of equality by members elected by all citizens resident in the province. There should also be an elected member representing Rotuma. In addition, there should be provision for a small number of appointed members to represent communities and groups which would otherwise be under-represented in Parliament as a whole.

9.134 While the universally recognised name "Parliament" should continue to be used to describe the legislature as a whole, the two Houses of Parliament should, we believe, have Fijian names. This will give them a unique character and distinguish them from the legislative bodies of other countries. The term Bose Lawa is already used as the name of the House of Representatives in the Fijian language. It should become the official name of that body. We propose that the Senate should be renamed the Bose e Cake, which means the Upper Chamber.

9.135 The 1990 Constitution provides that the President should be part of Parliament, as the Governor-General had been under the 1970 Constitution. However, section 62(4) provides that, when a Bill is presented to the President for assent, he shall signify his assent. The former provision had appeared to allow

the Governor-General a discretion whether to assent to, or withhold assent from, a Bill. However, the change was more one of form than of substance, because there was a constitutional convention that the Governor-General would not withhold assent.

9.136 We consider that, in recognition of the status of the office of President and its historical antecedents, the President should continue to be part of Parliament. The provision making it clear that the President has no discretion to refuse assent to Bills passed by the Bose Lawa and the Bose e Cake should be retained.

9.137 Accordingly, the Constitution should provide that there shall be a Parliament for the Republic of the Fiji Islands, consisting of the President, the Bose Lawa and the Bose e Cake. In Chapter 11, we discuss the relationship between the two Houses. We propose that the Bose e Cake should become solely a House of review.

9.138 In the next sections of this chapter we set out our detailed proposals for the composition of the two Houses. We also explain the reasons for our proposals and the effect they are likely to have in practice.

RECOMMENDATIONS

247. A bicameral Parliament should be retained as a way of allowing citizens to be represented in Parliament on a different basis and so providing better opportunities for all interests to be taken into account.

248. The Constitution should provide that there shall be a Parliament for the Republic of the Fiji Islands, consisting of the President, the Bose Lawa and the Bose e Cake.

249. The provision making it clear that the President has no discretion to refuse assent to Bills should be retained.

250. The Bose e Cake should become a mainly elected body in which the 14 provinces should be represented on a basis of equality by members elected by all citizens resident in the province. There should also be an elected member representing Rotuma. In addition, there should be provision for a small number of appointed members to represent communities and groups which would otherwise be under-represented or not represented in Parliament.

THE BOSE LAWA

The objectives

9.139 Nationally and internationally, a great deal of attention has been focussed on the present arrangements for electing the members of Fiji's Lower House. It is the main legislative organ and, even more crucially, the party alignments of its elected members determine which party will form the government and which party leader will become Prime Minister. It is at the centre of the web of the country's political institutions.

9.140 The Commission has already recommended that the present arrangements governing the composition of the Lower House and the election of its members should be revised. We have recommended also that the revised arrangements should be designed in such a way as to meet the following objectives:

- they should encourage the emergence of multi-ethnic governments;
- they should comply with the international standards by applying the principle of equal suffrage;
- they should be based on a more open system of representation;
- they should provide a gradual but decisive means of moving away from the present constitutional arrangements.

9.141 The Commission has thought carefully about how these objectives can best be achieved. It considers that there need to be changes both in the composition of the Bose Lawa and also in the system for electing its members.

Number of seats

9.142 A number of submissions considered, or took it for granted, that the size of the Lower House should remain at or near its present number of 70. Some thought that, as a cost-saving measure, its size should be reduced to a number nearer the 52 provided for under the 1970 Constitution. The Commission recognises that the cost of Parliament has to be kept within reasonable limits. However, the Lower House should not be so small that it unduly restricts the ability of the Prime Minister to choose a balanced Cabinet from among the members of the majority coalition or party. Moreover, any reduction in the size of the Bose Lawa would make it more difficult to implement the changes we propose to its composition. The Commission therefore favours retaining the present number.

A mixture of open and reserved seats

The 1990 system

9.143 For the system of communal and national seats under the 1970 Constitution, the 1990 Constitution substituted a system under which all seats are communal. The distribution of seats is 37 for Fijians, 27 for Indians, 1 for Rotumans, and 5 for general voters. All seats are filled by voting on communal rolls.

9.144 Many people in Fiji seem to be unaware that the system under which all seats are filled on a communal basis appears now to be unique, though such arrangements were not uncommon during the period of decolonisation. A study of the voting systems of 150 of the world's 186 sovereign states by the Inter-Parliamentary Union in 1993 shows that, in 25 states, some members are elected or appointed to the legislature to represent particular groups. These groups include women and interest groups as well as ethnic communities. In each case, the number of special seats is very small in comparison with the size of the legislative body.

9.145 The study recognises that there are ways other than quotas of securing parliaments that reflect the makeup of the population. We mention this to show that, in other multi-ethnic countries, an electoral system based *exclusively* on communal voting has not been seen as the answer to the fair parliamentary representation of all communities and the encouragement of cooperation among them.

A return to "national" seats?

9.146 Some submissions expressed support for the present composition of the Bose Lawa, or wanted to see it more heavily weighted in favour of indigenous Fijians. Other submissions, from individuals and groups in all communities, argued that at least some seats should be filled by allowing the candidates to be elected by voters from all communities. Many saw the seats filled by "cross-voting" under the 1970 Constitution as a desirable model. These seats were reserved for particular communities, but filled by voting on a national roll comprising the voters registered on one or other of the three communal rolls.

9.147 For the reasons explained in Chapter 2, the cross-voting system was only partly successful in bringing about a more conciliatory and less communally-based attitude to national politics. The choice of candidates for national seats and the style of the campaign had to take account of the fact that candidates would be

elected by the votes of members of all communities. This induced moderation. However, there was a tendency to feel that the national seats were the property of the community concerned. That community sometimes found it hard to accept that members elected mainly by the votes of other communities really represented the community to which the seat belonged. The Commission does not consider it desirable to return to the cross-voting system.

A move to "open" seats

9.148 The time has now come when most seats in the Bose Lawa should no longer be reserved for particular communities but should be what we propose to call "open" seats. Candidates for those seats should be elected by the voters of all communities. All parties, whether or not ethnically based, should be eligible to compete for them by nominating candidates without regard to their ethnicity.

9.149 This will in itself induce at least some parties, both in their choice of candidates and in their policies, to make an appeal for the support of all communities. We have already made the point that a system that encourages parties or coalitions that wish to become the government, to take account of the interests of all communities, is the best safeguard for the interests of individual communities.

9.150 We make proposals below about the choice of voting system and the principles for drawing constituency boundaries. These are intended to provide further inducements to parties to widen the basis of their appeals to voters. Parties, or coalitions of parties, will have a strong incentive to nominate a multi-ethnic slate of candidates, both within the multi-member constituencies we propose, and across all constituencies. The proposals will also be likely to encourage the trading of preferences in the manner we describe in Chapter 10.

9.151 For these reasons, we do not see elections for open seats as contests between candidates standing for exclusively communally-based parties. There is little reason to fear that they will give rise to communal hostility. We believe that the election of candidates for open seats will in fact encourage the members of all communities to look at the needs and aspirations they have in common, not at what divides them. A greater awareness of common interests should help people to realise that the ethnicity of individual candidates is not all-important. What they and their parties stand for is what matters.

9.152 In this respect, the open seats will have the advantages of the former national seats but not their disadvantages. The fact that no community can

legitimately claim that it "owns" a particular open seat should make people readier to accept the result of the poll, whatever the party and ethnicity of the successful candidate.

9.153 That said, we have laid stress on the need for multi-ethnic government and the likelihood of the parallel development of multi-ethnic opposition. This means that we would expect the ethnic composition of Parliament to broadly reflect the ethnic composition of the population as a whole. Parties will be competing not only for the open seats but also for the reserved seats in the Bose Lawa proposed below, as well as the seats in the Bose e Cake. They, too, will be open seats. No community will have reason to fear that it will not be adequately represented.

Retention of some "reserved" seats

9.154 To give all communities greater confidence, however, the Commission proposes as a transitional measure, the retention of some "reserved" seats in the Bose Lawa for each community. We accept that people in Fiji, with their experience of communal representation, may be unwilling to move to a totally open system in a single step.

9.155 However, it would frustrate the whole purpose of creating open seats if in comparison with the number of open seats, the number of reserved seats was too great. If that situation were to eventuate, the demands of community would dominate. Parties would have little inducement to become multi-ethnic in their membership and policies. The people of Fiji have to make a conscious choice about whether they wish to take a decisive step away from the communal system that has made ethnic politics inevitable since before independence.

The recognition of communities and groups for representation purposes

9.156 A number of the smaller communities in the Fiji Islands asked that their identity should be recognised by regarding them as a separate community for electoral purposes and allocating them an appropriate number of seats. Some groups also proposed that seats be specifically allocated to women, to take account of the fact that parties seldom nominate women as candidates for winnable seats.

9.157 The Commission has evaluated these submissions in the light of its view that the retention of reserved seats should be essentially a transitional measure, even though we have not proposed a timetable for their phasing out. As we have recognised, provisions for the mandatory review or automatic expiry of transitional

arrangements can themselves produce tensions. Nevertheless, we are strongly of the view that all reserved seats should be converted into open seats as soon as possible.

9.158 In these circumstances, the Commission does not favour placing greater stress on ethnic identity or gender for representation purposes by allocating seats to communities or groups which presently are not separately represented. The effort should go into healing existing divisions, not creating new ones. Similarly, parties should actively work to break down the barriers which stand in the way of the nomination and election of women. However, we do propose some remedial measures to ameliorate the consequences of the present definitions of communities for voting purposes, and the under-representation of women.

9.159 Citizens of Melanesian, Polynesian or Micronesian origin should again vote with members of the Fijian community rather than as general voters. Citizens of mixed descent should have the option of regarding themselves as members either of their father's community or their mother's community for voting purposes (but not for any other constitutional purpose, and without any effect on any matter relating to the ownership of land). Finally, the President should be empowered to appoint six members to the Bose e Cake to represent communities or groups that would otherwise be under-represented in Parliament. The first two proposals are further discussed in Chapter 10, and the last later in this chapter when we describe our proposals for filling the seats in the Bose e Cake.

The allocation of reserved seats among communities

9.160 Submissions emphasised the need for a fairer allocation of reserved seats among communities. We consider that the allocation should be based on population figures. Without creating imbalancing, it should also take account of historical and other factors that have affected the present and past allocations of communal seats. The starting point for our recommendations was the Bureau of Statistics projection of the total population as at 31 December 1995, but the proposed allocation also takes account of the other factors mentioned. Therefore, there would be no reason to revise it even if the census about to be taken shows that the actual distribution of ethnic communities in the population is somewhat different from what was projected. We believe that the proposed allocation of reserved seats will be generally perceived as fair and acceptable.

Reserved seats and the international standards

9.161 We earlier found that communal representation was not in itself inconsistent with the international standards, especially if it operates within a

framework both of individual choice and the principle of equal suffrage. There is an example of communal representation within the region that meets both criteria. In New Zealand, Maori have the choice of registering on the Maori roll or the general roll. The number of Maori constituency seats is determined under a formula which takes account of the number of electors who choose to register on each roll. The votes cast by Maori and by general electors for constituency members are therefore of equal value. Under the newly introduced mixed member proportional system of representation, no distinction is made between Maori electors and general electors in voting for the party of their choice.

9.162 Our own proposals for reserved seats are not quite so elastic. We consider that, within the narrow limits referred to above, it will be necessary to prescribe communal identity for voting purposes. Freedom of choice to vote communally or not might distort the outcomes in a way which cuts across the purpose of retaining some reserved seats for the time being.

9.163 The arrangements proposed restrict to some degree individual freedom to determine personal identity for representation purposes, and, when the results of the forthcoming census are known, may be found to deviate slightly from the principle of equal suffrage. Even so, we believe that, as a transitional measure, they will be recognised as being within the "margin of appreciation" that international law allows to states in applying the international human rights standards.

9.164 The purpose of the reserved seats is to achieve the objective referred to at the beginning of this chapter - to move away decisively but gradually from the present communal voting arrangements. Members of all communities will be able to vote without distinction for candidates for the open seats in the Bose Lawa and for the provincial seats in the Bose e Cake.

The composition of the Bose Lawa

9.165 For the reasons explained, we propose that the 70 seats in the Bose Lawa should be allocated as follows:

Reserved seats:	Fijians (including Pacific Islanders)	12
	Indo-Fijians	10
	General voters	2
	Rotumans	1
Open seats		45
Total		70.

9.166 The 25 reserved seats represent approximately 36% of the total number of seats in the Bose Lawa and the open seats 64%. The Commission sees that proportion of open seats to reserved seats as the bare minimum necessary to allow them to act as a spur to the development of multi-ethnic politics.

Constituencies for elections to the Bose Lawa

9.167 As a further incentive to the emergence of multi-ethnic governments, we propose that the 45 open seats should be filled by voting in 15 three-member constituencies. The criteria for the drawing of the boundaries of the open-seat constituencies should include the requirement that, so far as possible, they should be heterogeneous - that is, they should be composed of members of different ethnic communities. In Chapter 10, we explain the reasons for both these proposals and discuss the way the electoral system is likely to work in practice.

9.168 The principle of equal suffrage requires that, within acceptable limits, the boundaries of all constituencies for the election of members of the Lower House of a Parliament should be drawn so that each contains approximately the same number of inhabitants. All votes can then be said to be of equal value. Many submissions pointed out that the existing arrangements for the Fijian communal seats did not achieve equity between the large and heavily populated provinces and the smaller provinces. Nor did they achieve equity between the Fijian urban constituencies and the provincial constituencies. We understand that a main reason for the divergences was the desire that Fijians should, so far as possible, vote in the province to which they belong, rather than the province where they happen to reside.

9.169 Some submissions also expressed the view that the use of the provinces as constituencies for the election of the Fijian members of the House of Representatives had led to divided loyalties. It was not always clear whether members represented their parties or the Provincial Councils which had often been instrumental in their selection. In addition, old inter-provincial rivalries had tended to come to the fore, to the detriment of a focus on national issues and interests.

9.170 For these reasons, we consider that the provinces should no longer be the constituencies for the Fijian reserved seats, but, as already recommended, should become the basis for representation in the Bose e Cake. Where the Upper House is designed to allow the representation of particular territorial units of unequal geographical size and population, there is a recognised freedom to depart from the principle that every vote should be of equal value. Despite differences in population, it is accepted that each unit may be represented on an equal basis.

9.171 We therefore propose that the constituency boundaries for seats in the Bose Lawa should be drawn so as to divide the Fiji Islands into the requisite number of territorial constituencies for each category of seats. With some modifications, the principles at present set out in section 48(3) of the 1990 Constitution should be applied. As far as possible, each constituency for a reserved seat should contain an equal number of inhabitants belonging to the community whose seat it is. Similarly, each constituency for an open seat should, as far as possible, contain an equal number of inhabitants regardless of their community. The drawing of constituency boundaries should ensure that the inhabitants of every constituency are effectively represented, taking into account geographical features, the boundaries of existing administrative and recognised traditional areas, means of communication and density and mobility of population. And as already mentioned, the constituencies for the open seats should be required to be heterogeneous. We come back to these proposals in more detail in Chapter 10.

Voting system

9.172 In discussing the method of electing the President by an electoral college consisting of all members of the two Houses of Parliament, we explained the advantages of the preferential system of voting known as the alternative vote. It ensures that the winning candidate, or, in a multi-member constituency the winning candidates, gain an absolute majority of the votes cast - that is, more than 50%. As we show in Chapter 10, that may not happen under the first-past-the post or proportional systems if there are more than two candidates for any seat.

9.173 Under the alternative vote system, each voter numbers the candidates on the ballot paper in order of preference. A candidate who obtains more than 50% of valid first preferences is declared elected. If no candidate has that number of votes, the candidate with the lowest number of votes is eliminated. The votes cast for the eliminated candidate are transferred to the remaining candidates according to the voters' second preferences. The elimination of candidates and the transfers of votes continue until one candidate has an absolute majority of valid votes. The system is used for elections to the Australian House of Representatives and the Lower Houses of most Australian states.

9.174 For reasons explained in Chapter 10, the Commission sees the absolute majority support required under the alternative vote system as being of most importance in the election of candidates for the open seats in the Bose Lawa and the provincial seats in the Bose e Cake. However, it considers that, to avoid confusion, the election of candidates for the reserved seats should also be held

under that system. It therefore proposes that all elections of candidates for seats in the Bose Lawa and the Bose e Cake should be held under the preferential system known as the alternative vote. The reasons for that proposal are fully explained in Chapter 10.

THE BOSE E CAKE

9.175 As foreshadowed in our proposals about the role, and therefore the membership, of the Bose e Cake, and also about the drawing of constituency boundaries for the Fijian reserved seats, the Commission considers that the Bose e Cake should provide for the distinct identity of the provinces of Fiji, as well as Rotuma, to be represented in Parliament. In discussing our proposals for the representation of particular communities and women, we also indicated that there should be provision for the appointment to the Bose e Cake of a limited number of members to represent communities and groups that would otherwise be under-represented in Parliament, or not represented at all.

9.176 The Commission therefore proposes that the Bose e Cake should consist of 35 members, as compared with the present 34. It should be made up of 28 members elected to represent the provinces, one member elected to represent Rotuma and 6 members appointed by the President to represent communities and groups which would otherwise be under-represented in Parliament.

The representation of provinces

9.177 In our journeys throughout Fiji to receive submissions, it was evident that members of all communities share a sense of belonging to the province with which they have their closest links. In the case of Fijians, the link is with the vanua. The place in which a person is registered as having customary rights to land in that vanua establishes his or her identity more strongly than any other single factor.

9.178 Members of other communities have a similarly strong sense of territorial identity, through birth or residence in a particular place. Those who have cultivated the land feel a strong sense of identification with it, even if they are tenants, not owners. This sense of a common identity among people who belong to the same area also arises from shared or complementary interests. Time and again we were told by members of all communities belonging to a particular area that "here, we all get on well together". For these reasons, we propose that the members representing provinces in the Bose e Cake should be elected by the voters from all communities resident in the province. This will help to strengthen the sense of a

common identification with the province and their economic and, sometimes social, interdependence.

9.179 The integration of the provinces with the nation as a whole is likely to be enhanced by this widening of the focus to include all communities, and also by the role of political parties. We expect elections to the Bose e Cake to be contested by parties, in the same way that they already contest elections to the Bose Lawa. That development will be inevitable, particularly as the general elections of the members of both Houses will be held at the same time, for reasons explained more fully in Chapter 11. We propose that the members of each House should be elected for a four-year term, but an early dissolution of the Bose Lawa will result in the automatic dissolution of the Bose e Cake.

9.180 In these circumstances, we think that the alliances among different parties and the trading of preferences that we expect to occur in respect of elections to the Bose Lawa will also affect elections to the Bose e Cake. But we realise that the distribution of the different communities is very uneven among the provinces. In some provinces, the population is overwhelmingly Fijian. In provinces where the population is more heterogeneous, we would expect the same factors to operate as in the heterogeneous constituencies electing candidates for open seats in the Bose Lawa. We accept that because of the distribution of population, the members for the provincial seats in the Bose e Cake are likely to be predominantly Fijian, though, as members elected from provincial constituencies, they will represent provincial rather than narrow ethnic interests. We say more about the role of the Bose e Cake in Chapter 11.

Appointed members

9.181 As earlier indicated, the Commission considers that the President should be given power to appoint 6 persons as members of the Bose e Cake to represent communities or groups otherwise under-represented or not represented in Parliament. Although the Constitution should not seek to govern the exercise of the power more tightly, we see it as being relatively sharply focussed.

9.182 After each general election, the Electoral Commission should be required to provide the President with an analysis of the composition of both Houses, indicating the gender of their members and their ethnicity and other relevant characteristics, as far as is known from the information available to it. We consider that the appointing power should be used to redress the likely gender imbalance and allow the representation of groups such as the disabled, and the smaller

communities or groups who may not be adequately represented as members of the larger communities to which they belong for representation purposes.

9.183 We have in mind the ethnic communities and cultural or religious groups who form part of a larger community for the purposes of representation. We do not foresee a need to use the appointing power to redress any lack of proportionality between the main communities. It may not be possible to do justice to all groups on all occasions, but, over time, all groups should get a chance to be represented.

9.184 The Commission considered carefully whether the fact that most elected members of the Bose e Cake are likely to have a party allegiance was compatible with the inclusion of appointed members. We concluded that it was not likely to create problems. The different bases for the election of the members of the two bodies mean that, even if the elections to each are held at the same time, the party or coalition which has a majority in the Bose Lawa will not necessarily have majority support in the Bose e Cake. The President's power to appoint members should be exercised without regard to their party membership, if known. If the appointments happen to change the balance of power in the Bose e Cake between parties, this will probably have no significant consequences.

9.185 The Commission also considered whether the President, before exercising the appointing power, should be required to undertake consultations in order to discover which persons from particular communities or groups would be likely to command wide respect and support. Again, we thought that no constitutional provision was necessary. However, before acting in his own deliberate judgment, the President could well decide to take soundings from the members of the President's Council, for example, or from a range of community organisations. We believe that the President's appointments are likely to be well-considered and generally accepted.

RECOMMENDATIONS

251. The Bose Lawa should continue to consist of 70 members.

252. Approximately two-thirds of the seats should no longer be reserved for particular communities but should become open seats, candidates for which should be elected by the voters of all communities.

253. As a transitional measure, approximately one-third of the seats should be reserved for particular communities.

254. **In the light of the recommendation that the retention of reserved seats should be transitional, no reserved seats should be allocated to communities or groups at present not separately represented.**

255. **Citizens of Pacific Island origin should again vote with members of the Fijian community rather than as general voters.**

256. **Citizens of mixed descent should have the option of regarding themselves as members either of their father's community or their mother's community for voting purposes (but not for any other constitutional purpose, and without any effect on any matter relating to the ownership of land).**

257. **The President should be empowered, in the exercise of his own deliberate judgment, to appoint six members to the Bose e Cake to represent communities or groups that would otherwise be under-represented or not represented in Parliament.**

258. **The allocation of reserved seats among communities should be based on population figures but should also take account of historical and other factors that have affected the present and past allocations of such seats.**

259. **Although the recommended arrangements for the filling of reserved seats restrict to some degree individual freedom to determine personal identity for representation purposes, and may be found to deviate slightly from the principle of equal suffrage when the results of the forthcoming census are known, they should, as a transitional measure, be recognised as being within the "margin of appreciation" that international law allows to states in applying the international human rights standards.**

260. **The seats in the Bose Lawa should be allocated as follows:**

Reserved seats:	**Fijians (including Pacific Islanders)**	**12**
	Indo-Fijians	**10**
	General voters	**2**
	Rotumans	**1**
Open seats:		
		45
Total		**70.**

261. The recommended proportion of open seats to reserved seats in the Bose Lawa should be regarded as the minimum necessary to allow them to act as an encouragement to the development of multi-ethnic politics.

262. The 45 open seats should be filled by voting in 15 three-member heterogeneous constituencies - that is constituencies in which there is a mixed population made up of members of the different ethnic communities.

263. The provinces should no longer be the constituencies for the Fijian reserved seats, but, as already recommended, they should become the basis for representation in the Bose e Cake.

264. The constituency boundaries for all seats in the Bose Lawa should be drawn so as to divide the Fiji Islands into the requisite number of territorial constituencies for each category of seats. As far as possible, each constituency for a reserved seat should contain an equal number of inhabitants belonging to the community whose seat it is. Similarly, each constituency for an open seat should, as far as possible, contain an equal number of inhabitants regardless of their community. The drawing of constituency boundaries should ensure that the inhabitants of every constituency are effectively represented, taking into account geographical features, the boundaries of existing administrative and recognised traditional areas, means of communication and density and mobility of population, and, in the case of the open seats, the criterion referred to in Recommendation 196.

265. All elections of candidates for seats in the Bose Lawa and the Bose e Cake should be held under the preferential system known as the alternative vote.

266. The Bose e Cake should have 35 members, comprising 28 members elected to represent the provinces, one member elected to represent Rotuma and 6 members appointed by the President to represent communities and groups which would otherwise be under-represented or not represented in Parliament. The two members representing each province and the member representing Rotuma should be elected by all voters resident in the province or in Rotuma.

267. To assist the President in exercising the power to appoint 6 persons as members of the Bose e Cake to represent communities or groups who are otherwise under-represented in Parliament, the Electoral Commission, after each general election, should be required to provide the President with an analysis of the composition of both Houses, indicating the gender of their members, and their ethnicity and other relevant characteristics, as far as is known from the information available to it. The President should also be free to consult informally about possible appointments.

10

ELECTING THE MEMBERS OF PARLIAMENT

10.1 In this chapter we explain further three recommendations made in Chapter 9:

- that all elections of candidates for seats in the Bose Lawa and the Bose e Cake, as well as the election of the President and Vice-President, should be held under the preferential system known as the alternative vote;
- that the 45 open seats in the Bose Lawa should be filled by voting in 15 three-member heterogeneous constituencies in which there is a mixed population made up of members of the different ethnic communities;
- that, in voting for the reserved seats,
  - citizens of Pacific Island origin should again vote with members of the Fijian community rather than as general voters; and
  - citizens of mixed descent should have the option of regarding themselves as members either of their father's community or their mother's community for voting purposes (but not for any other constitutional purpose, and without any effect on any matter relating to the ownership of land).

In doing so, we make further recommendations for implementing these basic features of the electoral system. We also discuss and make recommendations on all other matters bearing on the election of members of Parliament.

THE CHOICE OF VOTING SYSTEM

The main kinds of system

10.2 By *voting system*, we mean the system under which voters cast votes for candidates seeking election to Parliament, and the method for determining from the votes cast, which candidates have been elected. To put it more shortly, we are looking at how *votes* should be turned into *seats*. The voting system operates in the context of the wider *electoral* system which includes rules about who may

vote and who may be a candidate, and how the election is actually conducted. We deal with those matters in later sections of the paper.

Plurality systems

10.3 In the Fiji Islands, as in most other former British colonies, it was taken for granted that the voting system used in Britain should be adopted. That is the plurality system known as first-past-the-post (FPP) under which the winning candidate is the one who gets the greatest number of votes. This is an entirely logical system when the choice is between only two candidates. One will not only have more votes than the other, but will have an absolute majority - that is more than 50%. The outcome must be regarded as fair.

10.4 If the choice is between more than two candidates, it can be shown mathematically that there is no *perfect* system of voting that fully reflects the possible range of preferences that all voters may have among them. In these circumstances, a plurality system may mean that the winning candidate receives less than 50% of the votes - that is fewer votes than those received by the competing candidates when their votes are added together. If there are three candidates, A, B and C, who receive 45%, 40% and 15% of the votes respectively, it is possible to imagine that some of the 15% who supported C might have preferred B to A, if it was impossible to elect C.

10.5 A further disadvantage of FPP as a method of voting for members of a legislature, and especially for electing the governing party under the parliamentary system, is that the number of successful candidates *belonging to a particular party* who are elected under FPP must be added up, to determine whether or not that party has a majority. It may then be found that, although a party may get a majority of the *votes* cast in the election, it does not get a majority of the *seats*. This is because the party's supporters are unlikely to be distributed evenly through all constituencies. Their candidates will be elected only if they obtain more votes than any other candidate in the constituency for which each is standing.

Majority systems

10.6 Because of the disadvantages of plurality systems, various ways of modifying it have been devised to ensure that a winning candidate must get an absolute majority of the votes cast, that is more than 50%. One is to hold an election under FPP, but if no candidate in the constituency obtains more than 50% of the votes, a second ballot is held a week or so later, between the two highest-polling candidates, or those candidates who have received a specified percentage of the votes.

10.7 The alternative vote system (AV) is based on the same principle as second ballots, but avoids the need for a second election at a later date. It is a refinement of the FPP system in that it requires voters to rank candidates in the order of their preference. To be elected, a candidate must have a majority of the votes cast. It will produce the same result as the FPP system if one or more candidates receive 50% plus 1 of the first preference votes. If there is only one seat to be filled, the candidate who passes this threshold and has the greatest number of votes will be declared elected. Only if no candidate reaches the threshold when first preferences are counted, will it be necessary to count and allocate second and subsequent preferences.

10.8 Then, if the election is for a single member constituency, the candidate with the lowest number of first preferences is eliminated. In the second round of counting, the ballot papers giving a first preference to that candidate are re-examined, and votes are allotted to those of the remaining candidates for whom the voter has expressed a second preference. After the second preferences are added to the first preferences for the candidates still in the running, the candidate with the lowest number of votes is again eliminated, and so on, until one of the candidates has obtained the required quota. This is calculated in accordance with the following formula:

$$\frac{\text{total number of valid ballot papers}}{2} + 1$$

10.9 The affirmative vote system can be used in multi-member, as well as single-member constituencies. An analogous method of eliminating the candidate with the fewest votes applies.

10.10 Unlike the single transferable vote system (STV), which need not necessarily require voters to indicate preferences in respect of all candidates on the ballot paper, AV requires voters to indicate preferences in respect of all or most candidates. Otherwise, all ballot papers may be exhausted before any candidate obtains the quota. There must in any case be a fall-back provision under which the candidate with the greatest number of votes is elected, but if this happens regularly because voters have failed to indicate sufficient preferences, the advantages of AV as compared with FPP will be lost.

10.11 Under the AV system, the election of the successful candidates does not, as in proportional representation systems, depend on the proportion of votes cast for the candidate. However, it is argued that, like PR systems, AV mitigates the winner take all aspects of FPP and generally achieves better proportionality of seats to votes than the FPP system.

Proportional systems

10.12 Plurality systems like FPP and majority systems like AV may be contrasted with proportional systems. These are designed to provide that the seats a party receives in Parliament bear a reasonable proportion to the number of votes that the party receives, either in all constituencies or in a separate vote treating the whole country as a single constituency.

10.13 Of the three main types of proportional system, the Commission received submissions in favour of two: a system based on *party lists* and STV. The latter had been recommended for open seats by the Royal Commission appointed in 1975 to consider the most appropriate method of electing members of the House of Representatives in Fiji (the *Street Commission*). The submissions expressed limited interest in the mixed member proportional system (MMP) adopted in post-war Germany, and recently in New Zealand. The general inclination was to wait and see how that system operates in New Zealand.

10.14 List system PR allocates seats to parties in proportion to the number of votes cast for the party. The system uses one or other of several recognised mathematical formulas for achieving the allocation. This is necessary because no party can be given a fraction of a seat. Generally speaking, the party managers decide whose names should appear on the lists and in what order. That gives better opportunities than most systems to include women and members of minority groups sufficiently high on the list to win a seat, but it is often seen as giving too much power to the party and not enough to individual voters.

10.15 If the system treats the whole country or major regions of a country as a single constituency, the list system also fails to provide the important links between a voter and his or her member. Measures to reduce the size of the constituency represented through the list, or to open the list to variation by individual voters deprive the system of the simplicity and proportionality it would otherwise have.

10.16 Under the STV system, the constituencies must be multi-member because the allocation is based on the range of preferences within the constituency. The greater the number of members, the greater the proportionality. As in the case of AV, the voter numbers the candidates in order of preference. But under STV, the underlying principle is the distribution of fractions of a single vote. If any fraction of the vote is not needed to help elect the candidate of the voter's first choice, or cannot be used because the candidate has been eliminated, it is transferred at a discounted value to help elect the candidate of second choice, and so on.

10.17 The quota needed to secure election is the lowest possible, taking account of the number to be elected. In a three member constituency it is just over 25%. If three candidates each get just over 25%, no other candidate can get more.

The criteria for choosing a voting system in ethnically divided societies

10.18 Over the twenty years since the *Street Commission* made its recommendations, there has been intensive discussion and writing about the best voting systems for ethnically divided societies. This work is not concerned exclusively with the relative merits of plurality systems, majority systems and proportional systems as ways of turning votes into seats. It focuses on the extent to which each is likely to bring about the representation of different ethnic communities and give them the opportunity to participate in government. South Africa's accession to democracy, in particular, has produced extensive literature about how the choice of voting system is likely to affect the working of the political system in that country.

10.19 Through this literature and in the papers specially prepared for the Commission as well as in discussions with recognised experts in the field, we have had access to analyses of the advantages and disadvantages of the voting systems in use or proposed for use, in a number of ethnically divided societies. These include not only South Africa, but also Malaysia, Sri Lanka, various African and Caribbean states, Lebanon, Cyprus and Northern Ireland, as well as the consociational democracies of western Europe like Switzerland, the Netherlands and Belgium. Strangely, there is little literature about Mauritius, but our brief visit to that country provided insights into the effect of the electoral arrangements there.

10.20 The political scientists base their analysis of voting systems on the assumption that politicians are motivated by the desire to be elected and reelected. They see the voting system as probably the most powerful instrument for shaping the whole political system, because it encourages politicians to behave in ways that maximise their chances of electoral success. There is general agreement that, in an ethnically divided society, political parties, at least to begin with, are likely to be ethnically based. The objective is to find ways of encouraging all, or a sufficient number, of them to come together for the purpose of governing the country in a way that gives all communities an opportunity to take part.

10.21 However, there is some division of opinion about the kind of voting system that is likely to work best for this purpose. In part, the different views result from differing perceptions about the importance of proportionality, as compared with

other likely consequences of particular voting systems. In part, they reflect some differences of opinion about the consequences of particular voting systems. Where, in making proposals about a voting system for use in the Fiji Islands, we have given preference to one particular view we have done so because it seems to meet best the situation in Fiji as we see it.

10.22 Before setting out the criteria we see as relevant to the choice of a voting system, we make the point once again that the voting system is not the only mechanism through which the Constitution should provide the requisite assurances to all communities in Fiji. We foreshadowed the most important of these in Chapters 2 and 3, and summarised them comprehensively at the beginning of Chapter 9.

Identifying and ranking the criteria

10.23 In identifying the criteria for judging voting systems for use in Fiji, we have focussed mainly, though not exclusively, on the voting system for electing candidates for the recommended 45 open seats in the Bose Lawa. We see the election of candidates for those seats as providing the main stimulus for the emergence of a multi-ethnic political culture in the Fiji Islands.

10.24 However, as we have explained, we think a single voting system should be used, not only for the election of members in the Bose Lawa and the Bose e Cake, but also for the election of the President and Vice-President, on a single ticket, by an Electoral College comprising all members of both houses. Therefore the system chosen has to be suitable for all these purposes.

10.25 The criteria we consider relevant take account of those set out in the New Zealand *Report of the Royal Commission on the Electoral System* (1986). However, in Fiji's different circumstances, we have included criteria not relevant in New Zealand and have left out or adapted some that relate particularly to New Zealand's circumstances. Because we consider it necessary to focus on the most important criteria, perhaps at the expense of others, we have ranked the criteria in what we consider to be the order of their importance.

10.26 This leads us to emphasise the Royal Commission's own conclusion about how a voting system should be chosen:

> If a system is designed to achieve one particular objective, the likelihood of meeting other objectives may thereby be lessened. The best voting system for any country will not be one which meets any of the criteria completely but will be one which provides the most satisfactory overall balance between them, taking account of that country's history and current circumstances.

10.27 Our own list of the relevant criteria is as follows:

- Encouragement of multi-ethnic government
- Recognition of the role of political parties
- Incentives for moderation and cooperation across ethnic lines
- Effective representation of constituents
- Effective voter participation
- Effective representation of minority and special interest groups
- Fairness between political parties
- Effective government
- Effective opposition
- Proven workability
- Legitimacy

EVALUATION OF VOTING SYSTEMS

10.28 In this section, we spell out the criteria just listed and evaluate our recommended voting system, the alternative vote (AV), against them. In doing so, we show how it compares with the existing first-past-the-post system (FPP), list system proportional representation (list system PR) and the single transferable vote (STV). We also fill out some details of the way we see AV working in practice.

Encouragement of multi-ethnic government

10.29 The consistent theme of this report, developed in Chapters 2 and 3 and sustained throughout, is that the encouragement of multi-ethnic government should be the overriding objective of constitutional arrangements for the Fiji Islands. It must therefore appear at the head of the list of criteria. The voting system must be one which promotes the emergence of multi-ethnic governments.

Recognition of the role of political parties

10.30 The Commission has explained, in Chapters 2 and 5, why it sees the role of political parties as a key element in the political process. The voting system should take full account of the fact that the goal of political parties is to be elected and to be re-elected. Everything in the experience of Fiji confirms that the nature of the voting system moulds the character of political parties. They respond to the forces which will determine their success or otherwise at the polls.

Incentives for moderation and cooperation across ethnic lines

10.31 Among political scientists there are two schools of thought about the best way of encouraging moderation and cooperation across ethnic lines. One view is that, in order to come together in stable multi-ethnic coalitions or perhaps a multi-ethnic party with broadly-based support, political parties must have strong electoral incentives to take real account of the interests of other communities. The voting system can provide these incentives by making it in a party's interests to enter into arrangements not only for *seat pooling*, but also for *vote pooling*.

10.32 The pooling of seats refers to the formation of coalitions through which parties that do not have a sufficient number of seats to govern alone agree to work together for the purpose of achieving a legislative majority. Vote pooling refers to arrangements under which parties exchange votes across party lines to secure the election of candidates who cannot expect to win if they receive the votes only of supporters of their own party. Parties will have incentives to pool votes if sufficient candidates of each ethnically based party, or component of a party, are marginally dependent on the support of voters in other ethnic communities.

10.33 A contrary view is that the voting system need not itself be directed to producing inter-community accommodations. The consociational model, as it is called, assumes that people will continue to vote communally. The voting system should ensure that, through its party or parties, each community is represented in proportion to its number in the population. However, unlike the communal system of representation, the system should not channel members of communities into monolithic blocks. It should allow the emergence of cross-cutting interests and identities, so that no one community is likely to gain sufficient electoral support to govern alone.

10.34 The parties representing different communities will still need to come together in a coalition in order to govern. Ideally, all ethnic parties will be members of an all-embracing "grand coalition". This, it is said, calls for sufficient willingness to compromise and accommodate each others' interests to make coalition possible. The viability of the coalition should be reinforced by giving communities maximum autonomy in the things that concern them most. When this is not practicable, then each should have a veto power.

10.35 The difference between the two approaches is that the first uses incentives that are essentially self-serving in order to induce or reinforce accommodations. The second uses agreements to cooperate and constraints in the form of exclusive or veto powers. These rely for their effectiveness on the wisdom and tolerance of political leaders.

10.36 In the circumstances of the Fiji Islands, the Commission considers that electoral incentives are necessary to reinforce accommodations reached by agreement among ethnic communities. The system in force since before independence has, in effect, focussed on the need for their adequate representation. It is evident that such representation alone has not brought about multi-ethnic governments.

10.37 In part, this may reflect an artificial solidarity within communities resulting from representation through communal seats filled by voting on a communal roll. But because present realities require the retention for the time being of some reserved seats, it is more important than ever to have strong incentives for political parties to exercise moderation and take initiatives to cooperate. We consider that, if such incentives can be provided through a particular voting system then that would be a strong reason for adopting it.

10.38 That does not mean that the Commission favours the incentives approach to the exclusion of relevant aspects of the consociational model. We have made it clear that the important interests of communities or groups should be safeguarded by veto powers. We have recommended a *Compact* enshrining agreement about principles and process designed to secure respect for the interests of all communities, but not about specific outcomes that over time may need to change to reflect changing circumstances. We do not wish to discount the value of far-sighted leadership. That will be needed in reaching agreement to put new arrangements in place and will always be valuable.

The ability of AV to provide incentives for moderation and cooperation

10.39 The three criteria just discussed can be considered together in evaluating the AV system. It is because we recognise the role of political parties in bringing about multi-ethnic government that we consider it so important to provide incentives for moderation and cooperation through the voting system. In the following paragraphs we show how the AV system can provide such incentives, and compare its ability to do so with that of the other systems mentioned.

10.40 If the AV voting system is to provide incentives for moderation and cooperation among ethnically based parties, two pre-conditions must be met. These are

- a multiplicity of parties based in the various communities, and
- heterogeneous constituencies.

A multiplicity of parties

10.41 In Chapter 2, we showed that ethnic communities in Fiji have not remained united in support of a single political party. While their members would come together politically to combat what they saw as a serious threat to the interests of the community, we think it reasonable to assume that, ordinarily, there will continue to be a multiplicity of parties. Some parties are already committed to encouraging multi-ethnic membership. The willingness of members of the various communities to support such a party depends on a perception that it will take account of the interests of all communities.

10.42 There is already a base for cooperation among communities and parties. This base could be strengthened by electoral incentives for communities to cooperate rather than compete. We think that, in Fiji, the existence of such incentives, rather than the existing disincentives, might lead to the formation of a widely-supported multi-ethnic party. But even if this did not happen, they would encourage cooperation among moderate parties based in the different communities.

10.43 The spread of parties apparent in Fiji suggests that not all may wish to reach out for multi-ethnic support. Some may remain firmly embedded within a particular community. But this is not a disadvantage if it makes moderate parties based in another ethnic community more attractive to some voters than more extreme parties within their own community. As we have mentioned, the parties based only in one community still have a useful role in preventing multi-ethnic parties or coalitions from going too far in fostering the interests of any one community.

Heterogeneous constituencies

10.44 Heterogeneous constituencies are required because the incentive for cooperation across the ethnic divide is the likelihood that the candidate or candidates of a community- based party will be unable to succeed if supported only by the votes of members of that community. This likelihood is all the greater if there is competition with other parties also based in that community.

10.45 The design of constituencies deliberately to *improve* the chances of success of a particular *party*, or to *exclude* the effective representation of a particular *community* is widely condemned as "gerrymandering". But it is wrong to suppose that constituency design cannot also be a legitimate element of a voting system, specially in an ethnically diverse society. Everything depends on the purpose for which constituencies are designed in a particular way. We discuss below the mechanism for drawing constituency boundaries.

10.46 The use of constituencies in Malaysia and Mauritius illustrates these points. In both countries the constituencies originally drawn by the British administrators were relatively homogeneous. Their purpose was to secure the representation of all ethnic groups in proportion to their number in the population. It was assumed that each constituency would elect a member from the predominant ethnic group.

10.47 In Malaysia, enough constituencies nevertheless had a sufficiently mixed population to give Chinese voters an effective influence on the election of some Malay candidates. They could not dominate, but they could not be ignored. However, since the race riots of 1969, constituencies have been more heavily weighted in favour of Malays. The ability of Chinese voters to influence electoral outcomes has decreased, although Chinese-based parties continue to form part of the ruling coalition.

10.48 In Mauritius, every two of the original ethnically based constituencies were combined to form heterogeneous constituencies, each electing three members. As mentioned earlier, elections largely take the form of contests between coalitions of ethnically-based parties which put up a multi-ethnic slate of candidates in each constituency. As a result, ethnicity has become far less important than political philosophy and policy in determining the outcome of elections and the composition of Parliament.

10.49 The Commission looked at whether, given the distribution of the different communities within the Fiji Islands, it would be possible to divide the country into heterogeneous constituencies. We took as criteria that each constituency should have roughly the same number of inhabitants, within a tolerance of 10% - 15%. We also applied the existing rule in section 48(3) of the 1990 Constitution that the principle of equality may be departed from to the extent expedient

> in order to take account of geographical features, the boundaries of existing administrative and recognised traditional areas, means of communication and density and mobility of populations.

One exercise involved the drawing of 45 single-member constituencies. The other was directed to producing 15 constituencies, each of which could be represented by three members.

10.50 These exercises showed that the choice between single-member and three-member constituencies did not affect the potential for heterogeneity in the more densely-populated areas in the Western Division, Macuata and the greater Suva and Nausori area. Using three-member constituencies made it marginally easier

to achieve a reasonable degree of heterogeneity by combining the less densely populated areas, such as the maritime provinces, with other areas having similar interests.

10.51 We took as the measure of heterogeneity the inclusion within the constituency of a mixed population ranging from a more or less equal balance between Fijians and Indo-Fijians, to a proportion as high as 85-90% of one community and 15-10% of the other. This last figure represented the limit of what was reasonably possible in constituencies which included island populations consisting mainly of Fijians. The average distribution was 60% of one community and 40% of the other.

10.52 We conclude that it is entirely possible to draw constituency boundaries in Fiji in a way that achieves reasonable heterogeneity. We now turn to how the AV system of voting, coupled with heterogeneous constituencies and a multiplicity of parties, can provide strong electoral incentives for cooperation among communities.

The nature of the incentives

10.53 We evaluate the ability of the AV system to promote the goal of multi-ethnic government by looking at the extent to which it encourages cooperation among parties based in different communities, or support for a multi-ethnic party, through vote pooling. We therefore look at whether voters will have both the opportunity and incentives to vote for some candidates not of their own ethnicity.

10.54 Obviously, the best method of inducing vote-pooling is to avoid inter-ethnic competition. A multi-ethnic party or pre-election coalition can put up a multi-ethnic slate of candidates. Ethnic parties based in different communities can agree not to contest a particular seat in a constituency where one community is outnumbered, in return for a corresponding favour in another constituency where that same community predominates. Such arrangements are more likely to be made between moderate parties than between those with more extreme policies.

10.55 One way in which AV provides incentives for vote-pooling is by requiring the winning candidate to obtain more than 50% of the votes. In a heterogeneous constituency, this threshold increases the need for the winning candidate to have multi-ethnic support. The second is by requiring voters to rank candidates in the order of their preference. The candidates with the lowest totals of preferences at each level are eliminated and preferences at the next level are allocated to those still in contention until a candidate is found who has more than 50% of the votes.

Although the successful candidate may not have been everybody's first choice, he or she must be relatively acceptable to over half of the voters in the constituency.

10.56 The AV system allows parties to agree to trade preferences. They may decide to put up competing candidates because they realise that most of their supporters will wish to give their first preferences to candidates of their own party and ethnicity. However, the party least likely to succeed may be willing to encourage its supporters to give their second or third preferences to the candidate of the other party, again in return for reciprocal support, not merely in the same constituency but also in another constituency where the ethnic balance is reversed. The effect of a preferential system like AV is to bring second, third and subsequent preferences into play as the weakest candidate is eliminated after each round of preferences is counted.

10.57 Again, only moderate parties with conciliatory policies will agree to trade preferences and be able to persuade their supporters to honour the agreement. The system therefore encourages the emergence of such parties. Some people may fear that, in response to the perceived pressures created by open seats and heterogeneous constituencies, ethnically based parties will not be willing and able to cooperate across the ethnic divide, but may coalesce into single ethnically-based parties, one or other of which might be able to win an outright majority. Any prolonged maintenance of such united positions would, however, be a reversal of the evident tendencies for ethnic communities to divide their support among two or more parties based in that community, as discussed at length in Chapter 2.

10.58 It would also run counter to what has happened in at least some other ethnically divided countries. There is no actual experience of AV, with open seats filled by voting in heterogeneous constituencies in an ethnically divided country, but an analogy can be drawn from the experience of Mauritius and Malaysia with open seats under FPP. The Malaysian experience is relevant, even though there has always been a large Malay party in a dominant electoral position, and constituencies have become less heterogeneous since 1969. In neither country, have small, ethnically-based parties coalesced into larger ethnic parties. Even a large ethnic party, like the main Malay party UMNO, which almost certainly would have the numbers to govern alone, is committed to the perpetuation of the multi-ethnic coalition now called the National Front.

10.59 The potentiality of AV to afford electoral incentives to moderation and cooperation in the ways we have suggested may be contrasted with that under other voting systems. As we have seen, under FPP, a candidate can be elected with substantially less than 50% of the votes. Once a vote is given to a particular

candidate, it is exhausted. The voter has no way of indicating a second or third choice if the candidate who is the voter's first choice is unsuccessful. Some voters may, however, decide not to vote for their most preferred candidate, if that candidate has a very poor chance of success. They may feel that such a vote would be "wasted".

10.60 Preferences may be expressed under some proportional representation systems, but their effect is quite different. The object is to elect a number of candidates in proportion to the number of votes received by the party. List-system PR requires that votes be cast for a single party list. Although some systems have been devised under which voters may make choices across party lists, it is argued that, if parties are ethnically-based, there is no practicable way of inducing voters to exercise such an option.

10.61 STV has the advantage of allowing voters to express second, third or subsequent preferences for individual candidates in the same way as under AV. But because STV is designed to be proportional in its outcomes, the quota that each candidate must obtain in a three member constituency is just over 25%. This may be compared with the just over 50% required under AV.

10.62 The overall effect of proportional systems compared with AV or even FPP, is that, if people vote communally, ethnic parties can expect to succeed in getting a number of candidates elected in proportion to the number of their community members in the constituency, and therefore in the country. This is irrespective of whether they are moderate and seek to reach accommodations with the ethnic parties of other communities. If a party wishes to appeal to voters in other communities by putting up a multi-ethnic list, it has to calculate whether this will attract more voters from those other communities than the number it will lose from its own. Set alongside the reserved seats that we propose be retained in Fiji as a transitional measure, any proportional system would, in our view, offer few incentives to parties to become more multi-ethnic in their composition or more willing to take account of the interests of all communities.

10.63 In terms of the extent to which it provides electoral incentives for moderation and compromise, we conclude that AV is greatly to be preferred to either list system PR or STV, the proportional representation systems advocated in submissions. AV is also to be preferred to FPP, though we see FPP as more conducive to moderation and compromise than PR systems. For this reason alone we favour the adoption of AV. We find also that it adequately meets the other criteria we have adopted for judging electoral systems.

Effective representation of constituents

10.64 Experience in Fiji shows that voters expect close links and accountability between individual members of Parliament and their constituents. It is important for voters to see themselves as represented not only by the member elected to the seat reserved for their community, but also by the member for their open seat constituency. Communal representation has obscured the usual expectation that a member of Parliament serves all the people in the constituency whether or not they support the member's party, and does so regardless of the community to which they belong.

The ability of the AV system to represent constituents effectively

10.65 The AV system requires the election of candidates to represent territorial constituencies. It is suited to the recommended single member reserved seat constituencies and also the three-member open seat constituencies. In this respect it compares with FPP and STV (except that STV requires multi-member constituencies). It is to be contrasted with list system PR if, as was suggested in one submission, the whole country were treated as a single constituency.

10.66 Voters usually feel strongly that they want to know who their member is and to have access to him or her both individually and as a group with common interests arising from their residence in a particular geographical area. At the time of our visit to South Africa, there were strong indications that, for this reason, the list system PR used as the only feasible way of conducting the first democratic election in that country was likely to be modified. (In its final form the constitution requires only that the electoral system must result, in general, in proportional representation, leaving the details of the system to national legislation.)

10.67 The introduction of list system PR in a Fiji-wide constituency might be acceptable if combined with representation through open seat constituencies, as under MMP, but we think that if list system PR were to be combined with reserved seats, the members for reserved seats would tend to be seen as people's "real" representatives. It might be hard for list system members to associate effectively with them, even though belonging to the same party, and it would be harder still if the member's ethnicity was different from that of the community to which the seat belongs.

10.68 STV has the defect of allowing constituency representation to become too much of a preoccupation. Because the threshold is so low, each party is likely to nominate more candidates than there are seats. Therefore, each candidate is

competing not only with candidates of other parties, but also with other candidates belonging to the same party. Consequently, members representing the same party in a particular constituency sometimes seek to outdo one another in their commitment to constituency work, to the neglect of other parliamentary duties. They may also concentrate on obtaining reciprocal support for constituency projects, to the detriment of a national outlook.

10.69 Under AV, the problem of intra-party competition in multi-member constituencies can be avoided by adding first, second and third preferences together before the candidate with the lowest number of votes is eliminated. This facilitates the adoption of party slates under which the party may ask voters to give their first preferences to A, their second preferences to B and their third preferences to C. As all preferences have equal weight when added together, it would be wrong to eliminate B or C before taking account of voters' second and third preferences, as well as first preferences. The Commission proposes that the AV system should be applied in this way in elections for the 3-member open seats in the Bose Lawa.

Effective voter participation

10.70 If individual citizens are to play a full and active part in the political process, they should have a real choice among political parties and their candidates. They should feel that their vote will affect the outcome and will be of equal weight to the votes of other citizens. The voting system, and, in particular the ballot paper, should be one they can understand and use effectively in order to cast valid votes.

The ability of the AV system to secure effective voter participation

10.71 The choice of AV as the voting system would give citizens a considerable opportunity to affect the outcome of the poll by expressing preferences among individual candidates. It is sometimes argued that, by requiring voters to indicate preferences for all or most candidates, it forces them to give at least some support to candidates they would otherwise not be prepared to vote for. We see this as more of a philosophical than a practical problem, but to mitigate it we propose that votes should be treated as formal if voters express preferences for at least 75% of the candidates.

10.72 It is also possible to have rules preserving the validity of the ballot paper even if candidates accidently fail to number preferences correctly beside the names on the ballot paper. For example they may put in the same number more than once, or omit one number in the numerical sequence.

10.73 To make sure that the election always produces a valid result, it should be provided that, if the requisite number of candidates has not reached the quota when all the preferences have been distributed, those with the highest number of votes should be deemed elected.

10.74 Generally, we think that the high level of literacy in the Fiji Islands will mean that few voters will have any difficulty in numbering the candidates in the order of their preference by writing the numbers 1, 2, 3, etc beside the names of particular candidates. Certainly, we envisage no difficulty in the elections of the single member for each reserved seat. The number of names on the ballot paper is not likely to be more than 3 or 4.

10.75 However, there are likely to be at least three times that number of candidates on the ballot paper for the three-member open seats. To assist people in marking the ballot paper, and also to encourage parties to exchange preferences and assist them in delivering them in accordance with the agreement, we propose that an "above the line / below the line" ballot paper should be used for elections to all seats. The ballot paper for the election of candidates for the multi-member seats in the Australian senate provides a model.

10.76 Voters wishing to vote on a "ticket" basis need only tick the name or symbol of the party, coalition or independent candidate whose ticket they wish to support. The effect is to allocate that voter's preferences in the order predetermined by the party, coalition or candidate, and registered with the Electoral Commission. If the voter wishes to indicate a different order of preferences, he or she is free to do so by putting numbers beside the names of the candidates in the bottom part of the paper. A specimen ballot paper for a three-member constituency is reproduced on the facing page.

10.77 There should be a statutory requirement that the Electoral Commission must ensure that voters are given full information about the consequences of choosing a particular ticket. The Act should provide that, if a ballot paper is marked both above and below the line, it should not, for that reason alone, be treated as informal. If the preferences indicated below the line are otherwise formal, they should be regarded as the expression of the voter's intentions and counted accordingly. If, however, the preferences below the line are themselves informal, the vote for the party ticket, if formal, should be treated as expressing the voter's choice.

10.78 The principle of eliminating the lowest-polling candidate in each round of preferences and redistributing the preferences of the voters whose candidates

You may vote in one of two ways

BALLOT PAPER FOR THE ELECTION OF THREE MEMBERS OF THE BOSE LAWA FOR THE VUNIVADRA OPEN CONSTITUENCY

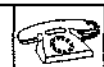
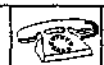
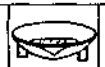
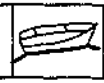
either

By placing a single tick in one and only one of these squares to indicate the voting ticket you wish to adopt as your vote

A VITI LIBERAL PARTY	B FIJI FIRST PARTY	C NATIONAL/REPUBLICAN COALITION
		

or

By placing the numbers 1 to 15 in the squares next to the symbols and names of each of the candidates in the order of your preference

A VITI LIBERAL PARTY	B FIJI FIRST PARTY	C NATIONAL/REPUBLICAN COALITION	D INDEPENDENTS
QARIKAU 	JONES 	KUMAR 	LINGAM 
SOLOMONE 	KHAN 	SINGH 	MATAI 
NUNIA 	CAMA 	VUKI 	FIRIPO 
			NAND 
			PECELI 
			WAQA 

are eliminated, until one candidate reaches the quota, is easily understood. Voters do not need to concern themselves with the mechanics of counting and distributing the preferences. These are relatively complicated and time-consuming. However, they are less complex than the allocation of surplus votes at a discounted value under STV.

10.79 We foresee no great difficulty in training the requisite number of electoral officers for the purpose of conducting elections under the AV system. The process of vote-counting and distribution is done openly. Candidates' agents will quickly understand and follow how it is done.

Effective representation of minority and special interest groups

10.80 The voting system should ensure that parties, candidates and members of Parliament are responsive to minority groups and special interests. This is particularly important in those cases where the minority group is required to belong to, or is in competition with, a larger ethnic community for the purposes of political representation.

The ability of AV to represent minority and special interest groups

10.81 AV does not have the same capacity as proportional systems to secure the election of representatives of every group in the country which chooses to organise politically and can win a minimum share of the votes. However, the need for a candidate to achieve an absolute majority means that no candidate can afford to neglect any small pocket of voters who might be willing to give their support in exchange for a policy which takes account of their interests. Just as AV encourages appeals across ethnic lines, so also it encourages appeals to women and to minorities with special interests.

10.82 In this respect it is greatly superior to FPP. However, it is difficult to gauge whether, under AV, parties would seek to gain wider support by nominating more women and members of minority groups as candidates than they do now under FPP. The evidence suggests that, under a proportional system, it is easier for candidates from disadvantaged or minority groups to win election. However, we think that this advantage is outweighed in the Fiji Islands by the disadvantages of a proportional system.

Fairness between political parties

10.83 When they vote at elections, voters are choosing between alternative party governments as well as alternative constituency members. The voting system

should encourage competition between potential majority parties or pre-election coalitions, so that voters can make a clear choice about the identity of their future government. At the same time the voting system in its method of turning votes into seats should not have the effect of unfairly excluding the representation of small parties, provided they win a significant share of the vote.

10.84 However, the voting system does not need to allow for the representation of every small party with just enough votes to justify an allocation of a seat on a percentage basis - 1.4% in a house of 70 members. Carrying the representation of minority interests to extremes creates a danger that they will be able to exert pressure out of proportion to their number. It should also be kept in mind that some of the support for minority parties results from "protest" voting. A vote for the small party may not represent the voter's expectation that it will become the government or even win a seat. Rather it may express unwillingness to support any of the larger parties which have a realistic chance of winning the election or at least obtaining representation.

10.85 Finally, the voting system should not produce a consistent pattern of electing governments that have less than 50% of the total number of votes cast in the election. In contrast to the position in New Zealand, that has not happened in Fiji. Most if not all governments that have taken office in Fiji since 1970 have received a majority of the total number of votes.

The ability of AV to achieve fairness between political parties

10.86 AV is not designed to secure the representation of political parties in proportion to their share of the total votes cast in the election. In this respect it has some of the deficiencies of FPP, though not to the same extent, because of the need for a candidate to win majority support. Taking account of all preferences which become effective, it would be virtually impossible for a party to win an election without obtaining a majority of the overall votes.

10.87 Some argue that AV has the same tendency as FPP to favour larger parties at the expense of smaller ones. They consider that this tendency is exacerbated when AV is used in multi-member constituencies, as it was in the Australian Senate between 1919 and 1946. The AV system was then replaced by STV with the object of securing the fairer representation of all *political parties* in the Upper House. The question of encouraging the fair representation of *ethnic communities* was not in issue, so too much should not be read into the decision to make the change.

10.88 The Commission considers that, even if the disproportionality of AV is greater in multi-member seats than in single member seats, multi-member constituencies for open seats are nevertheless desirable. In our view, they are likely to encourage multiracial party slates, not only across the country as a whole, but also in individual constituencies. This seems likely to make individual voters more willing to cast their votes on the basis of party, not ethnicity. The encouragement of such a development is yet another essential building block in enabling parties to adopt moderate policies and to broaden their electoral support across ethnic lines. If the consequence is that, as now under FPP, smaller parties may not be represented in proportion to the number of votes they receive, that seems a small price to pay.

10.89 The Commission has also considered the question of fairness to parties in the context of drawing constituency boundaries. It accepts that problems of fairness would not arise under a proportional system of representation. Under such a system, parties will get a number of seats in proportion to the number of votes they receive, regardless of the way in which boundaries are drawn. However, the Commission considers that the advantages of putting in place heterogeneous constituencies for the open seats outweighs any difficulty that may arise in also being fair to parties.

10.90 That issue must be seen in context. Any change in the voting system, including the transition from a system of exclusively communal seats to a mixed system of reserved and open seats, will require all parties to rethink their policies and to decide on the groups to which they will appeal. The situation is quite unlike that which can arise when boundaries under an existing system need to be revised. In that circumstance there may be real questions about interfering with the representation of areas from which particular parties have traditionally drawn support.

10.91 The initial drawing of new constituency boundaries will be an essentially political process calling for both fairness and compromise, if the essential objective of homogeneous constituencies is to be achieved. The processes we propose are described later in this chapter. Once the new constituencies are in place, we envisage that only major changes in the distribution of the population would call for an adjustment of their boundaries.

10.92 We are aware that the objective of heterogeneous constituencies runs counter to the instinct of parties that constituencies should bring together the groups that have traditionally supported them. That instinct will have to be resisted. The

objective of heterogeneous constituencies will need to be agreed upon as part of the overall political settlement under which new constitutional arrangements are put in place.

Effective government

10.93 The voting system should allow the election of Governments that have the support of a sufficient legislative majority to enable them to act decisively. In normal circumstances they should also be able to obtain parliamentary approval of their budgets and defeat Opposition no confidence motions, so that reasonable stability is assured. As we shall suggest in Chapter 12, the passage of other legislation should not normally be seen as an issue of confidence. The Government should have sufficient flexibility about the means of implementing its policies in legislation - if not the policies themselves - to allow the proposed parliamentary select committee system to function effectively.

The ability of AV to promote effective government

10.94 As a majoritarian, not a proportional system, AV is likely to encourage the emergence of a strong party or pre-election coalition government. AV, with its requirement that candidates win majority support, not a mere plurality as under FPP, should mean that relatively small swings in the electoral support for a particular parties will not have the effect of putting governments into or out of power. However, strong and stable Government should not, in itself, be seen as an overriding goal of the voting system.

10.95 First, in Chapter 5, we suggested that, even if an ethnically based party were to win a majority of the seats in the Bose Lawa, it should not necessarily signal immediately its ability and willingness to form a government on its own. Under the *Compact*, it would be bound to consider the objective of multi-ethnic government and the duty to take the interests of all communities into account. It would therefore need to consider whether other ethnic parties could and should be drawn into a coalition government.

10.96 Secondly, if a multi-ethnic pre-election coalition wins an election, it is still a coalition, though we believe it is likely to have a stronger base for remaining united than a coalition which comes into existence after an election because no party has the necessary majority to govern alone. Thirdly what cannot be excluded, even under AV, is the need for parties, none of whom has a sufficient majority to govern alone, to form a governing coalition after an election.

10.97 For some time to come, the people of the Fiji Islands will be juggling the two variables of party and ethnicity. It would not be surprising if the introduction not only of a new voting system but also the reconstitution of both houses of Parliament took some time to settle down. But it can be said that AV is just as likely as FPP, and more likely than a proportional system, to produce strong and stable governments.

Effective opposition

10.98 The voting system should ensure that, as well as effective government, there is also effective opposition. It should not be one under which relatively small swings in electoral support can have the effect of unduly reducing or eliminating the representation of the Opposition party or parties.

The ability of AV to promote effective opposition

10.99 We acknowledged in Chapter 9 that it is difficult to foresee the character and composition of future Opposition parties if the goal of multi-ethnic government is achieved. We believe that AV is less likely than FPP to allow relatively small swings in voter support not only to bring about a change of government but also to give it an overwhelming majority. The equitable representation of Opposition parties is more assured under proportional representation, but, in the circumstances of Fiji, we see the greatest need as the encouragement of multi-ethnic government through the AV system in the manner described above.

Proven workability

10.100 The Commission considers that the people of Fiji should adopt a voting system that has been successfully used elsewhere, preferably in the region. No unexpected problems would be likely to arise, and there would always be ready access to technical advice and help.

AV as a proven system

10.101 As already explained, AV is used for the election of candidates to single member seats in the Australian House of Representatives and the lower houses of most Australian states. From 1919 to 1946 it was used in the Australian Senate to elect candidates to multi-member constituencies. Apparently it is also used in multi member constituencies in Nauru. STV is used in electing the members of the Australian Senate, the lower house in Tasmania and the single chamber legislature in the Australian Capital Territory. New Zealand, in implementing

MMP, is gaining experience with party lists. All three systems have shown themselves to be workable in actual operation in other countries over a considerable period.

Legitimacy

10.102 Under this heading the New Zealand Royal Commission said:

> Members of the community should be able to endorse the voting system and its procedures as fair and reasonable and to accept its decisions, even when they themselves prefer other alternatives.

The Royal Commission saw this criterion as a test of whether the requirements of all of its preceding criteria had been adequately met. In a society like Fiji, legitimacy means that the members of all communities must be able to accept election results as fair and needing to be upheld, even when they themselves would have preferred another outcome. On this basis, legitimacy as a criterion deserves a higher priority, but we have left it at the end of the list because it still measures the overall effect of the voting system.

The legitimacy of elections under AV

10.103 This Commission's basic argument is that multi-ethnic government is in the interests of all communities. If this is accepted, then the electoral arrangements must not be unfairly weighted in the interests of any one community. In any event, as we have shown in Chapter 2, there is no guarantee that a weighted system will produce the desired result in all circumstances. If it does not, the reaction is to think that the electoral system has failed the interests of the community which sees itself as disadvantaged. Their likely response is that in order to remedy the situation, the system should be made even more lopsided.

10.104 Our approach is that the electoral system should not favour one community more than another, but that this alone is not sufficient. If the goal was the certainty that all communities will be proportionally represented, there might be no reason to move away from a system under which all seats are reserved on a fair basis. But that would not in itself lead to multi-ethnic government.

10.105 As our high priority criteria indicate, the Commission considers that, within a fair electoral system, the people of the Fiji Islands should put in place a voting system that helps to dissolve the present link between ethnicity and party. If all ethnic groups are adequately represented in the Government party or parties and in the Cabinet, then, so far as that outcome is facilitated by the voting system, that system should be seen as legitimate.

10.106 In our analysis of the way in which the criteria for choosing a voting system apply, we have concentrated on the election of candidates for the 45 open seats in the Bose Lawa, because we expect the voting system to have its most important effect in that context. However, we also see AV as encouraging multi-ethnicity in the election of members to represent at least some of the provinces in the Bose e Cake.

10.107 In the election of the President and Vice President by the Electoral College constituted by the members of both houses, the need for an absolute majority under AV provides a necessary guarantee that the choice will have widespread support across the political spectrum. For that reason it will be regarded as legitimate.

10.108 We are not the first Commission to propose AV as the system for electing members for the reserved seats which need to be retained for the time being. In both respects our recommendations coincide with those of the *Street Commission*. That body saw the need for the successful candidate for a reserved seat to obtain more than 50% of the votes as an advantage, compared with the possibility of election by a minority of the votes cast in the constituency under FPP. We share the view that AV will add to the legitimacy of the election of reserved seat members.

10.109 We also think that the dynamics affecting elections for reserved seats will be changed, not only by the move to the AV system, but also by all the other changes affecting the composition of the two houses of Parliament and the election of their members. Overall, we believe that the incentives for moderation applying to the election of other members of Parliament will also affect the election of members for the reserved seats.

10.110 The conclusions reached in this section of this chapter show how the Commission arrived at the recommendations made in Chapter 9 (and summarised in paragraph 10.1)

- that all elections of candidates for seats in the Bose Lawa and the Bose e Cake, as well as the election of the President and Vice-President, should be held under the preferential system known as the alternative vote.
- that the 45 open seats in the Bose Lawa should be filled by voting in 15 three-member heterogeneous constituencies, that is, constituencies in which there is a mixed population made up of members of the different ethnic communities; and

We now make several further recommendations concerning the implementation of these arrangements.

RECOMMENDATIONS

268. The details of conducting elections by the preferential system of voting known as the Alternative Vote, should be provided for in an Electoral Act. Among other things, that Act should make provision for the following matters:

(a) In elections for the 3-member open seats in the Bose Lawa, the first, second and third preferences given to each candidate should be added together, before the candidate with the lowest number of votes is eliminated.

(b) Votes should be treated as formal if voters express preferences for at least 75% of the candidates.

(c) There should be rules for preserving the validity of the ballot paper, so far as possible, even if candidates fail to number preferences in the correct numerical sequence.

(d) If the requisite number of candidates has not reached the quota when all the preferences have been distributed, those with the highest number of votes should be deemed elected.

(e) In the elections for all seats, an "above the line / below the line" ballot paper should be used. In the top part of the ballot paper voters should be given the opportunity to vote on a "ticket" basis, indicating support for the candidates in an order of preference registered by a party, coalition of parties or independent candidate. If the voter wishes to indicate a different order of preferences, he or she should be free to do so by putting numbers beside the names of the candidates in the bottom part of the paper.

(f) The Electoral Act should require the Electoral Commission to ensure that voters are given full information about the consequences of choosing a particular ticket.

(g) The Act should also provide that, if a ballot paper is marked both above and below the line, it should not for that reason alone, be treated as informal. If the preferences indicated below the line are otherwise formal, they should be regarded as the expression of the voter's intentions and counted accordingly. If, however, the preferences below the line are themselves informal, the vote for the party ticket, if formal, should be treated as expressing the voter's choice.

THE DETERMINATION OF CONSTITUENCY BOUNDARIES

Constituencies for the election of members of the Bose Lawa

10.111 As recommended in Chapter 9, the constituency boundaries for all seats in the Bose Lawa should be drawn so as to divide the Fiji Islands into the requisite number of territorial constituencies for each category of seats. So far as possible, each should contain an equal number of inhabitants of the relevant category, and should ensure that the inhabitants of every constituency can be effectively represented, taking into account geographical features, the boundaries of existing administrative and recognised traditional areas, means of communication and density and mobility of population. In addition, the constituencies for the open seats should be required to be heterogeneous, as already mentioned.

10.112 This recommendation departs from the criteria in section 48 of the 1990 Constitution by referring to "inhabitants" rather than "adult inhabitants". The Commission proposes the change as to reflect the principle that members of Parliament represent all inhabitants of their constituencies, regardless of age or eligibility to vote. Another relevant factor is that the census data relating to the distribution of the total population is readily available.

10.113 The Constitution allows the principle of equality of the population to be departed from in order to take account of other relevant factors. We consider that, in principle, the variation should not be greater than 10% on either side of the norm obtained by dividing the relevant population figure by the number of constituencies. However, we think it would be too restrictive to impose this target as a constitutional limit, particularly in drawing the boundaries of the open seat constituencies which are required to be heterogeneous. That requirement is basic to the idea that the open seats should act as a catalyst for a move away from ethnic politics. If need be, we therefore see it as overriding the requirement for equality.

Reserved seat constituencies

10.114 There will need to be 12 reserved seat constituencies for Fijian voters, 10 for Indo-Fijian voters, 1 for Rotuman voters and 2 for general voters. The starting point will be the number and distribution of the members of the population regarded as belonging to a particular community for representation purposes. In the next main section of this chapter we propose rules for determining who is entitled to register as a voter in a reserved seat constituency of each of the four communities. However, it would not be practicable to apply these rules when determining the distribution of the population belonging to each community. The Constitution should therefore refer to the distribution of inhabitants classified for census purposes as Fijians or Pacific Islanders, Indo-Fijians, Rotumans, and persons not belonging to any of those ethnic communities.

Open seat constituencies

10.115 There will also need to be 15 open seat constituencies, each electing three members. Although the distribution of the ethnic communities will not be relevant for the purpose of applying the principle that constituencies should have an equal number of inhabitants, it will be relevant in fulfilling the requirement that open seat constituencies must also be heterogeneous. Again, account should be taken of the distribution of the population as classified for census purposes.

10.116 The Commission does not think it feasible to specify the degree of heterogeneity required, but wishes to stress that the open seat constituencies should be as heterogeneous as possible. In some cases this criterion may need to be fulfilled in innovative ways, for example by placing more weight on lines of communication than on traditional ties. We made the point in Chapter 9 that, through their elected members in the reserved and open seats in the Bose Lawa and the provincial seats in the Bose e Cake, all the people of Fiji will have the opportunity to be represented in a variety of ways which will take full account of their range of interests.

Constituencies for the election of members of the Bose e Cake

10.117 There will be no need to determine the boundaries of constituencies for the purpose of electing members of the Bose e Cake. The boundaries of the provincial constituencies should be the provincial boundaries prescribed under the Fijian Affairs Act. The boundaries of Rotuma should be those referred to in the definition of "Rotuma" in the Rotuma Act.

CONSTITUENCY BOUNDARIES COMMISSION

Functions and powers

10.118 The task of determining the boundaries of constituencies for the election of members of the Bose Lawa should continue to be carried out by a Constituency Boundaries Commission. The Constitution should require the Constituency Boundaries Commission to determine the initial boundaries of all constituencies on the basis described above.

10.119 It should also require the Constituency Boundaries Commission, in the year following each census, to review the boundaries of all constituencies and decide whether or not they require revision to take account of changes in the distribution of the population as a whole, or of the members of any community. The Constitution should also empower the Constituency Boundaries Commission to review and redetermine all or any constituency boundaries at any other time during the intervals between each census (at present 10 years), if it has reason to think that such a review and redetermination might be desirable on those grounds. After the Constituency Boundaries Commission has reviewed constituency boundaries on any occasion, it should be required to report its findings to Parliament with an explanation of the reasons why it has decided either to redetermine boundaries or not to do so.

10.120 The procedures to be followed by the Constituency Boundaries Commission in determining or redetermining constituency boundaries should be prescribed by Act. We envisage that, among other things, such an Act would require the Constituency Boundaries Commission to give notice of its proposed determinations and hear objections before making a final determination.

10.121 The Commission's determinations of constituency boundaries, once made, should continue to be final. They should not be subject to appeal, but judicial review should be available to test whether the Commission has acted within its powers and in accordance with the prescribed procedures.

Constitution and membership

10.122 Although the Constituency Boundaries Commission will only need to exercise its functions periodically, we consider that it should be a standing Commission. Otherwise there is a risk that constituency boundaries will not be reviewed as and when necessary. Its membership should be entirely separate from that of the Electoral Commission. The functions of the two bodies are quite distinct.

10.123 The composition of the Constituency Boundaries Commission should take account of the fact that, although constituency boundaries should be drawn as impartially and fairly as possible and in accordance with the constitutionally prescribed principles, any determination of boundaries inevitably has political implications. We therefore propose that the Constituency Boundaries Commission should consist of three members holding office for terms of three years. The Chairperson should be a person who is, or is qualified to be, a judge of a superior court in the Fiji Islands, and should be appointed by the President acting in his or her own deliberate judgment, after consultation with both the Prime Minister and the Leader of the Opposition. The two other members should be appointed by the President on the nomination of the Prime Minister and the Leader of the Opposition respectively.

10.124 No qualifications should be specified for members other than the Chairperson, but no person should be qualified to be a member of the Commission if at any time during the four years preceding appointment he or she has been a member of Parliament or an elected member of the council of any municipality, as defined in the Local Government Act (Cap. 125). A serving member of the public service, the police or the military forces should also be disqualified. The Constituency Boundaries Commission should also be subject to the general principles and rules applying to all Commissions established by the Constitution, as proposed in Chapter 15.

THE NAMES OF CONSTITUENCIES

10.125 It is fair to say that not much imagination has been shown in naming constituencies in Fiji. The names of the main cities and the provinces have been used, with the addition of a reference to the relevant point of the compass if it was necessary for a geographic area to be subdivided. In addition, the designation of a member for a communal seat has included a reference to his or her community.

10.126 The names of the provinces and Rotuma should be used exclusively to describe the constituencies for elections to the Bose e Cake. As now, the members for a particular province will each be entitled to use the designation "Senator for Rewa", or whatever the province might be.

10.127 However, the constituencies in the Bose Lawa will take account of, but will not be based on, provincial boundaries. Although some seats in the Bose Lawa will continue to be reserved, we believe that the member should no longer be identified by reference to his or her community. This not only puts undue emphasis on communal identity, but will also become less practicable in the light of our recommendations for identifying the voters belonging to each community for voting purposes.

SUGGESTED BOSE LAWA CONSTITUENCY NAMES

Open Seat constituencies

1. Uluiqalau (Cakaudrove)
2. Seatura (Bua)
3. Babasiga (Macuata)
4. Veiyanuyanu (Lau-Lomaiviti-Rotuma)
5. Tebara ni Siga (Tailevu)
6. Vunivadra (Rewa)
7. Korobaba (Rewa)
8. Waimanu (Naitasiri South)
9. Medrau Sucu (Naitasiri North)
10. Toma ni Ivi (Ra)
11. Suka (Ba - Lautoka)
12. Dovu (Ba-Tavua)
13. Naloto (Nadi Yasawa)
14. Voma-Cakaubalavu (Namosi-Serua-Kadavu)
15. Maseki (Nadroga-Navosa)

Reserved Seat constituencies

Fijians including Other Pacific Islanders (Local Flowers)

1. Mocelolo
2. Kukuwalu
3. Lagakali
4. Cevuga
5. Sinu
6. Senibua
7. Seniuci
8. Tomole
9. Buasala
10. Maba
11. Makosoi
12. Misimisi

Indo-Fijians (Local Fish)

1. Babale
2. Saqa
3. Kawago
4. Kawakawa
5. Kurukoto
6. Ulavi
7. Walu
8. Kanace
9. Nuqa
10. Saku

General Voters (Local Fruit Trees)

1. Dawa
2. Kavika

Rotumans

1. [To be chosen by Rotumans]

10.128 We also consider that Fiji should do what is done in other countries and give constituencies distinctive names that prevent them from being confused with areas having recognised geographic boundaries. We therefore propose that constituencies for all seats in the Bose Lawa should be named after well-known physical features, like mountains or rivers, or after local flora and fauna. By way of example, we set out on the facing page a list of names that might be suitable. The people of Rotuma should be invited to propose a suitable name for their reserved seat constituency.

RECOMMENDATIONS

269. In applying the criteria for the determination of constituency boundaries for seats in the Bose Lawa set out in Recommendation 264, the distribution of members of communities, when relevant, should be determined by reference to the classification of the inhabitants of the Fiji Islands for census purposes as Fijians or Pacific Islanders, Indo-Fijians, Rotumans, and persons not belonging to any of those ethnic communities.

270. The boundaries of the provincial constituencies in the Bose e Cake should be the provincial boundaries prescribed under the Fijian Affairs Act. The boundaries of the Rotuma constituency should be those referred to in the definition of "Rotuma" in the Rotuma Act.

271. The task of determining the boundaries of constituencies for the election of members of the Bose Lawa should continue to be carried out by a Constituency Boundaries Commission. The Constitution should require the Constituency Boundaries Commission to determine the initial boundaries of all constituencies.

272. The Constitution should require the Constituency Boundaries Commission, in the year following each census, to review the boundaries of all constituencies and decide whether or not they require revision to take account of changes in the distribution of the population as a whole or of the members of any community. If so, it should redetermine the constituency boundaries accordingly. The Constituency Boundaries Commission should be empowered to review and redetermine all or any constituency boundaries at any other time, if it has reason to think that such a review and revision might be desirable on the grounds mentioned.

273. After the Constituency Boundaries Commission has reviewed constituency boundaries on any occasion, it should be required to report its findings to Parliament with an explanation of the reasons why it has decided either to redetermine boundaries, or not to do so.

274. The procedures to be followed by the Constituency Boundaries Commission should be prescribed by Act. Among other things, the Act should require the Constituency Boundaries Commission to give notice of its proposed determinations and hear objections before making a final determination.

275. The Constituency Boundaries Commission's determinations of constituency boundaries should continue to be final. Judicial review should be available to test whether it has acted within its powers and in accordance with the prescribed procedures.

276. The Constituency Boundaries Commission should be a standing commission with a membership entirely separate from that of the Electoral Commission. It should consist of three members holding office for terms of three years. The Chairperson should be a person who is, or is qualified to be, a judge of a superior court in the Fiji Islands, and should be appointed by the President acting in his or her own deliberate judgment, after consultation with both the Prime Minister and the Leader of the Opposition. The two other members should be appointed by the President on the nomination of the Prime Minister and the Leader of the Opposition respectively.

277. No person should be qualified to be a member of the Constituency Boundaries Commission if at any time during the four years preceding appointment he or she has been a member of Parliament or an elected member of the council of any municipality, as defined in the Local Government Act (Cap. 125). A serving member of any state service, including the police and the military forces, should also be disqualified.

278. The constituencies for seats in the Bose Lawa should be named after well-known physical features, like mountains or rivers, or after local flora and fauna, as in the examples supplied.

THE RIGHT TO VOTE

10.129 The right to vote is one of the most precious attributes of citizenship. It is a human right, clearly recognised by the international instruments and

should be explicitly stated in the Constitution to facilitate and encourage its exercise.

Registration as a voter

10.130 Registration as a voter should continue to be a precondition for the exercise of the right to vote. There should therefore be a clear constitutional right to be registered as a voter, as well as to vote.

10.131 A number of submissions expressed the view that the voting age should be lowered from 21 to 18. That is already the voting age in many other countries in the region. We therefore propose that everyone should have the right to be registered as a voter and to vote at the age of 18, though a person should still need to attain the age of 21 before becoming eligible to be a candidate.

Disqualification from being registered as a voter

10.132 The Commission proposes that a person should be disqualified from being or remaining registered as a voter in any of the following circumstances:

(a) if the person has not been resident in the Republic of the Fiji Islands at any time during the preceding two years, unless his or her absence was for a reason prescribed by law; or

(b) if the person is serving a sentence of imprisonment for a period of twelve months or more imposed by a court of the Republic, or is under a sentence of death, or is serving a sentence of imprisonment for a period of twelve months or more, imposed by a court in any other country prescribed by law; or

(c) if, in accordance with the law of the Republic, the person has been found to be of unsound mind; or

(d) if, in accordance with the law of the Republic, the person is disqualified from voting on the ground of a conviction for an offence connected with elections.

10.133 Paragraph (a) deals with the question of residence in Fiji. The Commission considers that a person should be disqualified from becoming or remaining registered as a voter if he or she has not been resident in Fiji during the preceding two years. In such a case it can usually be assumed that the person has lost the close contact with the country that gives meaning to the exercise of the right to vote.

10.134 On the other hand, the Commission considers that citizens who have lost the right to be registered as a voter by reason of residence outside Fiji should regain it immediately on their return. The intention of the section 49(2) of the 1990 Constitution may have been to require a 24 month period of residence before registration. However, its actual effect is far from clear as it deals with registration but specifies periods of time preceding a particular election. In any event, we believe the Constitution should regard a period during which a citizen was not resident in Fiji as a disqualification. It should not require a person to have a period of prior residence in Fiji in order to qualify for registration.

10.135 The concept of residence should not be qualified by the words "normal" or "continuous" which do nothing to assist the authorities in determining whether or not a person has become disqualified. Absences for the purpose of study, training or service to the Republic or to an international organisation should not give rise to disqualification, but the details should be prescribed by the Electoral Act, not in the Constitution. The protection should extend to spouses and other persons living as part of the family of the person concerned.

10.136 Paragraphs (b) corresponds to section 49(3)(b) of the 1990 Constitution, except for the inclusion of words making it clear that the person must actually be *serving* the prison sentence, and the new safeguard that Parliament should prescribe the countries which should be recognised for the purposes of the section. Paragraphs (c) and (d) correspond to section 49(3)(c) and (d) the substance of which should be retained.

10.137 The present section 49(3)(a) disqualifies a person who

> is, by virtue of his own act, under any acknowledgment of allegiance, obedience or adherence to a power or State outside Fiji.

This provision is adapted from one in the 1970 Constitution which referred to a "power or state outside the Commonwealth". It was included because that Constitution did not outlaw dual citizenship. In effect, the provision meant that a citizen of Fiji who became a citizen of a country outside the Commonwealth would lose the right to vote in Fiji. In the light of our recommendations in Chapter 6 about the circumstances in which a citizen of Fiji who acquires another citizenship will automatically lose his or her Fiji citizenship, we consider that it is unnecessary to keep the substance of section 49(3)(a). It should therefore be omitted in all contexts where it now appears.

Constituency rolls

10.138 Our proposals for the composition and membership of the Bose Lawa and the Bose e Cake mean that a registered voter will have the right to vote in three constituencies - reserved seat and open seat constituencies in elections for members of the Bose Lawa, and provincial constituencies in elections for members of the Bose e Cake. In speaking of provincial constituencies, we include Rotuma. The boundaries of these different kinds of constituencies will not coincide with one another, so there will have to be a roll for each constituency. The Constitution should make it clear that a registered voter must be entered on a roll for a reserved seat constituency, an open seat constituency and a provincial constituency.

10.139 The present terminology that identifies rolls with the right to vote for a particular category of communal seats will no longer be appropriate, though it will still be necessary to have rules about who is entitled to register on a roll for a reserved seat constituency of a particular community. We consider that these rules should continue to be included in the Constitution, but that all other rules about when a person becomes entitled to be registered in one constituency rather than another should be left to the Electoral Act.

10.140 As now those statutory rules will determine that entitlement on the basis of a person's place of residence. To avoid registration in a particular constituency on the basis of purely temporary residence, as a general rule a person should be regarded as having become resident in a constituency only after having resided there for six months. To avoid hardship, the Act should allow bona fide residence to be established on the basis of other evidence.

10.141 Voters should be eligible for enrolment for a particular provincial constituency, including Rotuma, because they reside there. The Electoral Act should so provide.

The right to be entered on a roll for a reserved seat constituency

10.142 The Commission received a number of submissions expressing concerns about the present rules governing registration on the various communal rolls. First, a number of Fijians raised questions about linking registration in the Vola ni Kawa Bula, which is a register of customary rights in land, with the classification of a person as a "Fijian" for voting and other constitutional purposes. We agree that this link puts too much strain on the integrity of both systems and should be removed.

10.143 The Constitution should deal only with the right to be entered on a roll for a Fijian reserved seat constituency. It should not define a "Fijian" for any other purpose. For example, it should not be concerned with the question of who is a "Fijian" for the purpose of being eligible for nomination as President - a matter safely can be left to the Bose Levu Vakaturaga - nor with the duty of the government to establish programmes promoting ethnic justice for "Fijians". If necessary, the requisite Act can set out exactly who is eligible to benefit from a particular programme.

10.144 Secondly, many members of the various Pacific Island communities in Fiji expressed unhappiness about the fact that the 1990 Constitution had removed them from the Fijian roll and included them on what is usually called the "general" roll. They considered that they had little community of interest with most of the other voters on that roll. None of them had succeeded in being elected to a seat belonging to the general voters' community. One suggested solution was the allocation of a communal seat to their community, an idea the Commission was unable to accept for the reasons explained in Chapter 9. Alternatively, they suggested that they should be restored to the Fijian roll, on the ground that many of them were *vasu* and lived closely with the Fijian community. Because we view the retention of the reserved seats as a transitional measure, we consider this solution is the better one. We therefore propose that Pacific Islanders should be eligible to vote in the Fijian reserved seat constituencies.

10.145 Thirdly, a number of submissions from members of all communities expressed unhappiness about the fact that persons have always been classified as "Fijians" and "Indians" for constitutional purposes by reason of descent through the male line. The only exception allowing for descent to be traced through the mother has been if the identity of a person's father is not known. We are satisfied that, in those cases where persons of mixed descent have been brought up in their mother's community rather than their father's, the provision has inflicted personal hardship by requiring people to vote as members of a community to which they do not belong.

10.146 Rotumans are not affected in the same way, because section 156(b) of the 1990 Constitution classifies a person as Rotuman if of Rotuman descent through either the father or the mother. This gave persons of mixed Rotuman and Fijian or Indian descent through the father a choice of rolls.

10.147 We believe that the original 1970 provisions were unduly preoccupied with having clear rules which could be applied automatically. Recognition

of descent through the father was acceptable to Fijians because the customary right to land is usually based on descent through the father rather than the mother. However, as proposed above, we believe that the right to vote in a Fijian reserved seat constituency should not depend on having a customary right to land.

10.148 By returning Pacific Islanders to the Fijian roll, many persons descended from an indigenous Fijian through their mother will acquire the right to vote in Fijian reserved seat constituencies. It would be unfair if other citizens also descended from an indigenous Fijian through their mother were not given the option of voting as members of the Fijian community.

10.149 We therefore propose that a person should be allowed to be registered on the roll for a Fijian reserved seat constituency if descended, through either the male or the female line, from an indigenous inhabitant of the Fiji Islands (other than Rotuma) or any other island in Melanesia, Micronesia or Polynesia. Similarly, a person should be permitted to register on the roll for an Indo-Fijian reserved seat constituency, if descended, through either the male or the female line, from a person who was originally from the sub-continent of India. A person who is descended, through either the male or the female line, from an indigenous inhabitant of Rotuma should have the right to be entered on the roll for the Rotuman reserved seat constituency.

10.150 A reference to "the male line or the female line" would allow descent to be traced back though the generations on either side of the family. Our proposals obviate any question of discrimination on the ground of a person's sex and give persons of mixed descent a choice. In our view, people will only want to change their present registration if it cuts across their sense of personal identity. The number is likely to be very small.

10.151 The right to be registered on the roll for a general reserved seat constituency should remain residual, so that registration is open to all persons who have no other options or, if they have the option of registering on another roll by reason of descent through the male line or the female line, but not both, have chosen not to exercise it.

10.152 No one may be registered on the roll for more than one reserved seat, open seat or provincial constituency. We believe that our proposals will foster a stronger sense of shared identity among all those who are registered on the roll for a particular constituency.

Facilitation of registration as a voter

10.153 The *Street Commission* noted that there was no statutory duty imposed on registration officers to compile a register of all eligible voters. Nor was there a statutory duty on eligible citizens to apply for registration. It compared this situation with the system commonly employed in other countries under which electoral officials have a legal obligation to ensure that all eligible voters are duly registered. All election officials have since been required by statute to ensure that all eligible voters are included on the rolls.

10.154 This Commission received a number of submissions that registration should be made compulsory. We are aware of the practical difficulties in ensuring that all eligible persons are registered. Even so, we consider the right to vote is so important that the Constitution should require the Electoral Commission, the Supervisor of Elections and all other officers concerned with the registration of voters to take all steps reasonably necessary to ensure that all persons who are eligible to be registered as voters are in fact so registered. It should be left to Parliament to decide whether it is also necessary to impose an obligation on eligible citizens to apply for registration.

Exercise of the right to vote

10.155 We also received submissions that voting should be made compulsory, as it is in some other countries including Australia. Such a proposal gives rise to greater difficulties of principle than compulsory registration, as well as the practical difficulties of enforcement. As a first step, we believe that the *right to vote* should be set out much more clearly and less ambiguously than it is now in section 50(1). The Constitution should provide that every person who is a registered voter has the right to vote in the manner prescribed by law in every election in a constituency on the roll for which that person is registered, unless that person is disqualified from voting on the grounds provided in the Constitution.

10.156 In particular, we consider that the *right to vote* should not itself be qualified by providing that it will be lost if "on the date appointed for polling [the person] is ... for any ... reason unable to attend in person at the place and time appointed for the polling". We realise that it is necessary to have strict rules about such matters, but we believe that their imposition should be authorised by providing that a registered voter has the right to vote "in the manner provided by law". The Electoral Commission and the Supervisor of Elections should make every effort with the help of modern technology, to ensure that registered voters have ample opportunities to cast their votes without undue inconvenience or hardship.

Again, it should be left to Parliament to decide whether it is also desirable to impose on registered voters a legal obligation to vote.

Disqualification from voting

10.157 There should continue to be provision that registered voters are disqualified from voting on any ground which would have disqualified them from remaining registered as voters. The Constitution continue to provide that, in accordance with the law of the Republic, a person is disqualified from voting by reason of his or her responsibilities in connection with the conduct of the election.

RECOMMENDATIONS

279. There should be a clear constitutional right to be registered as a voter, as well as to vote.

280. Everyone should have the right to be registered as a voter and to vote at the age of 18 (though a person should still need to attain the age of 21 before becoming a candidate).

281. A person should be disqualified from being or remaining registered as a voter

(a) if the person has not been resident in the Republic at any time during the preceding two years, unless his or her absence was for a reason prescribed by law; or

(b) if the person is serving a sentence of imprisonment for a period of twelve months or more imposed by a court of the Republic of the Fiji Islands, or is under a sentence of death, or is serving a sentence of imprisonment for a period of twelve months or more, other than a suspended sentence, imposed by a court in any other country prescribed by law; or

(c) if, in accordance with the law of the Republic, the person has been found to be of unsound mind; or

(d) if, in accordance with the law of the Republic, the person is disqualified from voting on the ground of a conviction for an offence connected with elections.

282. The Constitution should not require a person to have a period of prior residence in Fiji in order to qualify for registration.

283. In view of the Commission's recommendations that Fiji citizens will lose that citizenship automatically if they become citizens in another country, the ground for disqualification in Section 49(3)(a) of the 1990 Constitution is unnecessary in the context of the right to be registered as a voter, to become a candidate and to be a member of Parliament.

284. The Constitution should make it clear that a registered voter must be entered on a roll for a reserved seat constituency, an open seat constituency and a provincial constituency.

285. The rules about who is entitled to register on a roll for a reserved seat constituency belonging to a particular community should continue to be included in the Constitution, but all other rules about when a person becomes entitled to be registered in one constituency rather than another should be left to legislation.

286. The Electoral Act should provide, among other things, that the right to be entered on the roll for reserved, open seat or provincial constituencies should continue to be based on residence in that constituency. As a general rule, a person should be regarded as having become resident in a constituency only after having resided there for six months, but, to avoid hardship, it should allow bona fide residence to be established on the basis of other evidence.

287. The Constitution should deal only with the right to be entered on a roll for a Fijian reserved seat constituency. It should not define a "Fijian" for any other purpose.

288. A person should be entitled to be registered on the roll for a Fijian reserved seat constituency if descended, through either the male or the female line, from an indigenous inhabitant of the Fiji Islands (other than Rotuma) or any other island in Melanesia, Micronesia or Polynesia.

289. A person should be permitted to register on the roll for an Indo-Fijian reserved seat constituency if descended, through either the male or the female line, from a person who was originally from of the sub-continent of India.

290. A person who is descended, through either the male or the female line, from an indigenous inhabitant of Rotuma should

have the right to be entered on the roll for the Rotuman reserved seat constituency.

291. The right to be registered on the roll for a general reserved seat constituency should be open to all persons who are not entitled to register on a roll for a Fijian, Indo-Fijian or Rotuman reserved seat constituency, or, if they have the option of registering on such a roll by reason of descent through the male or the female line, but not both, have chosen not to exercise it.

292. The Constitution should make it clear that no one may be registered on the roll for more than one reserved seat, open seat or provincial constituency.

293. The Constitution should require the Electoral Commission, the Supervisor of Elections and all other officers concerned with the registration of voters to take all steps reasonably necessary to ensure that all persons who are eligible to be registered as voters are in fact so registered.

294. It should be left to Parliament to decide whether it is necessary to impose an obligation on eligible citizens to apply for registration.

295. The Constitution should provide that every person who is a registered voter has the right to vote in the manner prescribed by law in every election in a constituency on the roll for which that person is registered, unless that person is disqualified from voting on the grounds provided in the Constitution.

296. The Electoral Commission and the Supervisor of Elections should make every effort, with the help of modern technology, to ensure that registered voters have ample opportunities to cast their votes without undue inconvenience or hardship. It should be left to Parliament to decide whether it is also desirable to impose on registered voters a legal obligation to vote.

297. The Constitution should continue to provide that registered voters are disqualified from voting on any ground which would have disqualified them from remaining registered as a voters, or if, in accordance with the law of the Republic, they are disqualified from voting by reason of responsibilities in connection with the conduct of the election.

ELIGIBILITY TO BE A CANDIDATE

10.158 Once again, the Constitution should clearly state that every registered voter who has attained the age of 21 years is eligible to be nominated as a candidate for election as a member of the Bose Lawa or the Bose e Cake, unless that person is disqualified on a ground provided in the Constitution. It should go on to state that only a person registered on a roll for a Fijian, Indo-Fijian, Rotuman or general reserved seat constituency is eligible to be nominated as a candidate for a reserved seat of the relevant community.

10.159 There should be no constitutional requirement that a person can be nominated for a particular constituency only if on the roll for that constituency. The question whether a person has a sufficient connection with a constituency to be elected to represent it should be left to parties, candidates and the voters themselves.

10.160 The Commission has carefully considered the grounds on which a person should be disqualified from being a candidate. In particular, it examined closely section 42(1)(f) of the 1990 Constitution which disqualifies a person who, "subject to any exceptions prescribed by Parliament, holds or is acting in any public office". The principle behind the provision is a sound one. People who wish to stand for Parliament have to be prepared to give up any other office in the service of the state.

10.161 However, the provision has given rise to considerable practical difficulties. The Constitution does not make it clear whether the disqualification applies at the time of nomination, or only at the date of election. In addition, it may sometimes be difficult to determine on the facts whether a person "holds or is acting" in a public office. It is also wrong in principle to allow Parliament to make exceptions to the rule. The rule itself should be drafted so as to exclude persons who should not be caught by it. In this connection, it should be noted that the drafting device of defining "public office" widely enough to include judicial office for the purposes of this particular provision, among others, has led to confusion in other contexts because it seems to equate members of the judiciary with other servants of the state.

10.162 The Commission therefore proposes a different approach. All persons holding an office in the service of the state coming within the terms of the present definition of "public office" (including the office of the

Commander of the Fiji Military Forces, contrary to the provision in section 150(b)(ii)), should be treated as having vacated that office immediately before the time their signed nomination as a candidate for election as a member of the Bose Lawa or the Bose e Cake is filed. Office-holders appointed to the Bose e Cake by the President should be treated as having vacated office immediately before being so appointed.

10.163 The provisions just proposed need to be complemented by a further provision that persons whose nominations as candidates for election as members of the Bose Lawa or the Bose e Cake have been filed become disqualified for election if, with their consent, they are appointed to an office in the service of the state. Sitting members of either House of Parliament should be treated as vacating their seats if, with their agreement, they are nominated as a candidates for another seat, either in the same House or the other House.

10.164 There are a small number of offices that should be regarded as carrying a continuing disqualification for election as a Member of Parliament, for a period after the person concerned has ceased to hold the office. Provision to this effect was included in the 1970 Constitution but was omitted from the 1990 Constitution. It should be restored. The offices affected should include those in which persons might, directly or indirectly, be able to put in place arrangements that would give them an advantage in contesting an election or in their capacity as members of Parliament. The Commission considers that a person who has held office as a member of the Electoral Commission, the Constituency Boundaries Commission, the Parliamentary Emoluments and, or the Constitutional Offices Commission or as Supervisor of Elections should be disqualified from being a candidate for election as a member of Parliament for a period of four years after ceasing to hold office.

10.165 The other grounds for disqualification should include any which would disqualify a person from being or remaining registered as a voter or from voting. As at present, they should include the fact that a person is an undischarged bankrupt (section 42(1)(b)).

10.166 The 1970 Constitution also disqualified a person who "subject to any exceptions or limitations prescribed by Parliament, has any such interest in any such government contract as may be so prescribed". This rather awkwardly drafted provision, which left it to Parliament to prescribe the circumstances in which a person with an interest in a government contract should be disqualified, was omitted from the 1990 Constitution. The term "government contract" was not defined. The principle behind the former provision is closely linked to our recommendations

in Chapter 15 about an integrity code. We consider that the Constitution should include, as a ground for disqualification, the fact that the person has any such interest in a contract entered into by the Government of the Republic of the Fiji Islands as may be prescribed by law.

10.167 The Constitution should also make it clear that a person should be disqualified from being a candidate if any ground for disqualification applies to that person at the time of filing his or her nomination or becomes applicable at any time after that date and before the declaration of the results of the poll.

RECOMMENDATIONS

298. The Constitution should clearly state that every registered voter who has attained the age of 21 years is eligible to be nominated as a candidate for election as a member of the Bose Lawa or the Bose e Cake, unless that person is disqualified on a ground provided in the Constitution.

299. The Constitution should provide that only a person registered on a roll for a Fijian, Indo-Fijian, Rotuman or general reserved seat constituency is eligible to be nominated as a candidate for a reserved seat of the relevant community. There should, however, be no constitutional requirement that a person can be nominated for a particular constituency only if on the roll for that constituency.

300. The Constitution should provide that all persons holding an office in the service of the state coming within the terms of the present definition of "public office" (which should include the office of the Commander of the Fiji Military Forces) should be treated as having vacated that office immediately before the time at which their signed nomination as a candidate for election as a member of the Bose Lawa or the Bose e Cake is filed. It should also provide that office-holders appointed to the Bose e Cake by the President will be treated as having vacated office immediately before being so appointed.

301. There should be a further provision that persons whose nominations as candidates for election as a member of the Bose Lawa or the Bose e Cake have been filed become disqualified for election to that office if, with their consent, they are appointed to an office in the service of the state.

302. Sitting members of either House of Parliament should be regarded as vacating office as members if they file a nomination as a candidate for another seat, either in the same House or the other House.

303. A person who has held office as a member of the Electoral Commission, the Constituency Boundaries Commission, the Parliamentary Emoluments Commission, or the Constitutional Offices Commission or as Supervisor of Elections should be disqualified from being a candidate for election as a member of Parliament for a period of four years after ceasing to hold that office.

304. The grounds of disqualification should continue to include any ground which would disqualify a person from being or remaining registered as a voter or from voting, and the fact that a person is an undischarged bankrupt.

305. The Constitution should include as a ground of disqualification the fact that the person has any such interest in a contract entered into by the Government of the Republic of the Fiji Islands as may be prescribed by law.

306. The Constitution should also make it clear that a person should be disqualified from being a candidate if any ground for disqualification applies to that person at the time of filing his or her nomination or becomes applicable at any time after that date and before the declaration of the results of the poll.

THE TIMING AND CONDUCT OF ELECTIONS

The term of Parliament

10.168 At present the maximum term of Parliament is five years from the date of the first sitting of Parliament after a general election. Since independence Parliament has twice been dissolved prematurely, after the Government was defeated on an issue of confidence. Otherwise, Parliament has run its full term or has been dissolved only a few months before the time at which it would otherwise expire. There has been no disposition on the part of a Prime Minister to call an early election in an attempt to take advantage of propitious circumstances.

10.169 The submissions expressed a range of views about the duration of Parliament, some favouring the retention of a five-year term, and others suggesting

that it should be reduced to four years or even three. A study of the terms of parliaments in 39 democratic countries shows that 19 favour a four-year term, 17 favour a five-year term and only 3 have a three-year term. The present five-year term in the Fiji Islands is therefore not exceptional.

10.170 The New Zealand Royal Commission on the Electoral System examined the arguments for extending the present three-year term in that country to four or five years. In the absence of a controlled constitution (in contrast to Fiji), that Commission was cautious about any extension of the term, but concluded that a four-year term would give governments a good opportunity to embark upon sound policies and would not deprive voters of adequate opportunities to pass judgment on those policies and the government itself.

10.171 We consider that a four-year term would enhance government accountability without adversely affecting its ability to design and implement its policies. We propose, therefore that the maximum term of Parliament should be four years. The Constitution should retain the substance of the provision in section 80(4) of the 1990 Constitution by providing for the extension of the life of Parliament for up to one year during a state of "national emergency". The meaning of that term is discussed in Chapter 19. Section 80(3), providing for an extension of up to four years if Fiji is at war, should be repealed. If it should ever be necessary, such a postponement should be authorised by amendments of the Constitution.

The effect of dissolution

10.172 As now, the automatic dissolution on the expiry of the term of Parliament or any earlier dissolution by the President acting on the advice of the Prime Minister, should have the effect of dissolving both the Bose Lawa and the Bose e Cake. Consequently general elections will always involve the election of the members of both Houses. We accept that the same party will not necessarily obtain a majority in each House but we consider it desirable that the elections to both should take place simultaneously, so that each is equally affected by the dynamics of the political situation at the time.

The timetable for elections

10.173 The Constitution at present contains a very tight timetable for the holding of general elections. This reflects the democratic principle that, as soon as possible after one Parliament has been dissolved, another should be elected. However, the timetable also needs to take account of another democratic principle: parties and candidates should have adequate time to select their candidates and conduct an election campaign. There must also be time for proper arrangement to be put in place for the conduct of the general election.

10.174 Earlier in this chapter we explained the importance we place, in the circumstances in the Fiji Islands, on the idea that moderate parties should be encouraged to cooperate in putting up multiethnic slates and trading preferences. It is important that the timetable should allow sufficient time for arrangements of this kind to be negotiated. Such negotiations can occur in advance when Parliament runs for its full term but that will not necessarily be the case. The decision to dissolve the Parliament is in the hands of the Prime Minister, even if the Government retains the confidence of the lower house.

10.175 We believe that the timetable for holding a general election should be slightly extended, and responsibilities clarified. The Constitution should provide that, not later than 7 days after the date of the dissolution of Parliament, the President, acting on the advice of the Prime Minister, shall issue the writs for the election of members to fill all reserved and open seats in the Bose Lawa and all provincial seats in the Bose e Cake. We would expect that the Prime Minister will take into account the recommendations of the Electoral Commission about a timetable that is administratively feasible within the prescribed maximums.

10.176 The writs specify the dates on which nominations will be called for, the date, or the last date for filing nominations, the date on which polling may commence and the date by which it must end. The Commission considers that the Constitution should provide that the last date for filing nominations must be not more than 14 days after the date of the issue of the writs. It would be understood that nominations should be called for as soon as possible after the issue of the writs, to give parties time to choose their candidates through their own constitutional processes, and also to allow for the negotiations among parties that we envisage. Individual candidates must also have time to raise their deposits or collect signatures to evidence their support.

10.177 The Constitution should provide that polling must commence not more than 30 days after the last date for filing nominations. During this period, parties or candidates will need to register any tickets that they wish to appear above the line on the ballot paper. The Electoral Commission will have to ensure that the implications of voting for particular tickets are publicised, and the ballot papers will have to be printed and distributed. The election campaign will also be in full swing. If parties or coalitions put up tickets, they will need time to persuade their supporters to vote for the ticket.

10.178 For these reasons, we see the constitutional maximums as being a guide also to the minimum periods necessary to ensure that there is adequate time for

the democratic process to operate at all stages in the process of conducting a general election. We do not think that the Constitution needs to specify the maximum time over which polling should extend. That is likely to get shorter as transport and communications improve. Under present conditions it should be possible to complete polling within a maximum of 8 days.

10.179 The Constitution does not provide time limits within which by-elections must be held to fill a vacancy among elected members of Parliament. That should be regulated by legislation, using the constitutional timetable for general elections as a guide. Although it is important that constituencies should not be left without representation, there is not quite the same need for urgency as there is when Parliament has been dissolved. As a cost-saving measure, the Constitution should provide that no by-election to fill a vacancy need be held if there is less than six months between the date on which the vacancy arises and the date on which Parliament will stand dissolved automatically.

The Electoral Commission

10.180 The Constitution should continue to provide for an Electoral Commission. That body should be given general responsibility for, and the power to supervise, the registration of voters for the election of members of Parliament and the conduct of the election of the President and Vice-President, and of the members of the Bose Lawa and the elected members of the Bose e Cake. It should continue to have such powers and functions as may be prescribed by law in relation to other elections, such as the election of the members of local authorities.

10.181 The main rules for the registration of voters and the conduct of Presidential and Parliamentary elections should be contained in a comprehensive Electoral Act. The Electoral Commission should have power to make regulations only in respect of administrative matters. The need for proposed electoral legislation to be referred to the Electoral Commission and the Supervisor of Elections for comment should be retained.

10.182 The Electoral Commission should consist of a Chairperson and four other members, all of whom should hold office for terms of four years. (The length of the term reflects the recommended reduction in the duration of Parliament from five years to four.)

10.183 The membership should not overlap with that of the Constituency Boundaries Commission. The Chairperson of the Electoral Commission should be a person who is, or is qualified to be, a judge of a superior court of the Republic

of the Fiji Islands. The appointment should be made by the President, acting in his own deliberate judgment. The four other members should be appointed by the President on the advice of the Prime Minister acting after consultation with the Leader of the Opposition. These arrangements should ensure that the Commission has a neutral and well-qualified Chairperson and its other members are acceptable to all political parties.

10.184 Sitting members of Parliament, members of the councils of municipalities under the Local Government Act (Cap. 125), candidates for any of those offices nominated with their consent, public officers and local government officers should be disqualified from membership.

10.185 In a recent decision on comparable provisions of the Constitution of Mauritius, the Privy Council held election officers are "public officers" and should therefore have been appointed by the Public Service Commission, not the Electoral Commission. The 1990 Constitution permits the Public Service Commission to delegate the appointing power to the Electoral Commission. The Public Service Commission should make such a delegation so that the Electoral Commission is able to recruit temporary election officers whenever the need arises.

10.186 In view of the recommended changes in the constitutional provisions about eligibility for registeration on a roll for a Fijian reserved seat constituency, the provision requiring the Electoral Commission to consult with the Native Lands Commission will no longer be required.

10.187 There should be transparency and accountability in the work of the Electoral Commission. In addition to its obligation to make an annual report to the President and Parliament, it should be empowered to report whenever it considers that matters have arisen which ought to be brought to their attention.

The Supervisor of Elections

10.188 The Constitution should continue to make provision for the office of Supervisor of Elections. It should provide that, under the general direction of the Electoral Commission, the Supervisor of Elections has administrative responsibility for the registration of voters for the election of members of Parliament, and the conduct of the election of the President and Vice-President, and of the members of the Bose Lawa and the elected members of the Bose e Cake, as well as such other elections as may be prescribed by law.

10.189 In view of our recommendation in Chapter 13 that the Judicial and Legal Services Commission be reconstituted as the Judicial Service Commission, the Supervisor of Elections should be appointed by the Constitutional Offices Commission recommended in Chapter 15. Otherwise the substance of section 52 of the 1990 Constitution should be retained.

RECOMMENDATIONS

307. **The maximum term of Parliament should be four years from the date of the first sitting of Parliament after a general election. Parliament should be able to extend its life by up to a year during a state of national emergency.**

308. **The automatic dissolution of Parliament on the expiry of its term or any earlier dissolution by the President acting on the advice of the Prime Minister, should have the effect of dissolving both the Bose Lawa and the Bose e Cake.**

309. **The Constitution should provide that, not later than 7 days after the day of the dissolution of Parliament, the President, acting on the advice of the Prime Minister, shall issue the writs for the election of members to fill all reserved and open seats in the Bose Lawa and all provincial seats in the Bose e Cake.**

310. **The Constitution should provide that the last date for filing nominations must be not more than 14 days after the date of the issue of the writs, and that polling must commence not more than 30 days after the last date for filing nominations.**

311. **The Constitution should provide that no by-election to fill a vacancy need be held if there is less than six months between the date on which the vacancy arises and the date on which Parliament will stand dissolved automatically.**

312. **The Electoral Commission should continue to be given general responsibility for, and the power to supervise, the registration of voters for the election of members of Parliament and the conduct of the election of the President and Vice-President, and of the members of the Bose Lawa and the elected members of the Bose e Cake. It should continue to have such powers and functions as may be prescribed by law in relation to other elections.**

313. **The main rules for the registration of voters and the conduct of Presidential and Parliamentary elections should be contained in a comprehensive Electoral Act. The Electoral Commission should have the power to make regulations only in respect of administrative matters. The requirement that proposed electoral legislation should be referred to the Electoral Commission and the Supervisor of Elections for comment should be retained.**

314. **The Electoral Commission should consist of a Chairperson and four other members, who should hold office for terms of four years. The Chairperson should be a person who is, or is qualified to be, a judge of a superior court of the Republic of the Fiji Islands, and should be appointed by the President, acting in his own deliberate judgment. The four other members should be appointed by the President on the advice of the Prime Minister acting after consultation with the Leader of the Opposition.**

315. **Sitting members of Parliament, members of the councils of municipalities under the Local Government Act (Cap. 125), candidates for any of those offices nominated with their consent, public officers and local government officers should be disqualified from membership.**

316. **The Public Service Commission should delegate the power to appoint election officers to the Electoral Commission.**

317. **In addition to its obligation to make an annual report to the President and Parliament, the Electoral Commission should be empowered to make such a report whenever it considers that matters have arisen which ought to be brought to their attention.**

318. **The Constitution should provide that, under the general direction of the Electoral Commission, the Supervisor of Elections has administrative responsibility for the registration of voters for the election of members of Parliament, and the conduct of the election of the President and Vice-President, and of the members of the Bose Lawa and the elected members of the Bose e Cake, as well as such other elections as may be prescribed by law. The Supervisor of Elections should be ap-**

pointed by the Constitutional Offices Commission recommended below. Otherwise the substance of section 52 of the 1990 Constitution should be retained.

CHALLENGES TO THE VALIDITY OF ELECTIONS OR MEMBERSHIP OF PARLIAMENT

10.190 Section 46 of the 1990 Constitution confers jurisdiction on the High Court to determine certain questions about the validity of a person's election to, or continued membership of the House of Representatives. An express provision is necessary because, historically, such questions were not regarded as coming within the jurisdiction of the courts but were matters to be determined by Parliament itself. However, modern Westminster constitutions recognise that the courts are better equipped than Parliament to make the findings of fact on which such questions often depend and to apply the law impartially.

10.191 The wording of the section, however, does not make a clear enough distinction between testing the validity of the *processes* followed in conducting an election and determining whether a person declared elected remains qualified to serve as a member of Parliament. These two questions need to be dealt with in different ways.

Election petition

10.192 The Constitution should provide that the validity of the election of the President and Vice-President, or of any person declared elected as a member of Parliament can be called in question by means of an election petition, on the ground that the election, or the declaration of the result of the election, was unlawful. This ground includes a claim that the person was not qualified to be or remain a candidate, or that a person was wrongfully excluded from being a candidate, or that the electoral process itself was flawed.

10.193 In order to attain finality concerning the outcome of a particular election, the Constitution should provide that an election petition can be brought only within a specified time after the declaration of the result of the poll. This time limit should be six weeks from the date of the declaration, except in the case of fraud, when time should run from the date of the discovery of the fraud.

10.194 We also consider that the present provision allowing any registered voter to question the outcome of elections is too wide. The right should be limited to persons with an interest in the outcome of the particular election. It should therefore be provided that an election petition may be brought by any person entitled to

vote in the election to which it relates or by any person who was a candidate or who claims to have had the right to be a candidate at that election or by the Solicitor-General.

10.195 The Solicitor-General should also have standing to intervene if not a party. There should be a provision that the person whose election is complained of is the respondent, and, if the petition complains of the conduct of a returning officer or the Electoral Commission or the Supervisor of Elections, they should also be respondents. The procedures for the hearing of election petitions should be spelt out in the Electoral Act.

10.196 The decision of the High Court on an election petition should continue to be final. An election petition should be the exclusive means of questioning the outcome of an election. Provision to this effect should be re-inserted in what is now section 113 of the 1990 Constitution dealing with the original jurisdiction of the High Court in constitutional questions.

Determination of questions of membership of Parliament

10.197 There should be a separate provision allowing an interested person to bring proceedings in the High Court, at any time after a person has been declared elected as a member of Parliament, claiming that the member's seat has become vacant, or, if it is so provided, that the person should cease to perform the functions of a member pending the determination of that question. It will then be clear that such proceedings can be brought at any time during which the person purports to be or to remain a member. The procedure should apply to the members of both Houses of Parliament.

10.198 Until the time for bringing an election petition expires, it may be possible to challenge a person's election under both procedures - for example on the ground that, as a non-citizen the person was not qualified to be a candidate and is not qualified to be a member. After the expiry of the time for bringing an election petition, it will still be possible to bring proceedings on the ground that the member's seat has been vacated.

10.199 Any other member of Parliament, and any registered elector, whether or not registered on the roll for the member's constituency, should have standing to bring such an action, as should the Solicitor-General. As in the case of an election petition, the Solicitor-General, if not a party, should have standing to intervene. Again, the decision of the High Court should be final, and the otherwise overlapping jurisdiction under section 113 should be excluded.

Circumstances in which a member's seat should become vacant

10.200 Although the rules about the vacation of the seats of members of Parliament do not form part of the electoral process, in substance they overlap the rules which may disqualify persons from being registered as voters or becoming candidates. For that reason, it is convenient to deal with them here.

10.201 The Constitution should continue to provide that the seats of all members of Parliament become vacant upon a dissolution of Parliament. This does not affect the tenure of office of the Prime Minister and other Ministers, or after Parliament has been dissolved, prevent the appointment of a Prime Minister or Ministers from among persons who were members of Parliament immediately before the dissolution. The substance of the present provisions to this effect should be retained.

10.202 Similarly, the Constitution should continue to provide that the seat of a member becomes vacant on resignation which should continue to be effective when received by the Speaker of the Bose Lawa or by the President of the Bose e Cake, as appropriate.

10.203 The Commission proposes that the Constitution should also provide that the seat of a member becomes vacant

(a) if the member is not, or has ceased to be, a citizen of the Republic of the Fiji Islands;

(b) if the member is absent from two consecutive meetings of the Bose Lawa or the Bose e Cake without the permission of the Speaker or the President of the Bose e Cake, as the case requires;

(c) if the member is an undischarged bankrupt;

(d) if the member is under a sentence of imprisonment for a period of twelve months or more, other than a suspended sentence, imposed by a court in the Republic or is under a sentence of death, or of imprisonment for a period of twelve months or more, other than a suspended sentence, imposed by a court in any other country prescribed by law;

(e) if, in accordance with the law of the Republic, the person has been found to be of unsound mind;

(f) if, in accordance with the law of the Republic, the person is disqualified from voting on the ground of a conviction for an offence connected with elections;

(g) if, with the member's consent, he or she is appointed to an office in the service of the state;

(h) if, with the member's consent, he or she is nominated as a candidate for election to another seat in Parliament;

(i) if the member has any such interest in a contract entered into by the Government of the Republic of the Fiji Islands as may be prescribed by law;

(j) if the member resigns from the registered political party for which he or she was a candidate at the time of election to Parliament, or, by reason of conduct in or relating to the proceedings of Parliament, the member is in breach of the rules concerning party discipline contained in the constitution of such a party, and is for that reason expelled from the party, under the rules about expulsion contained in that constitution, and in conformity with the requirements of natural justice.

10.204 We propose that paragraph (j) should be qualified by providing that the reference to "proceedings of Parliament", for the purposes of the paragraph, does not include proceedings in a select committee of the Bose Lawa or the Bose e Cake, or a joint select committee of those Houses. It will need to be supplemented also by a provision that the member's seat becomes vacant when the Speaker or the President of the Bose e Cake receives a certificate signed by the President and the Secretary of the party, setting out the details of the member's resignation or expulsion from the party.

10.205 We now comment on these proposals. Paragraphs (a) and (b) correspond to the present section 43(1) (b) and (c) and section 56(4)(b) and (c). Paragraphs (d) - (f) correspond to the grounds on which a person is disqualified from becoming or remaining registered as a voter. The only difference is that the seat of a member of Parliament becomes vacant on being sentenced to a term of imprisonment for 12 months or more, not when he or she begins to serve the sentence. The substance of the existing provisions allowing members to be relieved of their parliamentary functions without actually losing their seats, until all avenues of appeal have been exhausted, should be retained. Paragraph (g) corresponds to the existing section 42(1)(f) but takes account of Recommendation 301. Paragraphs (h) and (i) reflect our recommendations about the grounds on which a person is disqualified from becoming a candidate.

10.206 Paragraph (h), together with the provision which accompanies it, is a revised version of the present section 43(1)(e) providing that a member loses his or her seat on "crossing the floor". That provision was introduced by the 1990 Constitution. It reflected the view that a member of Parliament owes a duty of loyalty to the party whose support assisted him or her to succeed in the election. While it is true that most political parties insist that their members observe party discipline, and give themselves power to expel a member who breaches that discipline, it is unusual to provide that dismissal from the party will lead to vacation of a member's seat. A member who is expelled usually retains the seat until Parliament is dissolved. Then the party will not again nominate the renegade as a candidate. That is usually sufficient to deter casual breaches of party discipline.

10.207 A rule that may require a member to vacate his or her seat in Parliament as a result of resigning from the party or as a consequence of a breach of party discipline should be included in the Constitution only with the greatest of caution. Otherwise there is a risk of undermining the basic democratic principle that Members of Parliament have a free mandate to act in accordance with their consciences, without being bound by the instructions of their constituency supporters, or, on occasions, the decisions of the party to which the member belongs.

10.208 Under the Westminster system there is a tension between reliance on party unity and the recognition that, in extreme circumstances, party unity may have to be sacrificed to other concerns. The basic provisions about the formation and the fall of a Government reflect the expectation that, to enable a government to take office, it must have the support of a party or parties making up a majority in Parliament. A resolution of no confidence in the Government cannot be passed unless some or all members of the ruling party are prepared to vote for it. That implies the abandonment of the Prime Minister as party leader, a split within the party or the defection of some of its members. A famous British constitutional lawyer once wrote that "there is no loyal way to change a Prime Minister". The Commission considers that the inclusion of the proposed rule will not undermine the basic safeguard provided by the ability to move and carry a motion of no confidence in the Government.

10.209 In Chapter 10, we propose the inclusion in Standing Orders of new rules about sector standing committees, through which members of the Bose Lawa who are not members of the Cabinet should have the opportunity to play an influential role in the formulation of legislation and the monitoring of the executive. While the successful operation of such committees must depend on relaxing the

rules of party discipline so that committees do not customarily divide on party lines, the application of the party whip on occasions cannot be excluded. A failure to vote with the party in a select committee should not be treated as "crossing the floor". Otherwise, the new procedures we propose may not have the effect we hope for.

10.210 We have also sought to devise a rule that achieves the desired purpose without exposing members to an undue risk of being deprived of their seats because of differences of opinion or contests for office within the party. Our proposed rule makes it clear that a member's seat becomes vacant only as a result of his or her own decision to resign from the party, or the party's decision to expel the member for a clear breach of party discipline. It also gives the expelled member a basis for contesting the legality of the expulsion in the courts.

10.211 The proposed safeguards include the following requirements:

- A party wishing to take advantage of the provision must register itself and its constitution with the Electoral Commission. This will avoid doubt about the identity of a "party". It will also enable candidates standing for the party to obtain ready access to the party constitution.
- The party constitution must contain clear rules about the observance of party discipline by its parliamentary members and also empower an organ of the party to expel such a member for a breach of those rules.
- The expulsion must be effected in accordance with the party's rules for expulsion and also in accordance with the requirements of natural justice. These include the need for the member to be given a fair hearing, and require the decision-making body to act within its powers and not to be motivated by bias.

As in the case of a person sentenced to imprisonment for more than 12 months, it should be provided that members who wish to challenge their expulsion in the courts should be relieved of their parliamentary functions until that remedy is exhausted. If the validity of the expulsion is upheld, the member's seat will then become vacant.

RECOMMENDATIONS

319. The Constitution should provide that the validity of the election of the President and Vice-President, or of any person declared elected as a member of Parliament can be called in question by

means of an election petition, on the ground that the election, or the declaration of the result of the election, was unlawful.

320. The Constitution should provide that an election petition can be brought only within a period of six weeks after the declaration of the result of the poll, except in the case of fraud, when time should run from the date of its discovery.

321. Any person entitled to vote in the election to which the petition relates, and any person who was a candidate or who claims to have had the right to be a candidate at that election, and the Solicitor-General should have standing to bring an election petition.

322. The Solicitor-General should have standing to intervene if not a party. The person whose election is complained of should be the respondent, and if the election petition complains of the conduct of a returning officer or the Electoral Commission or the Supervisor of Elections, they should also be respondents.

323. The decision of the High Court on an election petition should continue to be final. An election petition should be the exclusive means of questioning the outcome of an election

324. There should be a separate provision allowing an interested person to bring a proceeding in the High Court, at any time after a person has been declared elected as a member of Parliament, claiming that the member's seat has become vacant, or, if it is so provided, that the person should cease to perform the functions of a member pending the determination of that question.

325. Any other member of Parliament, and any registered elector, whether or not registered on the roll for the member's constituency, should have standing to bring such a proceeding. The Solicitor-General, if not a party, should also have standing to bring such a proceeding or to intervene. The decision of the High Court should be final. The poceeding should be the exclusive means of challenging the retention of office by a member of Parliament.

326. The Constitution should continue to provide that the seats of all members of Parliament become vacant upon a dissolution of Parliament. The substance of the present provisions that,

after Parliament has been dissolved, a Prime Minister or Ministers may be appointed from among persons who were members of Parliament immediately before the dissolution should be retained.

327. **The Constitution should continue to provide that the seat of a member becomes vacant if he or she resigns the seat. The resignation should be effective when received by the Speaker or by the President of the Bose e Cake, as the case requires:**

328. **The Constitution should provide that the seat of a member becomes vacant**

(a) **if the member is not, or has ceased to be, a citizen of the Republic of the Fiji Islands;**

(b) **if the member is absent from two consecutive meetings of the Bose Lawa or the Bose e Cake without the permission of the Speaker or the President of the Bose e Cake, as the case requires;**

(c) **if the member is an undischarged bankrupt;**

(d) **if the member is under a sentence of imprisonment for a period of twelve months or more, other than a suspended sentence, imposed by a court in the Republic or is under a sentence of death, or of imprisonment for a period of twelve months or more, other than a suspended sentence, imposed by a court in any other country prescribed by law;**

(e) **if, in accordance with the law of the Republic, the person has been found to be of unsound mind;**

(f) **if, in accordance with the law of the Republic, the person is disqualified from voting on the ground of a conviction for an offence connected with elections;**

(g) **if, with the member's consent, he or she is appointed to an office in the service of the state;**

(h) **if, with the member's consent, he or she is nominated as a candidate for election to another seat in Parliament;**

(i) **if the member has any such interest in a contract entered into by the Government of the Republic of the Fiji Islands as may be prescribed by Act;**

(j) **if the member resigns from the registered political party for which he or she was a candidate at the time of election to Parliament, or, by reason of conduct in or relating to the proceedings of Parliament, the member is in breach of the rules concerning party discipline contained in the constitution of such a party, and is for that reason expelled from the party, under the rules about expulsion contained in that constitution, and in conformity with the requirements of natural justice.**

329. **Paragraph (j) should be qualified by providing that the reference to "proceedings of Parliament", for the purposes of the paragraph, do not include proceedings in a select committee of the Bose Lawa or the Bose e Cake, or a joint select committee of those Houses. It should be supplemented also by a provision that the member's seat becomes vacant when the Speaker or the President of the Bose e Cake, as the case requires, receives a certificate signed by the President and the Secretary of the party, setting out the details of the member's resignation or expulsion from the party. But if the member wishes to challenge the validity of the expulsion in the courts the member should be relieved of parliamentary functions until the expulsion is overturned or that remedy is exhausted, whichever is the later.**

11

THE FUNCTIONING OF PARLIAMENT

11.1 In this chapter we review those provisions of the 1990 Constitution concerned with the functioning of Parliament. Some relatively minor changes are proposed, reflecting the changes in its composition and other relevant considerations. We also set out in detail our foreshadowed proposals for the introduction of standing select committees with the functions of overseeing all sectors of Government administration and considering and making recommendations on most if not all Bills before they are passed by Parliament.

SESSIONS, MEETINGS AND SITTINGS OF PARLIAMENT

11.2 Section 79(4) of the 1990 Constitution, when read with section 79(1), requires the President, acting on the advice of the Prime Minister, to appoint a date, not more than thirty days after the date prescribed for polling, for the commencement of the first session of Parliament after any general election. The substance of this important constitutional requirement should be retained. Occasionally, as we explain in Chapter 12, it may not be clear until Parliament meets whether the Prime Minister in office before the general election can still command the support of a majority of the members of the Bose Lawa. In any case it is desirable that, whether or not the Government changes, Parliament should meet promptly after a general election.

11.3 Otherwise, sessions of Parliament commence at a time appointed by the President on the advice of the Prime Minister. Under section 79(2), there must not be an interval of more than six months between the end of one session and the first sitting of Parliament in the next session. During the period when Parliament is not in session, the President, under section 79(5), may call a session in the exercise of his own deliberate judgment

> if he receives a request in writing for the summoning of a session of Parliament from not less than one-quarter of the members of the House of Representatives and he considers that the Government no longer commands the confidence of a majority of the members of that House or that it is necessary for the two Houses of Parliament to consider without delay a matter of public importance.

The need for such a provision is well-recognised. Its purpose is to prevent a Prime Minister from staving off a no-confidence motion or avoiding any other kind of political challenge by not advising the President to appoint a time for the commencement of a session of Parliament.

11.4 Its substance, though not its detail, should be retained. It seems invidious to require the President to summon Parliament if he considers that the Government no longer commands the confidence of a majority of the members of the Bose Lawa. This may be a matter that only the members of the Bose Lawa themselves can determine. The need to consider without delay a "matter of public importance" should be regarded as including an intention to move a no-confidence motion.

11.5 These existing constitutional provisions about sessions of Parliament are designed for a country in which Parliament meets regularly during the whole of the time for which it is in session, and then remains out of session for up to six months. That is not the practice here. Each session of Parliament lasts approximately a year. The current session ends when Parliament is prorogued, and the next session ordinarily commences shortly afterwards. But, during the period when Parliament is in session, sittings are held only during "meetings" of each House.

11.6 Standing Order 15 of the House of Representatives provides as follows:

> Meetings of the House other than the first meeting of any session shall begin on such day and at such hour as the Speaker may determine after consultation with the Prime Minister.

Although only 14 days notice of a meeting is required, in practice the dates of meetings throughout the year are fixed at the beginning of the year. Meetings take place at intervals of about two months or less, and generally last from one to two weeks.

11.7 Theoretically, however, it would be possible for the Prime Minister to seek to extend the time between *meetings* to more than the minimum 6 months period between sessions. In such a case section 79(5) would not apply, because Parliament would already be in session.

11.8 The fact that the Speaker determines the time of meetings "after consultation with the Prime Minister" and not on the Prime Minister's advice, affords a substantial safeguard. Even so, we consider that the Constitution should

provide that, if, while Parliament is in session, more than two months have elapsed since the last meeting of the Bose Lawa, the Speaker should be required to call a meeting of that House for a date not more than two weeks after receiving a written request to do so from not less than one-quarter of the members of the Bose Lawa, on the ground that a specific matter of public importance requires urgent consideration. The substance of section 79(6), allowing the sittings of each House to be held in accordance with its Standing Orders, should be retained.

RECOMMENDATIONS

330. The Constitution should make the following provisions for sessions of Parliament:

(a) the President, acting on the advice of the Prime Minister, should be required to appoint, as the date for the commencement of the first session of Parliament after any general election, a date not more than thirty days after the date for the commencement of polling prescribed in the writs.

(b) Otherwise, sessions of Parliament should commence at a time appointed by the President on the advice of the Prime Minister, but there should not be an interval of more than six months between the end of one session and the first sitting of Parliament in the next session.

(c) During the period when Parliament is not in session, the President should be empowered to call a session in the exercise of his own deliberate judgment if he is so requested in writing by not less than one-quarter of the members of the House of Representatives on the ground that it is necessary for the two Houses of Parliament to consider without delay a matter of public importance. A "matter of public importance" should be regarded as including a no-confidence motion.

331. The Constitution should provide that, if, while Parliament is in session, more than two months have elapsed since the last meeting of the Bose Lawa, the Speaker should be required to call such a meeting for a date not more than two weeks after receiving a written request to do so from not less than one-quarter of the members of the Bose Lawa, on the ground that a specific matter of public importance requires urgent consideration.

332. The substance of section 79(6), allowing the sittings of each House to be held in accordance with its Standing Orders, should be retained.

THE PRESIDING OFFICERS

The Speaker

Election of the Speaker

11.9 Several submissions expressed support for the provision in the 1990 Constitution under which the Speaker is elected by the House of Representatives from among persons who are not members of the House. They saw it as enhancing the Speaker's independence and impartiality. The Commission proposes that this arrangement be retained. The eligible persons should be those who are qualified to be candidates for election as members of Parliament. The term of office should be the life of Parliament, so that every newly-elected House has the opportunity to elect its own Speaker. A Speaker should be elected whenever the office of Speaker is vacant. The Speaker should be required to take the Oath of Allegiance before entering on the duties of the office.

When the office becomes vacant

11.10 The Speaker should remain in office after a dissolution of Parliament. The office should become vacant on the day immediately preceding the first day on which the House meets in accordance with its Standing Orders after a general election. It should also become vacant if the Speaker resigns from office, or in any circumstance in which, if the Speaker were a member of the House, his or her seat would become vacant. The office should also become vacant if the House removes the Speaker from office by a resolution supported by not less than two-thirds of the total number of its members.

The Deputy Speaker

11.11 At present the Deputy Speaker is also elected from outside Parliament. The Commission considers that this requirement is unnecessary. The Bose Lawa should elect a Deputy Speaker from among its members, other than those who are Ministers or Assistant Ministers. Our later proposal that any member of either House, presiding in the absence of the Speaker or of the President of the Bose e Cake, should have a deliberative vote but not a casting vote, will avoid any disadvantage to the member concerned or to the constituents that the member represents.

11.12 The Constitution should provide that, if the Speaker is unable to exercise any of the functions of that office, they may be exercised by the Deputy Speaker. All references to the Speaker can then be read as including the Deputy Speaker. The person elected to the office of Deputy Speaker will take the Oath of Allegiance in his or her capacity as a member of the Bose Lawa.

11.13 The office of Deputy Speaker should become vacant on the day immediately preceding the first day on which the House meets in accordance with its Standing Orders after a general election. It should also become vacant if the Deputy Speaker resigns from office, is appointed as a Minister or an Assistant Minister, or vacates his or her seat in the House. As in the case of the Speaker, the House should be able to remove the Deputy Speaker from office by a resolution supported by not less than two-thirds of the total number of its members.

11.14 If neither the Speaker nor the Deputy Speaker is available to preside over a sitting of the House, the Constitution should, as now, permit the members of the House to elect one of their number to preside over the sitting.

The President and Vice-President of the Bose e Cake

11.15 We propose that the constitutional provisions relating to the President and the Vice-President of the Bose e Cake should parallel those relating to the Speaker and Deputy Speaker. The President of the Bose e Cake should continue to come from outside Parliament but the Vice President should be elected from among the members of the Bose e Cake.

11.16 The provisions concerning election and vacation of office of the President and Vice-President of the Bose e Cake should correspond to those applying to the election and vacation of office of the Speaker and Deputy Speaker. So also should provision for a member of the Bose e Cake to be elected to preside at a sitting of that House in the absence of both the President and the Vice President of the Bose e Cake.

Voting by the presiding officer

11.17 The Commission proposes some changes in the present rules in section 69(2) about the votes which may be cast by the person presiding in either House at the time of a vote. At the moment, such a person does not have a deliberative vote, that is, a right to vote for or against the proposal under consideration or to record an abstention. However, if the votes cast are equally divided, the presiding officer is entitled to exercise a casting vote.

11.18 That does not mean that such a vote should be cast in accordance with the presiding officer's personal views or any allegiance to a party. Under the Westminster system, there are well-developed guiding principles for the exercise of a casting vote, including its use to keep discussion open whenever that is possible. A more modern approach is that the value of keeping the discussion going is outweighed by the cost of using the time and resources of the House for that purpose if the matter has not received majority support.

11.19 We consider that no presiding officer should have a casting vote. As provided in section 69(1), all questions, other than those in respect of which the Constitution makes a different provision, should be decided by a majority of the votes of the members of the House present and voting. If a vote is tied, it has not received a majority and is therefore lost.

11.20 This proposed rule fits in well with the fact that the Speaker and the President of the Bose e Cake will continue to be elected from outside those Houses. Accordingly, neither should have a deliberative vote. However, as members of Parliament, the Deputy Speaker and the Vice President of the Bose e Cake, as well as a member of either House elected to preside at a sitting in the absence of any other presiding officer, should have a deliberative vote. This will allow them both to represent their constituents, and, to support the positions of their parties. We do not think that they themselves, or other members, will see the exercise of such a vote as affecting their impartiality in carrying out their duties in the chair.

RECOMMENDATIONS

333. Whenever the office of Speaker is vacant, a Speaker should be elected by the Bose Lawa from among persons who are not members of that House but are qualified to be candidates for election as members of Parliament. The Speaker should be required to take the Oath of Allegiance before entering on the duties of the office.

334. The office of Speaker should become vacant on the day immediately preceding the first day on which the House meets after a general election. It should also become vacant

(a) if the Speaker resigns from office, or

(b) in any circumstance in which, if the Speaker were a member of the House, his or her seat would become vacant, or

(c) **if the House removes the Speaker from office by a resolution supported by not less than two-thirds of the total number of its members.**

335. **The Bose Lawa should elect a Deputy Speaker from among its members, other than a Minister or Assistant Minister. The Constitution should provide that, if the Speaker is unable to exercise any of the functions of that office, they may be exercised by the Deputy Speaker.**

336. **The office of the Deputy Speaker should become vacant on the day immediately preceding the first day on which the House meets after a general election. It should also become vacant if the Deputy Speaker resigns from office, vacates his or her seat in the House, is appointed as a Minister or an Assistant Minister, or is removed from office by a resolution supported by not less than two-thirds of the total number of its members.**

337. **If neither the Speaker nor the Deputy Speaker is available to preside over a sitting of the House, the Constitution should permit the members of the House to elect one of their number to preside over the sitting.**

338. **The Constitution should provide that the President of the Bose e Cake should continue to be elected from among persons who are not members of Parliament but the Vice President should be elected from among the members of the Bose e Cake.**

339. **The provisions concerning election and vacation of the offices of President and Vice-President of the Bose e Cake, and for a member of the Bose e Cake to be elected to preside at a sitting of that House in the absence of both the President and the Vice President of that House should correspond to those applying to the election, vacation of office and absence of the Speaker and Deputy Speaker.**

340. **No presiding officer in the Bose Lawa or the Bose e Cake should have a casting vote. All questions, other than those in respect of which the Constitution makes a different provision, should be decided by a majority of the votes of the members of the House present and voting.**

341. **Neither the Speaker nor the President of the Bose e Cake should have a deliberative vote, but the Deputy Speaker and the Vice**

President of the Bose e Cake, as well as a member of either House elected to preside at a sitting in the absence of any other presiding officer, should be entitled to exercise a deliberative vote.

PROCEDURE AND ADMINISTRATION

Quorum

11.21 The usual practice is for a quorum of a House of Parliament to consist of about one-third of the total number of members. We propose the retention of a quorum of 24 members for the Bose Lawa and 12 members for the Bose e Cake. The number should exclude the Speaker and the President of the Bose e Cake, who are not members of Parliament. Other presiding officers should be counted for the purpose of determining whether the members present constitute a quorum.

Procedure

11.22 The Constitution should continue to make provision for the matters at present dealt with in section 63. Each House should be empowered to regulate its own procedure consistently with the Constitution. A vacancy among its members, or the participation of a person who is not a member, should not invalidate its proceedings. Parliament should be empowered to make provision for the exercise of the powers of each House and its Committees and for the privileges and immunities of their members.

Parliamentary salaries, allowances and benefits

11.23 In any democratic country, the fixing of Parliamentary salaries, allowances and benefits can give rise to difficult issues. One set of questions is philosophical and practical. In most countries, those who serve the state accept that the material rewards are likely to be less than those of people who achieve success in the private sector. An element of sacrifice is involved. In the case of non-elective office, however, the lower levels of remuneration have been seen as offset by greater certainty of continued employment. Politicians have no such certainty. They serve at the will of their constituents.

11.24 Historically, membership of Parliament was the preserve of those with other sources of income. However, universal franchise led to the election of persons who had to give up their employment to carry out their parliamentary duties. They needed to be paid a living wage. Yet the duties of a member of Parliament are not necessarily full-time, though they certainly take up more time than the hours during which Parliament is actually sitting.

11.25 A second set of questions is fiscal and political. Provision needs to be made in the budget for the salaries, allowances and other benefits of members of Parliament. That, in itself, is a useful constraint. Remuneration levels need to be in accord with the Government's overall economic policy. Few Governments will risk the political consequences of increasing the salaries, allowances and other benefits of Members of Parliament unless an increase is thoroughly justified. But even when it is, the Government may not be willing to face the likely public criticism.

11.26 For reasons of this kind, the 1990 Constitution made provision for an Independent Parliamentary Emoluments and Benefits Committee. As provided in section 64(2), the Committee is responsible for reviewing from time to time, at intervals determined by it, the salaries, allowances and benefits, financial or otherwise, (including personal accident insurance, pensions or retirement benefits) of the following persons:

(i) the Prime Minister;
(ii) Ministers;
(iii) Assistant Ministers;
(iv) the Speaker;
(v) the Deputy Speaker;
(vi) the President of the Senate;
(vii) the Vice-President of the Senate;
(viii) Members of Parliament;

and for making recommendations thereon. We have already recommended that the Leader of the Opposition should be included in this list.

11.27 The Commission considers that an independent body should continue to have the task of reviewing parliamentary emoluments. It should have the power to gather relevant information and consider submissions. It should be required to set out its recommendations in a report to the Speaker who should, in turn, be required to table the report in Parliament.

11.28 The Constitution should also provide that the salaries, allowances and benefits of those referred to in the provision should be as prescribed by Act. This will give Parliament, as well as the Government, the clear responsibility of implementing - or deciding not to implement - any recommendations that the independent body may make about the desirable levels of parliamentary emoluments.

11.29 In the light of its functions, the Commission considered the present composition of the Committee and the method of appointing its members. At the moment, the Committee consists of a Chairperson and not less than two nor more than four other members. No qualifications are specified. All members are appointed by the Speaker. As the Committee is required to review the Speaker's salary, this arrangement lacks the desirable degree of transparency.

11.30 We therefore consider that the Committee should be replaced by a Parliamentary Emoluments Commission. That body should be a constitutional commission to which the general rules recommended in Chapter 15 should apply, including the duty to act independently in the exercise of its functions. It should consist of a Chairperson and two other members, one of whom should be a qualified actuary with at least five years' practical experience. No person whose remuneration is reviewable by the Commission should be qualified to be a member.

11.31 The members of the Commission should be appointed by the President on the recommendation of the sector Standing Committee of the Bose Lawa responsible for overseeing administrative services. (We propose below the creation of such a committee, among others.) That Committee should make its recommendation after considering names placed before it by the Speaker.

The Secretary-General and staff of Parliament

11.32 The Commission proposes that, as at present under section 81 of the Constitution, there should continue to be a Secretary-General to Parliament, a Secretary to the Bose Lawa and a Secretary to the Bose e Cake. In view of the status of the Secretary-General to Parliament and the fact that the holder of the office must serve all members in both Houses, we think that appointments to that office should be made by the Constitutional Offices Commission proposed in Chapter 14. That Commission should consult the Speaker and the President of the Bose e Cake before the appointment is made or the Commission exercises any other power in respect of the office of Secretary-General to Parliament.

11.33 As at present, there should be similar consultations before the Public Service Commission exercises any power in relation to any public officer appointed to the staff of the Secretary-General or of either House. Later in this chapter, we make detailed proposals about the use of sector Standing Committees in the Bose Lawa. We mention there the staffing requirements that will need to be met if the Committees are to function effectively.

RECOMMENDATIONS

342 **The quorum for the Bose Lawa should continue to be 24 members and the quorum for the Bose e Cake should continue to be 12, including in each case a presiding officer other than the Speaker and the President of the Bose e Cake.**

343. **The Constitution should continue to empower each House to regulate its own procedure consistently with the Constitution, provided that a vacancy among its members or the participation of a person who is not a member should not invalidate its proceedings, and empower Parliament to make provision for the exercise of the powers of each House and its Committees and for the privileges and immunities of its members.**

344. **The Constitution should continue to give an independent body the task of reviewing parliamentary emoluments. That body should have the power to gather relevant information and consider submissions, and should be required to set out its recommendations in a report to the Speaker who should table it in Parliament.**

345. **The Constitution should provide that the salaries, allowances and benefits of those referred to in the provision should be as prescribed by Act.**

346. **The present Independent Parliamentary Emoluments and Benefits Committee should be replaced by a Parliamentary Emoluments Commission. That body should be a constitutional commission to which the general rules later recommended should apply. It should consist of a Chairperson and two other members, one of whom should be a qualified actuary with at least five years' practical experience. No person whose remuneration is reviewable by the Commission should be qualified to be a member.**

347. **The members of the Commission should be appointed by the President on the recommendation of a sector Standing Committee of the Bose Lawa responsible for overseeing Administrative Services. That Committee should make its recommendation after considering names placed before it by the Speaker.**

348. **There should continue to be a Secretary-General to Parliament, a Secretary to the Bose Lawa and a Secretary to the Bose e Cake.**

349. The Secretary-General to Parliament should be appointed by the recommended Constitutional Offices Commission after consultation with the Speaker and the President of the Bose e Cake.

350. The Public Service Commission should be required to consult the Speaker and the President of the Bose e Cake as appropriate, before exercising any power in relation to any public officer appointed to the staff of the Secretary-General or of either House.

THE LEGISLATIVE POWER

Vesting of the legislative power

11.34 Section 61 of the 1990 Constitution provides:

> Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Fiji.

This is the formula traditionally used in colonial constitutions. Case law establishes that it confers plenary legislative powers, once the limits on the powers of a colonial legislature are removed. In the case of Fiji this was done by section 1 of the Fiji Independence Act 1970 and Schedule 1 to that Act. In itself, the reference to "laws for the peace, order and good government of Fiji" is misleading. It suggests that a law may be challenged on the ground that it does not serve any of those purposes, but that is not the case.

11.35 Parliament's law-making powers are required to be exercised in conformity with the Constitution. But that flows from the provision in section 2 that the Constitution is the supreme law of Fiji and that any inconsistent law is void to the extent of the inconsistency. We return to the significance of that provision in Chapter 20. Here we make the point that there is no need for the provision conferring the law-making power to be "subject to the provisions of this Constitution". The *grant* of that power, as distinct from its *exercise*, should be unqualified.

11.36 For all of these reasons, we propose a more modern, though still standard, formulation of Parliament's power to make laws. Instead of retaining the formula in section 61, the Constitution should provide that the legislative power of the Republic of the Fiji Islands is vested in Parliament. Section 62 is already entitled "Mode of exercise of legislative power". The express grant of that power would be in conformity with that usage and would correspond with the language of section

82(1) vesting the executive authority of Fiji in the President. In Chapter 13 we propose a corresponding provision vesting the judicial power in the courts.

Exercise of the legislative power

11.37 Section 62 makes it clear that the legislative power must be exercised by Act. To become law, a Bill for an Act must be passed by both Houses of Parliament unless the Constitution provides otherwise, and must be assented to by the President. The substance of these basic rules should be retained. We have already recommended the retention of the provision making it clear that the President has no discretion to refuse assent.

11.38 Coupled with the vesting of the legislative power in Parliament, the provisions just referred to make it clear that, under the Constitution, no Minister or other organ of the executive branch of government has any inherent law-making power. However, Parliament may delegate such a power to a Minister or other person or body by Act, so long as it retains its own power to withdraw or alter the terms of the delegation.

11.39 The Constitution should also retain the safeguard that no Act shall come into operation until it has been published. It is hardly necessary to spell out that Parliament may postpone the coming into operation of all or part of an Act or make laws with retrospective effect. In the last-mentioned case, the law must comply with the prohibition in the Bill of Rights on the retrospective creation of offences or imposition of a more severe penalty.

The roles of the Bose Lawa and the Bose e Cake

The power to initiate Bills

11.40 Section 62(2) and (3) set out the basic rules about the roles of the two Houses of Parliament in enacting legislation. They raise the important question of whether both Houses should have the power to initiate Bills, or only the Bose Lawa. Under the 1970 Constitution, all Bills had to originate in the House of Representatives. The 1990 Constitution gives the Senate the power to initiate Bills for both public and private Acts. However, that power has never been exercised.

11.41 A number of submissions argued that it was wrong for Bills to originate in the Senate, but this argument was based on the fact that the Senate is an appointed, not an elected, body. Nevertheless, we consider that, although under our proposals the Bose e Cake will be predominantly an elected body, it should be exclusively a House of review. All Bills should originate in the Bose Lawa.

11.42 We take this view because we see the role of the Bose e Cake as essentially protective of the interests which it represents. As we explained in Chapter 9, a second chamber is justified if the interests of the people can be represented there on a different basis from the way in which they are represented in the Lower House. The Upper House should be able to exercise a significant influence on legislation and Government policy generally.

11.43 However, this does not mean that the Upper House should have the power to initiate policy in the form of legislative proposals. The Government has effective control of the Bose Lawa, as long as it commands the confidence of the majority of its members. The Government may or may not also have a majority in the Bose e Cake. If it does not, there would be little likelihood that Bills passed there despite the opposition of Government members would receive majority support when they were considered in the Bose Lawa. Even if the Government has a majority in the Bose e Cake, its control of legislative initiatives would require quite elaborate machinery and the application of the Party Whip in a way that would perhaps frustrate the expression of the interests that the Bose e Cake is designed to represent.

11.44 Although those interests stem from the distinct identity of the Fijian provinces and Rotuma, as well as the communities and groups represented through appointed members, the provinces are not the units of a federal state. Therefore the role of the Senate in a state like Australia or the United States does not provide a guide. We consider that the Constitution should seek to make the influence of the Bose e Cake as effective as possible, but should not increase the possibility of its coming into conflict with the Bose Lawa by allowing it to initiate Bills.

The power to amend or reject Bills passed by the Bose Lawa

11.45 The present role of the Senate in respect of ordinary Bills passed by the House of Representatives is set out in sections 62(3) and 75 of the Constitution. The procedures are spelt out in the Standing Orders of each House. By "ordinary" Bills, we mean Bills other than the following:

- Bills that are the responsibility of the Cabinet because they make provision about financial matters - often called "money Bills";
- Appropriation Bills, as a special category of money Bills;
- Bills altering the Constitution or entrenched legislation;
- Urgent Bills.

Ordinary Bills

11.46 The essential steps in the passage of an ordinary Bill are as follows:

- Every Bill passed by the House of Representatives is sent to the Senate.
- The Senate may pass the Bill with or without amendment or may reject the Bill.
- Where the Senate amends a Bill, the House of Representatives considers the amendments. It may agree to them, reject them or agree to them in amended form.
- If the House of Representatives does not agree to the amendments, the Bill is then returned to the Senate, in the form again passed by the House of Representatives. The process of consideration by the Senate is then repeated.
- In order to avoid deadlock, the Constitution provides that if
  - the House of Representatives passes a Bill in two successive sessions, and
  - there is an interval of at least six months between the dates on which the Bill is passed in each session, and
  - on each occasion the Senate rejects the Bill, or passes it with amendments to which the House of Representatives does not agree,

  the Bill shall nevertheless be presented to the President for assent, unless the House of Representatives resolves otherwise.
- There is a provision under which the House of Representatives can help break a deadlock between the two Houses by suggesting to the Senate amendments which will be taken as having been agreed to by the House of Representatives if they are approved by the Senate.

11.47 The Commission considers that the Bose Lawa and the Bose e Cake should each have the same roles as the House of Representatives and the Senate have at present in passing ordinary Bills. The Constitution should set out the governing principles, leaving as much of the detail as possible to be filled out in the Standing Orders of each House.

11.48 We would expect the Bose Lawa to make every effort to reach agreement with the Bose e Cake if that body is not willing to pass a Bill in the form in which it was first passed by the Bose Lawa. The Standing Orders of both Houses could make provision for the setting up of ad hoc Joint Committees to consider such Bills and endeavour to recommend amendments which would make the Bill acceptable to both Houses.

Urgent Bills

11.49 Section 74 makes provision for the President, acting on the advice of the Prime Minister, to certify that a Bill is a matter of urgency. In that case, the Senate has seven days in which to pass it in its original form or with amendments to which the House of Representatives agrees. Otherwise, at the expiry of the seven days, the Bill is to be presented to the President for assent unless the House of Representatives resolves otherwise. That provision, too, should be retained in substance. The involvement of the President seems to reflect formal responsibilities originally vested in the Governor-General, and may be unnecessary. The essential point is that the Bose Lawa should have decided, if necessary by a special majority, that the Bill is a matter of urgency.

Other Bills

11.50 To the extent that they differ from the arrangements governing the passage of ordinary Bills, the role of the Bose e Cake in passing Appropriation Bills and money Bills other than Appropriation Bills is discussed in Chapter 16. In Chapter 20, we deal with its role in passing Bills amending the Constitution or entrenched legislation.

RECOMMENDATIONS

351. The Constitution should provide that the legislative power of the Republic of the Fiji Islands is vested in Parliament.

352. It should continue to provide that

(a) the legislative power must be exercised by Act;

(b) to become law, a Bill for an Act must be passed by both Houses of Parliament unless the Constitution provides otherwise, and must be assented to by the President; and

(c) no Act shall come into operation until it has been published.

353. **The Constitution should provide that all Bills must originate in the Bose Lawa.**

354. **The Constitution, supplemented by the Standing Orders of each House, should continue to provide that Bills, other than Appropriation Bills and other money Bills, urgent Bills, and Bills altering the Constitution or other entrenched legislation, must be passed in accordance with the following procedures:**

(a) **Every Bill passed by the Bose Lawa is sent to the Bose e Cake.**

(b) **The Bose e Cake may pass the Bill with or without amendment or may reject the Bill.**

(c) **Where the Bose e Cake amends a Bill, the Bose Lawa considers the amendments. It may agree to them, reject them or agree to them in amended form.**

(d) **If the Bose Lawa does not agree to the amendments, the Bill is then returned to the Bose e Cake, in the form in which it was again passed by the Bose Lawa. The process of consideration by the Bose e Cake is then repeated.**

(e) **If,**

(i) **the Bose Lawa passes a Bill in two successive sessions, and**

(ii) **there is an interval of at least six months between the dates on which it is passed in each session, and**

(iii) **on each occasion the Bose e Cake rejects the Bill, or passes it with amendments to which the Bose Lawa does not agree,**

the Bill shall nevertheless be presented to the President for assent, unless the Bose Lawa resolves otherwise.

355. **The provision under which the Bose Lawa can help break a deadlock by suggesting to the Bose e Cake amendments which the Bose Lawa will be taken as having agreed to if they are approved by the Bose e Cake, should be retained. The Standing Orders of both Houses should make provision for the setting**

up of ad hoc Joint Committees to consider Bills which are not acceptable to the Bose e Cake in their original form. The Joint Committee should endeavour to recommend amendments which would make the Bill acceptable to both Houses.

356. The Bose e Cake should continue to have seven days in which to pass an urgent Bill in its original form or with amendments to which the Bose Lawa agrees. Otherwise, at the expiry of the seven days, the Bill must be presented to the President for assent unless the Bose Lawa resolves otherwise.

357. The role of the Bose e Cake in passing Appropriation Bills and other money Bills and Bills altering the Constitution or other entrenched legislation should be as recommended later.

SECTOR STANDING COMMITTEES

The nature of sector Standing Committees

11.51 During its visits to South Africa and New Zealand, the Commission had the opportunity of learning about the strong sector parliamentary select committee system which has been put in place in each of those countries. By "sector" select committees, we mean standing select committees concerned with particular areas of Government policy and administration. In New Zealand especially, the sector select committees are structured in such a way that all departments and other Government agencies come within the supervision of some committee. In each country, the view was expressed that a strong standing select committee system enables Parliament to exercise a measure of influence and control over the executive in a way that is not otherwise possible when the Government has a majority in the House.

11.52 Submissions, too, stressed the importance of using such committees as a way of permitting all members of the Bose Lawa who are not Ministers or Assistant Ministers, and whether belonging to the Government or the Opposition, to take part in national decision-making. They saw it as allowing the members of all ethnic communities to take part in the political process. The Commission sees much merit in this approach. The work of select committees tends to be carried out on a less partisan basis than the proceedings of the whole House. They therefore mitigate the adversarial nature of the Westminster system and allow the House to use the talents of all its members to good advantage in a collaborative way. Very often a consensus will emerge - a process in keeping with deeply-rooted Pacific traditions.

New sector Standing Committees of the Bose Lawa

11.53 At present, the Standing Orders of the House of Representatives make provision for two Select Committees with responsibilities for matters not internal to the House: the Public Accounts Committee (chaired by a member of the Opposition) and the Standing Select Committee on Sugar. The Commission proposes that, in addition, the Standing Orders of the Bose Lawa should establish standing Select Committees which, among them, should have responsibilities for all areas of Government policy and administration. We believe that these responsibilities could be allocated among five standing Select Committees, each dealing with one of the following sectors:

- economic services
- social services
- natural resources
- foreign relations
- administrative services.

This tentative structure needs to be re-examined to make sure that is capable of including all areas of Government responsibility.

11.54 A sector standing committee system in the Fiji Islands should be allowed to operate in a way that suits local conditions. Committees should be allowed to develop their own working methods. The following matters will need to be considered.

Functions of sector Standing Committees

11.55 The Commission sees the sector Standing Committees as having two responsibilities. The first is the systematic scrutiny of all areas of government activity. The second is the legislative function of considering Bills referred to them by Parliament, hearing submissions on them from members of the public and reporting them back to Parliament with the amendments recommended by the Committee. The timetable of meetings of Parliament should allow sufficient time for the work of the sector Standing Committees. They should not normally meet while the House itself is sitting. Time must also be allowed to debate their reports.

The scrutiny function

11.56 The single most important aspect of the scrutiny role is that it allows Committees the initiative to take up matters within their sectors. Such scrutiny

could include all or any of the following activities:

- examining the estimates of expenditure prepared by departments and other government agencies;
- financial reviews of departments;
- reviews of regulations and other subordinate legislation made under the authority of Acts administered by departments;
- reviews of the performance and current operations of statutory bodies;
- follow-up and in-depth inquiries into particular matters;
- reviews of State-owned enterprises;
- reviews of audit reports and the responses made to them;
- in-depth policy inquiries.

We believe that, in these ways, sector Standing Committees should be able to make a major contribution to Government policy-making and accountability.

11.57 If, in the course of an inquiry, the conduct of an individual comes under scrutiny, the procedures followed must be fair, and take account of the principles of natural justice. However, because a sector Standing Committee hearing is a parliamentary proceeding, it should not be reviewable by the courts. A sector Standing Committee should not investigate the possible commission of a crime. Any relevant evidence should be referred to the police.

The legislative function

11.58 The legislative function of sector Standing Committees should be carried out by providing in Standing Orders that every Bill, other than an Appropriation Bill, stands referred to a sector Standing Committee unless the House has accorded urgency to its passing. The Standing Orders should also require the House to determine the sector Standing Committee to which a particular Bill should be sent.

11.59 Until recently, the practice in the New Zealand Parliament was to refer Bills to Select Committees before the Second Reading. The new Standing Orders of that Parliament provide for the Second Reading debate on a Bill to be held before the Bill is referred to a Select Committee. This change allows members of the Committee to have "an understanding of the mind of the House", before they consider the Bill. We believe the practice has much to commend it and should be considered here.

11.60 The task of the sector Standing Committees should be to examine the Bill, and determine whether it should be passed in its existing form. It should be empowered to recommend amendments that are relevant to the subject-matter of the Bill and consistent with its purposes and objects. Care should be taken that the constitutional provisions which preserve the Cabinet's responsibility for financial matters do not unnecessarily require amendments proposed by a Committee to be ruled out of order because they have minor financial implications - a matter we discuss more fully in Chapter 16.

11.61 The House should indicate the time-frame within which the Bill should be reported back. The sector Standing Committee's report on a Bill would be considered by the Committee of the Whole House, after which the motion would be put that the Bill be read a second time.

11.62 A main aspect of the sector Standing Committee's work should be to hear submissions on the Bill. This gives members of the public who are likely to be most affected by the Bill a valuable opportunity to make a direct input. Care should be taken to allow those wishing to make submissions enough time to prepare them. Unless there are special reasons for hearing submissions in private, all submissions should be heard in public.

Committee proceedings and reports

11.63 Other proceedings of sector Standing Committees should not be open to the public, and should remain confidential until the committee reports to the House. Confidentiality fosters a non-partisan approach and may encourage the emergence of a consensus. However, sector Standing Committees may not always agree. Although minority reports should not be permitted, the report itself should record the range of views.

Membership of sector Standing Committees

11.64 The members of sector Standing Committees should be appointed at the beginning of a new Parliament. Every member who is not a Minister or an Assistant Minister should be a member of at least one Committee. In principle, their membership should remain relatively constant so that members can develop expertise in the relevant area and establish good working relationships that allow them to function in a relatively non-partisan way. The overall membership of sector Standing Committees should reflect the balance of the parties in the House. It is not necessary to have a Government majority, or a Government Chairperson. The Chairperson and the Deputy Chairperson should come from opposite sides of the House.

Role of Ministers

11.65 Although not members of sector Standing Committees, Ministers in charge of Bills must play a direct part in their legislative work. The practice elsewhere is to allow the Minister, while his or her Bill is being considered, to take part in the proceedings of the Committee but not to vote. This practice is seen as allowing the Minister to brief the Committee on the intended policy objectives of the Bill, hear the evidence, answer for the policy (rather than the departmental officials or the Chairperson) and take responsibility for any amendments the departmental officials may recommend.

11.66 Ministers should also be encouraged to cooperate with sector Standing Committees in the exercise of their scrutiny functions. They should be expected to attend Committee meetings if invited to do so. Committees should have the power to call for relevant information, and summon departmental and other officials. While Committees should identify and report on mismanagement, their focus should be on ensuring that government activities are as useful and productive as possible. Their general approach should be constructive.

Standing Joint Committee of the Bose Lawa and the Bose e Cake?

11.67 A submission was made to the Commission that there should also be standing Joint Committees of the two Houses, specially on financial matters. The Commission believes that this idea is worth exploring, perhaps by widening the role of the present Public Accounts Committee of the Bose Lawa and creating a Joint Finance and Expenditure Committee in its place. Such committees elsewhere play a useful role in the various stages of the annual budget cycle.

Servicing sector Standing Committees

11.68 The Secretary-General of Parliament will need to develop a permanent but flexible structure for servicing sector Standing Committees by providing them with their own staff, and access to researchers, policy analysts and experts to assist them in their work. This will prevent Committees from being too heavily dependent on departmental officials. Provision for these purposes should be included in Parliamentary appropriations.

RECOMMENDATIONS

358. The Standing Orders of the Bose Lawa should establish sector Standing Committees with responsibility for all areas of Government policy and administration.

359. Sector Standing Committees should have

(a) the duty to scrutinise areas of government activity on a systematic basis, and

(b) the legislative function of considering Bills referred to them by Parliament, hearing submissions on them from members of the public and reporting them back to Parliament with any amendments recommended by the Committee.

360. The parliamentary timetable should allow sufficient time for the work of the sector Standing Committees.

361. Their function of scrutinising should allow sector Standing Committees on their own initiative to take up matters within their subject areas. Their scrutiny could include all or any of the following activities:

- **examining the estimates of expenditure prepared by departments and other government agencies;**
- **financial reviews of departments;**
- **reviews of regulations and other subordinate legislation made under the authority of Acts administered by departments;**
- **reviews of the performance and current operations of statutory bodies;**
- **follow-up and in-depth inquiries into particular matters;**
- **reviews of State-owned enterprises;**
- **reviews of audit reports and the responses made to them;**
- **in-depth policy inquiries.**

362. The legislative function of sector Standing Committees should be carried out by providing in Standing Orders that every Bill, other than an Appropriation Bill, stands referred to a sector Standing Committee unless the House has accorded urgency to its passing. The Standing Orders should also require the House to determine the Committee to which a particular Bill should be sent.

363. Consideration should be given to adopting the practice of holding the Second Reading debate before the Bill is referred to a sector Standing Committee, so that members of the

Committee will have "an understanding of the mind of the House", before they consider the Bill. Sector Standing Committees should be empowered to recommend amendments that are relevant to the subject-matter of the Bill and consistent with its purposes and objects.

364. Unless there are special reasons for hearing submissions in private, all submissions should be heard in public. Other proceedings of sector Standing Committees should not be open to the public, and should remain confidential until the Committee reports to the House.

365. The members of sector Standing Committees should be appointed at the beginning of a new Parliament. All members of the Bose Lawa who are not Ministers or Assistant Ministers should be members of at least one. The overall membership of sector Standing Committees should reflect the balance of the parties in the House. The Chairperson and the Deputy Chairperson of each Committee should come from opposite sides of the House.

366. The Minister in charge of a Bill, while his or her Bill is being considered, should be permitted to take part in the proceedings of a Committee but not to vote. Ministers should also be encouraged to cooperate with Committees in the exercise of their scrutiny functions.

367. Consideration should be given to the possibility of creating a standing Joint Finance and Expenditure Committee of the Bose Lawa and the Bose e Cake, with wider functions than the present Public Accounts Committee of the Bose Lawa, and perhaps replacing it.

368. The Secretary-General of Parliament should develop a permanent but flexible structure for servicing sector Standing Committees by providing them with their own staff, and access to researchers, policy analysts and experts.

12

EXECUTIVE GOVERNMENT: THE RESPONSIBILITIES OF THE PRESIDENT, THE PRIME MINISTER AND THE CABINET

THE NATURE OF THE CONSTITUTIONAL RULES

12.1 This chapter focusses on the structure of the executive branch of government. In this area, more than any other, the basic principles of the Westminster system have evolved gradually, as substantive power was transferred from the Sovereign to Ministers responsible to Parliament. This evolution left formal power in the hands of the Sovereign, but required that power to be exercised in accordance with informal rules, known as constitutional conventions. These are generally accepted understandings about when and how political figures such as the Head of State, the Prime Minister and other Ministers, ought to exercise their legal powers or take other steps that will have legal consequences.

12.2 In the codified Westminster Constitutions, the principle that executive power is vested in the Head of State was retained. Some constitutional conventions affecting its exercise were codified, and have now become legal rules. It is sometimes argued that, if a convention recognised in Britain was not codified in this way in the constitution of a former colony, it no longer applies. We believe this is an over-simplified view.

12.3 As we show, there are some areas in which the exercise of the legal powers and duties of the President and the Prime Minister in particular cannot produce an acceptable result unless there are informal understandings about how those powers should be exercised in various circumstances. We agree, however, that there is no obligation to follow the particular conventions that have evolved in Britain or any other country with a Westminster constitution. As one would expect, there are now quite wide divergences in the practice followed in different countries in dealing with the same issue. The Fiji Islands, too, is free to develop the necessary conventions in a way that suits its circumstances.

12.4 It is implicit that, over time, a convention may evolve or otherwise be changed to meet new circumstances or new views about the way it ought to work. If at some stage there is a departure from what was thought to be a convention, there may be a question whether the convention has changed or has been broken. Generally speaking, such a question is eventually resolved through the political process, not the courts. Although we express what we believe to be the present conventions in certain areas, they will remain subject to this process of evolution

and change. In itself, that is often a good reason for not writing them into the Constitution.

THE EXECUTIVE AUTHORITY OF THE REPUBLIC

Basic principles

12.5 Reflecting the choice of a republican form of government, section 82(1) of the 1990 Constitution vests the executive authority of Fiji in the President. That provision must be read in the light of three further provisions which clarify its effect:

- Section 82(1) provides that the executive authority of the Republic may be exercised by the President, the Cabinet, or any Minister authorised by the Cabinet.
- Section 88(1) requires the President to act only in accordance with the advice of the Cabinet or a Minister, except in those cases where he is required by the Constitution to act on the advice of, or after consultation with, some other person or body, or in his own deliberate judgment.
- Section 85(2) provides that the Cabinet is collectively responsible to Parliament for any advice given to the President by the Cabinet or a Minister, and for all things done by or under the authority of any Minister in the execution of his office.

The Constitution should continue to include these basic principles on which executive government rests, but should make their fundamental nature and their interaction clearer than it is at present.

12.6 The Cabinet, Ministers acting under the authority of the Cabinet, and, through them, the departments and other government agencies, are the main instruments through which executive authority is exercised. The President is involved only when, under the Constitution or some other law, he or she is required personally to perform some formal act. Even then, the President ordinarily acts on the advice of Cabinet or a Minister.

12.7 Under section 89 of the 1990 Constitution, the Prime Minister has a duty to keep the President informed. That duty should be retained. As we indicated in Chapter 9, its existence implies that the President has the right to be consulted about major issues, and to encourage Ministers in their initiatives or warn them of possible disadvantages. But the President does not govern.

12.8 The Constitution sometimes requires the President to act on the advice of, or after consulting, some specified person or body, other than the Cabinet or a

Minister, or in the exercise of his own deliberate judgment. The most important of the President's personal discretions are concerned with finding or changing a Prime Minister. That task is logically prior to the President's duty to act on the advice of the Cabinet and other Ministers.

12.9 The rule that the Cabinet is collectively responsible to Parliament for its exercise of executive authority is fundamental to democratic government. It is the only link between the policy decisions of the Cabinet or individual Ministers and their implementation through the departments and other government agencies, on the one hand, and, on the other, the will of the people as expressed through the election of members of Parliament.

12.10 The concept of collective responsibility to Parliament reflects the principle that the Government must have the confidence of a majority of the members of the Bose Lawa. The rules about the choice of a Prime Minister and the circumstances in which the Prime Minister should resign, or seek a new mandate from the country, are designed to secure the observance of that principle. The President acts as a facilitator, and if necessary an enforcer of these rules. Because they precede the formation of a Cabinet, or may lead to the resignation of its members, individually or as a group, the Cabinet is not responsible for the Prime Minister's advice to the President about the appointment and responsibilities of Ministers or the dissolution of Parliament.

12.11 Collective responsibility also means that the members of the Cabinet stand or fall together. The rules about the tenure of office of individual Cabinet Ministers reflect this principle, as well as the principle that, while the Government remains in office, Ministers serve at the pleasure of the Prime Minister.

12.12 However, a Prime Minister is not free to govern without other Ministers. The Constitution requires there to be a Cabinet. A Prime Minister who has been displaced from the leadership of the governing party or coalition must resign from office. If he or she does not do so, the other members of the Cabinet are likely to resign, thus forcing a change of Prime Minister.

Content of executive authority

12.13 Like most constitutions, neither the 1990 Constitution nor the 1970 Constitution contain any provision about the source and content of executive authority. In this area the 1990 Constitution remains firmly based on the same principles as its predecessor, despite the change to a republican form of government. It is therefore safe to say that the content of executive authority has

not changed. It is to be ascertained by reference to the powers of the Sovereign under the common law, often described as the prerogative, except so far as modified by the Constitution or by statute.

12.14 All powers conferred on the President by the Constitution are to be regarded as declaring or amplifying the scope of the executive authority of the Republic. As section 82(2) indicates, that authority can be further amplified by statutes that are consistent with the Constitution. The Bill of Rights prohibits the executive from interfering with the rights and freedoms of individuals, except by or under a law. Such a law must be one coming within a permitted limitation of the right or freedom concerned. Furthermore, as we explain in Chapter 16, the executive cannot raise revenue or spend money without the consent of Parliament.

12.15 In some areas there are likely to be conventions about matters which, although within the *powers* of the executive, ought nevertheless to be approved by Parliament, informally or formally, before the executive power is exercised. The acceptance of major treaty obligations is one such area, even if the treaty does not impose obligations which need to be implemented by changes to the law.

RECOMMENDATIONS

369. The Constitution should continue to vest the executive authority of the Republic of the Fiji Islands in the President, and provide for its exercise in accordance with the following rules:

(a) The President, the Cabinet, or a Minister authorised by the Cabinet, as well as a department or other government agency acting under the direction and control of a Minister, should be empowered to exercise the executive authority of the Republic.

(b) To the extent that the executive authority of the Republic is exercised by the President, he or she should be required to act only in accordance with the advice of the Cabinet or a Minister, except in those cases where the President is required by the Constitution to act on the advice of, or after consultation with some other person or body, or in the President's own deliberate judgment.

(c) The Cabinet should be collectively responsible to Parliament for any advice given to the President by the

Cabinet or a Minister (except advice given by the Prime Minister about the appointment or responsibilities of Ministers or the dissolution of Parliament) and for all things done by or under the authority of any Minister in the execution of the Minister's office.

370. The Constitution should continue to require the Prime Minister to keep the President informed concerning the general conduct of the government of the Republic, and to supply such other information about any particular matter relating to the conduct of government as the President may request.

APPOINTING THE MEMBERS OF THE CABINET

12.16 The Commission's recommendations 237 - 241, contained in Chapter 9, set out the basic rules for the formation of a government. In discussing the more detailed rules about the composition of the Cabinet, we build on those recommendations.

Composition of the Cabinet

12.17 The Constitution should provide that there shall be a Cabinet, consisting of the Prime Minister and not more than 15 other Ministers. It should also permit the appointment of not more than 5 Assistant Ministers who are not members of the Cabinet, but attend Cabinet meetings on invitation if a matter for which they are responsible is under discussion. In the Fiji Islands, Assistant Ministers are often referred to as Ministers of State, but we keep the original terminology as indicating more clearly their role and status. All Ministers and Assistant Ministers should be required to be elected members of Parliament.

12.18 The Commission decided to recommend a ceiling on the number of Ministers and Assistant Ministers, both as an economy measure and because it is important that the governing party or coalition should have a certain number of backbench members. In the House itself, Government backbench members are likely to speak and vote in accordance with the party whip, but in the confidentiality of the caucus room, they are an important moderating influence on a Government with a majority.

12.19 The Commission also considers that, in a Parliament with 99 elected members, there is no reason for Ministers to come from among the six appointed members of the Bose e Cake. They are there to ensure that the concerns of under-represented communities and groups can be aired in Parliament, but the fact that

Ministers come from among elected members and remain collectively responsible to the Bose Lawa provides the only link with the voters. No Government is likely to have difficulty in selecting well-qualified elected members to fill all ministerial positions.

12.20 There is already an understanding that, as a general rule, most Ministers should come from the Bose Lawa, not the Bose e Cake. Although, under our proposals, most members of the Bose e Cake will also be elected, the Cabinet does not need to have the support of a majority in that House. Without proposing the inclusion of a provision in the Constitution, we record our view that not more than one quarter of all Ministers and Assistant Ministers should be appointed from among the elected members of the Bose e Cake. We have already recommended that, as at present, the Prime Minister should be required to be a member of the Bose Lawa.

12.21 Section 83(1) of the 1990 Constitution requires the Cabinet to include an Attorney-General and a Minister responsible for defence and security. While we do not doubt the need for Ministers to be assigned responsibility for these portfolios, there seems no need to mention that fact specifically, while not referring to the inclusion in the Cabinet of a Minister responsible for Finance, for example. We consider that the Constitution should not specifically require the inclusion in the Cabinet, of Ministers responsible for particular portfolios, but, subject to what we say below about the Attorney-General, should preserve the freedom of the Prime Minister to advise the President to create such Ministerial portfolios as the Prime Minister considers desirable.

12.22 We return later to the allocation of responsibilities among the members of the Cabinet. The ceiling on the total number of Ministers and Assistant Ministers means that some members of the Cabinet will have more than one area of responsibility.

The Attorney-General

12.23 Some submissions expressed the view that, as the state's chief legal adviser with responsibilities for upholding the Constitution, the Attorney-General should not be an elected member of Parliament, or a member of the Cabinet, but should be an independent constitutional officer. They suggested , as a requirement, that the Attorney-General should be not merely a person entitled to practise as a barrister and solicitor in Fiji, but one who has had a prescribed period of actual practice.

12.24 The Commission considered these concerns but believes that the Attorney-General should continue to be a member of the Cabinet, and that the person appointed to that office should continue to be a member of Parliament. The Attorney-General is likely to exercise the greatest influence over the members of the Cabinet and of Parliament if he or she is equal to them in responsibilities and status.

12.25 The Attorney-General's membership of the Cabinet does not unduly politicise the office. For one thing, the responsibility for taking decisions about the institution or discontinuance of criminal proceedings, which in some countries rests with the Attorney-General, is in the Fiji Islands the responsibility of a constitutionally independent officer, the Director of Public Prosecutions.

12.26 For another, the Attorney-General is advised and assisted by the Solicitor-General who is at present independently appointed by the Judicial and Legal Services Commission. We propose below that the office of Solicitor-General should be given constitutional status, and that he or she should be appointed by the Constitutional Offices Commission and given an element of independence in making decisions about litigation in which the state is involved. In Chapter 10, we recommended that the possibility of a direct conflict of interests should be avoided by giving the Solicitor-General, rather than the Attorney-General, standing in relation to election petitions and claims that the seat of a member of Parliament has been vacated.

12.27 Although the Attorney-General may conduct civil litigation on behalf of the state, the principal role of the holder of that office will remain that of advising the Cabinet and Parliament on the legal parameters within which policy decisions ought to be taken. The Attorney-General will also have the responsibility of explaining to Parliament the reasons for particular decisions taken by the Solicitor-General or the Director of Public Prosecutions in the exercise of their independent responsibilities, and answering for the general policies they apply.

12.28 The Constitution should continue to provide that the Attorney-General is the principal legal adviser to the Government and that the person appointed to that office must be qualified to practise as a barrister and solicitor in the Fiji Islands. The Attorney-General should continue to have the right to take part in the proceedings of either House of Parliament, but to vote only in the House of which he or she is a member.

12.29 Section 83(4) provides that, if the person holding the office of Attorney-General is for any reason unable to perform the functions of that office, they may

be performed by another qualified person, whether or not a member of Parliament, appointed by the President on the advice of the Prime Minister. This provision now seems unnecessary and should be repealed.

12.30 We make a general proposal below about the exercise of a Minister's responsibilities by a Cabinet colleague, if the Minister is unable to perform the functions of the office. It should be provided that a Minister may be appointed to act as Attorney-General, whether or not legally qualified, but, in order to ensure that there is always someone who can exercise the Attorney-General's legal powers, it should also be provided that, in such a case, the Solicitor-General may exercise any power specifically conferred on the Attorney-General by law, or by virtue of the Attorney-General's appointment to any body or office created by or under a law. The Government will in any case be able to call on the Solicitor-General for advice, whether or not the Attorney-General is available.

12.31 Section 86(2) makes it clear that the Attorney-General may be assigned other ministerial responsibilities. That should continue to be the case, though it does not need to be provided for specifically. It has been the usual practice to assign to the person holding the office of Attorney-General the responsibility for the Justice portfolio. Some submissions expressed concern about the likelihood of confusion about what belongs to the office of Attorney-General, and what is the responsibility of the Minister for Justice.

12.32 The possibility of confusion is not lessened by the fact that the Solicitor-General, in effect, usually acts as the Permanent Secretary of a department with wide ranging responsibilities in the justice area. This department administers the courts, as well as having a number of other responsibilities. In Chapter 13, we endorse a recommendation of the *Commission of Inquiry on the Courts of Fiji* that a separate Court Services Department should be established. That Commission suggested that the new department should be headed by a separate Permanent Secretary called the Chief Courts Administrator. Responsibility for the new department will have to be assigned to a Minister, possibly the Minister who is already Attorney-General and responsible for the Justice portfolio.

12.33 The new arrangements will make it more important than ever for the substantive responsibilities of the different Ministerial portfolios and those of the departments or offices coming under the general direction and control of a particular Minister to be clearly defined. Although this comment is made in the context of the portfolio of Attorney-General and related portfolios, it is one that applies generally.

The appointment of the Prime Minister

12.34 The Commission has already recommended that the Constitution should continue to require the President, acting in his or her own deliberate judgment, to appoint as Prime Minister the member of the Bose Lawa who appears to the President best able to command the support of the majority of the members of that House. It added that the need for the President to take account of the electoral support received by the various parties and other relevant factors, including the outcome of negotiations about the formation of a government, the identity of the Prime Minister and the composition of the Cabinet, should be clearly understood.

12.35 Although the people of Fiji are used to learning the result of a general election within 24 hours of the closing of the polls, we believe they will accept that it is likely to take longer than that to determine the results of a general election conducted under the alternative vote system (AV). They will also need to accept that, even when the result of the general election is known, it may not always be clear immediately who should be appointed as Prime Minister. That was the case after the first election in 1977, and again in 1992.

12.36 When a single party or pre-election coalition wins the support of a majority of the seats in the Bose Lawa, the Prime Minister is normally the leader of that winning coalition or party. The convention is already established that, if that party or coalition's *leadership* is not clear, the President should leave it to the party or coalition itself to sort out that question.

12.37 In discussing the recommended *Compact*, we have proposed that account should be taken of a further matter before a Prime Minister is appointed. A party or coalition based exclusively or predominantly in a particular ethnic community which is in a position to govern alone should nevertheless consider whether there is a political basis for forming a multi-ethnic government.

12.38 If, after a general election, no one party or coalition is in a position to form a government, then, of necessity, all parties will immediately begin the process of assessing one another as potential coalition partners. Again, the duty under the *Compact* to take account of the interests of all communities will come into play. We have made the point in Chapter 11 that, although AV is not a proportional system, the encouragement it affords to parties to cooperate across ethnic lines may result in no one party or pre-election coalition achieving a majority. Here we wish to focus on the role of the President in that situation.

12.39 Some guidance can be obtained from the way in which the Governor-General of New Zealand proposes to discharge his responsibilities, if a similar

situation arises when the first general election under a proportional system of representation is held in October 1996. It is worth quoting at some length from a recent public speech given by His Excellency:

> The formation of a government is a political decision. It should be arrived at by politicians. My job in all of this is to ascertain the will of Parliament, that is, to find out where the necessary support lies and make an appointment accordingly. ...
>
> I would expect that at some stage, there would be clear and public evidence that the necessary political agreement had been reached, and that a government could be formed which had the support of a new Parliament. That might be in the form of a joint public statement by the party leaders. It might be a fully-fledged coalition agreement. It might be a public acknowledgment by smaller parties that they will support a larger one as a minority government. ...
>
> There may come a stage where it becomes necessary for me to talk with the party leaders. I may need to satisfy myself that I understand the arrangements that have been made. Or, if coalition negotiations become protracted, or bogged down, a little encouragement may not be out of place. My role *then* is simply that of facilitator, providing such assistance as I can to bring about the formation of a new government.

12.40 The Governor-General explained that he laid stress on a public outcome of the political negotiations for two reasons. First, the people who cast their votes should know what is happening and understand the basis for the appointment of the Prime Minister. Secondly, a clear and public agreement among the parties would allow him to make the appointment while remaining distanced from the political negotiations.

12.41 We consider that the President should have a corresponding role. However, unless the Prime Minister in office before the general election has tendered a resignation, the President should not hold discussions with the leaders of other parties without the Prime Minister's knowledge and consent. We also endorse the need for the political parties themselves to make public the outcome of their negotiations, to the extent that it provides a basis for the appointment of a Prime Minister.

12.42 The words of the 1990 Constitution, following almost exactly those of the 1970 document, do not capture these underlying realities of the process of choosing a Prime Minister, or fully reflect the formal position while this process is going on. Section 84(3)(b) provides that the office of Prime Minister becomes

vacant if, at the first sitting of the House of Representatives after any general election, he is not a member of the House. Section 84(2) provides that

> If at any time between the holding of a general election and the first sitting of the House of Representatives thereafter the President, acting in his own deliberate judgment, considers that, in consequence of changes in the membership of the House resulting from that general election, the Prime Minister will not be able to command the support of a majority of the members of the House, the President may remove the Prime Minister from office.

12.43 These provisions imply, but do not state, that after a general election a Prime Minister who has not been re-elected to the Bose Lawa, or who clearly no longer commands the support of a majority of the House, should tender a resignation but must remain in office in a caretaker capacity until a new Prime Minister is appointed. If the parliamentary situation is not clear, a Prime Minister who is still a member of the Bose Lawa is under no obligation to resign, but is entitled to stay on and try to obtain the support of a majority.

12.44 If necessary, the position can be resolved by waiting until Parliament meets, as it must do within 30 days after the date specified in the writs for the commencement of polling. A Prime Minister who meets Parliament and survives a vote of no-confidence or is not challenged will simply remain in office.

12.45 The provisions under which the Prime Minister vacates office if not re-elected to the House, or may be dismissed by the President on the ground that the Government no longer commands the support of a majority, are fail-safe mechanisms which should never need to be used. The prominence given to them, and the failure to state other relevant principles, obscure the duties of the Prime Minister after a general election, including the requirement that the country must never be left without a Government. The relevant provisions of the Constitution should be rewritten to accord more closely with all the constitutional principles relevant to a possible change of government after a general election. The President should have a residual power to dismiss the Prime Minister only in circumstances where the Prime Minister is under a constitutional duty to resign but does not do so.

12.46 In the light of the principles just explained, section 80(1)(b) of the Constitution is an anachronism. It provides that

> if the office of Prime Minister is vacant and the President considers that there is no prospect of his being able within a reasonable time to appoint to

> that office a person who can command the support of a majority of the members of the House of Representatives, the President, acting in his own deliberate judgment, may dissolve Parliament.

The office of Prime Minister will be vacant in the literal sense only if the Prime Minister ceases to be a member of Parliament otherwise than by reason of a dissolution. That includes the case where the Prime Minister dies in office. The governing party or coalition will presumably move quickly to select a new leader whom the President can, "within a reasonable time" appoint as Prime Minister.

12.47 As has been seen, if there is no one party with a majority after a general election, or at any other time during the life of Parliament, it is for the political leaders themselves to work out how a Government is to be formed and who is to be appointed as Prime Minister. The President should be a facilitator of that process, but not a prime mover, though, in the last resort, he could appoint a caretaker Prime Minister. A Government which has not been clearly defeated in a general election may remain in office until Parliament meets. If it is not then defeated on a confidence vote, it will continue to govern. If it is defeated, then the rules covering that situation will apply. We discuss them below. Section 80(1)(b) should be repealed.

The appointment of other Ministers

12.48 The Commission has already recommended that the Constitution should continue to provide that the President appoints the other members of the Cabinet on the advice of the Prime Minister. The same rule should continue to apply to Assistant Ministers. The Prime Minister's recommendations will need to be made within the limit on the number of Ministers and Assistant Ministers proposed above.

Cabinet secrecy

12.49 All members of the Cabinet should continue to be required to take the Oath of Allegiance and the Oath for the due execution of office. That Oath binds the members of the Cabinet not to disclose without authority anything that has transpired in or in relation to the proceedings of the Cabinet while in office or at any time thereafter. The duty not to disclose differences of opinion among members of the Cabinet is traditionally seen as necessary to support the doctrine of the Cabinet's collective responsibility to Parliament. In fact Cabinet secrecy is often taken a great deal further than is necessary for that purpose. It should be looked at critically in the light of the principles it serves, so that it can be reconciled with the competing principle discussed in Chapter 15 that there ought to be freedom of access to official information unless there is good reason to withhold it.

Tenure of office of other Ministers

12.50 The Constitution should continue to provide that a Minister or Assistant Minister may be dismissed by the President on the advice of the Prime Minister. Again this is a safeguard. A Prime Minister who wishes to change the membership of the Cabinet will normally ask for and receive the resignations of Ministers whom he or she wishes to remove from office.

12.51 The Constitution should continue to make it clear that the members of the Cabinet stand or fall with the Prime Minister. Again, the provisions in section 84(4) and 84(5)(d) that Ministers vacate office on the appointment of a new Prime Minister or on the Prime Minister's resignation or removal after the adoption of a no-confidence motion are there only as a backstop. A Prime Minister who tenders his or her resignation after losing the support of the majority of the members of the House, or the leadership of the governing party or coalition, normally tenders also the resignations of all other Ministers and Assistant Ministers.

12.52 At present, the Constitution contains no provision expressly permitting a Minister to tender a resignation from office or providing when that resignation takes effect. The general provision about resignations from office in section 155 is not wholly apposite. The Constitution should provide for the vacation of the office of a Minister or Assistant Minister if its holder tenders his or her resignation, or ceases to be a member of Parliament otherwise than by reason of a dissolution, or is not re-elected to Parliament after a general election. However, in all cases where the vacation of office is associated with a need for a change of Government, the Constitution should recognise that the Prime Minister and other members of the Cabinet who tender their resignations remain in office until the new Prime Minister is appointed.

Responsibilities of Ministers

12.53 The substance of section 86(1) providing that the President, acting on the advice of the Prime Minister, may assign to any Minister, including the Prime Minister, responsibility for the conduct of any business of the Government, including responsibility for any department, should be retained. There should be a further provision that the Prime Minister has responsibility for any matter in respect of which no such assignment has been made.

12.54 Such a provision avoids the possible consequences of an accidental omission to assign responsibility for a particular aspect of the business of the Government. It also reinforces the constitutional principle that, as one leading

authority put it, "there is nothing for which a Minister is not responsible". What he meant was that, even if the Government has sought to take a particular matter out of its own hands by giving responsibility for it to an independent authority, or privatising it, the Government is still answerable for the decision to do so. That does not mean that the Constitution should in any way prejudge the correctness or otherwise of such decisions. It simply means that, at all times, Ministers retain a responsibility for considering whether the Government ought to take action in respect of any situation or state of affairs arising within, or affecting, the country or its citizens.

12.55 The substance of section 87 concerning the performance of the Prime Minister's functions during illness or absence should be retained, apart from the requirement that a Minister performing the functions of the Prime Minister shall be a Fijian. There should be a corresponding provision allowing the President, on the advice of the Prime Minister, to authorise another Minister to perform the functions of a Minister who is ill or absent. Again, the general provision for acting appointments in section 152 is insufficiently precise. The fact that a Minister has been authorised to perform the functions of the Prime Minister or another Minister should be required to be notified in the Gazette.

CONFIDENCE MOTIONS AND DISSOLUTIONS

12.56 The Constitution assumes, rather than provides for, the right of a member of Parliament to move a motion of no confidence in the Government. It makes no express reference to the case where the Prime Minister moves a positive motion that the House has confidence in the Government, or chooses to regard the passage of particular legislation, such as the annual Appropriation Bill, as an issue of confidence. The failure of the Bose Lawa to pass a Government Bill that has not been made an issue of confidence may be politically embarrassing, but it should not be seen as having constitutional consequences. We use the words "confidence motions" to describe the various procedural initiatives, of the Opposition or the Government itself, which put to the test the Government's continuing ability to command the confidence of a majority of the members of the Bose Lawa.

12.57 If a confidence motion results in a clear expression by the House that it has no confidence in the Government - a situation we describe as a vote of no-confidence - the Prime Minister has the alternative of resigning or of advising a dissolution of Parliament. That is the implication of Section 80(1)(a) which provides that

> if the House of Representatives passes a resolution that it has no confidence in the Government and the Prime Minister does not within three days either

> resign from his office or advise the President to dissolve Parliament within seven days or at such later time as the President, acting in his own deliberate judgment, may consider reasonable, the President, acting in his own deliberate judgment, may dissolve Parliament.

12.58 The President's power to dissolve Parliament without advice means that, even if the Prime Minister fails to resign or advise a dissolution after being defeated in Parliament, he or she will still go into the ensuing general election as Prime Minister, with all the advantages that position carries. We consider that the President should have no power to dissolve Parliament without the advice of the Prime Minister.

12.59 Section 80(1)(a) should be rewritten to provide that, if the Government is defeated on a confidence vote, the Prime Minister must resign or advise a dissolution. A Prime Minister who fails to take either step should be dismissed by the President. The fact that the Government has been defeated on a confidence vote implies that a Prime Minister appointed from among the Opposition members, or those of any party or faction that has ceased to support the Government, is likely to be able to command the support of the majority of the Bose Lawa.

12.60 The present provision, and the revised version we propose, imply a convention that, if a Prime Minister defeated on a confidence vote requests a dissolution, the President will grant the request. Not all Westminster or similar parliamentary systems give a Prime Minister the option of advising a dissolution in such circumstances. For example, the convention in the Australian Federal Parliament now is that another Government should be found from among the members of the existing House if at all possible. In Fiji, however, as in Britain, the Constitution and the conventions that support it recognise that a Prime Minister defeated in the House should have the opportunity to appeal to the voters against the decision of Parliament.

12.61 We consider that, to avoid uncertainty, this convention should be formalised. In a situation where a coalition Government is in office, it is a safeguard against the instability which might occur if the parties making up the coalition were free to leave it and combine in a different way to form another Government. If they know that a departure from the coalition will almost certainly lead to a dissolution, they will be unlikely to leave it on the basis of mere opportunism, but only on a major issue of principle. This approach may enhance the stability of a Government formed by a multi-ethnic coalition or party.

12.62 The Constitution should make it clear that, if a Prime Minister advises a dissolution, the President must act in accordance with that advice, except in the circumstances we refer to below. This does not emerge clearly from the introductory words of section 80(1), perhaps because they were intended to give the President a necessary element of discretion to refuse a request for a dissolution in the following circumstances:

- if the Government in office before a general election is defeated on a vote of no- confidence shortly after Parliament meets following a general election. Such a vote merely confirms what was presumably unclear until then - that the former Government has been defeated and a new one elected. The Prime Minister cannot seek to overturn the verdict of the voters by obtaining another dissolution.
- if a new Government formed after a general election is defeated shortly after meeting Parliament. This situation is the converse of the first. A new Parliament should have a reasonable opportunity to see if it can find a Government from among its members before being dissolved. If another general election is inevitable, then the rule that a Prime Minister who is defeated on a confidence vote is entitled to a dissolution should be allowed to take its course. This may involve the President in making a decision about when to grant a dissolution rather than refuse it, but the invidious nature of such a decision is not avoided by retaining the President's existing power, in these circumstances, to dissolve Parliament without advice.
- if the Prime Minister is displaced from the leadership of the governing party or coalition, whether or not he has also been defeated on a confidence vote. Section 85(3)(b) of the Constitution recognises the convention that, in advising a dissolution, the Prime Minister is not obliged to consult the Cabinet. This convention assumes, however, that the Prime Minister retains the leadership of the governing party or coalition. If that is not the case, he must resign from the office of Prime Minister. He is not entitled to be granted a dissolution so that he can appeal to the voters over the heads of the members of the ruling coalition or party.

We consider that the Constitution should include express rules giving effect to these principles.

RECOMMENDATIONS

371. The Constitution should provide that there shall be a Cabinet, consisting of the Prime Minister and not more than 15 other Ministers appointed from among elected members of Parliament. It should also permit the appointment, from among elected members, of not more than 5 Assistant Ministers. There should be a convention that not more than a quarter of all Ministers and Assistant Ministers should be appointed from among the elected members of the Bose e Cake. The Constitution should no longer require the inclusion in the Cabinet of Ministers responsible for named portfolios.

372. The Constitution should provide that the office of Attorney-General must be filled by a member of the Cabinet qualified to practise as a barrister and solicitor in the Republic of the Fiji Islands. The Attorney-General should continue to be the chief legal adviser to the Government and have the right to take part in the proceedings of either House of Parliament, but to vote only in the House of which he or she is a member.

373. Section 83(4), providing that, if the person holding the office of Attorney-General is for any reason unable to perform the functions of that office, they may be performed by another qualified person, whether or not a member of Parliament, appointed by the President on the advice of the Prime Minister, should be repealed. The Constitution should provide that, in such a case, a Minister may be appointed to act as Attorney-General, whether or not legally qualified, and that the Solicitor-General may exercise any power specifically conferred on the Attorney-General by law, or by virtue of the Attorney-General's appointment to any office or body created by or under a law.

374. With particular reference to the Attorney-General, but with reference also to other members of the Cabinet, the substantive responsibilities of each Ministerial portfolio assigned to a member of the Cabinet, and those of the departments or offices coming under the general direction and control of the Minister holding that portfolio, should be clearly defined.

375. If after a general election, no one party or pre-election coalition is in a position to form a government, the President should, if

necessary, facilitate negotiations among political parties about the formation of a coalition government. Unless the Prime Minister in office before the general election has tendered a resignation, the President should obtain the Prime Minister's consent before talking to the leaders of other parties.

376. The political parties should make public the outcome of their negotiations, to the extent that it provides a basis for the appointment of a Prime Minister.

377. Sections 84(2) and (3) should be rewritten to make it clear that, after a general election, a Prime Minister who has not been re-elected to the Bose Lawa, or who clearly no longer commands the support of a majority of the House, must tender a resignation, but remains in office in a caretaker capacity until a new Prime Minister is appointed. It should be implicit that a Prime Minister who has not clearly lost the support of the majority is entitled to remain in office until Parliament meets. The President should have a residual power to dismiss the Prime Minister only if the Prime Minister is under a constitutional duty to resign but fails to do so.

378. Section 80(1)(b) of the Constitution, authorising the President, acting in his own deliberate judgment, to dissolve Parliament, if the President considers that there is no prospect of his being able within a reasonable time to appoint to that office a person who can command the support of a majority of the members of the House of Representatives, should be repealed.

379. All members of the Cabinet should continue to take the Oath of Allegiance and the Oath for the due execution of office which binds the members of the Cabinet not to disclose without authority anything that has transpired in or in relation to the proceedings of the Cabinet while in office, or at any time thereafter.

380. The doctrine of Cabinet secrecy should be looked at critically in the light of the principles it serves, so that it can be reconciled with the competing principle that there ought to be freedom of access to official information unless there is good reason to withhold it.

381. The Constitution should continue to provide that a Minister or Assistant Minister may be dismissed by the President on the advice of the Prime Minister.

382. **It should provide for the vacation of office by a Minister or Assistant Minister if its holder tenders resignation, or ceases to be a member of Parliament otherwise than by reason of a dissolution, or is not re-elected to Parliament after a general election, or if the Prime Minister vacates office. The Constitution should recognise that the Prime Minister and other members of the Cabinet who tender their resignations in anticipation of a change of Government remain in office until the new Prime Minister is appointed.**

383. **The substance of section 86(1) providing that the President, acting on the advice of the Prime Minister, may assign to any Minister, including the Prime Minister, responsibility for the conduct of any business of the Government, including responsibility for any department, should be retained. There should be a further provision that the Prime Minister has responsibility for any matter in respect of which no such assignment has been made.**

384. **The substance of section 87 concerning the performance of the Prime Minister's functions during illness or absence should be retained, apart from the requirement that a Minister performing the functions of the Prime Minister shall be a Fijian. There should be a corresponding provision allowing the President, on the advice of the Prime Minister, to authorise another Minister to perform the functions of a Minister who is ill or absent. The fact that a Minister has been authorised to perform the functions of the Prime Minister or another Minister should be notified in the Gazette.**

385. **Section 80(1)(a) should be rewritten to provide that, if the Government is defeated on a confidence vote, the Prime Minister must resign or advise a dissolution within prescribed time limits. A Prime Minister who fails to take either step should be dismissed by the President. The President should have no power to dissolve Parliament without the advice of the Prime Minister.**

386. **The Constitution should make it clear that, if a Prime Minister advises a dissolution, the President must act in accordance with that advice, unless**

(a) **the Prime Minister was in office before a general election and his Government is defeated on a vote of no-**

confidence shortly after Parliament meets following a general election; or

(b) the Prime Minister is the leader of a new Government formed after a general election and that Government is defeated shortly after meeting Parliament; or

(c) the Prime Minister is displaced from the leadership of the governing party or coalition.

THE NON-POLITICAL EXECUTIVE

12.63 The distinction between the Cabinet and the non-political executive is an important feature of the Westminster system as it applies in the Fiji Islands. In Chapter 3 we explained that, although a system under which some legislators are members of the political executive may seem to cut across the principle of the separation of powers, there is a balancing factor. The duty of a permanent, politically neutral public service to administer the law and give Ministers free and frank policy advice offsets the fact that, at the political level, the same persons exercise both legislative and executive functions.

12.64 In this section of the chapter we look at how, in carrying out their own responsibilities, the departments, the police and the armed forces come under the direction and control of Ministers. We also look at why certain executive functions have been excluded from direct ministerial control and have become the responsibility of independent constitutional officers.

The Departments

12.65 Section 92 encapsulates two important principles:

- a Minister responsible for a department exercises general direction and control over it;
- the department is under the supervision of a Permanent Secretary or some other supervising officer who is required to be a public officer.

These deceptively simple statements have a number of implications and consequences.

12.66 The first statement reflects, though it does not articulate, the constitutional doctrine that Ministers are individually responsible to Parliament for the work of their departments. The present-day effect of that doctrine is much debated. Some argue that individual ministerial responsibility is no longer meaningful, because

the Government's majority in Parliament shelters individual Ministers from censure or dismissal if their departments make mistakes or otherwise fail to perform. A discussion of that question is beyond the scope of this report. However, individual ministerial responsibility still provides the basic link between the actions of public servants and the democratic process.

12.67 Section 92 refers in terms only to the authority flowing from the Minister to the department. The exercise of "general direction and control" by the Minister is contrasted with the "supervision" of the Permanent Secretary or other supervising officer. That office is a "public office", a term which, as we have mentioned, carries more weight in the Constitution than it should be made to bear. It signifies, among other things, that the Permanent Secretary must be appointed by the Public Service Commission or another service commission. Its holder is a public servant who is expected to have the qualities of experience and professionalism, and to serve the Government of the day loyally, without becoming involved in party politics.

12.68 The language of section 92 does not reflect the subtlety of the relationship between a Minister and a Permanent Secretary. Ministers, and through them the Cabinet, have control of policy, but policy is often developed within a department. Even if it is not, the Permanent Secretary has a role in advising the Minister of the implications of policies developed elsewhere. Nevertheless, the Minister's exercise of "general direction and control" rightly indicates that, once the policy is settled, the department must carry it out faithfully.

12.69 The reference to the Permanent Secretary's "supervision" of the Department is a signal that the Minister should not be concerned with the actual running of the department. Effective Ministers will, however, be aware of the strengths and weaknesses of their departments. The statement that departments are "under the supervision" of their Permanent Secretaries does not throw much light on the nature of their responsibilities. Nor does the section state that the Permanent Secretary is responsible to the Minister for carrying out this task.

12.70 The modern focus is on the duty to "manage" the department - a task that requires the Permanent Secretary to ensure that the department carries out its functions effectively, efficiently and economically. It includes the financial management of the department and responsibility for its financial performance.

12.71 In Chapter 16, we show how the public funds required for a department's work must be appropriated by Parliament. Most countries, including Fiji, are now focussing more sharply on mechanisms that ensure not only accountability

for the money appropriated, but also facilitate scrutiny of what "output" the expenditure achieved, whether that output contributed to the attainment of the government's objectives, and whether good value was obtained for the money spent.

12.72 On the private sector model, some countries have introduced "performance contracts" between Ministers and their Permanent Secretaries - a concept that is hard to square both with traditional constitutional doctrine and the fact that the power to "hire and fire" public servants remains with an independent Commission. Nevertheless, it is an indication of the seriousness with which Governments are trying to ensure that they can implement their policies while reducing public sector spending.

12.73 Section 92 gives no inkling that responsibility also flows from the department to the Minister, who is accountable to Parliament for the department's work. Ministers must respond to questions in the House about any matter within their portfolio. Major issues concerning the operation of their departments can be made the subject of a full-scale debate. If it becomes apparent that problems need to be addressed, at the very least, the Minister will give an assurance that effective remedial action has been, or is being, taken.

12.74 A long-standing convention has traditionally required the Minister not to name individual public servants responsible for mistakes or wrong-doing, but their identity often becomes public knowledge in other ways. It is questionable whether the convention continues to serve a useful purpose, except as a reflection of the principle that attacks should not be made in Parliament on named persons - whether or not they are public servants - who are unable to speak in their own defence. Unless the Minister is guilty of personal wrongdoing, the collective responsibility of the Cabinet will usually shield him or her from a need to respond to calls to resign.

12.75 A succinct constitutional provision cannot capture all the nuances of the different responsibilities of a departmental Minister and the Permanent Secretary. We consider, however, that the Constitution should recognise that the Minister exercises general direction and control over the department and is accountable to Parliament for its work. It should also state that, subject to the Minister's general direction and control, the Permanent Secretary or other officer in charge of the department is responsible to the Minister for its efficient, effective and economical management.

12.76 The term "department" is not defined, except for the indication that it includes the offices of the Prime Minister and other Ministers. It should be seen as including all government offices, regardless of the name by which they are called. All independent constitutional officers are either serviced by a department or, in effect, head a department which supports them in the exercise of their functions. As disciplined services, the police and the armed forces are not "departments" but, as will be seen, a Minister must have control over the responsibilities of those services though not the precise way in which those responsibilities are carried out. To help ensure that the policies governing the roles of the disciplined services are sufficiently broadly based, the Minister should have access to policy advice from civil service officers as well as from officers of the disciplined service.

The Police Force

12.77 Section 95 of the 1990 Constitution creates the office of Commissioner of Police, provides for the appointment of the holder of that office, and provides that the Police Force is under the command of the Commissioner. It authorises the Prime Minister or another Minister to give general policy directions to the Commissioner of Police, and preserves the President's power, on the advice of the Prime Minister, to assign to a Minister responsibility for the organisation, maintenance and administration of the Police Force. Within those limits, the Commissioner is to act independently in exercising responsibilities and powers with respect to the use and operational control of the Force. Provision for all those matters needs to be made in the Constitution, but the details of the arrangements should be varied in the ways we now propose.

12.78 The Constitution should continue to constitute the office of Commissioner of Police, and provide that the Police Force is under the Commissioner's command. Section 95(1) provides that the Commissioner of Police shall be appointed by the Police Services Commission *on the advice of* the Prime Minister for a term of five years. There is a conflicting provision in Section 129(1) which requires the Police Services Commission to make the appointment after *consulting* the Prime Minister. As we explain in Chapter 15, the whole point of requiring appointments to be made by a commission is that they should be made independently. Therefore service commissions should be required only to consult the relevant Minister before making the appointment.

12.79 In view of the independent responsibility of the Commissioner of Police for the deployment and operational control of the Police Force, and consistent with the concept that all police officers are personally responsible for acting within

the law in exercising their powers in respect of individual citizens, the Commission considers that the existing constitutional independence of the Commissioner should be reinforced. The holder of that office should be appointed by the Constitutional Offices Commission recommended in Chapter 14, after the Commission has consulted the Minister responsible for the Police Force.

12.80 The Constitution should provide that the Commissioner is responsible for the organisation, maintenance and administration of the Police Force, as well as for determining its use and controlling its operations. In matters pertaining to the organisation, maintenance and administration of the force, the Commissioner of Police should be under the general direction and control of the Minister responsible for the Police Force. The Commissioner should also be required to act in accordance with such general directions of policy with respect to the maintenance of public safety and public order as may be given by that Minister. In exercising his or her powers and authorities for the purpose of determining the use and operational control of the Force, the Commissioner should not be subject to the direction or control of any other person or authority.

12.81 The effect of the existing constitutional provision requiring the Commissioner of police to exercise responsibilities and powers with respect to the use and operational control of the force, free of the direction and control of any person or authority, was recently in issue before the Court of Appeal. The Court held that, by reason of that provision, there was no jurisdiction to issue a writ of mandamus requiring the police to undertake a criminal investigation. (It also expressed the view that, even if there had been jurisdiction, no order should have been made on the merits.)

12.82 The Court's decision reflects section 158 of the Constitution which saves aspects of the jurisdiction of the courts in respect of the functions of a person or authority which is "not subject to the direction or control of any other person or authority". A court may determine whether such a person or authority "has performed those functions in accordance with this Constitution or any other law or should not perform those functions". This formula omits any reference to the issue of a writ of mandamus ordering the person or authority to perform any function.

12.83 The Commission was invited to consider whether there is a need for a constitutional amendment to authorise courts to direct police officers to execute arrest warrants and other legal processes, as they do at present under section 50 of the Magistrates' Courts Act. As we explained in Chapter 7, the exercise of certain

police powers is dependent on first obtaining authority from the courts or acting at their direction.

12.84 However, such an authorisation or direction is given by the courts to individual police officers, by name or by description. We believe that those authorisations or directions should not be regarded as impinging on the responsibility of the Commissioner to determine the use and control the operations of the Force, without being subject to the direction or control of any other person or body. For example, it is inconceivable that a court would regard itself as prevented by that requirement from issuing a writ of habeas corpus ordering a member of the police who is holding a person in custody to bring that person before the court. Accordingly, we do not think that any constitutional amendment is necessary to meet the point raised.

The Republic of Fiji Military Forces

12.85 The 1990 Constitution departed from the 1970 Constitution by making express provision for the Republic of Fiji Military Forces. Section 94 provides that there shall be such a force, and that it shall be under the command of a Commander appointed by the President on the advice of the Prime Minister. Section 94(3) provides as follows:
It shall be the overall responsibility of the Republic of Fiji Military Forces to ensure at all times the security, defence and well being of Fiji and its peoples.

12.86 The inclusion of provision for the existence of the Republic of Fiji Military Forces in the Constitution raises a basic issue of constitutional principle. The Bill of Rights passed by the British Parliament in 1688 contained the following provision:

> That the raising or keeping a standing army within the kingdom in time of peace unless it be with the consent of Parliament is against the law.

This was a clear recognition that the existence of a standing army is a potential threat to the liberties of the subject. Ever since 1688, the British Parliament has provided by Act for the raising of the army, and later the air force, though not the navy which was not regarded as being "within the kingdom". Until comparatively recently, the authorising Act expired after twelve months and had then to be renewed. It still has a limited duration.

12.87 Commenting on the Bill of Rights provision, which is part of Fiji's constitutional heritage, a standard constitutional law textbook observes:

> This declaration remains important today, not because there is now any possibility that Parliament would withdraw authority for the continued

> maintenance of an army but because it asserts that the armed forces are constitutionally subordinate to Parliament.

In the light of this principle, the Commission considers that the provisions of section 94 of the Constitution requiring there to be a military force to be called the Republic of Fiji Military Forces and specifying their responsibilities, unduly constrain Parliament in the control it should have over the existence and functions of any military force in the Fiji Islands.

12.88 We therefore propose that provision for the existence of the Republic of Fiji Military Forces should be made by Act, rather than in the Constitution. The Constitution should restate the principle in the 1688 Bill of Rights. It should provide that a military force may be raised or maintained in the Fiji Islands only under the authority of an Act. The current Defence Review gives the Government the opportunity to consider whether the Act should confer authority to maintain such a force indefinitely, or for a specified period, after which a renewal would be required. Section 94(1) should be repealed.

12.89 The Commission also considers that the Constitution should refer in a more definite way than it does now to ministerial responsibility for the armed forces. As mentioned above, section 85(1) requires the Cabinet to include a Minister responsible for defence and security. However, there is no express provision giving that Minister any authority in respect of the Republic of Fiji Military Forces.

12.90 We believe that, nearly a decade after the events of 1987, it has again been fully accepted that, like other parts of the non-political executive, the Republic of Fiji Military Forces exist solely to serve the purposes of the Government. Any deployment for a particular purpose must be in response to a decision taken at the ministerial level.

12.91 In practice, the matter would first be considered by the responsible Minister who would be likely to take it to Cabinet. If the situation were at all serious, the Minister or the Prime Minister would be likely to consult Parliament before taking a decision. If that were not possible before making a decision, the Government would certainly inform Parliament as soon as possible afterwards.

12.92 The political control just referred to is distinct from the power to command a military force. "Command" refers to the authority of a member of that force to issue lawful orders to members of lower rank. There is a chain of command stretching downwards from the Commander. The power to command encompasses

also responsibility for the highly professional organisation, training and planning activities of a modern military force, so that it is in a position to undertake any duties or operations for which the Government decides that it should be deployed.

12.93 The Constitution should provide for both ministerial control of the Republic of Fiji Military Forces and for its command. We do not wish to pre-empt the outcome of the Defence Review by being too specific about the terms in which it should do so but consider that effect should be given to the following principles:

- The Republic of Fiji Military Forces should be under the control of the Government of the Republic of the Fiji Islands, exercised through the Cabinet and a Minister responsible for those forces.
- The Republic of Fiji Military Forces should be under the command of a Commander appointed by the President acting in accordance with the advice of the Prime Minister.

As in the case of the Commissioner of Police, there is no need to provide in the Constitution for the length of the term.

12.94 The Commission received a number of submissions questioning the effect of section 94(3), quoted above, on the ground that it gives the Republic of Fiji Military Forces functions going beyond those which should properly be assigned to the armed forces. The Commission considers that the purposes for which the armed forces may be raised or deployed should not be specified in the Constitution. They, too, should be prescribed by Act of Parliament. Section 94(3) of the Constitution should be repealed. The Act should also set out the circumstances and the machinery through which decisions may be taken by the Government to use the armed forces or any part of them to perform a public service or to provide assistance to the police.

12.95 The use of the armed forces to provide a public service is relatively straightforward, as when the army helps to clean up after a cyclone. It is sensitive, however, if the armed forces are used to provide services when these have been interrupted by an industrial dispute. It may be desirable to make a distinction between using the armed forces to provide minimum essential services to the public in those circumstances, and using their labour to help break the strike.

12.96 Sometimes, the military forces may need to assist the police, for example in a major terrorist incident if the police have neither the training nor the equipment to act alone on the scale required. The key element is that the members

of the armed forces assisting the police should be given, by Act, the powers that may be exercised by a member of the police. Otherwise, members of the armed forces would have only the more limited powers of private citizens when called upon to assist the police. The powers of the police are themselves severely restricted. Members of the armed forces assisting the police are not permitted to act as they would in engaging in armed conflict when they are subject only to the limits imposed by international humanitarian law.

12.97 The Act should also give members of the armed forces assisting the police the protections that members of the police have against criminal and civil liability. The members of the armed forces concerned should at the same time retain the legal protection they may acquire by having acted in obedience to a lawful order - a defence not available to members of the police who must always act on their own responsibility. The availability to members of the armed forces of the defence of superior orders is justified because they do not have the training which is designed to help police officers exercise their powers within the limits of the law.

12.98 Finally, the Act should prescribe a procedure for obtaining the authority of a Minister before the armed forces are used to provide a public service or assist the police on a particular occasion. Although that occasion may loosely be described as an "emergency", it will seldom give rise to the need to declare a *state of emergency* as discussed in Chapter 20. The key feature of a state of emergency is that it gives the Government access to legal powers additional to, and often in conflict with, those provided under the regular law or ordinarily permitted under the Constitution. The armed forces are also likely to be needed when a state of emergency is declared, but that situation should not be confused with the more common and less serious situations described above.

12.99 There is an example of a statutory provision authorising the use of the armed forces to provide a public service or assist the civil power in section 9 of the Defence Act 1990 (NZ). The underlying issues are fully discussed in the New Zealand Law Commission's *First Report on Emergencies: Use of the Armed Forces* (NZLC R12).

The independent officers

12.100 Our discussion of the responsibilities of the Commissioner of Police has shown that, although the conduct of executive government should generally be under the control of Ministers, there are some functions which need to be exercised independently of the pressures to which the political executive may be subjected.

These functions concern the exercise of executive powers or authorities in specific cases. Even then, Ministers should remain responsible for the broad policies governing the exercise of the power or authority, but the application of the policy in the particular case should be left to the discretion of an independent officer or body.

12.101 In this chapter we make proposals about two officers who should be given this kind of independence, the Solicitor-General and the Director of Public Prosecutions. The exercise of the prerogative of mercy is another exercise of executive discretion which needs to be similarly protected, but, because it is so closely linked with the administration of justice, we deal with it in Chapter 13.

The Solicitor-General

12.102 The office of Solicitor-General is recognised in the Constitution only through the provision for appointments to that office to be made by the Judicial and Legal Services Commission. As in the case of the Attorney-General, the office of Solicitor-General is deeply-rooted in British constitutional history. As the two positions evolved, the holders of both were recognised as Law Officers of the Crown. The Solicitor-General was junior to the Attorney-General, but there was no marked distinction in their functions.

12.103 In Britain, the holders of both offices are now members of Parliament and Ministers. In the Fiji Islands, as in most other common law countries which maintain the office, the Solicitor-General, appointed as a civil servant by the colonial administration, has remained an officer of the non-political executive. The creation in Fiji of the office of Director of Public Prosecutions and its constitutional independence means that the Solicitor-General is solely concerned with civil matters.

12.104 In this sphere, the Solicitor-General's responsibility as legal adviser to the Government is second only to that of the Attorney-General. Obviously, the Solicitor-General and the Attorney-General must work closely together, but, if the Solicitor-General gives legal advice, he or she takes personal responsibility for it, and does not act on the instructions of the Attorney-General.

12.105 The Commission considers that the Constitution should make provision for the office of Solicitor-General. Because the duties of that office and its relationship with the office of Attorney-General have evolved through the historical process just mentioned, the Constitution should not attempt to describe them in general terms. However, there are some aspects of the Law Officers' functions

which the Constitution should assign to the Solicitor-General rather than the Attorney-General, so that they can be exercised independently, without reference to political considerations.

12.106 We have in mind decisions to initiate or discontinue legal proceedings in civil cases in which the state is the plaintiff, and decisions to defend or settle civil cases in which the state is the defendant. It is not so much that the Solicitor-General should have a discretion to make these decisions without discussion with Ministers. Certainly, the Solicitor-General should not commit the Government to a settlement of a civil claim involving the payment of damages without obtaining authorisation for the necessary expenditure as required by the financial accountability mechanisms discussed in Chapter 16. However, none of the actions mentioned should be taken *without the concurrence* of the Solicitor-General. In giving or withholding that concurrence, the Solicitor-General should not be subject to the direction or control of any other person or authority.

12.107 Such a provision will safeguard individual Ministers from the pressures to initiate, defend or settle civil litigation by or against the state, to which they may otherwise be subject. It will also safeguard the resources of the state against the consequences of uninstructed or unwise decisions in respect of those matters.

12.108 The Constitution should provide that the office of Solicitor-General is required to be filled by a person qualified to be appointed as a judge of the High Court. He or she need not necessarily come from among legal officers already in the employment of the state.

12.109 In view of the recommendation in Chapter 13 that the present Judicial and Legal Services Commission should be replaced by a Judicial Service Commission concerned exclusively with judicial appointments, the Solicitor-General should be appointed by the Constitutional Offices Commission recommended in Chapter 15. Before making the appointment, that Commission should consult the Attorney-General.

12.110 The Solicitor-General cannot have the requisite degree of independence in the exercise of the functions of that office unless appointed to it for a fixed term. The term must be long enough to remove any sense of pressure to conform with the Government's wishes in the hope that the appointment will be renewed.

12.111 We have mentioned already that, in effect, the Solicitor-General has the responsibilities of a Permanent Secretary of a Justice Department. This compounds

the confusion that can arise from the fact that the Attorney-General usually holds the portfolio of Minister of Justice. While the Solicitor-General continues to act, in effect, as Permanent Secretary of a Department of Justice or any other department, the responsibilities of the various offices should, so far as possible, be kept distinct.

The Director of Public Prosecutions

12.112 It has always been accepted that the state needs to have an element of discretion in deciding whether to prosecute a person for the alleged commission of an offence. It also needs a discretion to discontinue a prosecution if it is found not to be justified. The need for such a discretion reflects at least three broad considerations:

- No one charged with a criminal offence should be made to stand trial for that offence if the evidence against them is patently insufficient to enable the state to discharge the burden of proving their guilt beyond reasonable doubt.
- Life would be intolerable if everyone appearing to have transgressed the criminal law were always to have its whole weight visited upon them. There needs to be a way of taking account of circumstances and deciding whether a warning or other diversionary action would be sufficient to deter further offending. A prosecution should be brought only if, in the light of all the circumstances, it is in the public interest.
- The creation of offences designed to protect the state against overthrow or insurrection, or the incitement of ill-will between different communities, or less serious but still significant evils such as indecent or offensive behaviour, or the consequences of prolonged industrial action, often involves an exercise of judgment about the purpose or effect of people's actions that may, in themselves, be lawful. For this reason it is usual to provide that no prosecution may be brought for such an offence without the express consent of an officer of the state in a position to make such a judgment.

12.113 No decision of the executive branch of government needs to be taken with more probity and independence from political pressure than the decisions just mentioned. At the same time, the decisions often need to be made with considerable sensitivity to their political implications. A tradition of independence in the making of decisions about the institution or the withdrawal of prosecutions has grown up, even when those decisions are made by an Attorney-General who

is a Minister. However, in a number of countries, of which Fiji is one, prosecutorial decisions have been taken out of the hands of a member of the political executive and given to an independent officer.

12.114 Under section 96 of the 1990 Constitution, the discretion in respect of prosecutions has been vested exclusively in a Director of Public Prosecutions (also referred to as the DPP). Even when a prosecution has been initiated by another person or body, the DPP has an overriding authority. The DPP exercises this discretion in accordance with well-recognised and publicly known principles. Section 96 contains the usual safeguard that, in the exercise of the powers it confers, the Director of Public Prosecutions shall not be subject to the direction or control of any other person or body. The Constitution should maintain these arrangements.

12.115 At present the Director of Public Prosecutions is appointed by the Judicial and Legal Services Commission. The 1990 Constitution made significant changes in the provisions governing the qualifications for membership of that body. It also provided that the Commission may not select a person for appointment to the office of Director of Public Prosecutions unless the Prime Minister has agreed that such a person may be so selected.

12.116 The *Commission of Inquiry on the Courts of Fiji* recommended that the Judicial and Legal Services Commission should be reconstituted to deal exclusively with judicial appointments. It went on to recommend as follows:

> Upon the establishment of the new Judicial Commission, the Solicitor-General in consultation with the Attorney-General, should be responsible for appointing all government legal officers including the Director of Public Prosecutions.

12.117 This Commission endorses the recommendation that a separate Commission should be established to deal with the appointment of judicial officers and related matters. We so propose in Chapter 13. However, we consider that the proposal that all government legal officers including the Director of Public Prosecutions should be appointed by the Solicitor-General in consultation with the Attorney-General, does not take account of several relevant considerations. We refer to some of these in Chapter 15, in proposing that the Public Service Commission should appoint government legal officers, other than the Director of Public Prosecutions and the Solicitor-General (for whose office no method of appointment was recommended by the *Commission of Inquiry on the Courts*).

12.118 In respect of the Director of Public Prosecutions, the recommendation did not reflect the DPP's co-ordinate, rather than subordinate, position in relation

to the Solicitor-General in the exercise of their different legal functions. A 1983 decision of the Privy Council made it clear that the Attorney-General's general direction and control of the DPP's office was to be seen as upholding, rather than undermining its independence. The Solicitor-General has no professional responsibility for the discharge of the functions of the DPP.

12.119 We therefore propose that, like the Solicitor-General, the Director of Public Prosecutions should be appointed by the Constitutional Offices Commission recommended in Chapter 14. Before making the appointment, that Commission should consult the Attorney-General. The Director of Public Prosecutions should continue to be a person qualified to be appointed as a judge of the High Court. As in the case of the Solicitor-General and for the same reasons, the appointment should be for a fixed term of sufficient length to ensure independence.

Constitution of other offices

12.120 Section 98 of the 1990 Constitution provides as follows:

> Subject to the provisions of this Constitution and of any other law, the President may constitute offices for Fiji, make appointments to any such office and terminate any such appointment.

This provision is a remnant of the Sovereign's constituent power in respect of the colonies customarily delegated to the Governor. The 1970 Constitution preserved it in the hands of the Governor-General, and it has now passed to the President. In accordance with section 88(1), the power would have to be exercised on the advice of the Cabinet or a Minister.

12.121 Although the power to constitute and make appointments to offices looks significant, in reality it has little practical importance. The power it confers to create offices and make appointments to them is subject to the Constitution and any other law. In those cases where provision for the constitution of offices by the Constitution or any other law is to be regarded as an exclusive code, the President would have no power to constitute offices of a like nature. For example, the President could not create a judicial office. It is well-settled under the common law that such an office may be created only by the Constitution or by Act.

12.122 Even where there may be room to *constitute* an office, the net at present provided by section 127(1) of the Constitution would catch all offices so constituted by regarding them as public offices and vesting the power of appointment in the Public Service Commission. This is a necessary protection against patronage. Almost without exception, when a new office is required within the executive branch of government, the Public Service Commission exercises its statutory power

to establish the office and its constitutional power to fill it. However, the provision could conceivably serve some useful purpose, and should be allowed to remain.

RECOMMENDATIONS

387. **The Constitution should recognise that the Minister responsible for a department exercises general direction and control over it and is accountable to Parliament for its work. The Constitution should also state that, subject to the Minister's general direction and control, the Permanent Secretary or other officer in charge of the department is responsible to the Minister for the efficient, effective and economical management of the department.**

388. **The term "department" should include all government offices other than a disciplined service.**

389. **The Constitution should continue to constitute the office of Commissioner of Police, and provide that the Police Force is under the Commissioner's command.**

390. **The Commissioner of Police should be appointed by the Constitutional Offices Commission, after the Commission has consulted the Minister responsible for the Police Force.**

391. **The Constitution should provide that the Commissioner is responsible for the organisation, maintenance and administration of the Police Force, as well as for determining its use and controlling its operations.**

392. **In matters pertaining to the organisation, maintenance and administration of the Force, the Commissioner of Police should be under the general direction and control of the Minister responsible for the Police Force. The Commissioner should also be required to act in accordance with such general directions of policy with respect to the maintenance of public safety and public order as may be given by that Minister. In exercising the powers and authorities of the office for the purpose of determining the use and operational control of the Force, the Commissioner of Police should not be subject to the direction or control of any other person or authority.**

393. **The Constitution should provide that a military force may be raised or maintained in the Fiji Islands only under the authority**

of an Act. Section 94(1) of the 1990 Constitution, requiring the maintenance of the Republic of Fiji Military Forces, should be repealed.

394. The Constitution should give effect to the following principles:

(a) The Republic of Fiji Military Forces should be under the control of the Government of the Republic of the Fiji Islands, exercised through the Cabinet and a Minister responsible for those forces;

(b) The Republic of Fiji Military Forces should be under the command of a Commander appointed by the President acting in accordance with the advice of the Prime Minister.

395. The purposes for which the armed forces may be raised or maintained should be specified in an Act, rather than the Constitution. Section 94(3) of the Constitution, specifying the present responsibility of the Republic of Fiji Military Forces, should be repealed.

396. Such an Act should set out the circumstances in which, and the machinery through which, decisions may be taken by the Government to use the armed forces or any part of them to perform a public service or to provide assistance to the police.

397. The Act should give members of the armed forces assisting the police, the powers that may be exercised by a member of the police and the protections of a member of the police against criminal and civil liability, but without prejudice to the legal protection they may otherwise acquire by having acted in obedience to a lawful order.

398. The Act should prescribe a procedure for obtaining the authority of a Minister before the armed forces are used to provide a public service or assist the police on a particular occasion.

399. The Constitution should make provision for the office of Solicitor-General.

400. It should provide that no legal proceeding in a civil case in which the state is the plaintiff may be initiated or discontinued and no legal proceeding in a civil case in which the state is the defendant may be defended or settled without the concurrence

of the Solicitor-General. In giving or withholding that concurrence, the Solicitor-General should not be subject to the direction or control of any other person or authority.

401. The Constitution should provide that the Solicitor-General must be a person qualified to be appointed as a judge of the High Court.

402. The Solicitor-General should be appointed by the Constitutional Offices Commission. Before making the appointment, that Commission should consult the Attorney-General.

403. The responsibilities of the office of Solicitor-General should be kept distinct from other responsibilities which that office-holder has as, in effect, Permanent Secretary of a Department of Justice or any other department.

404. The Constitution should maintain the substance of the arrangements in section 96 of the 1990 Constitution under which the discretion in respect of prosecutions is vested exclusively in a Director of Public Prosecutions. It should continue to provide that, in the exercise of the powers conferred by the Constitution, the Director of Public Prosecutions shall not be subject to the direction or control of any other person or body.

405. The Director of Public Prosecutions should continue to be a person qualified to be appointed as a judge of the High Court. Appointments to that office should be made by the Constitutional Offices Commission, after consulting the Attorney-General.

406. The substance of section 98 of the 1990 Constitution, which empowers the President to constitute offices for Fiji, make appointments to them and terminate the appointments, subject to the provisions of the Constitution and of any other law, should be retained.

13

THE ADMINISTRATION OF JUSTICE

13.1 In this chapter we review most of Chapter VIII of the 1990 Constitution, entitled "The Judicature". We leave until Chapter 17 a discussion of two provisions - section 100, dealing with customary laws and decisions of the Native Lands Commission, and section 122, dealing with Fijian courts.

13.2 The Commission approached its review of Chapter VIII knowing that in 1994 the structure and operation of the judicial system of Fiji had been the subject of a wide-ranging report by the Honourable Sir David Beattie, who was appointed as a Commission of Inquiry to review those matters (the *Beattie Commission*). Some recommendations made by the *Beattie Commission* are already being implemented, but we understand that those which would involve an amendment of the 1990 Constitution have been left aside, for consideration after our report is available.

13.3 This Commission has studied the *Beattie Commission* report thoroughly, so far as it affects the Constitution. In our own recommendations on the Bill of Rights and other matters we take account of relevant recommendations. In this chapter, we discuss and adopt, occasionally with some modifications, all recommendations in the *Beattie Commission* report which affect the provisions of the 1990 Constitution dealing with the courts.

13.4 In our discussion of the policy issues, we have been assisted by a number of helpful submissions. We have not attempted to relate the policy issues to the present text of the Constitution quite as closely as we have in other areas. In constituting the superior courts and dealing with their jurisdiction and powers, a number of technical issues need to be considered. If the Constitution is rewritten, that rewriting will need to involve a consideration of whether there are fundamental provisions now to be found in statute that should be included in the Constitution. Conversely, it may be that some of the present constitutional provisions on matters of detail can safely be left to legislation or to rules of court.

THE JUDICIAL POWER

13.5 In keeping with our recommendations about the legislative power and the executive authority of the Republic of the Fiji Islands, the Commission

considers that the Constitution should vest the judicial power of the Republic in a Supreme Court, a Court of Appeal and a High Court, and such other courts as may be established by law. Each of the named courts should be constituted by the Constitution. Section 101(1) should be rewritten accordingly.

The High Court

13.6 There is no question about the continuing need for the High Court, which is a superior court of general jurisdiction, and exercises appellate and supervisory jurisdiction in respect of the lower courts, tribunals and other persons or bodies exercising quasi-judicial or executive powers. As further discussed below, it also has original and other jurisdiction in respect of constitutional questions.

The Court of Appeal

13.7 The court at present called the "Fiji Court of Appeal" is also essential, empowered as it is to hear appeals from the High Court in both its original and appellate jurisdiction. We consider, however, that, for the sake of consistency with the names of the other superior courts, which do not include the word "Fiji", it should revert to its original name, the "Court of Appeal". (The recommendation of the *Beattie Commission* that, in the event that the Court of Appeal becomes the final appellate tribunal, it should continue to be called the Fiji Court of Appeal (Recommendation 13) was, we believe, directed to the point that the court should not be renamed the Supreme Court, rather than to the retention of the word "Fiji".)

The Supreme Court

13.8 The Supreme Court was created by the 1990 Constitution to provide a second tier appeal system, because the former right of appeal to the Judicial Committee of the Privy Council was no longer available. The *Beattie Commission* looked at whether the Supreme Court should be retained - a question raised expressly in its terms of reference.

13.9 At the time of the inquiry, no sitting of the Supreme Court had been convened. The *Beattie Commission* recommended that

> It is desirable to retain the Supreme Court in the short term, monitor its performance and review the need for it after two years. (Recommendation 3)

Shortly after we began our work, a first sitting of the Supreme Court took place. As well as the Chief Justice, its members include distinguished judges from

Australia and New Zealand.

13.10 More than two years have passed since the presentation of the *Beattie Commission* report. The Supreme Court is operating effectively as the final court of appeal for the Fiji Islands. Without taking a position on the question whether, in the longer term, a second tier of appeal is both affordable and desirable, we consider that the Supreme Court should be retained for the time being. The need for its retention should be considered again when it has heard a sufficient number of cases to allow a study of the number of appeals considered, the grounds for appeal, the outcome on appeal, the time lag involved in hearing a second appeal, and the jurisprudence created by its decisions, as well as the cost involved.

13.11 Like other Pacific Island countries, Fiji is fortunate in being able to obtain the assistance of serving or retired judges from larger neighbouring countries to help service not only the Supreme Court but also the Court of Appeal. If the eventual conclusion in Fiji, as in many other countries in the region, is that a second tier appeal is not justified, there is every reason to believe that judges of the same high calibre as those now serving on the Supreme Court would be available to sit in a permanent Court of Appeal.

The Magistrates' Courts

13.12 The only provision in the Constitution expressly referring to the Magistrates' Courts is that contained in section 124 and the Second Schedule providing for the appointment of Magistrates by the Judicial and Legal Services Commission. The *Beattie Commission* recommended that the Magistrates' Courts should retain their basic framework as courts of summary jurisdiction (Recommendation 38). It recommended the creation of a Family Division of the Magistrates' Court, to be called the Family Court (Recommendations 55-66), the abolition of the different classes of magistrate (Recommendation 51), and the need for all magistrates to be legally qualified with at least five years practice since qualification (Recommendation 52). The Commission also recommended that, when the magistrates have the confidence of judges, the Law Society and the public, an increase in status to that of District Court Judge and an increase in jurisdiction should be considered (Recommendation 53).

13.13 Submissions were made to this Commission that the Magistrates' Courts should be recognised in the Constitution. Although we are aware that the Magistrates' Courts are the indispensable workhorses through which justice is administered in the Fiji Islands, constitutions do not usually constitute courts of summary jurisdiction. That is left to the legislature. Certainly, it would be

premature to give constitutional recognition to the Magistrates' Courts before they are ready to be given the title and status of District Courts, as contemplated in the *Beattie Commission* report. However, our recommendations in the next section of this chapter about the independence of the courts will apply to the Magistrates' Courts in the same way as they apply to all other courts, whether or not they are constituted by the Constitution.

Other courts

13.14 Parliament's power to establish other courts by law should be retained. Sometimes it will be thought that particular matters, such as those affecting relationships within the family, or between workers and employers, should be dealt with by a specialised court which has the necessary expertise. The Bill of Rights of 1688 makes it clear that Parliament's power to establish courts is exclusive. The purported creation of courts by the executive was declared "illegal and pernicious".

RECOMMENDATIONS

407. The Constitution should vest the judicial power of the Republic of the Fiji Islands in a Supreme Court, a Court of Appeal and a High Court, and such other courts as may be established by law.

408. The court at present called the "Fiji Court of Appeal" should be renamed the "Court of Appeal".

409. The Supreme Court should be retained for the time being. The need for its retention should be considered again when it has heard a sufficient number of cases over a period to allow a study of the number of appeals considered, the grounds for appeal, the outcome on appeal, the time lag involved in hearing a second appeal, and the jurisprudence created by its decisions, as well as the cost involved.

410. The Constitution should constitute the Supreme Court, the Court of Appeal and the High Court. It would be premature to give constitutional recognition to the Magistrates' Courts before they are ready to be given the title and status of District Courts, as contemplated in the *Beattie Commission* report.

411. It should empower Parliament to create other courts by Act.

THE INDEPENDENCE OF THE COURTS

13.15 A number of submissions urged that the independence of the courts should be spelt out in the Constitution. In fact, the 1990 Constitution, unlike its predecessor, makes express provision for this purpose. Section 101(3) states categorically:

> Every court shall in the exercise of its judicial functions be independent of the executive or any other authority.

The Constitution should continue to affirm the independence of the courts. It should do so in slightly wider terms by providing that the judicial power of the Republic of the Fiji Islands is independent of the legislative power and the executive authority of the Republic. There are other ways, too, in which the independence of the courts should continue to be protected, and in some cases enhanced, by the Constitution.

Judicial oath

13.16 As now, judges should be required to take the judicial oath or affirmation. We suggest that, in keeping with our earlier recommendation about the form of the oath of allegiance, its form should be slightly revised to read as follows:

> I, , do swear [or solemnly affirm] that I will well and truly serve the Republic of the Fiji Islands, in the office of . I will in all things uphold the Constitution; and I will do right to all manner of people in accordance with the laws and usages of the Republic, without fear or favour, affection or ill will. So help me God. [To be omitted in affirmation.]

The protection of judicial salaries

13.17 Section 110 provides that "[t]he remuneration and other terms and conditions of a judge shall not be altered to his disadvantage after his appointment". Its substance is repeated in section 146. The provisions under which judicial salaries, among others, are required to be prescribed by law and are charged on the Consolidated Fund are discussed in Chapter 16. They provide a constitutional assurance that the remuneration of judges is not at risk, no matter what decisions they may give in respect of the state, its institutions and officers. These safeguards are universally recognised as providing an important guarantee of judicial independence. Their substance should be retained.

Judicial office not to be equated with other "public office"

13.18 A source of considerable confusion about the status of the judges under the Constitution is the provision in section 150:

> In this Constitution the expression "public office" shall be construed -
>
> (a) as including the office of any judge of the High Court, the Fiji Court of Appeal or the Supreme Court, and the office of member of any other court of law in Fiji, unless the context otherwise requires.

Despite the qualification, "unless the context otherwise requires", the provision creates the general impression that the judges are generally to be equated with civil servants and other officers of the executive branch of government. The *Beattie Commission* recommended that, insofar as the Constitution may imply that the judiciary and/or the magistracy are public officers or servants, its review should result in wording that reinforces the principles of the independence of the judiciary and the separation of powers (Recommendation 137). We endorse this recommendation. In any drafting provision applying to all persons in the service of the state, care should be taken to avoid referring to members of the judiciary in a way that appears to equate them with persons serving in the executive branch of government.

Other measures enhancing judicial independence

13.19 In later sections of this chapter we endorse the recommendation of the *Beattie Commission* that the Judicial and Legal Services Commission be reconstituted to deal only with judicial appointments, and become responsible for judicial study and refresher programmes, and deal in the first instance with complaints about judicial officers. We propose that the new Judicial Service Commission should have a clearer responsibility for recommending persons for appointment as judges of the superior courts. The executive should also have a clear but limited role in the making of those judicial appointments, and a Select Committee of the Bose Lawa should have the opportunity to approve recommended appointments before they are made.

13.20 We also endorse the proposal made by the *Beattie Commission* for a separate Courts Administration Department. Increasingly, the way in which the courts are administered and resourced is being recognised as an important element in ensuring their independence. Finally, we propose that a judge of a superior court should be removable only by Parliament. Taken together, all these safeguards

will strengthen the independence of the courts under the Constitution and in the eyes of members of the public.

RECOMMENDATIONS

412. The Constitution should provide that the judicial power of the Republic of the Fiji Islands is independent of the legislative power and the executive authority of the Republic.

413. Judges should be required to take the judicial oath or affirmation in the following slightly revised form:

I, , do swear [or solemnly affirm] that I will well and truly serve the Republic of the Fiji Islands, in the office of . I will in all things uphold the Constitution; and I will do right to all manner of people in accordance with the laws and usages of the Republic, without fear or favour, affection or ill will. So help me God. [To be omitted in affirmation.]

414. The substance of the provisions which prohibit the remuneration and other terms and conditions of a judge from being altered after appointment to the judge's disadvantage, and require judicial salaries to be prescribed by law and charged on the Consolidated Fund, should be retained.

415. In drafting any provision of the Constitution applying to all persons in the service of the state, care should be taken to avoid referring to members of the judiciary in a way that appears to equate them with persons serving in the executive branch of government.

JURISDICTION OF THE COURTS

13.21 Broadly speaking, the term "jurisdiction" is used to describe how the judicial power is shared among the country's various courts. The Constitution should continue to embody the basic common law rule enunciated in section 101(2) that a court has only such jurisdiction as is given to it by the Constitution or by law. We have already seen that no court can be created except by law. Similarly, the executive has no power to give a court jurisdiction to hear and determine particular kinds of cases, or grant particular remedies or impose particular punishments. All those things must be prescribed by Parliament.

13.22 Jurisdiction may be original, appellate, supervisory or advisory. The hearing of all cases involving a dispute between parties must take place in a court

with original jurisdiction. As the name suggests, appellate jurisdiction involves the reopening of a matter decided by a lower court. The appellate court may be empowered to overturn the decision of the lower court on the ground that it was wrong in law, or on the facts, or both. Supervisory jurisdiction involves the review of whether a subordinate court or tribunal or other body or person invested with discretionary powers should or should not exercise its powers or has exceeded its powers or failed to exercise them in accordance with the law or the rules of natural justice. Advisory jurisdiction involves the reference of a question to a court otherwise than in the context of a dispute, in order to obtain the court's opinion.

13.23 The jurisdiction of different courts is often overlapping. It may be based on a number of variables, such as the kinds of claims that may be brought in the court concerned, the kinds of remedies the court may grant, the kinds of people who may bring a claim or against whom they may bring it. It follows that, except where it is desired to confer exclusive jurisdiction on a particular court for a particular purpose, references in the Constitution to the jurisdiction of a court should be seen as descriptive rather than prescriptive. Subject to the Constitution, Parliament should be free to vary the allocation of jurisdiction as among the different courts.

Jurisdiction of the High Court

Original jurisdiction

13.24 Under section 111(1), the High Court has unlimited original jurisdiction to hear and determine any civil or criminal proceeding. It may be given other jurisdiction and powers by the Constitution or by law. This provision should be retained. It allows the High Court to exercise jurisdiction in all matters not assigned to some other court by Parliament.

13.25 Section 112 is a transitional provision vesting in the High Court, which was first created by decree, the jurisdiction and powers vested by the law in force immediately before 5 December 1987 in the former court of unlimited jurisdiction, the Supreme Court which was constituted by the 1970 Constitution. The Supreme Court Act (Cap. 13) conferred various types of jurisdiction on the former Supreme Court by reference to the powers of corresponding courts in England.

13.26 The *Beattie Commission* recommended that the conferment of jurisdiction on the High Court by reference to English law and practice should be discontinued and replaced by modern local legislation. (Recommendation 17). The requisite jurisdiction should be conferred directly on the High Court by a new High Court

Act, obviating the need for the re-enactment of section 112. If that cannot be done by the time that it is desired to put new constitutional arrangements in place, the substance of section 112 should be moved to a separate chapter of the Constitution containing transitional provisions.

Jurisdiction in constitutional questions

13.27 Section 113 gives persons who claim that any provision of the Constitution other than a provision of the Bill of Rights has been contravened, and that their interests are being or are likely to be affected, the right to apply to the High Court for a declaration as to whether or not there has been a contravention. If the Court declares that there has been a contravention, the person may apply for and be granted relief. This provision corresponds to the High Court's original jurisdiction under section 19 to hear and determine applications and questions concerning the contravention of the Bill of Rights, discussed in Chapter 7. Its substance should be retained.

13.28 The drafting of the section needs to be examined, taking account of the issues raised in discussing sections 19 and 46 among others. In particular, it should be made clear that there is no power under this provision to raise issues which are to be determined exclusively under an election petition or a proceeding alleging that a seat of a member of Parliament has become vacant. The section should not be made subject to other sections of the Constitution except in those cases where a limitation on the ability to call a matter in question in the courts concerns an alleged contravention of the Constitution itself.

13.29 Section 114(2) and (3) require a subordinate court to refer to the High Court any substantial question of law as to the interpretation of any provision of the Constitution other than the Bill of Rights. The subordinate court is required to dispose of the matter in accordance with the decision of the High Court or any higher court to which the matter is referred on appeal. These provisions, too, should be retained.

13.30 The jurisdiction conferred on the High Court in respect of constitutional questions, including questions about the contravention of the Bill of Rights, should be seen as an exclusive code. Parliament's power to create courts and confer jurisdiction upon them would not permit any modification of the comprehensive provision made by the Constitution for the disposition of constitutional questions and other questions in respect of which jurisdiction is expressly conferred by the Constitution.

Appellate and supervisory jurisdiction

13.31 Section 111(2) gives the High Court

> jurisdiction to hear and determine appeals in both civil and criminal matters from courts subordinate to it as may be conferred on it by this Constitution or any other law.

This wording, which follows that of the 1970 Constitution, is ambiguous. It is not clear whether the appellate jurisdiction is to be conferred by law, or the right of appeal, or both. The Constitution should confer appellate jurisdiction on the High Court to hear and determine appeals from courts subordinate to it in those cases where a right of appeal is conferred by law.

13.32 Section 114(1) gives the High Court jurisdiction to supervise any civil or criminal proceedings before any subordinate court. Its substance should be retained.

Jurisdiction of the Court of Appeal

13.33 The jurisdiction of the Fiji Court of Appeal under the 1990 Constitution is not set out expressly in the Constitution, but, under section 116, it "shall include the jurisdiction and powers vested in the Court of Appeal under the laws existing prior to December 5, 1987 ...". The Constitution should expressly confer on the Court of Appeal jurisdiction in respect of appeals from decisions of the High Court.

13.34 To the extent that the jurisdiction and powers of the Court of Appeal are not fully set out in the Constitution, it should be described as having "such other jurisdiction and powers as are conferred by law". A transitional provision should provide that the renamed court is the same court as the Fiji Court of Appeal. It should be noted that the jurisdiction of the Fiji Court of Appeal is not wholly appellate. Under section 37 of the Court of Appeal Act (Cap. 12), that court has power to determine a question of law of general public importance coming before the High Court and reserved by that court for the consideration of the Fiji Court of Appeal.

Jurisdiction of the Supreme Court

13.35 The appellate jurisdiction of the Supreme Court is provided for in section 118. Because there is no statute governing the functioning of the Supreme Court, it is more detailed than the constitutional provisions conferring jurisdiction on other courts. The Constitution should continue to confer on the Supreme Court

exclusive jurisdiction to determine finally any appeal from a final decision or order of the Court of Appeal.

13.36 The question whether the Constitution should continue to articulate the doctrine of precedent as it applies to the Supreme Court should be examined in consultation with the Solicitor-General and the judiciary, as should the power of the Supreme Court to review its own decisions. We are not in a position to comment on the legal implications. The Constitution should continue to empower the President of the Supreme Court to make rules of court.

13.37 In Chapter 7 we referred to the advisory jurisdiction of the Supreme Court conferred by section 120. The President, acting on the advice of the Cabinet or a Minister, may,

> in the public interest, refer to the Supreme Court for its opinion any question as to the effect of any provision of this Constitution which has arisen or appears likely to arise ... .

The Supreme Court is required to give its opinion on any question referred to it in open court.

13.38 This useful jurisdiction should be retained but not over-used. The tradition of the common law is that the courts give decisions in the context of particular disputes, and have the benefit of the arguments made by opposing counsel under the adversary system. Although the Attorney-General and the Solicitor-General would appear on the hearing of a question referred to the Supreme Court for its opinion, this does not give the court the same opportunity to hear opposing arguments on behalf of persons with an interest.

13.39 Moreover, experience shows that, in interpreting a constitution that is supreme law, a country's highest court needs to have ways of not deciding issues unless they are essential to the disposition of the particular case. The court can give a provision a meaning and effect in the context of a particular fact situation. It does not have to consider how the provision might apply in different circumstances that are not before the court. This means that the law of the Constitution can be developed cautiously and realistically, and that its application can change over time, as discussed in Chapter 5. It may be harder for the Supreme Court to observe this doctrine of judicial restraint if it is required to give advisory opinions on a wide range of matters.

RECOMMENDATIONS

416. The Constitution should continue to provide that a court has only such jurisdiction as is given to it by the Constitution or by law.

417. The High Court should continue to have unlimited original jurisdiction to hear and determine any civil or criminal proceeding and such other jurisdiction and powers as are conferred on it by the Constitution or by law.

418. The jurisdiction conferred on the High Court by the transitional provision contained in section 112 should be conferred directly on the High Court by a new High Court Act. As recommended by the *Beattie Commission*, that Act should not describe the jurisdiction by reference to English law and practice, but should use modern terms. If that cannot be done by the time that it is desired to put new constitutional arrangements in place, the substance of section 112 should be moved to a separate chapter of the Constitution containing transitional provisions.

419. The Constitution should retain the substance of section 113 which gives persons who claim that any provision of the Constitution other than a provision of the Bill of Rights has been contravened, and that his interests are being or are likely to be affected, the right to apply to the High Court for a declaration and relief. In exercising this right, there should be no power to raise issues which are to be determined exclusively under an election petition or a proceeding alleging that a seat of a member of Parliament has become vacant.

420. The substance of section 114(2) and (3) requiring a subordinate court to refer to the High Court any substantial question of law as to the interpretation of any provision of the Constitution other than the Bill of Rights should be retained.

421. The Constitution should confer appellate jurisdiction on the High Court to hear and determine appeals from courts subordinate to it in those cases where a right of appeal is conferred by law.

422. The substance of section 114(1) giving the High Court jurisdiction to supervise any civil or criminal proceedings before any subordinate court should be retained.

423. The Constitution should expressly confer on the Court of Appeal jurisdiction in respect of appeals from decisions of the High Court and such other jurisdiction and powers as are conferred by law. A transitional provision should provide that the renamed court is the same court as the Fiji Court of Appeal.

424. The Constitution should continue to confer on the Supreme Court exclusive jurisdiction to determine finally any appeal from a final decision or order of the Court of Appeal.

425. The question whether the Constitution should continue to articulate the doctrine of precedent as it applies to the Supreme Court should be examined in consultation with the Solicitor-General and the judiciary, as should the power of the Supreme Court to review its own decisions. The Constitution should continue to empower the President of the Supreme Court to make rules of court.

426. The Constitution should continue to empower the President, acting on the advice of the Cabinet or a Minister, to refer questions as to the effect of any provision of the Constitution to the Supreme Court for its opinion. The power should not be over-used.

CONTEMPT OF COURT

13.40 Section 121 provides that the superior courts have power to punish persons for contempt of court in accordance with the law. The law relating to contempt of court has developed over the centuries as a means by which the courts may act to prevent or punish conduct which tends to obstruct, prejudice or abuse the administration of justice, either in relation to a particular case or generally. The law relating to contempt has to draw the line between protecting the judicial system against improper attack and recognising that the courts operate in a democracy and must be subject to criticism.

13.41 The constitutional provision allowing the courts to punish for contempt "in accordance with the law" makes it clear that the power is subject to the Bill of Rights with its guarantees of freedom of expression and personal liberty. It would

also allow Parliament to intervene if necessary, to control its exercise. On this basis, the provision in section 121 should be retained.

RECOMMENDATION

427. The Constitution should continue to provide that the superior courts have power to punish persons for contempt of court in accordance with the law.

RIGHTS OF APPEAL

13.42 The Constitution does not deal comprehensively with rights of appeal. That is understandable, in view of the fact that Parliament may create courts and confer jurisdiction upon existing courts and other courts created by law. The question is how far the Constitution should go in conferring rights of appeal on the one hand or restricting them on the other.

Appeals to the High Court and Court of Appeal

13.43 We have already referred to the fact that rights of appeal from subordinate courts to the High Court in the exercise of its appellate jurisdiction are those conferred by law. It should also be left to Parliament to prescribe the rights of appeal from the High Court to the Court of Appeal in the exercise of its original civil and criminal jurisdiction and its appellate jurisdiction, except in those cases where a constitutional question is involved.

13.44 That would be the effect of section 115(1)(d) of the Constitution, were it not for the cross-reference in section 115(1)(b) to section 111 of the Constitution. That appears to be a mistake. The reference should have been to section 113. At present, unless a court is prepared to rectify the mistake, there is no right of appeal under the Constitution in respect of decisions made under section 113. That section gives the High Court power to determine whether any provision of the Constitution, other than the Bill of Rights, has been contravened.

13.45 The Constitution itself should provide that appeals from final decisions of the High Court lie to the Court of Appeal as of right

- in the exercise of its original or appellate jurisdiction, on questions as to the interpretation of the Constitution;
- in the exercise of its original jurisdiction to determine claims that the Bill of Rights or other provisions of the Constitution have been contravened; and

- in the exercise of its jurisdiction to determine whether a taking of property is constitutional, and if so, the amount of compensation (if any) that is payable.

It should also provide that, as of right or with leave, appeals shall lie in such other cases as may be provided by law, consistently with the Constitution. We have recommended the inclusion in the Bill of Rights of a provision that every person convicted of a criminal offence has the right to have recourse by way of appeal to or review by a higher court.

13.46 On the other hand, we have recommended that there should be no right to appeal against a determination of the High Court on an election petition or a claim that the seat of a member of Parliament has ben vacated. It is in the public interest that these matters be determined quickly and finally by the High Court.

Appeals to the Supreme Court

13.47 Section 117(1) of the Constitution provides a right of appeal to the Supreme Court

(a) from final decisions in any appeal to the Fiji Court of Appeal on any constitutional questions;
(b) from final decisions in any civil proceedings where the matter in dispute is of the value of 20,000 dollars or upwards or where the appeal involves, directly or indirectly, a claim to or a question respecting property or a right of the value of 20,000 dollars or upwards; and
(c) in such other cases as may be prescribed by law.

Other provisions permit appeals to be brought in certain cases with the "leave" or the "special leave" of the Supreme Court.

13.48 By inference, appeals lie as of right in the cases referred to in section 117(1). The reference to "constitutional questions" in section 117(1)(a) is therefore confusing, as section 115(3) provides that, on the specific constitutional, and other, questions referred to in that section, appeals lie to the Supreme Court subject to the special leave of the Supreme Court.

13.49 On the model of the constitutional provisions originally applying to appeals to the Judicial Committee of the Privy Council, section 117(2) provided for appeals to the Supreme Court with the leave of that court in the following cases:

- from decisions in any civil proceedings where in the opinion of the court the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to the Supreme Court; and
- in such other cases as may be prescribed by law.

Section 117(3) preserves the power of the Supreme Court to grant special leave to appeal from the decision of any court in any civil or criminal matter.

13.50 The *Beattie Commission*, after considering submissions from the Chief Justice, the President of the Court of Appeal and the Fiji Law Society, recommended that there should be no appeals to the Supreme Court as of right, as there are now. Appeals should lie only by leave as follows:

- by leave of the Court of Appeal on a question certified by that court to be of great general or public importance; and
- by special leave of the Supreme Court in any criminal or civil matter (Recommendation 5).

13.51 This Commission endorses that recommendation. The provision that the Court of Appeal may grant leave to appeal on a question certified by that court to be of great general or public importance will encourage it, in its judgments, to recognise the significance of particular cases coming before it. Having heard the case on appeal, the Court of Appeal is in the best position to consider an application for leave to appeal on the ground that the case is of "great general or public importance".

13.52 The residual power of the Supreme Court to grant special leave to appeal to the Supreme Court from a decision of the Court of Appeal in any criminal or civil matter would be needed only when the Court of Appeal has refused leave to appeal. We consider that this power would rarely need to be exercised. However, it is an important safeguard which will allow allegations of a miscarriage of justice to come before the Supreme Court.

13.53 We expect, too, that, if the Bill of Rights is made more accessible to the people of Fiji, there will be more appeals arising out of allegations that its provisions have been contravened. Such allegations are likely to be made not only in the context of proceedings brought to vindicate constitutional rights, but also in the course of other proceedings. Although they may not raise issues of "great general

or public importance", there may nevertheless be good reason to allow the Supreme Court to consider them, at least until the jurisprudence has become well-developed.

RECOMMENDATIONS

428. The Constitution should provide that appeals lie to the Court of Appeal as of right from final decisions of the High Court

(a) in the exercise of its original or appellate jurisdiction, on questions as to the interpretation of the Constitution;

(b) in the exercise of its original jurisdiction to determine claims that the Bill of Rights or other provisions of the Constitution have been contravened; and

(c) in the exercise of its jurisdiction to determine whether a taking of property is constitutional, and if so, the amount of compensation (if any) that is payable.

It should also provide that appeals shall lie, as of right or with leave, in such other cases as may be provided by law, consistently with the Constitution.

429. As recommended by the *Beattie Commission*, the Constitution should provide that appeals from the Court of Appeal to the Supreme Court should not lie as of right. Such appeals should lie only

(a) by leave of the Court of Appeal on a question certified by that court to be of great general or public importance; and

(b) by special leave of the Supreme Court in any criminal or civil matter.

COMPOSITION OF THE COURTS

13.54 The principle of the separation of powers requires the composition of the courts to be prescribed in the Constitution, subject only to the power of the legislature or the executive to increase the number of judges if the workload of a particular court increases. It would be potentially dangerous if the legislature could reduce the number of judges. Against that background, we consider the present provisions of the Constitution and the recommendations of the *Beattie Commission*.

Composition of the High Court

13.55 Section 102 of the Constitution provides that

> The judges of the High Court shall be the Chief Justice and not more than eight puisne judges or such other number as Parliament may prescribe.

The *Beattie Commission* recommended that

> [p]ursuant to the Prescription of Judges Act 1971, the numbers of judges of the High Court should be increased by one to nine judges plus the Chief Justice; [and] the maximum permitted number should be increased to twelve judges apart from the Chief Justice (Recommendation 16).

13.56 We accept the substance of that recommendation but, for the reasons mentioned, consider that the Constitution should provide that the High Court consists of the Chief Justice and not fewer than nine puisne judges or such greater number of puisne judges as Parliament may prescribe.

Masters of the High Court

13.57 The *Beattie Commission* considered a submission of the Chief Justice that there was a need for a person who could perform judicial work in chambers, issue directions on practice and procedure and deal with many interlocutory matters. It therefore recommended that the office of Master of the High Court should be created, and that a Master should possess the same qualifications as a High Court judge (Recommendations 35 and 37). This Commission therefore proposes that provision should be made in the Constitution for the appointment of not more than two Masters of the High Court or such greater number as Parliament may prescribe. Their jurisdiction and powers should be prescribed by Act.

Composition of the Court of Appeal

13.58 Under section 106(1) of the Constitution, the Fiji Court of Appeal consists of a Judge, other than the Chief Justice, who is the President of that Court; such Justices of Appeal as may be appointed by the President after consultation with the Judicial and Legal Services Commission; and the puisne judges of the High Court. A number of questions arise.

13.59 The first is the role of the Chief Justice. For historical reasons, the office of Chief Justice was originally situated in the High Court rather than the Court of Appeal. The *Beattie Commission* considered that it would be more appropriate for the Chief Justice to preside in the country's highest court or courts,

assuming that they sit continuously, but thought that neither the Supreme Court nor the Court of Appeal would do so for some time to come. Therefore the Chief Justice should remain a member of the High Court. He should also continue to be the President of the Supreme Court.

13.60 The *Beattie Commission* recommended, however, that the Constitution should be amended to allow the Chief Justice to sit in the Court of Appeal and preside over it when he sits (Recommendation 14). This Commission considers, first, that such an arrangement would involve too great an aggregation of power in the one individual. It would also compound the problem of the same persons sitting as members of all three superior courts. The requirement for a judge who has participated at an earlier stage of a particular case to disqualify himself or herself from sitting on an appeal is well understood, though it should be reinserted in the Constitution as a general principle. Even so, such a provision does not dispose of the problems that can arise if all or most judges sit both at first instance and on appeal.

13.61 Perceptions may arise of a certain unwillingness to overturn the decisions of judges who may themselves sit on appeals from decisions of the judges concerned. Most developing countries have to accept such an arrangement, at least to some extent, because they do not have the resources to do otherwise. Nevertheless, we consider that the composition of both the Court of Appeal and of the Supreme Court, as far as possible, should continue to ensure that there is not a complete overlap between their membership and that of the High Court.

13.62 The provision for appointing Justices of Appeal gives the power to determine the *number* of appointments as well as the *appointing power* to the President, after consultation with the Judicial and Legal Services Commission. Although, in principle, the number of Justices of Appeal should be specified by the Constitution or by law, an open-ended provision suits the circumstances of the Fiji Islands. The Justices of Appeal, other than the President of the Court of Appeal, are judges or former judges from other countries who are appointed on contract. It is necessary to have a moderately large pool, because a particular Justice of Appeal will not necessarily be available on all occasions when the Court of Appeal is sitting. Three judges are normally required to constitute the Court of Appeal, but, if the matter being considered on appeal is particularly important, the President of the Court is likely to constitute a Court of at least five members.

13.63 In the light of these considerations, we consider that, as now, the Chief Justice should not be a member of the Court of Appeal. We propose that the Constitution should provide that the Court of Appeal consists of:

- a Justice of Appeal who is appointed to be the President of the Court of Appeal;
- such other Justices of Appeal as are appointed to be members of that Court; and
- the puisne judges of the High Court.

Composition of the Supreme Court

13.64 We propose no change in the present composition of the Supreme Court. It should consist of:

- the Chief Justice, who shall be the President of the Supreme Court;
- such Justices of the Supreme Court as are appointed to be members of that Court; and
- the Justices of Appeal, other than the President of the Court of Appeal.

RECOMMENDATIONS

430. The Constitution should provide that the High Court consists of the Chief Justice and not fewer than nine puisne judges or such greater number of puisne judges as Parliament may prescribe.

431. It should provide that there may be not more than two Masters of the High Court, or such greater number as Parliament may prescribe. They should have the jurisdiction and powers conferred by Act.

432. The requirement for a judge who has participated at an earlier stage of a case to disqualify himself or herself from sitting on an appeal should be reinserted in the Constitution as a general principle.

433. As now, the Chief Justice should not be a member of the Court of Appeal. The Constitution should provide that the Court of Appeal consists of:

(a) a Justice of Appeal who is appointed to be the President of the Court of Appeal;

(b) such other Justices of Appeal as are appointed to be members of that Court; and

(c) the puisne judges of the High Court.

434. The Constitution should provide that the Supreme Court consists of:

(a) the Chief Justice, who shall be the President of the Supreme Court;

(b) such Justices of the Supreme Court as are appointed to be members of that Court; and

(c) the Justices of Appeal, other than the President of the Court of Appeal.

THE QUALIFICATIONS OF JUDGES

13.65 In this and the following sections of this chapter we deal with the qualifications, appointment and tenure of office of all judges of the superior courts, who comprise the Chief Justice and the puisne judges of the High Court, Masters of the High Court, acting judges of the High Court, Justices of Appeal and Justices of the Supreme Court. Generally speaking, the rules should be uniform, but we propose special provisions for particular offices whenever that is necessary.

13.66 Under section 103(3) of the Constitution, a person is not qualified to be appointed as a judge of the High Court unless:

(a) he holds, or has held, high judicial office in Fiji or in any other country that may be prescribed by Parliament; or

(b) he is qualified to practise as a barrister or solicitor in such court or a court of equivalent jurisdiction and has been so qualified for not less than five years.

Sections 106(2) and 107(2) apply the same requirements to Justices of Appeal and Justices of the Supreme Court.

13.67 The *Beattie Commission* recommended that judges of the High Court should have at least seven years practice after qualification (recommendation 34). By "practice", that Commission meant actual experience in legal work, rather than being qualified to practise. However, it noted that "practice" should not mean continuous and active practice because that might exclude otherwise suitable people, although it thought it would be very rare for anyone to be appointed who had not actively been in practice. The definition should be wide enough to include state employees, for example the Solicitor-General and Director of Public Prosecutions, Legal Defenders, legally qualified registrars, and academic lawyers who also practise in the Courts.

13.68 On an analogy with section 103(4), "practice" would include a period of service as a judicial officer. The *Beattie Commission* considered that there should be no institutional procedure for promotion from a Magistrate's Court to the High Court bench, but noted that magistrates of high ability may be suitable for appointment to the High Court.

13.69 This Commission endorses the recommendation of the *Beattie Commission* that a person should be qualified to be appointed as a judge of a superior court only if he or she has had not less than seven years' practice as a barrister or solicitor in Fiji or in another country prescribed by law. The term "practice" should be interpreted as discussed in paragraphs 66 and 67. A person should continue to be qualified for such an appointment if he or she holds, or has held, high judicial office in Fiji or in any other country prescribed by law.

RECOMMENDATION

435. The Constitution should provide that a person is not qualified to be appointed as a judge of the High Court unless that person:

(a) holds, or has held, high judicial office in Fiji or in any other country that may be prescribed by law; or

(b) has had not less than seven years' practice as a barrister or solicitor in Fiji or in another country prescribed by law. The term "practice" should be interpreted as discussed in paragraphs 13.66 and 13.67.

THE APPOINTMENT OF JUDGES

13.70 The report of the *Beattie Commission* noted that, at least since independence in 1970, all appointments to the judiciary (except that of the Chief Justice) and to government legal services had been made by an independent commission, insulated from both executive and legislative control. The *Beattie Commission* contrasted the system with that in the United Kingdom, where judicial appointments are made on the advice of Ministers, and the United States, where the executive's nominees are subject to scrutiny and confirmation by the legislature.

13.71 Like the *Beattie Commission*, this Commission considers the recommendation of high judicial appointments by an independent commission is a vital safeguard. However, we believe that the Constitution should recognise that the executive and the legislature also have a legitimate interest in judicial appointments to the superior courts. We steer a middle course between the arrangements in the United Kingdom and the United States.

A Judicial Service Commission

13.72 The *Beattie Commission* proposed the creation of a Judicial Commission which would deal exclusively with the appointment of judicial officers and other matters affecting the judiciary. The genesis of the proposal for a separate Commission seems to have been some disquiet within Government about the involvement in the appointment of government legal officers of practising members of the bar, in their capacity as members of the Judicial and Legal Services Commission. We emphasise the need to mark out more clearly that the judicial branch of government is separate from, and independent of, the executive branch. The same Commission should not be responsible for recommending the appointment of members of the two branches.

13.73 This Commission shares the view that the Constitution should provide for a service commission dealing exclusively with the judiciary. We consider that it should be called the Judicial Service Commission, rather than the Judicial Commission, to indicate that its functions are broadly comparable with those of the Public Service Commission and the proposed Disciplined Services Commission. The existing appointment powers of the Judicial and Legal Services Commission should be redistributed. In Chapter 12 we recommended that the Solicitor-General and the Director of Public Prosecutions should be appointed by the proposed Constitutional Offices Commission. In Chapter 14 we propose that other legal officers should be appointed by the Public Service Commission.

Composition of the Judicial Service Commission

13.74 The *Beattie Commission* recommended a Judicial Commission with the following membership:

- The Chief Justice as Chairman
- The Chairman of the Public Service Commission
- The Solicitor-General
- The Secretary for Justice (if a different person from the Solicitor-General)
- The President of the Fiji Law Society (or a representative of the Law Society)
- One other lay member to be appointed by the President of Fiji after consulting the Chief Justice. (Recommendation 107).

13.75 This Commission believes that the Chief Justice should be the Chairperson of the Judicial Service Commission, except when the office of Chief Justice is vacant, a matter we deal with below. The Chairman of the Public Service Commission should also be a member. The holder of that office, who is usually not a lawyer, can bring to the selection of judges experience in the making of senior appointments, a wide perspective and an ability to take account of the career interests and abilities of eligible members of the government legal service and the competing demands for their services.

13.76 The *Beattie Commission* recommended the inclusion in the Judicial Commission of the Solicitor-General and the Secretary for Justice (if a different person from the Solicitor-General) to take account of the need for the executive to have an input. We consider that it is inappropriate for persons in the service of the state to be members of service commissions, and that it is not desirable for the Solicitor-General, in particular, to be involved in the selection of the judges before whom he or she may appear.

13.77 We propose that the interest of the executive in judicial appointments should be met by requiring the Judicial Service Commission to make its recommendations in the first instance to the Minister responsible for the Justice portfolio. That will give the Minister the opportunity to either concur in the recommendation or ask the Judicial Service Commission to reconsider. There will no need for the executive to be represented in the Judicial Service Commission itself.

13.78 The *Beattie Commission* proposed also the inclusion of the President of the Fiji Law Society or a member nominated by the Law Society, to allow input from the legal profession, and a lay member, to represent the public interest. We received submissions on the inclusion both of persons representing the legal profession and of lay members.

13.79 Opinion was divided about the inclusion of members of the practising profession. As most of its members are in active practice before the courts, some saw its representation on the body which selects the members of the judiciary as undesirable. We share that view. We therefore propose that the third member of the Judicial Service Commission should be a person who is qualified to be a judge of the High Court but is not in active practice in Fiji. Persons in this category would include someone who has retired from practice or is teaching law or is qualified but not practising. That will ensure an input from a legal professional perspective, but would not allow the perception of the Judicial Service Commission's independence to be affected by what might be seen as a conflict of interest.

13.80 As the submissions indicated, there is a public interest in the appointment of members of the judiciary. The *Beattie Commission* noted that the inclusion of a lay member in the recommending commission would help ensure that the judicial system is responsive to the needs of the wider community and that appointments are made regardless of sex, ethnic origin or religion. We accept the validity of these objectives. However, we prefer to keep the number of members of the Judicial Service Commission at three, in line with the membership of the other service commissions, and to provide for the public interest in judicial appointments to be taken into account in another way.

13.81 That interest should be met by requiring the Minister responsible for Justice to place recommendations for appointments to the superior courts before the Select Committee of the Bose Lawa responsible for matters affecting the administration of justice. Only if the Committee approves the recommendation will the Minister be able to advise the President to make the formal appointment. If it does not approve the recommendation, the Judicial Service Commission will have to find another candidate.

13.82 We do not envisage the Select Committee conducting the searching inquiry into the personal philosophy and way of life of candidates for judicial office of the kind now common in the United States. Nor do we think that the Committee would often have reason to withhold its approval. But its scrutiny of proposed appointments to the superior courts is a valuable safeguard. The Committee would also keep its eye on the range and quality of appointments to the Magistrates' Courts.

13.83 During our visit to South Africa we were impressed by the open and contestable method of making appointments to that country's highest courts, including the Constitutional Court. One of its judges told us that he had found it strange to appear before the public hearing by the selection panel, and answer questions about what he thought he could bring to that court. On reflection, he had concluded that there was no reason why he should not have been required to answer that question publicly.

13.84 We do not propose a similar procedure here, but wish to show that the traditional system of making judicial appointments behind closed doors should not be regarded as sacrosanct. Moves to open up the process are desirable, and perhaps inevitable, as people understand better how much authority is placed in the hands of the judiciary, particularly through their responsibility for interpreting and applying the Bill of Rights.

13.85 We propose that the Chief Justice and the Chairperson of the Public Service Commission should be ex officio members of the Judicial Service Commission. The third member should be a person qualified to be a judge of a superior court but not in active practice in Fiji. That person should be appointed to the Commission by the President on the advice of the Minister responsible for Justice, after the Minister has obtained the approval of the Select Committee of the Bose Lawa responsible for matters affecting the administration of justice. The term of office should be three years.

13.86 The rules about disqualification for appointment proposed in respect of members of other service commissions in Chapter 14 should apply to the third member, as should the rules about disqualification from office in the service of the state, including judicial office, for 3 years after ceasing to be a member of the Judicial Service Commission. However, a member of the Judicial Service Commission should be free to accept nomination as a candidate for election to Parliament, with the consequent automatic loss of office.

A vacancy in the office of Chief Justice

13.87 In view of the importance of the office of Chief Justice, and the emphasis we place on enhancing judicial independence, we believe that the method of selecting the Chief Justice should be reconsidered. Under section 103(1) of the Constitution, the Chief Justice is appointed by the President acting on the advice of the Cabinet. The *Beattie Commission* favoured a requirement that the Leader of the Opposition as well as the Cabinet be consulted by the Prime Minister before he submits a name or names to the President for the exercise of the President's deliberate judgment. It commented that, whichever method of appointment is used, the Chief Justice's appointment must be free from political manoeuvrings.

13.88 We agree with that comment and consider that the appointment of a Chief Justice should be initiated by the Judicial Service Commission, the same independent body that selects candidates for other high judicial offices. Because the person appointed to act as Chief Justice while the office of Chief Justice is vacant may be a potential candidate, he or she should not act as the Chairperson of the Judicial Service Commission.

13.89 Instead, the Constitution should provide that a Justice of Appeal or a Justice of the Supreme Court who does not wish to be considered for the position of Chief Justice should be appointed to preside over the Judicial Service Commission for any period during which the office of Chief Justice is vacant.

The appointment should be made by the President on the advice of the Minister responsible for Justice. It is unnecessary to provide for the approval of the Select Committee as the choice must be made from among judges whose appointment it has already approved.

13.90 The Judicial Service Commission will then be able to recommend a person for appointment as Chief Justice in the same way that it recommends persons for appointment to other high judicial office. As in those cases, the Minister responsible for Justice and the Select Committee will need to concur in the recommendation before it goes to the President. The Opposition interest in the quality of the appointment would, we think, be met by the requirement of recommendation by the Judicial Service Commission and the concurrence of the appropriate Select Committee of the Bose Lawa.

The appointment of the judges of the superior courts

13.91 In discussing the composition of the Judicial Service Commission, we have explained its role in recommending persons for appointment to the offices of Chief Justice, Justice of the Supreme Court, the President of the Court of Appeal or other Justice of Appeal, and puisne Judges and Masters of the High Court. We have explained how that role should be complemented by the participation of the executive and the legislature. Appointments to the offices mentioned should be made by the President, on the recommendation of the Judicial Service Commission, with the concurrence of the Minister responsible for Justice and the approval of the Select Committee of the Bose Lawa responsible for matters affecting the administration of justice.

13.92 When the office of Chief Justice is vacant, an Acting Chief Justice should be appointed, to hold office until the new Chief Justice takes office. A similar appointment should be made if the Chief Justice is absent or is unable to fulfil the functions of the office. The provision for the appointment of acting judges of the High Court should also be retained. In each case the appointment should be made by the President on the recommendation of the Judicial Service Commission and with the concurrence of the Minister responsible for Justice. It is not necessary to involve the Select Committee.

The appointment of other judicial officers

13.93 The Constitution should give to the Judicial Service Commission the responsibility of appointing all judicial officers presently required to be appointed by the Judicial and Legal Services Commission. They include all magistrates and

the Central Agricultural Tribunal appointed under the Agricultural Landlord and Tenant Act. Before making the last-mentioned appointment, the Commission should be required to consult the Prime Minister. The former duty to consult the Leader of the Opposition as well should be restored.

13.94 The Constitution should require the Judicial Service Commission to appoint the holders of all other judicial offices for which provision is made by Parliament. An example is the person appointed to hold a Court of Review under the Income Tax Act (Cap. 201). Under that Act, the appointment is required to be made by the Judicial and Legal Services Commission.

13.95 Because the Judicial Service Commission should have responsibilities only for the judicial branch of government, Parliament should not be able to give the appointing power to the Judicial Service Commission unless the office is a judicial office. The question whether a particular office is a "judicial" office or not is ultimately one for the courts. If Parliament creates a tribunal whose functions are not exclusively judicial, the Public Service Commission, as the catch-all appointing body, will be required to make the necessary appointments.

13.96 Nevertheless, there may be cases in which the two Commissions consider that it is more appropriate for the Judicial Service Commission to be the appointing body. The mechanism under which the Public Service Commission can decline responsibility in an appropriate case, by regulation made with the concurrence of the Prime Minister, is discussed in Chapter 15. The Constitution should give the Judicial Service Commission a complementary power to assume responsibility for making the appointment, by regulation made with the concurrence of the Prime Minister.

Localisation

13.97 Section 124(1)(b) of the Constitution requires the Judicial and Legal Services Commission to act in accordance with the advice of the Prime Minister in appointing persons who are not Fiji citizens as judges of the subordinate courts. Section 124(3)(a), introduced in 1990, has the effect of extending that obligation to the appointment of a non-citizen as a judge of the High Court, the Fiji Court of Appeal or the Supreme Court.

13.98 We accept that the localisation of the judicial branch of government remains an important policy objective and discuss below the way in which it should be permissible to implement it by appointing judges under a contract for a term of years. However, we consider that the requirement to obtain the consent of the Prime Minister should not apply to non-citizens recommended for appointment as judges of the superior courts.

13.99 Such a requirement could become an instrument for influencing the Judicial Service Commission in making its recommendations. As we explain below, that Commission's overriding responsibility is to maintain the quality of judicial appointments. The need for its recommendations for the appointment of the judges of the superior courts to be concurred in both by the Minister responsible for Justice, as well as by the Select Committee of the Bose Lawa responsible for the matters affecting the administration of justice, will provide adequate safeguards against the unnecessary appointment of non-citizens. The Judicial Service Commission should continue to obtain the Prime Minister's consent before appointing non-citizens to other judicial offices.

Ethnic and gender balance

13.100 In Chapter 8 we described the way in which the 1990 Constitution introduced, in section 124(3)(b), (4) and (5), requirements concerning the distribution of judicial positions among ethnic groups. We saw these provisions as a focussed form of affirmative action inconsistent with the general principles that should be applied in making appointments to judicial office. We therefore propose their repeal, although as an objective we accept that the composition of the judiciary, as well as the departments and offices of the executive branch of government, should reflect the composition of the population as a whole.

13.101 In Chapter 14, we propose a statement of the general principles which should be applied in recruiting and promoting members of the state services belonging to the executive branch of government. We consider that the Constitution should contain a similar provision setting out the principles to be applied in selecting the members of the judiciary.

13.102 The over-riding principle should be the maintenance of the quality of judicial appointments, while seeking in the longer term to ensure that the composition of the judiciary reflects the ethnic and gender balance among citizens as a whole. The provision should be directed not only to the Judicial Service Commission but also to the executive and legislative branches of government in exercising their responsibilities for concurring in recommended judicial appointments.

13.103 Within that broad directive, the Judicial Service Commission should be expected to take other relevant factors into account, such as the need for a balance between the number of judges drawn from among government legal officers and from the practising profession. Judicial salaries need to be determined, bearing in

mind the importance of that objective. The *Beattie Report* discusses this question at length, recognising that an element of sacrifice is usually involved when well-qualified practitioners accept appointment to the bench. We have not gone into the question of judicial salaries, but it has constitutional as well as fiscal and economic implications.

RECOMMENDATIONS

436. The Constitution should make provision for a service commission dealing exclusively with the judiciary. It should be called the Judicial Service Commission.

437. The Chief Justice and the Chairperson of the Public Service Commission should be ex officio members of the Judicial Service Commission. The third member should be a person qualified to be a judge of a superior court but not in active practice in the Fiji Islands. That person should be appointed to the Commission by the President on the advice of the Minister responsible for Justice, after the Minister has obtained the approval of the Select Committee of the Bose Lawa responsible for matters affecting the administration of justice. The term of office should be three years.

438. The third member of the Judicial Service Commission should be subject to the rules applying to members of other service commissions, about

(a) disqualification for appointment, and

(b) appointment to other office in the service of the state, including judicial office, after ceasing to be a member.

The third member should be free to accept nomination as a candidate for election to Parliament.

439. To permit the appointment of a Chief Justice to be initiated by the Judicial Service Commission, the Constitution should provide that a Justice of Appeal or a Justice of the Supreme Court who does not wish to be considered for the office of Chief Justice should be appointed to preside over that Commission for any period during which the office of Chief Justice is vacant. The appointment should be made by the President on the advice of the Minister responsible for Justice.

440. The Constitution should provide that the President shall appoint the Chief Justice, Justices of the Supreme Court, the President of the Court of Appeal and other Justices of Appeal, and puisne Judges and Masters of the High Court, on the recommendation of the Judicial Service Commission, and with the concurrence of the Minister responsible for Justice and the approval of the Select Committee of the Bose Lawa responsible for matters affecting the administration of justice.

441. When the office of Chief Justice is vacant or the Chief Justice is absent or unable to fulfil the functions of the office, an Acting Chief Justice should be appointed by the President on the recommendation of the Judicial Service Commission, and with the concurrence of the Minister responsible for Justice. Corresponding provision should be made for the appointment of acting judges of the High Court.

442. The Constitution should give to the Judicial Service Commission the responsibility of appointing all magistrates and the Central Agricultural Tribunal appointed under the Agricultural Landlord and Tenant Act. Before making the last-mentioned appointment, the Commission should be required to consult the Prime Minister and the Leader of the Opposition.

443. The Constitution should require the Judicial Service Commission to appoint the holders of all other judicial offices for which provision is made by Parliament.

444. The Judicial Service Commission should be given power, by regulation made with the concurrence of the Prime Minister, to assume responsibility for appointing persons who are not strictly judicial officers in those cases where the Public Service Commission has excluded that responsibility under a corresponding mechanism.

445. The Constitution should not require the Judicial Service Commission to obtain the consent of the Prime Minister before recommending a non-citizen for appointment as a judge of a superior court. However, it should be required to obtain that consent before appointing a non-citizen to any other judicial office.

446. The Constitution should provide that, in appointing persons to judicial office, the over-riding principle should be the maintenance of the quality of judicial appointments, while seeking in the longer term to ensure that the composition of the judiciary reflects the ethnic and gender balance among citizens as a whole. Section 124(3)(b), (4) and (5) should be repealed.

THE TENURE OF OFFICE OF JUDGES

13.104 The independence of the judiciary requires the holders of judicial office to have adequate security of tenure. This is provided in two ways. First a judge should be appointed for a fixed, and sufficiently long, term. Secondly, a judge should be protected against removal from office except for inability to carry out the functions of the office and what is traditionally called "misbehaviour". We now examine the constitutional provisions for each of those purposes.

Term of office

13.105 Section 105(1) of the Constitution provides that a judge of the High Court other than the Chief Justice holds office until attaining the age of 65. This provision does not apply to a person appointed as an acting judge of the High Court. No retiring age is prescribed for the Chief Justice. Section 151(1) provides that persons may be appointed to certain offices including the office of any judge of the High Court for terms of not less than four years. It is not clear whether "a judge of the High Court" in that context includes the Chief Justice. A term appointment may not exceed the period within which the appointee will reach the prescribed retiring age. A Chief Justice who was not appointed for a term of years, assuming that is permitted, must be taken as having been appointed for life.

13.106 An acting judge of the High Court, appointed when the office of such a judge is vacant or a judge is absent or unable to perform the functions of the office, holds office until the holder of the office resumes his functions or until the appointment is revoked by the President acting in accordance with the advice of the Chief Justice.

13.107 The *Beattie Commission* recommended that the retiring age for Supreme Court and Court of Appeal judges should be 75; for High Court judges 70; and for magistrates 65 (Recommendation 116). The recommendation did not refer to the Chief Justice specifically. It is not clear whether, as President of the Supreme Court, the Chief Justice would retire at 75, or is to be treated as a judge of the High Court and retire at 70.

13.108 The *Beattie Commission* explained that the general practice has been for local judges to be given appointments until retiring age or for their lifetimes if no retiring age is prescribed, but for expatriate judges to be appointed for specified terms. It accepted as valid the use of term appointments to implement a policy of localisation and also to give an opportunity of making sure that expatriate judges are suited to conditions in Fiji. It noted, but without making a recommendation, that

> longer non-renewable contract terms of five or seven years, coupled with more rigorous selection procedures, may strike the necessary balance between meeting the fears of those who have expressed concern about the quality of some judicial appointments and the obvious possibility of judicial integrity being compromised by a judge feeling pressurised to tailor judgments to ensure reappointment.

13.109 This Commission, too, accepts the need to make contract appointments as well as appointments until a specified retiring age and that it is undesirable to make an express distinction between the appointment of citizens and non-citizens. However, we consider that citizens should be appointed until retiring age. We believe that the retiring age proposed by the *Beattie Commission* is too high. Therefore the Constitution should provide as follows:

- The Chief Justice should hold office until the age of 70. It should not be possible to appoint a Chief Justice for a term of years. That should be taken into account in deciding at what age it is appropriate to appoint a person as Chief Justice.
- A Justice of the Supreme Court or a Justice of Appeal, including the President of the Court of Appeal, who is not appointed for one or more sessions of the Court or for a term of years, should hold office until the age of 70.
- A judge of the High Court, other than the Chief Justice, should hold office until the age of 65.
- A Chief Justice, Justice of the Supreme Court, Justice of Appeal, including the President of the Court of Appeal, or judge of the High Court, who has held office until reaching the retirement age, should, like expatriate judges or former judges, be eligible to be appointed as a Justice of the Supreme Court or a Justice of Appeal for one or more sessions of the Court or for a term not exceeding three years, if under the age of 75 years at the date of the appointment.

- A person should be eligible for appointment as an acting judge of the High Court if under the age of 70 years at the date of the appointment.

- A person appointed as Acting Chief Justice or as an acting judge of the High Court should vacate office when the holder of the office resumes the duties of the office, or, if the office was vacant, when the person appointed to fill the vacancy takes up office.

13.110 The Constitution should continue to allow a Judge of the High Court other than the Chief Justice to be appointed for a term of years. The term should be not less than four years and not more than seven years.

13.111 The retiring age or term of office of magistrates and other judicial officers should be as prescribed by the Constitution or other law.

RECOMMENDATIONS

447. The Constitution should provide as follows:

(a) The Chief Justice should hold office until the age of 70. It should not be possible to appoint a Chief Justice for a term of years.

(b) A Justice of the Supreme Court or a Justice of Appeal, including the President of the Court of Appeal, who is not appointed for one or more sessions of the Court or for a term of years, should hold office until the age of 70.

(c) A judge of the High Court, other than the Chief Justice, should hold office until the age of 65.

(d) A Chief Justice, Justice of the Supreme Court, Justice of Appeal, including the President of the Court of Appeal, or judge of the High Court, who has held office until reaching the retirement age, like expatriate judges or former judges, should be eligible for appointment as a Justice of the Supreme Court or a Justice of Appeal for one or more sessions of the Court or for a term not exceeding three years, if under the age of 75 years at the date of the appointment.

(e) A person should be eligible for appointment as an acting judge of the High Court if under the age of 70 years at the date of the appointment.

(f) A person appointed as Acting Chief Justice or as an acting judge of the High Court should vacate office when the holder of the office resumes the duties of the office, or, if the office was vacant, when the person appointed to fill the vacancy takes up office.

448. The Constitution should continue to allow a Judge of the High Court other than the Chief Justice to be appointed for a term of years. The term should be not less than four years and not more than seven years.

449. The retiring age or term of office of magistrates and other judicial officers should be as prescribed by the Constitution or other law.

DISCIPLINARY CONTROL OR REMOVAL OF JUDICIAL OFFICERS

13.112 The constitutional protections giving members of the judiciary security of tenure have to be balanced by arrangements for dealing with complaints made against them by members of the public, and for removing them from office for wrong-doing. However, the provision made for these legitimate purposes has itself to be protected against its use by the executive to get rid of judges who give unwelcome decisions.

Judges of the subordinate courts

13.113 The provisions concerning judges of subordinate courts and other judicial officers appointed by the Judicial and Legal Services Commission are straightforward. The power to exercise disciplinary control over them and to remove them is vested exclusively in that Commission. A corresponding authority should be given to the Judicial Service Commission.

Judges of the superior courts

Complaints about the conduct of a judge

13.114 The Judicial and Legal Services Commission has no role in the removal of judges of the superior courts, and no formal powers to investigate misconduct

not sufficiently grave to justify removal. The *Beattie Commission* recognised that any procedure for inquiring into judicial conduct raises difficult and sensitive issues. It considered that the best way of subjecting the actions of judges to discipline was by keeping the courts open to the news media and the public. There should be no suggestion that the judiciary is under supervision.

13.115 However, it recognised that complaints may sometimes be made about the conduct of individual judges and recommended that they should be channeled through the Secretary of the Judicial Commission and from that officer to the Chief Justice. The Chief Justice might decide to deal with them himself, or consider them with two additional persons holding high judicial office. Without recommending the inclusion of a provision in the Constitution, we endorse this suggestion with the substitution of a reference to the Judicial Service Commission.

Removal of a judge

13.116 Under section 109 of the Constitution, judges may be removed only by the President, and then only on the recommendation of a specially constituted tribunal. The grounds for removal are inability to perform the functions of the office (whether due to infirmity or some other cause) or misbehaviour. If the President considers that the question of removing a judge from office on such a ground ought to be investigated, he is required to constitute a tribunal consisting of not less than three persons who hold or have held high judicial office in Fiji or some other country. The tribunal is required to inquire into the matter and report its findings to the President. If it recommends removal, the President must remove the judge from office.

13.117 The *Beattie Commission* recommended the continuation of this arrangement which it likened to the position in Western Samoa where a judge can be removed by the Head of State only on an address of the Legislative Assembly adopted by two-thirds of its members. In our view the position in Western Samoa is significantly different from that in Fiji. In Western Samoa the decision is in the hands of the legislature. In Fiji, the legislature is not involved. In deciding that the question of removing a judge ought to be investigated, and in appointing the members of a tribunal for that purpose, the President is required to act on the advice of the Cabinet or a Minister. Experience elsewhere has shown that such an arrangement is open to abuse.

13.118 We consider that it ought to be possible to remove a judge from office only with safeguards similar to those we have recommended for the removal from

office of the President or the Vice-President. If the tribunal recommends the removal of the judge, its report should be submitted to Parliament. The President should remove the judge only if each House adopts a resolution to that effect supported by three fourths of its members present and voting.

RECOMMENDATIONS

450. The power to exercise disciplinary control over judges of subordinate courts and other judicial officers appointed by the Judicial Service Commission should be vested exclusively in that Commission.

451. Complaints about the conduct of individual judges of the superior courts should be channeled through the Secretary of the Judicial Service Commission and from that officer to the Chief Justice. There is no need to provide for this in the Constitution.

452. The Constitution should continue to provide that the only grounds for removing a judge of a superior court from office are inability to perform the functions of the office (whether due to infirmity or some other cause) or misbehaviour. If the President, acting on the advice of the Cabinet or a Minister, considers that the question of removing a judge from office on such a ground ought to be investigated, he should be required to constitute a tribunal consisting of not less than three persons who hold or have held high judicial office in Fiji or some other country. The tribunal should be required to inquire into the matter and report its findings to the President. If it recommends removal, its report should be submitted to Parliament. The President should remove the judge only if each House adopts a resolution to that effect supported by three fourths of its members present and voting.

JUDICIAL TRAINING AND STUDY OPPORTUNITIES

13.119 The modern approach to the judicial role recognises that it is not enough to appoint able lawyers to the bench, and expect them to learn on the job all they need to know about being a judge. Members of the judiciary need opportunities for further training and study. They must keep up not only with developments in the law, but also with the increasing focus on the role of law in society.

13.120 Sentencing policy deserves close attention, to consider. The purposes of punishment are a perennial question. Arrangements for achieving reasonable uniformity of sentences need to be kept under review. Another question is the gender-bias in the law. Policy-makers, lawyers and judges are gradually becoming aware that the law reflects the place traditionally accorded to women in most societies. With heightened consciousness of the problem, its consequences can be addressed.

13.121 Yet another area in which the judges need to keep up to date is the developing law of human rights, discussed fully in Chapters 3 and 7. In the Fiji Islands, the way in which the law deals with sensitive issues affecting particular ethnic or religious communities also deserves special awareness and consideration.

13.122 We mention these matters because the *Beattie Commission* considered that the Judicial Service Commission should be given the responsibility for arranging study and refresher programmes for members of the judiciary. This is an area that tends to be neglected if no such responsibility is assigned. The Constitution should expressly give this responsibility to the Judicial Service Commission. Account should be taken of study and training requirements in appropriating funds for that Commission's operation.

RECOMMENDATION

453. The Constitution should expressly give the Judicial Service Commission the responsibility for arranging study and refresher programmes for members of the judiciary.

THE ADMINISTRATION OF THE COURTS

13.123 International attention is now widely focussed on the fact that the independence of the judiciary depends in part on the way in which the courts are administered and resourced. Constitutional guarantees of judicial independence can be ineffective if the executive does not appropriate the funds to service the courts adequately, or fails to ensure that they are provided with sufficient well-qualified staff.

13.124 That is the background against which the judiciary recommended to the *Beattie Commission* the adoption of a recently introduced South Australian arrangement under which the judges assume direct responsibility for the administration of the courts. In its report, the *Beattie Commission* stated that its investigations in Adelaide had shown that the arrangement had not been in place

long enough for its operation in practice to be tested. Moreover, its introduction had been preceded by the setting up of a separate Courts Department. Over a period of 12 years, the Department had established a culture that the independence of the courts requires a special type of administration and relationship with the Government on issues of funding , staffing and facilities.

13.125 The *Beattie Commission* thought that the introduction of judicial responsibility for courts administration without this preliminary step held greater risks for the independence of the judiciary than the continuation of the present system. It therefore concluded that the proposal for a separate judiciary-controlled court administration system, as in South Australia, was premature. However, it recommended that preliminary steps should be taken against the time when Fiji could consider taking this step (Recommendation 134). Meantime, Fiji should establish by statute a Court Services Department with a chief executive called the Chief Courts Administrator. It should endeavour to provide a pool of appropriately qualified administrators (Recommendation 135).

13.126 In their submission to this Commission, the judiciary accepted that there should be a Courts Administrator, but they proposed that the Courts Administrator should be responsible to the Chief Justice and the Judicial and Legal Services Commission, instead of remaining in the departmental setting (when it would come under the auspices of the Public Service Commission). In this, and in their recommendations for the appropriation and spending of funds for the administration of the courts, there was no suggestion that there would continue to be ministerial responsibility for the functioning of the courts.

13.127 In our view, there is considerable merit in the idea of a separate Courts Department which would bring a much sharper focus to the administration of the courts. Such a step should help significantly reduce the unacceptable delays in bringing some cases before the courts and, if rights of appeal are exercised, allow them to proceed expeditiously through all stages until final decision.

13.128 We consider that such a department should remain part of the executive branch of government. The Public Service Commission should continue to have the power to appoint its officers, including court registrars and other staff. Persons appointed to those positions should have other career opportunities within the public service. We would expect major delegations of the appointing power to the Courts Administrator. That office should not be held in conjunction with any other office involving a major administrative or advisory responsibility, though its holder could appropriately be appointed as Secretary of the Judicial Service Commission.

13.129 To the extent that the Public Service Commission itself exercises the responsibility of appointing or promoting members of the Courts Department, court staff or the secretarial staff of judges and magistrates, those responsibilities should be exercised only after consultation with the Courts Administrator and the Chief Justice, the President of the Court of Appeal or the Chief Magistrate, as appropriate. A Minister should be assigned responsibility for the Courts Department. Through the Courts Administrator, the judiciary should have the opportunity to make an input into the preparation of the estimates and the approval of expenditure from the funds appropriated by Parliament for the administration of the courts.

13.130 Provision for these matters need not be included in the Constitution. Nevertheless, we include recommendations about them in this report because we consider that they are a vital factor in improving the administration of justice in the Fiji Islands.

RECOMMENDATIONS

454. The administration of the courts should be the responsibility of a separate Courts Department headed by a Courts Administrator. Such a department should remain part of the executive branch of government. The Public Service Commission should have the power to appoint its officers, including court registrars and other staff, but should consider delegating major aspects of that power to the Courts Administrator. The holder of that office could appropriately be appointed as Secretary of the Judicial Service Commission.

455. To the extent that the Public Service Commission itself exercises the responsibility of appointing or promoting members of the Courts Department, court staff or the secretarial staff of judges and magistrates, those responsibilities should be exercised only after consultation with the Courts Administrator and the Chief Justice, President of the Court of Appeal or Chief Magistrate, as appropriate.

456. A Minister should be assigned responsibility for the Courts Department.

457. There is no need to make provision in the Constitution for any of these matters.

THE PREROGATIVE OF MERCY

13.131 The exercise of the prerogative of mercy enables the executive to intervene in an essential and almost the only permissible way in the administration of the criminal law by the courts. For this reason it should always be exercised in a quasi-judicial manner, free from external influence and political motives. Through its exercise, justice can be done by giving due weight to factors not taken into account by the courts. This may have been because they were not relevant to the legal issues, were not the subject of admissible evidence, or came to light after the legal proceedings terminated. The exercise of the prerogative of mercy allows account to be taken of special circumstances in ways that may not be available to the courts in imposing the punishment laid down by statute.

13.132 Section 99(1) of the Constitution which codifies the content of the prerogative of mercy in a clear way should be retained. Section 99(3) constitutes a Commission to advise the President on the exercise of the prerogative of mercy. It is to consist of a Chairman and not less than two other members appointed by the President acting in his own deliberate judgment. The President is bound to act in accordance with the Commission's advice. Under section 38 of the Court of Appeal Act (Cap. 12), the President may refer the whole case to the Court of Appeal for consideration or obtain its opinion on a particular point. Advice to do so would need to come from the Prerogative of Mercy Commission.

13.133 The *Beattie Commission* found that, although members of the Commission had been appointed, it was not functioning, apparently because there was no institutional link with the executive. The Commission recommended that the Minister of Justice should be the Chairman of the Commission. We agree, and consider that the Constitution should give effect to this recommendation.

13.134 Traditionally, the Cabinet or a particular Minister has advised the Head of State on the exercise of the prerogative of mercy. Advisory Commissions to undertake this duty were set up in newly-independent states only to ensure that the prerogative was not exercised in a political way. On the other hand, there is no reason why account should not be taken of the Government's broad policies, such as the proportion of a sentence of imprisonment that a person should be required to serve. We believe that in the Fiji Islands the basis on which the prerogative of mercy should be exercised is well understood and accepted.

13.135 We propose that the Constitution should provide that the chairperson of the Prerogative of Mercy Commission should be the Minister responsible for Justice. The other two members should be persons appointed by the President, acting in his own deliberate judgment.

RECOMMENDATIONS

458. The substance of section 99(1) of the Constitution codifying the content of the prerogative of mercy should be retained.

459. The Constitution should continue to make provision for a commission to advise the President on the exercise of the prerogative of mercy. The chairperson of the Prerogative of Mercy Commission should be the Minister responsible for Justice, ex officio. The other two members should be persons appointed by the President, acting in his own deliberate judgment. The President should be required to act in accordance with the Commission's advice.

14

EFFICIENT AND POLITICALLY NEUTRAL STATE SERVICES

14.1 In this chapter, we focus on measures for ensuring an efficient, politically neutral civil service, police force and military force. We describe these various components of the executive arm of government collectively as the 'state services' and their members as 'state servants'. In particular, this chapter reviews the sections of the 1990 Constitution which provide for independent service commissions to exercise power to appoint, remove and exercise disciplinary control over state servants. We have looked at the nature of the military forces in Chapter 12 and considered the constitutional rules which should apply to the Judiciary (including magistrates) in Chapter 13. They are referred to in this chapter only for the purpose of discussing general principles.

ROLE OF STATE SERVICES

14.2 In Chapter 12 we discussed both the rules which vest the authority and the duty to direct executive government in ministers and the rules by which they are appointed and periodically may change office. Subject to ministerial direction, it is the state servants, however, who are responsible for the actual work of running of the country. Unlike ministers, their tenure is not affected by political processes and normally lasts for a term fixed by law or contract. It is they who make day-to-day decisions; implement government plans, policies and programmes; carry out public works; and perform the many public services and administrative tasks which are expected of modern governments. Ministers are said to be responsible for policy, and state servants for administration. Even then, given their specialised skills and experience, most government policies are based on the technical and professional advice of senior state servants.

EFFICIENT AND POLITICALLY NEUTRAL STATE SERVICES

14.3 In the Westminster system, a vital corollary to the power of politically appointed ministers to direct government policy is the expectation that the administration of that policy will be carried out economically, efficiently and effectively by politically neutral and impartial state servants.

14.4 There are good reasons for requiring political neutrality and impartiality. In their absence, the considerable powers and resources of the State, which are

directly administered by state servants, might become the instruments of patronage or victimisation. Such abuse would contradict the basic democratic principle that although a government should be chosen by the majority, it should govern for the benefit of all. A state servant is also expected to be politically neutral in order to serve successive ministers with the same loyalty.

14.5 Economy, efficiency and effectiveness are equally important. As the source of most public revenue and, in a broad sense, the ultimate employer of all state servants, citizens are entitled to receive services of the highest possible standard for the least possible cost. In short, they are entitled to good government for their money.

14.6 It is clear to us from the submissions that these expectations are shared by all of the people of the Fiji Islands. Many expressed opinions about ways of ensuring the effectiveness and economy of state services, the impartiality and efficiency of state servants and their use of public resources.

14.7 A major issue in any democratic system is how to ensure that state servants carry out the policies of a politically elected government in an efficient and effective way, while remaining politically neutral and impartial. Most countries expressly require that their personnel authorities strive to attain economy, efficiency and effectiveness in the state services. They also mandate that all appointments and promotions should be made on merit. Another very common device is to establish independent service commissions responsible for the appointment, disciplinary control, and removal of state servants. In these ways, political factors are prevented from influencing decisions on appointments, promotions and other related matters. They also ensure that employment decisions are not only fair to the individuals concerned, but also promote the interests of efficient and effective government.

Efficiency, economy and effectiveness

14.8 Although the objectives of economy, efficiency and effectiveness in the state services have a long history in Fiji, they have never been expressly required by the Constitution. We believe that these objectives are so fundamental to the functioning of all state services that they should be reflected in a constitutional provision.

14.9 Recognition is particularly important in the circumstances of the Fiji Islands. Although always implicit they have been overshadowed by constitutional provisions providing for other objectives, such as localisation and the fair representation of communities, to be attained in making state service appointments.

Constitutional requirements

14.10 Section 105(9)(b) of the 1970 Constitution required that in selecting candidates for entry into the public service, the Public Service Commission should:

(a) give preference, other things being equal, to local candidates who, in its opinion are suitably qualified and shall not select persons who are not citizens of Fiji except to the extent that the Prime Minister has agreed that such persons may be selected; and

(b) ensure that, so far as possible, each community in Fiji receives fair treatment in the number and distribution of offices to which candidates of that community are appointed on entry.

14.11 Paragraph (a) allowed efficiency and effectiveness to be moderated by the objective of localisation, while paragraph (b) imposed the relatively broad objective that each 'community' should receive 'fair treatment' in the 'number and distribution' of entry appointments. As paragraph (b) referred only to appointments on entry, it did not apply to promotion decisions about candidates already in the public service. In those cases, the implication was that efficiency and effectiveness were the sole objectives of the service and merit was the criterion for selection.

14.12 Although they were required to promote localisation, the Judicial and Legal Services Commission as well as the Police Service Commission and the Commissioner of Police were not required to consider the fair distribution of offices to communities. In part, the absence of a provision applicable to the police force may have reflected the fact that, at independence, the force was broadly representative of the population as a whole. The absence of any obligation on the Judicial and Legal Services Commission perhaps arose from the view that merit appointments were necessary to achieve the highest standards of justice.

14.13 The 1990 Constitution retained the requirements for the Public Service Commission and in section 124(3) extended them to the Judicial and Legal Services Commission. While section 129(4) continued the requirement that the Prime Minister should consent to an appointment of a non-citizen to any position in the police force, the obligation to ensure a fair distribution of offices still does not apply to that force.

14.14 The Constitution also introduced an additional, more stringent obligation on the Public Service Commission and Judicial and Legal Services Commission, but again, not on the Police Service Commission or the Commissioner of Police.

Sections 124(4) and 127(11) oblige the two Commissions to ensure that, in making appointments (which includes those on promotion and transfer), each level of each department comprises not less than fifty percent Fijians and Rotumans, and not less than forty percent members of other communities. Appointments of "other suitably qualified persons" may be made in contravention of this obligation, only in circumstances beyond the relevant Commission's control and then only with the concurrence of the Prime Minister.

Representation of ethnic communities

14.15 In Chapter 8, we analysed the submissions which the Commission received on ethnic representation in the civil service, army and police force, as well as the facts and perceptions upon which they were based. In summary, we found that the provisions which were introduced by the 1990 Constitution were a response to the concerns of those indigenous Fijians who felt that, although they were well represented in the police and predominated in the army, by 1987 they were lagging behind other communities in other spheres, specially at the higher levels of the civil service and in the judicial and legal services. The 1990 provisions reflected expectations about what would constitute adequate Fijian representation at all levels. The 1970 provisions, which focused on entry to the civil service, had apparently not been sufficient to meet those expectations.

14.16 We also found that over the last ten years, there has been a significant reduction in the proportion of Indo-Fijians employed in the state services, particularly at the senior levels. This reduced representation in the civil service was consistently referred to in most Indo-Fijian submissions. Many linked it to the new provisions although the Commission believes the reduction may also be partly attributed to a variety of other factors mentioned in Chapter 8.

14.17 Current figures show that it has not been possible to comply with the proportional formula introduced in the 1990 Constitution for the allocation of civil service posts at all levels of all departments . As at 25 June, 1996, disregarding the levels *within* departments, only eight out of forty-four departments complied as a whole with the stated proportions. The provisions, however, require *every level* within *every department* to meet the stated proportions. In that regard, only two departments comply.

14.18 We were informed by the Public Service Commission that for reasons such as the particular technical responsibilities of departments, occupational preferences and availability of candidates, it had been impossible to achieve the stipulated proportions within every level of every department as required by subsection 127(11).

14.19 The Public Service Commission pointed out that the stated proportions cannot always be fulfilled in view of the number of posts at a particular level of department. For example, where a department comprises only one post or three posts at a particular level, as most do at the upper levels, it is impossible for the Commission to comply with the 50% - 40% formula.

14.20 In posts controlled by the Judicial and Legal Services Commission, our own research also found some non-compliance with the proportions set out in subsection 124(4).

14.21 A number of submissions expressed a concern at falling Indo-Fijian representation in the police force and their almost total absence from the armed forces. Neither force is subject to any general or specific requirement which makes ethnicity a consideration in appointments. As we said in Chapter 8, the police and armed forces are the state agencies which are permitted to use force. These submissions reflected concerns not only about fair representation in state services, but also about whether the two forces are impartial as between members of different communities.

14.22 In discussions with the Commissioner of Police and his senior officers, it was explained that although Indo-Fijians were well represented amongst recruits and therefore at the lower levels of the police, there were imbalances at the higher levels resulting from historical factors, such as events which occurred immediately after the 1987 *coups*, as well as current emigration patterns and subsequent occupational choices made by Indo-Fijian policemen and policewomen.

14.23 We were given to understand that occupational preferences are an important reason for very low Indo-Fijian representation in the armed forces. We were also told that current disparities are not the result of deliberate discrimination, but instead result from low enlistment and very high voluntary attrition by members of that community.

14.24 Nonetheless, it is clear to us that fair representation in all state services is very important to the communities in Fiji. The submissions led us to the conclusion that although efficiency, economy and effectiveness should be the principal objectives in managing state services, some more appropriate account must be taken of the overall representation of different ethnic communities at all levels in all the various state services.

14.25 In Chapter 8, we gave our reasons for not favouring the reservation of specific public positions for members of particular ethnic groups. We are also

convinced that both the "entry level" approach initially mandated by the 1970 provisions and the specified proportion approach introduced to supplement it in 1990, are not desirable on the grounds of efficiency and effectiveness. Nor are they workable in practice. They should be repealed. Our review of the existing provisions and their effect, together with the comments of those who are presently obliged to enforce them, leads us to conclude that this objective must be achieved in a broader and more flexible way.

New constitutional provision

14.26 In order to address the concerns of the different communities about fair representation at all levels of all state services, without subordinating economy, efficiency, effectiveness and merit, we propose that the Constitution should contain a general provision along the following lines:

> In recruiting and promoting members of all state services belonging to the executive branch of government, including the public service, the Fiji Police Force and the Republic of Fiji Military Forces, and in the management of those services, the factors to be taken into account shall include:
>
> (a) the need to ensure that government policies can be carried out effectively;
>
> (b) the need to achieve efficiency and economy in all the state's services;
>
> (c) the need to make appointments and promotions on the basis of merit;
>
> (d) the need to provide men and women and the members of all ethnic groups, with adequate opportunities for training and advancement;
>
> (e) the need for the composition of each service, at all levels, broadly to reflect the ethnic composition of the population, taking account, however, of occupational preferences.

14.27 As drafted, the provision applies to all state offices and services within the executive branch. It binds both Government and the independent appointing authorities. For the first time, there will be governing principles applying to recruitment and promotion in the military and police forces. The provision will also apply to those exercising personnel powers under a delegation.

14.28 The provision allows economy, efficiency and effectiveness to be the main objectives, and merit to be the main basis for appointment, but it is flexible enough to allow other relevant factors to be taken into account. We refer to the appointment of women, as well as of members of all ethnic groups, because their fair representation in the state services is also important.

14.29 Our approach to the representation of ethnic communities deliberately avoids the existing mathematical formula and the previous limited focus on entry appointments. We also consider that the different occupational preferences of various communities and the different professional responsibilities of the various government departments, require that specific references to 'departments' be avoided. The approach should allow practical limitations to be considered and balanced against the principle of fair representation of communities.

14.30 The words "recruiting and promoting" and the references to "management" and "opportunities for training and advancement" are deliberate. They are used to indicate that as an objective, the fair representation of different groups involves more than decisions taken for the purposes of appointments. It requires good management. Those responsible for appointments to a state service would be under an obligation to keep the composition of the service under review and take active steps, through proper planning, training and recruitment drives, to redress any undue disproportionality within the service.

14.31 We see this provision as a necessary addition to those provisions recommended in Chapter 8. Those provisions authorise the Government to take appropriate affirmative action in respect of particular groups if they are found to be under-represented in any aspect of the service of the state and at any level of that service. We envisage that the affirmative action provisions will mandate Government-sponsored programmes which will focus on increasing the pool of individuals from under-represented communities who are eligible for appointment to the particular services or levels. Such programmes would include special scholarship or training schemes. These programmes and other government policies must also effectively address the loss of skilled persons of all communities to more well-paid employment overseas.

14.32 Given the constitutional independence of service commissions, a constitutional provision on affirmative action could not and should not authorise the government to give directions on individual employment decisions. The new provision recommended in this chapter places the duty squarely on all responsible for appointments and management of the state services, without compromising their independence.

Localisation

14.33 We received no submissions seeking any change to the rule requiring the Prime Minister's concurrence to the initial appointment of non-citizens. We believe that localisation remains an important goal in the state services. The Constitution

should therefore continue to contain a provision requiring the Prime Minister's concurrence to any appointment of a non-citizen who is not already in the service of the state. The provision should apply to all offices in all state services, regardless of the body or person responsible for appointments.

RECOMMENDATIONS

460. The Constitution should contain a provision along the following lines:

In recruiting and promoting members of all state services belonging to the executive branch of government, including the public service, the Fiji Police Force and the Republic Fiji Military Forces, and in the management of those services, the factors to be taken into account shall include:

(a) the need to ensure that government policies can be carried out effectively;

(b) the need to achieve efficiency and economy in all the state's services;

(c) the need to make appointments and promotions on the basis of merit;

(d) the need to provide men and women and the members of all ethnic groups with adequate opportunities for training and advancement;

(e) the need for the composition of each service, at all levels, broadly to reflect the ethnic composition of the population, taking account, however, of occupational preferences.

461. The Constitution should no longer contain provisions such as those contained in subsections 124(3), (4) and (5) and 127(10), (11) and (12) of the 1990 Constitution.

462. The Constitution should provide that no person or authority exercising a power to appoint any person to any office may appoint a person who is not a Fiji citizen and not already in the service of the State, unless the Prime Minister has agreed that person may be appointed.

INDEPENDENT SERVICE COMMISSIONS

14.34 Fiji has for many years had a system of independent service commissions with responsibility for appointments, discipline and removal of state servants. Apart from the Judicial and Legal Services Commission, the 1990 Constitution provides for two other service commissions with separate responsibilities for the general civil service and police officers respectively. Members of both commissions are at present appointed by the President on the advice of the political executive. The Constitution requires them to act independently in considering recruitments, promotions, transfers, disciplinary matters and the removal of state servants under their jurisdiction. In order to isolate the commissions from political influence, the Constitution disqualifies various categories of people from being appointed to them. There are also other constitutional rules concerning the remuneration and removal of commissioners which are designed to guarantee their independence. We will consider the latter rules in the next chapter when we consider independent constitutional institutions in general.

14.35 Although we received some submissions seeking changes in the composition, membership and appointment of service commissions, as well as in their areas of responsibility, there was general support for their continued existence. People see them as a means of insulating decisions on state service employment from political pressure and favouritism. We recommend that the Constitution should continue to provide for independent service commissions with responsibility for the appointment, disciplinary control over, and removal, of state servants, other than members of the armed forces. Responsibility in that area should continue to rest with the Commander of the Republic of Fiji Military Forces, within the ambit of overall ministerial responsibility for the armed forces.

14.36 For constitutional purposes, under section 152 of the 1990 Constitution, the power of appointment includes any power to appoint any person to any state office on promotion or transfer, or on an acting basis. In describing the responsibility of service commissions, we use the expression "power of appointment" and the word 'appoint' in that wide sense.

14.37 Similarly, under section 154, the power to remove includes any power conferred by law to require or permit an officer to retire. It also includes a power to terminate a contract of employment, or to determine whether a contract should or should not be renewed. Our references to the power to remove are intended also to include these powers.

14.38 The recommendation made above distinguishes between the responsibility for deciding on the appointment, removal and discipline of individual officers

and the more general responsibility for policy in respect of the state services that is a proper function of the executive government. The Government's general responsibilities would include matters relating to the machinery of government, the allocation of resources, levels of remuneration in terms of overall budgeting allocation and other such policy matters. As is made clear by section 98 and subsection 154(2) of the 1990 Constitution, the creation or establishment of positions in the state services and their abolition are not included within the constitutional powers of any service commission.

14.39 Insofar as a service commission exercises any of these general responsibilities under an Act of Parliament, as the Public Service Commission at present does, they are not required to be exercised independently. We think it should be made clear in the Constitution that the Government remains responsible for the structure of the state services and for the general policies involving their management.

14.40 We have already recommended in Chapter 12 that the Judicial and Legal Services Commission should be replaced by a Judicial Service Commission with responsibilities concerning the appointment of judges and magistrates. We now recommend that the Constitution should also provide for:

- a new Constitutional Offices Commission (the composition and the functions of which we discuss in detail in Chapter 15);
- a new Disciplined Services Commission, in place of the Police Service Commission, with responsibility for the police force and the prisons service; and
- a Public Service Commission with responsibility generally for all state servants, who are not subject to the appointing jurisdiction of any other commission or for whom no other provision is made by or under the Constitution.

RECOMMENDATIONS

463. The Constitution should continue to provide for independent service commissions with responsibility for the appointment, disciplinary control over, and removal of, state servants. It should provide that, subject to the Constitution, in the exercise of its powers, the commissions should not be subject to the direction or control of any other person or authority.

464. The Constitution should provide for:

- **a new Constitutional Offices Commission, (the functions, powers and composition of which should be as recommended in the next Chapter);**
- **a new Disciplined Services Commission to replace the existing Police Service Commission;**
- **a Public Service Commission.**

465. Responsibility for the appointment, discipline and removal of members of the Republic of Fiji Military Forces should continue to rest with the Commander, subject to ministerial responsibility for the armed forces.

466. The Constitution should make it clear that Government remains responsible for the structure of state services and, subject to any Act, the general policies involving their management.

APPOINTMENT AND TENURE OF SERVICE COMMISSIONERS

14.41 We now discuss the general principles that should govern the appointment of members of all service commissions as well as the qualifications and disqualifications for membership. The proposed arrangements for the Judicial Service Commission which are described in Chapter 13, depart from these principles only to the extent necessary to take account of the separate provision for its membership and the nature of its functions.

Appointment

14.42 Under section 126(1) of the 1990 Constitution, the chairperson and all the members of the Public Service Commission are appointed by the President on the advice of the Prime Minister. The Police Service Commission, on the other hand, is required to be appointed in accordance with the general rule that the President is to act on the advice of the Cabinet or a minister generally authorised by the Cabinet.

14.43 Both methods of appointment reflect the principle that the Cabinet and government ministers are collectively and individually responsible to Parliament and the people for executive government. Therefore, although commissions are constitutionally required to act independently when making decisions on individual appointments, they should be generally accountable to the government for the exercise of their functions.

14.44 We received submissions expressing concern about a perceived lack of transparency and accountability in the existing arrangements for the appointment of service commissions. Many of these were based on the view that the system permitted the appointment of partisan commissioners, thus infusing political considerations into the appointment, discipline and removal of state servants. Impartiality and political neutrality, as well as efficiency and effectiveness, were thus likely to be compromised. We agree that transparency and accountability are important goals.

14.45 Some proposed that the Constitution should give the Leader of the Opposition the right to be consulted on appointments to commissions, either by the Prime Minister before advising the President, as was the case under the 1970 Constitution, or directly by the President. Others proposed that he or she should have the right to nominate a certain number of members directly.

14.46 Given the underlying Westminster principles, we do not favour giving the Leader of the Opposition a direct role in appointing service commissioners. Such an approach might give the impression that these commissions are intended to be bipartisan rather than nonpartisan. However, the method of appointing service commissioners can be improved in a way which respects the principles of ministerial responsibility, while at the same time improving accountability and transparency.

14.47 In Chapter 13, we recommended that the appointed member of the proposed Judicial Service Commission should be appointed by the President but should first be nominated by the Minister responsible for justice subject to confirmation by the appropriate sector standing committee of the Bose Lawa. This is the procedure that we consider should be followed in appointing the members of all the service commissions. The Minister to whom ministerial responsibility for a commission has been assigned should have the power to select and nominate the persons whom he or she believes are best qualified to be the chairperson and members of the relevant commission. Their names should be submitted to the appropriate sector standing committee of the Bose Lawa. The committee would have authority only to confirm or reject the Minister's nominations. In the event of confirmation, the Minister would then advise the President accordingly. But if a name is rejected, the Minister would have to find another suitable candidate.

14.48 Under our recommendation, therefore, the President would still appoint the chairperson and commissioners on the advice of a Minister. The Minister

retains authority for selecting and advising on the appointment of commissioners, but the accountability and transparency of the process is enhanced by requiring the approval of the sector standing committee of the Bose Lawa.

Tenure

14.49 The 1990 Constitution provides that appointed members of service commissions are to serve for three years from the date of their appointment. In our view, three years is a reasonable tenure to achieve independence. It is within the shorter four year term of Parliament, which we recommended in Chapter 10. In normal circumstances, it will allow each government to make at least one set of appointments to the various service commissions.

14.50 At present, a member who is appointed to replace someone who has prematurely vacated office serves for a full term of three years and not the unexpired term of the previous office holder. Under section 153 of the 1990 Constitution, which applies to all constitutional appointments, members may be re-appointed on the expiry of their terms of office. There are desirable provisions which allow for the continuity of the work of commissions. The provision should continue to apply to service commission members.

Performance of chairperson's functions:

14.51 The 1990 Constitution provides that where the office of chairperson of the Public or Police Service Commission is vacant, or where either chairperson is unable to perform his or her functions, the President may appoint another existing member to exercise the chairperson's functions. In so doing, the President must act on the advice of the Prime Minister.

14.52 Because of our recommendations for the appointment of commissioners, we believe the power to appoint a member to perform the chairperson's functions should be exercised by the members themselves. They will be limited to choosing from among persons already selected by the responsible Minister and approved by the sector standing committee of the Bose Lawa responsible for administrative services. We also believe that this will provide an incentive for the Minister to initiate the appointment of a new substantive chairperson through the recommended process in a timely manner.

Acting members

14.53 Subsections 123(6), 126(8) and 128(7) of the 1990 Constitution allow the President to appoint acting members to the Judicial and Legal Services

Commission, the Public Service Commission and the Police Service Commission, when there is a substantive vacancy or when a member cannot perform his or her functions. An acting member serves until the appointment is revoked by the President. In making or revoking acting appointments to the Police and Public Service Commissions, the President is required to act on the advice of the Prime Minister. In appointing an acting member of the Judicial and Legal Services Commission, the President must act in his own deliberate judgement.

14.54 The Constitution should continue to provide that acting members may be appointed when a member cannot for any reason perform the functions of his or her office. We propose, however, that an acting member should be appointed by the President acting on the advice of the Prime Minister, tendered after the Prime Minister has consulted the Leader of the Opposition.

14.55 The Commission also proposes that the Constitution no longer provide for the appointment of acting members to fill vacancies. Service commissions should continue to be empowered to exercise their functions despite the vacancy in their membership but subject to the requirement of a quorum. The absence of a provision for the appointment of acting members should encourage the making of substantive appointments as quickly as possible.

Qualifications and disqualification for appointment to service commissions

14.56 At present the only affirmative qualification prescribed by the Constitution is in relation to the chairperson and one member of the Police Service Commission. Section 128(2) requires the chairperson and one member of that Commission to be Fijians. In light of the conclusions which we reached in Chapter 8 against the policy of reserving any position for members of any ethnic group, we propose that that requirement be repealed.

14.57 The 1990 Constitution prescribes disqualifications, some of which apply to appointments to both the Public Service and the Police Service Commissions, and some to one Commission. We believe that apart from the special case of the proposed Judicial Service Commission, the Constitution should prescribe the same disqualifications for all appointments to service commissions.

14.58 We propose that the Constitution should provide that a person is not qualified for appointment as chairperson or member of the Public Service Commission or the Disciplined Services Commission or the Constitutional Offices Commission if he or she is, or, in the three years immediately prior to appointment, has been:

- a member of either House of Parliament or an elected member of any municipal council or other similar body prescribed by Parliament;
- nominated with his or her consent as a candidate for election as a member of either House of Parliament or any municipal council or other similar body prescribed by Parliament;
- a national office bearer in any political organisation that sponsors or supports or in the previous three years has sponsored or supported a candidate for election to either House of Parliament;
- a public officer or a local government officer.

14.59 Under the 1990 Constitution the first three of these disqualifications apply to the Public Service and Police Service Commissions. They are essential to ensure politically neutral service commissions, and through them politically neutral, impartial and efficient state services.

14.60 The reference to "any municipal council or other similar body prescribed by Parliament" represents a slight change from the existing provision. At present the disqualification applies also to elected members of the Council of Rotuma, provincial councils and township boards. In our opinion, the application of this provision to members of the Council of Rotuma and provincial councils is too wide. It is also inconsistent in not including other similar bodies such as the Bose Levu Vakaturaga and the Rabi Council of Leaders.

14.61 The clear object of the disqualification is to keep party politics out of state service appointments. Although parties endorse candidates for election as members of city and town councils, they do not do so for the purposes of election of members of the Council of Rotuma or provincial councils. Furthermore, many Fijians of ability and integrity serve on provincial councils in order to contribute to the development of their provinces, as do Rotumans on the Council of Rotuma. They do so in an apolitical capacity. We do not see any good reason why their talents and qualities should not be used for the greater public good.

14.62 We consider that the restriction should be limited to municipal councils under the Local Government Act (Cap. 175) which includes city and town councils. That Act abolished the system of township boards so that particular reference is no longer necessary. We give Parliament the discretion to prescribe 'other similar bodies' and so take account of any later developments in local government in Fiji.

14.63 The disqualification of public officers and local government officers, at present applies only to appointment to the Police Service Commission. It does not apply to the Public Service Commission. Apart from the proposed Judicial Service Commission, we believe that this disqualification should apply to all service commissions. Since public officers and local government officers are subject to the direction of ministers and politicians in their everyday duties, their appointment to serve on commissions would be incompatible with the objectives of independence and impartiality. The possibility of personal conflicts of interest arising out of their own status and career prospects would also threaten their impartiality.

14.64 Candidates for selection by the Bose Levu Vakaturaga or the Council of Rotuma for appointment to the Senate are at present disqualified from appointment to the Police Service Commission under section 128(3) of the 1990 Constitution. In view of our recommendation for the membership of the Bose e Cake, this disqualification will no longer be necessary.

14.65 Under the 1990 Constitution, a person who is a member of one service commission is disqualified from appointment to any other service commission. There are two exceptions to this rule. First, the chairperson of the Public Service Commission is also an *ex-officio* member of the Judicial and Legal Services Commission. Secondly, the same person may simultaneously hold appointments as the chairperson of the Public Service Commission and the Police Service Commission.

14.66 Subject to the exception discussed below, we recommend the retention of a general rule disqualifying persons from being a member of more than one service commission at the same time. This will help to ensure that the power over state service appointments is not concentrated in the hands of a few. It will also allow a greater opportunity for all able citizens to be appointed to service commissions.

14.67 In Chapter 13, we recommended that the chairperson of the Public Service Commission should be an ex-officio member of the new Judicial Service Commission. We are also in favour of an exception to the general rule which would allow the chairperson of the Public Service Commission to be appointed also to the Disciplined Services Commission as well as to the Constitutional Offices Commission.

14.68 This special exception is justified on the basis that it may be desirable to give a service-wide perspective to the work of each commission. As the Public

Service Commission has responsibility for most state offices, we believe its chairperson would be best able to provide the link between the various service commissions. We do not, however, favour any rule like the present one which requires, that if the chairperson of the Public Service Commission is to be appointed to be a member of Police Service Commission, he or she can only be appointed as its chairperson. We believe that the Constitution should allow some flexibility in that area.

Post-membership disqualification

14.69 Section 126(5) of the 1990 Constitution disqualifies a member of the Public Service Commission from being appointed to hold or act in any office in the state services for a period of twelve months after he or she was last a member of the Commission or acted as such. Section 123(4) similarly disqualifies an appointed member of the Judicial and Legal Services Commission from being appointed as a state servant for three years. A similar provision which applied to members of the Police Service Commission was removed in the 1990 Constitution.

14.70 A post-membership disqualification exists to secure impartiality. The disqualification prevents commissioners from making particular decisions in their own self-interest or being accused of so doing. It also strengthens the independence of a commission by making it impossible to offer any commissioner an appointment to a public position as a reward for making a particular decision.

14.71 For these reasons, we believe that a post-membership disqualification is essential. Apart from the special case of the Judicial Service Commission, it should be applied to members of all service commissions. We consider, however, that the present twelve month period for the Public Service Commission is insufficient. In our opinion, the period should be a standard three years for all service commissions. This would be consistent with the term of appointment of commission members. It would also be consistent with the period of disqualification from appointment to commissions which we recommended should apply to former politicians.

RECOMMENDATIONS

467. Apart from the special case of the Judicial Service Commission, the Constitution should provide for the same procedure to be followed for selecting and appointing the chairpersons and members of all of the independent service commissions.

468. **The Constitution should continue to provide that the chairperson and members of independent service commissions be appointed by the President. The Minister responsible for the particular commission should nominate a candidate to the appropriate sector standing committee of the Bose Lawa. The committee should have authority only to confirm or reject the Minister's nominations. If a nomination is confirmed, the Minister should advise the President accordingly, but if it is rejected, the Minister would have to nominate another suitable candidate.**

469. **The tenure of the chairperson and members of independent service commissions should remain three years. Persons who are appointed to fill casual vacancies should be appointed for a full term of three years. Commissioners should be eligible for re-appointment.**

470. **The Constitution should provide that if the office of chairperson of any service commission is vacant or if the holder is unable to perform the functions of the office, the members may elect one of their number to perform the functions of the chairperson.**

471. **The Constitution should provide that an acting member may be appointed when a member cannot for any reason perform the functions of his or her office. An acting member should be appointed by the President, acting on the advice of the Prime Minister, tendered after the Prime Minister has consulted the Leader of the Opposition.**

472. **The Constitution should no longer allow the appointment of a person to act as a member of a service commission in the case of a vacancy. Subject to the presence of a quorum, service commissions should continue to be empowered to act despite a vacancy in their membership.**

473. **The Constitution should no longer reserve any position on a service commission for members of any particular ethnic group and it should no longer contain provisions like those in subsections 128(2) and (6).**

474. **The Constitution should provide that a person is not qualified to be appointed to be a member of the Constitutional Offices**

Commission, the Disciplined Services Commission, or the Public Service Commission if he or she is, or, in the immediately preceding three years, has been:

- **a member of either House of Parliament or an elected member of any municipal council or other similar body prescribed by Parliament;**
- **nominated with his or her consent as a candidate for election as a member of either House of Parliament or any municipal council or other similar body prescribed by Parliament;**
- **a national office bearer in any political organisation that sponsors or supports or in the previous 3 years has sponsored or supported a candidate for election to either House of Parliament;**
- **a public officer or a local government officer.**

475. **The Constitution should also disqualify a person who is a member of a service commission, other than the chairperson of the Public Service Commission, from being a member of another service commission at the same time. It should, however, allow the person who is the chairperson of the Public Service Commission also to be the chairperson or a member of the Constitutional Offices Commission or the Disciplined Services Commission.**

476. **A person who is appointed to any service commission should be disqualified from appointment to any office in any state service for a period of three years after he or she was last the chairperson or a member of a service commission.**

PUBLIC SERVICE COMMISSION

Composition

14.72 Section 126 of the 1990 Constitution prescribes the composition of the Public Service Commission. Under subsection (1), the Public Service Commission consists of a chairperson and not less than three nor more than five other members. In view of its relatively large area of responsibility, we believe that the Constitution should continue to provide for a Commission of this size.

Functions

14.73 The Public Service Commission is at present established by section 126(1) of the 1990 Constitution. The Commission is vested, under section 127(1), with power to make and confirm appointments to all state offices and to remove and to exercise disciplinary control over the holders of all state offices, other than those for which the Constitution makes other provision.

14.74 As we mentioned earlier, by virtue of section 152(1), the power to appoint to an office also includes the power to make appointments on promotion and transfer, and to make acting appointments to that office; and the power to remove includes the power to make decisions on contracts of employment.

14.75 We propose that the Public Service Commission should continue to be vested with broad appointing, removal and disciplinary powers over all state service positions and officers other than those which are specifically made the responsibility of some other commission or authority, or which, by or under the Constitution, are not to be subject to any service commission.

14.76 This residual approach to defining the Public Service Commission's area of responsibility means that all state offices will fall within the responsibility of a service commission except where the Constitution, itself, for special reasons otherwise provides or allows. Decisions on appointments to almost all offices, and on the discipline and removal of the holders of these offices are therefore protected from political considerations.

14.77 In Chapter 13, we recommended that the Judicial and Legal Services Commission should be replaced by a Judicial Service Commission with a narrower constitutional responsibility only for judicial officers (including magistrates). At present, the Judicial and Legal Services Commission, in addition to its responsibility for judges and magistrates, has responsibility also for the various non-judicial offices listed in Schedule 2 of the 1990 Constitution.

14.78 These comprise government's legal officers, senior court officers and the heads of the departments which have traditionally fallen within the Attorney-General's area of ministerial responsibility. In Chapter 12, we recommended that responsibility for making appointments to the offices of the Solicitor-General and the Director of Public Prosecutions should be vested in the Constitutional Offices Commission. We now propose that all other non-judicial officers should fall within the responsibility of the Public Service Commission.

Requirements for consultation or concurrence

14.79 Subsections (5) to (9) of section 127 at present require the Public Service Commission to consult or to obtain the concurrence of specified persons before exercising its powers in respect of certain offices. We have the following comments to make.

14.80 Under subsection 127(5), the Commission must consult the Prime Minister before making a substantive or acting appointment to the office of Auditor-General. In the next Chapter, we propose that the Auditor-General should, with other constitutional officers, come under the appointing jurisdiction of the Constitutional Offices Commission. The existing provision will therefore no longer be necessary.

14.81 Under the same subsection, the Commission must also consult the Prime Minister before making appointments to an office of agricultural tribunal. These tribunals decide, at first instance, claims brought under the Agricultural Landlord and Tenant Act (Cap. 270). Given their importance, we consider that, as before, they should be appointed by the Public Service Commission after consultations with the Prime Minister and the Leader of the Opposition. In Chapter 13, we made recommendations on the appointment of the Central Agricultural Tribunal which is responsible for hearing appeals from decisions of the agricultural tribunals.

14.82 Subsection (6) prohibits the Commission from making any substantive or acting appointment to the offices of Secretary to the Cabinet or any permanent secretary or head of any government department or ministry without the concurrence of the Prime Minister. There is good reason for requiring the concurrence of the political executive for *appointments* to these offices. However, the Commission should not consult or seek the concurrence of the Prime Minister in exercising its powers of *removal* and *discipline* over these offices.

14.83 We explained in Chapter 12 how the permanent secretaries and comparable officers function as the pivot in the division of responsibilities between Ministers and the state servants in their departments. We have also discussed how, even though most administration is carried out by state servants, Ministers are individually, and the Prime Minister and his Cabinet are collectively, responsible to Parliament for their actions. They are also accountable to the people at a general election for the performance of the government. For these reasons, we propose retaining the existing requirement of the Prime Minister's concurrence.

14.84 In the next chapter, we deal with independent officers whose appointment

we propose should be the responsibility of the Constitutional Offices Commission. All of these offices hold the rank of permanent secretary or have management responsibilities for a department. The recommendation just made should not be interpreted to suggest that these managerial responsibilities should bring them also within the area of responsibility of the Public Service Commission.

14.85 Under subsection (7), as in 1970, the Public Service Commission may not make substantive or acting appointments to any office on the staff of the Ombudsman without prior consultation. Because the Ombudsman must act through subordinate officers, we consider that the Ombudsman should have the right to *concur* in the exercise by the Public Service Commissions of any of its constitutional powers over any office on his or her staff, so that the independence and effectiveness of the office is not compromised. This is necessary in view of our proposal in Chapter 15 that, subject to an Act of Parliament, the Ombudsman should investigate the exercise of statutory functions by the Public Service Commission.

14.86 Similarly, the Auditor-General must also act through his or her officers and has the responsibility of auditing the accounts of the Public Service Commission. We propose that this officer should also be required to concur in the exercise by the Public Service Commission of any of its constitutional powers over offices on the staff of the Auditor-General's department.

14.87 The Public Service Commission may not under subsection 127(8) exercise "any of its powers" over any of the President's personal staff without the President's concurrence. The provision is very widely worded to suggest that it covers not only those powers conferred on the Commission by the Constitution, but also any other powers that the Commission might enjoy under statute. The requirement is a mark of respect for the country's head of state. It should be retained subject to the express requirements that it is limited to the exercise of constitutional powers and that in deciding whether or not to concur the President acts in his own deliberate judgement.

14.88 A slightly narrower provision applies to the staff of Parliament. Subsection (9) at present requires the Commission to "consult" the Speaker before exercising "any of its powers" in relation to the offices of Secretary-General to Parliament, Secretary to the House of Representatives and any member of the Speaker's staff, and to persons holding or acting in those offices. It also requires the Commission to consult the President of the Senate in respect of the Secretary to the Senate or any member of the Senate's staff.

14.89 Unlike the President, who must concur in decisions affecting his personal staff, the Speaker and the President of the Senate need only be consulted. The reasons for this courtesy lie in the idea of the separation of powers and the legislature's independence from the executive. The provision balances this principle against the other principle of a central, independent personnel authority for all state officers. We consider that the provision should be retained subject to limitation to the exercise of the Commission's constitutional powers.

14.90 In Chapter 11, we recommended and stated why the power to make appointments to the office of the Secretary-General to Parliament should be exercised by the Constitutional Offices Commission. It is our contention that the Public Service Commission should continue to be required to consult the Speaker before exercising any of its powers in respect of Secretary to the Bose Lawa and all other offices on the staff of the Bose Lawa which remain its responsibility. Similarly, it should be required to consult the President of the Bose e Cake in respect of the Secretary to the Bose e Cake and other staff of that House.

14.91 We also propose that there should be a constitutional requirement that the Public Service Commission should consult Permanent Secretaries and similar officers who are charged with managing their departments effectively, on appointments to the offices in their departments. We understand that, in practice, the Commission consults departmental heads before making appointments. Our recommendation therefore does not depart from the existing procedures. We believe that stating this as a constitutional requirement will better reflect the shared management responsibilities of the Commission and departmental heads.

Exceptions

14.92 Section 127(4), at present, lists specific offices and classes of office which are outside the appointing authority of the Public Service Commission.

14.93 The Constitution should continue to provide that the Public Service Commission's power to appoint, discipline or remove does not extend to offices which are the responsibility of another service commission or any offices in the Police Force, Republic of Fiji Military Forces or any naval or air force, or offices for which other provision is made by or under the Constitution.

14.94 Paragraph (g) of section 127(4) at present allows the Public Service Commission, by regulation, to exempt any office or class of office from its own jurisdiction. The regulations must receive the agreement of the Prime Minister. This is a useful provision which allows the Commission to decline responsibility

for offices which might be caught by the residual definition of the Commission's jurisdiction, but which, given their nature and responsibilities, should be within the responsibility of some other commission or authority. Possible examples include offices which combine judicial and civil characteristics. In that regard, the Public Service Commission's power would be exercised in conjunction with the Judicial Service Commission's power to add offices to their responsibility by regulations. Another possible example might occur if Ministers were allowed, as in many countries, to appoint political assistants paid directly out of state funds. In that case, as it is prohibited from delegating appointing power to a Minister, the Commission might decide it is best to relinquish control over those positions, by regulation.

14.95 We view the requirement of the Prime Minister's concurrence as a necessary check on this wide discretion and recommend the Constitution should continue to contain a provision in these terms.

RECOMMENDATIONS

477. The Constitution should continue to provide that the Public Service Commission comprise a chairperson and not less than three nor more than five other members appointed in accordance with the procedure outlined in recommendation 468.

478. The Public Service Commission should have constitutional responsibility for appointing, removing and exercise of disciplinary control over, all offices and officers in the state services that are not specifically made the responsibility of some other commission, or other authority by or under the Constitution. The Constitution should provide that the Public Service Commission should not have the power to appoint, remove or exercise disciplinary control over the offices and officers that are the responsibility of another service commission, or any in the Fiji Police Force, Republic of Fiji Military Forces, or any naval or air force, or for which other provision is made by or under the Constitution.

479. The Constitution should continue to permit the Public Service Commission to make regulations with the concurrence of the Prime Minister by which any office or class of office is exempted from its constitutional responsibility.

480. Apart from the offices of the Director of Public Prosecutions

and the Solicitor-General, the Public Service Commission should have responsibility for all non-judicial offices which are at present the responsibility of the Judicial and Legal Services Commission. These would include the State's legal officers, the heads of departments within the portfolio of the Ministry for Justice and senior officers in the administration of the courts.

481. The Constitution should require the Commission to consult both the Prime Minister and the Leader of the Opposition before appointing an agricultural tribunal.

482. The Constitution should continue to require the Public Service Commission to obtain the concurrence of the Prime Minister before making any appointment to the office of Secretary to the Cabinet, or any office of Permanent Secretary, or head of any government department or ministry.

483. The Constitution should require that the Public Service Commission should obtain the concurrence of the Ombudsman and the Auditor-General before exercising any of its constitutional powers over any office on their staff.

484. The Constitution should continue to require the Public Service Commission to obtain concurrence of the President before exercising any of its constitutional powers over any of the President's personal staff.

485. The Constitution should provide that the Commission should consult the Speaker before exercising any of its constitutional powers over the Secretary to the Bose Lawa and any member of the staff of the Bose Lawa. Similarly, it should be required to consult the President of the Bose e Cake in respect of the offices of Clerk to the Bose e Cake or any other member of the staff of the Bose e Cake.

486. The Constitution should require that all Permanent Secretaries and heads of departments should be consulted prior to any appointment or removal of a member of their staff.

AMBASSADORS AND FOREIGN SERVICE OFFICERS AND OTHERS SERVING OVERSEAS

14.96 Under section 125(1) of the 1990 Constitution, power to appoint and

remove ambassadors or principal representatives of Fiji in other countries or to any international organisation is vested in the President acting on the advice of the Prime Minister. The section repeats the provisions of section 103(1) of the 1970 Constitution. It reflects the well-accepted convention that power to appoint envoys is a function of the executive which is vested in the Head of State, acting on the advice of the political chief executive. We propose that the Constitution should continue to so provide.

14.97 Prior to advising the President, the Prime Minister is, however, required by the proviso to the subsection (1) to consult the Public Service Commission if the relevant person at the time is holding or acting in a "public office". Subsection (2) specifically provides for the rights of these officers in the event of their removal as ambassadors or principal representatives. It provides that the power to remove any person from his or her position as an ambassador or principal representative does not include the power to remove such a person from the state services. We favour the retention of this principle in the Constitution.

14.98 The subsection at present allows the Public Service Commission to place the person in a comparable job or, failing that, to grant him or her an early government pension. As most officers are no longer eligible for government pensions, the pension protection aspects should be removed from the Constitution and, to the extent that they may still be necessary, placed in ordinary legislation.

14.99 Subsections (4) to (6) of section 125 allow the Prime Minister to prescribe specific state offices which involve residence overseas (whether in the Ministry of Foreign Affairs or in some other department), to which the Prime Minister, and not the Public Service Commission, may make appointments on transfer. This power is limited to transferring officers between prescribed overseas posts carrying the same salary. This power to transfer may be delegated by the Prime Minister to another Minister and by the Minister exercising the power, to a public officer.

14.100 We consider that the provision allows those charged with responsibility for Fiji's foreign affairs a degree of flexibility in arranging their staffing matters. It does so without unduly affecting the employment protection provided to individual state servants by independent service commissions. We therefore believe it should be retained with a slight change.

RECOMMENDATIONS

487. The Constitution should continue to vest in the President,

acting on the advice of the Prime Minister, power to appoint and remove ambassadors and principal representatives of Fiji to other countries and to international organisations. It should provide that before recommending the appointment of a person who is a state servant to be an ambassador or principal representative, the Prime Minister shall first consult the Public Service Commission.

488. The Constitution should also provide that the power to remove an ambassador or principal representative from office does not include the power to remove a person from the state services, if that person was already a state servant when appointed to be an ambassador or principal representative.

489. The Constitution should no longer empower the Public Service Commission to grant such officers early pensions. To the extent that it may be desirable to provide for pensions, provision should be made in an Act.

490. The Constitution should continue to allow the Prime Minister to prescribe specific state offices requiring residence overseas. Once prescribed, the power to make appointments on transfer between these offices should vest in the Prime Minister. The Constitution should allow this power to be delegated to a minister public officer. The power should be limited to transferring between offices carrying the same salary.

DELEGATION

14.101 Section 127(3) permits the Public Service Commission, by directions in writing, to delegate any of its powers to appoint, remove, or exercise disciplinary control, other than its powers over the Auditor-General, an agricultural tribunal, the Secretary to Cabinet or any Permanent Secretary, head of a department or comparable officer, to any member of the Commission, or to any public officer or class of public officer. Delegations to public officers may be limited by an Act of Parliament. In keeping with the principle of political neutrality, powers cannot be delegated to ministers. The Commission may impose conditions on delegations and may withdraw a delegation if it thinks fit.

14.102 We believe that politically neutral and efficient state services are best guaranteed by flexible constitutional provisions which provide for a central state service appointing authority which is vested with the power to delegate. This ensures that there is a single centralised body with responsibility and accountability

for the way appointment, removal and disciplinary powers are exercised by itself, or by its delegates across the various departments. The existing power to make conditional delegations and to withdraw a delegation ensures that the Commission can and should maintain control over its delegated powers. In our view, this system allows the greatest flexibility in responding to changing circumstances and management concepts in the public sector. We believe that the requirement for departmental needs to be balanced by a consistent, service-wide perspective, promotes impartiality and efficiency, without sacrificing fairness.

14.103 We propose that the existing power to delegate to individual commissioners or to state servants should be retained. The Constitution should continue to prohibit any delegation of the powers over agricultural tribunals, the Secretary to Cabinet or any Permanent Secretary, head of department or other comparable officer. It should also continue to allow Acts of Parliament to impose limitations, and the Commission to impose conditions on its delegations.

14.104 Concerns expressed to us regarding the concentration of power in the Public Service Commission and its possible detrimental effect on the management of departments, may be met, to a large degree, by effective delegations by the Public Service Commission to those responsible for management. Modern public sector management policies practised elsewhere involve significant appointing, disciplinary and removal power at the ministry or departmental level. The Public Service Commission informed us that it was in the process of drawing up appropriate delegations for Fiji. We believe that this process should be expedited.

RECOMMENDATIONS

491. The Constitution should continue to allow the Public Service Commission to delegate any of its functions to an individual commissioner or a public officer. It should continue to prohibit any delegation of the powers over agricultural tribunals, the Secretary to Cabinet or any Permanent Secretary, head of department or other comparable officer. It should continue to allow Acts of Parliament to impose limitations on the power to delegate. It should allow the Commission to impose conditions on its delegations.

492. The Public Service Commission should expedite the consideration of the delegation of its powers.

STATUTORY FUNCTIONS

14.105 In addition to its powers of appointment, removal and discipline, the

Public Service Commission, since 1974, has also been vested by various statutes with other functions and powers relevant to personnel matters in the state services.

14.106 Some submissions complained that the combination of the Commission's constitutional and statutory functions concentrated too much power in the hands of one commission and its secretariat. The submissions claimed that the need for the Commission to approve decisions on matters as trivial as office furniture and small training expenses had a stultifying effect on the management of departments and on their efficiency and effectiveness. Some department heads sought a constitutional provision to grant them greater autonomy from the Commission.

14.107 We appreciate that the centralisation of the powers which the Public Service Commission enjoys under statute promotes economy, consistency and accountability across all the departments of the government. Yet, at the same time we recognise that these objectives must be balanced against the real concerns and frustrations of departmental managers and their duty to be efficient and effective.

14.108 We propose that the Commission's statutory functions be reviewed by the Government. The review should examine whether all or any of the powers should be devolved and exercised by individual department heads under a new statute or by delegations under the existing statute. It should also examine whether they should remain centralised but be exercised by a Ministry or department of the Government instead of the Commission. The latter is the practice in some neighbouring countries.

RECOMMENDATION

493. The Government should re-examine the statutory functions of the Public Service Commission to see if all or any of these might be more efficiently, effectively or economically exercised either centrally by a Government ministry or by the individual departments and ministries.

APPEALS

14.109 Section 127(2) of the 1990 Constitution provides that "no appeal should lie against decisions of the Public Service Commission with respect to matters concerning appointments, promotions and transfers". Although the provision prohibits any appeals against the merits of Commission decisions, it does not prevent the Courts from reviewing decisions on procedural and other grounds recognised in administrative law.

14.110 The 1970 Constitution had expressly authorised Parliament to provide for appeals to lie against "such decisions" of the Public Service Commission to "such body" as Parliament might prescribe. This express authorisation was necessary, as an appeal system, specially if outside the courts, compromises the freedom from direction and control which is the essence of constitutional independence enjoyed by the Public Service Commission.

14.111 Parliament provided for appeals in the Public Service Act of 1974. The Act established a Public Service Appeals Board consisting of a chairperson and one official member and two staff members, all of whom were public officers. The chairperson and members were appointed by the Minister responsible for the public service. The official member was nominated by the Public Service Commission, the service members by the unions recognised by the Commission and in appointing the chairperson, the Minister was required to consult both the Commission and the unions. Only one service member was entitled to sit at any particular hearing.

14.112 We received strong representations for the re-establishment of a system of appeals which allowed the reasons behind decisions as well as the procedures leading up to decisions to be challenged. The submissions expressed the view that the existing remedy of judicial review was expensive, time consuming and too narrowly focussed to provide an accessible method of challenging wrongful decisions of the Commission. They argued that an appeals system, as distinct from judicial review, was essential to ensure that employment decisions by the Public Service Commission were based on proper grounds. In particular, the submissions argued that appeals were essential to ensure that the Commission was accountable, its work transparent and its decisions non-discriminatory and fair.

14.113 We heard equally strong representations against the re-introduction of appeals. It was argued that the effect of the 1974 appeals procedure was a fractious and paralysed civil service. We were informed that under that system, appeals had been lodged against almost every appealable appointment, promotion or transfer. Consequently, there had been some disruptions to government services, particularly where appeals had been filed against transfers to rural areas.

14.114 It was also pointed out that decisions on appointments are rarely clear-cut. Invariably the requirements for any position have several dimensions. Individual candidates are likely to have different strengths and weaknesses. Identifying the most suitable candidate is often a matter of personal judgement

for the decision-makers. It is always possible that in the same circumstances someone else might make another, different decision but equally valid. In this view, a system of appeals on the merits invites frequent reversals of appointments, promotion and transfer decisions, causing uncertainty and low morale among officers, and consequently inefficiency and ineffectiveness in the state services.

14.115 Another criticism of the previous appeals system was that the former appeals body had comprised only public officers. This had sometimes resulted in the officers on the Appeals Board considering the appointments or promotions of officers senior to them. Furthermore, although the Public Service Act attempted to ensure some measure of impartiality by prohibiting members of the Appeals Board from considering any appeal on a position in their own department, it was possible for personal contacts and structural links across departments to colour the consideration of appeals.

14.116 We were also made aware of new methods of public sector management used in neighbouring countries that are being considered for adoption in Fiji. These are based on the idea that greater efficiency, effectiveness and economy can be achieved if the criteria for, and conditions of, state service appointments were made more like those in the private sector. It was argued that an appeals system reinforced the worst aspects of public sector employment practices. In particular, in regard to promotions, it favoured the rigid application of objective criteria such as seniority, over more important qualitative and subjective matters such as ability and suitability for a position. If decisions on the discipline and the removal of officers could also be appealed against, it would make the already difficult task of dealing with inefficient officers even harder.

14.117 We have given a great deal of consideration to this matter. In our view, a delicate balance must be struck between the State's need, as an employer, to be able to hire and fire in the interests of efficiency, effectiveness and economy, and the right of individual state servants, as employees, to be treated fairly. Although we endorse the measures to improve state services through the introduction of some private sector management techniques, we do not believe that analogies with private employers should be carried too far. Unlike positions in the private sector, those in the state services are public positions which require the highest standards of equity, accountability and transparency to be applied in respect of appointments. We believe that an appeals procedure is an important way of achieving those standards.

14.118 The Commission therefore proposes that the Constitution should again

authorise Parliament by Act to provide for appeals against decisions of the Public Service Commission. It should also expressly allow appeals against decisions of any person exercising any of the Commission's powers by delegation. As before, the provision should be broad enough to allow the types of decisions and the types of positions to which the right of appeal should apply to be prescribed by or under the Act. The provision should also allow Parliament a wide discretion to prescribe the body to which appeals should lie.

14.119 We believe that many of the difficulties experienced under the former Public Service Appeals Board resulted from the composition and jurisdiction of that body. We consider that many difficulties would be avoided if state servants were prohibited from sitting on the appeals body. One alternative which Parliament might consider is a body comprising a member nominated by the unions, one nominated by the Public Service Commission and a chairperson selected by the Minister after consulting the Unions and the Commission, none of whom may be state servants.

14.120 In defining the jurisdiction and the procedural rules for the appeals body, great care must also be taken to avoid the disruptions which occurred in the past. We believe that special consideration must be given to the rules which should be applicable if appeals are allowed to be lodged against decisions involving transfers. They should ensure that government services, especially those in rural areas, are not disrupted. Special attention must also be paid to the grounds upon which appeals may be lodged and the factors which the appeals body should be entitled to take into account.

RECOMMENDATIONS

494. **The Constitution should authorise Parliament to provide by Act for a system of appeals against decisions of the Public Service Commission or any person exercising any of the Commission's powers by delegation. The provision should allow Parliament a discretion to prescribe the body to hear appeals and the types of decisions that may be appealed against.**

495. **In drafting new statutory provisions for appeals, care must be taken to avoid the difficulties experienced under the system established by the 1974 Public Service Act. State servants should be excluded from membership of the appeals body. Appeals against decisions involving transfers to rural areas should be provided for in a way which does not affect rural services unduly.**

DISCIPLINED SERVICES COMMISSION

Police force

14.121 Section 129(1) establishes a Police Service Commission with power to appoint, remove and exercise disciplinary control over police officers above the rank of senior inspector. These officers are generally known as the "gazetted officers". They comprise the six most senior ranks of the Police Force, and at present include the office of Commissioner of Police. We do not deal with appointments to that office in this chapter.

14.122 Subsection 129(2) vests in the Commissioner of Police the power to appoint, remove or discipline officers of or below the rank of senior inspector. These officers are classified as the inspectorate and subordinate officers. However, the concurrence of the Police Service Commission is required before the Commissioner of Police can remove or reduce the rank of any inspectorate or subordinate officer.

14.123 Subsection 129(5) takes account of any subsequent alteration in the ranks into which the Police Force is divided. In that event, the Police Service Commission may, for the purpose of dividing responsibilities between itself and the Commissioner of Police, specify the new rank which is equivalent to senior inspector.

14.124 In principle, police officers, who are subject to a stringent code of discipline should continue to be dealt with separately from officers in the civil service proper.

Prisons service

14.125 Offices in the prisons service at present come under the appointing, disciplinary and removal jurisdiction of the Public Service Commission. We received a representation seeking to have jurisdiction over prison officers removed from that Commission.

14.126 The prisons service is a disciplined service. It is established and organised under the Prisons Act (Cap. 86). As with the police and military forces, the prisons service also exercises some of the State's power to use force, in its case, with regard to convicted and detained persons. Like the other two forces, the

organisation and operation of the prisons service are based on the concept of command and a high degree of discipline. Section 11 of the Prisons Act (Cap. 86) requires every officer of the Prisons Service to "obey all lawful directions in respect of the execution of his office which he may from time to time receive from his superiors".

14.127 We were told that because the Public Service Commission deals mainly with the discipline of civil servants, it did not appreciate the stricter standards of discipline which must apply to prison officers. This had caused some difficulty in maintaining an efficient and effective prisons service. We understand these concerns, particularly in view of recent events, and agree that the prisons service should no longer come under the jurisdiction of the Public Service Commission.

14.128 We propose that the Police Force and Prisons Service should be brought under the jurisdiction of a single commission. In view of this wider jurisdiction, the Commission should be called the Disciplined Services Commission.

Composition

14.129 The Disciplined Services Commission should comprise a chairperson and two other members. They should be appointed in accordance with the procedure and subject to the qualifications which we earlier recommended should apply to service commission appointees.

Functions of the Disciplined Services Commission

14.130 The Disciplined Services Committee should have responsibility for appointing, removing and exercising disciplinary control over offices in the police above the rank of senior inspector other than the office of Commissioner of Police. We make separate recommendations on appointments to that office in Chapter 12.

14.131 We also recommend that the present provision under which the Commissioner of Police has power to appoint, discipline and remove officers of or below the rank of senior inspector, should be retained. We believe that it is important for the discipline and efficient operation of the Force that these officers be directly subject to the Commissioner of Police. The important safeguard that removal from office and reduction in rank should be subject to the concurrence of a supervising service commission should remain. It should now be vested in the Disciplined Services Commission.

14.132 The Constitution should also continue to provide for the possibility of any alteration in the ranks of the Police Force. The Disciplined Services Commission should be empowered to specify the equivalent office to senior inspector for the purpose of determining the respective responsibilities of the Commission and the Commissioner of Police.

14.133 The new Commission should also exercise the powers now vested in the Public Service Commission in respect of all offices of the prisons service.

14.134 Section 129(3) at present allows the Police Service Commission to delegate any of its powers to any member of the Commission. To the extent that the Prime Minister directs in writing, it may also delegate any of its powers over gazetted officers to the Commissioner of Police. We consider that the Disciplined Services Commission should also have these powers subject to any conditions which it sees fit to impose and to such extent as the Prime Minister may direct in writing. We favour the retention of the Prime Minister's power because questions of law and order have wide ramifications. We are also mindful of the independence which the Constitution guarantees to the Commissioner.

14.135 In addition, the Constitution should provide that, as with the Public Service Commission, the power to delegate should be subject to any Act of Parliament.

14.136 We also recommend that the Commission should have a similar power to delegate any of its functions over prison officers to an individual commissioner or to the Commissioner of Prisons. This power should be subject to the same limitations as its power to delegate in regard to the police.

14.137 In recommending a single commission to deal with police and prison officers, it is necessary to stress that we do not thereby propose the amalgamation of the two services nor do we wish to suggest a common career path between the two. They each have a distinct responsibility in relation to those accused or convicted of committing offences. We believe that this distinction is essential to ensure accountability and transparency in the treatment of detained persons. It should therefore be maintained.

RECOMMENDATIONS

496. The Disciplined Services Commission should comprise a chairperson and two other members appointed in accordance with the procedure outlined in recommendation 468.

497. The Disciplined Services Commission should have constitutional responsibility for appointing, removing and exercising disciplinary control over all offices of the prisons service and all police officers above the rank of senior inspector. It should not be responsible for the office of Commissioner of Police.

498. The Constitution should continue to give the Commissioner of Police the responsibility for appointing, removing and disciplining police officers of, or below the rank of, senior inspector. It should provide that the Commissioner cannot remove or reduce the rank of any officer without the concurrence of the Disciplined Services Commission.

499. The Constitution should provide that in the event of any alteration in the ranks of the police force, the Disciplined Services Commission may by order specify the equivalent rank to senior inspector for the purpose of defining the extent of the respective responsibilities of the Commission and the Commissioner of Police.

500. The Disciplined Services Commission should have the power to delegate any of its powers to any member of the Commission. It may also, to the extent that the Prime Minister directs in writing, delegate any of its powers over gazetted officers to the Commissioner of Police.

501. The Constitution should also provide that, as with the Public Service Commission, the power to delegate should be subject to any Act of Parliament.

502. The Disciplined Services Commission should have a similar power to delegate any of its functions over prison officers to an individual commissioner or to the Commissioner of Prisons. This power should be subject to the same limitations as its power to delegate in regard to the police.

15

ETHICAL AND ACCOUNTABLE GOVERNMENT

15.1 In this chapter, we examine special measures to secure the ethical and accountable use of public power and resources by Ministers, state servants, and other agencies of the state. Many submissions proposed the strengthening of existing measures and the introduction of additional ones.

15.2 Institutions which we review include the Ombudsman and Auditor-General, the independent constitutional offices charged with inquiring into and reporting on the Government's administration and its management and use of public money and property. We also review the constitutional rules which guarantee independence to the holders of these and other constitutional offices so that their sensitive functions and powers are exercised in an impartial manner.

15.3 In addition, this chapter addresses the submissions which proposed that the Constitution should provide standards of ethical conduct for important officers. It also responds to those which sought a constitutional provision regarding official information in order to secure greater government accountability and transparency.

CONCEPT OF ACCOUNTABILITY

15.4 Because a democratic government derives its powers and resources from the people, it is accountable to the people for the way in which those powers and resources are used. Generally, a government is accountable for its policies, either to the people's representatives in Parliament, through questions, motions of censure or confidence votes, or directly to the people themselves at a general election.

15.5 Public accountability is also concerned with the way in which individuals in Government use public power or resources. Experience shows that there are always some in every society who abuse the power and resources entrusted to them. They may do so by victimising others, prolonging their hold on power, deriving personal gain or in a variety of other ways. Public trust may also be abused through discrimination, mismanagement, inefficiency and inaction.

15.6 People everywhere seek laws and institutions to deter such practices. To that end, their constitutions provide for specific mechanisms to prevent abuse of office and to secure accountable and ethical government. They are entrenched to

ensure that the laws upholding accountability and ethical government are not easily changed or interfered with by those holding political power.

Need for special measures

15.7 The basic safeguards in any democracy are those contained in the rules guaranteeing the democratic process itself and, in particular, the people's right to change the Government periodically. In addition, there are the checks and balances provided by the rules which maintain the separation of powers between the different branches of government.

15.8 In earlier chapters, we made recommendations for written constitutional provisions guaranteeing two democratically elected houses of Parliament exercising the state's legislative power. We proposed the retention of provisions for a Cabinet and Ministers who are collectively and individually responsible to Parliament for executive government. To strengthen their accountability, we recommended provisions to ensure an effective opposition and a system of sector standing committees in the Bose Lawa. In addition, we made proposals for independent courts vested with the judicial power to enforce the Constitution and the rule of law. We also recommended the strengthening of the constitutional Bill of Rights to ensure, among other things, that public opinion, enlightened by a free press, can be fully expressed.

15.9 Special measures are necessary to supplement those basic safeguards. The scale of executive government and the state services and the powers and public resources at their disposal have no historical precedent. As governments have grown, the capacity of the legislature and the judiciary to fulfil their traditional roles as checks on abuse of authority has been correspondingly reduced.

15.10 The fact that the same political party or parties control both the legislative and executive branches of government in the Westminster system already provides one limitation on public accountability. Apart from this, in view of the number of decisions and actions state servants take daily, it is not possible for members of Parliament to keep all government activity under constant scrutiny. Legislatures now tend to be almost wholly occupied with considering laws. Their accountability role has therefore become restricted to questioning policy and the occasional very blatant instance of corruption, abuse of authority or maladministration. Even then, it may not always be easy for Parliament as an institution to carry out impartial, detailed investigations into those allegations.

15.11 Traditionally, the Courts have been entrusted to keep executive government ethical and accountable. However, they too lack investigating

authority, and are limited to determining only criminal or civil matters brought before them for adjudication. Furthermore, they are generally limited to applying laws and standards made by Parliament. To its credit and despite these limitations, the Judiciary has attempted to keep pace with the growth in the executive government and its powers. It has done so through the development of the common law, especially the principles of administrative law and the process of judicial review.

15.12 In view of these factors, special constitutional measures are needed to strengthen the ability of Parliament and the Courts to scrutinise executive action. In addition, some recent constitutions contain provisions which provide specifically for ethical standards of conduct for important office holders. We consider that option below.

ETHICAL GOVERNMENT

Submissions

15.13 The Commission received many submissions proposing that the Constitution should contain provisions directed towards preventing official corruption and achieving higher ethical standards of conduct for those holding important offices of the state. The submissions indicate great concern among the citizens of the Fiji Islands for the integrity of government and the prevention of official misconduct.

15.14 The submissions did not allege that all Ministers, politicians and state servants are corrupt or promote their own private interests at the public expense. Rather, they wanted to reduce the possibility that one or more of these persons may fail to uphold the standards expected. They also sought to ensure the election or appointment of persons of high personal qualities. The submissions were about public confidence in Fiji's system of government and the integrity of its leaders. Effective democratic governments are built on the trust and confidence of the people. It seems clear to us that the people of the Fiji Islands seek to protect their trust and confidence in their government.

Existing laws

15.15 The Constitution and statutes already provide some standards and rules to ensure ethical government. Under sections 42 and 55(2) of the 1990 Constitution, a person is not qualified to become a member of either House of Parliament or, consequently a Minister if, among other things, he or she is an undischarged bankrupt, or under sentence of death or imprisonment for more than twelve months,

or disqualified by a law relating to electoral offences. Under other provisions, a person who is already a member of either House, or a Minister, vacates office, if any of these circumstances arise. In Chapter 10 , we proposed that these disqualifications should be retained in the Constitution. We also recommended the re-introduction of a constitutional provision allowing Parliament to provide by Act that those who have a prescribed interest in government contracts should be disqualified from membership of Parliament and from holding ministerial office.

15.16 Various statutes, regulations and orders contain ethical standards and rules which apply to state servants, members and officers of statutory bodies and provide for disciplinary penalties or removal from office in the event of their breach.

15.17 Fiji's Penal Code (Cap. 17) also contains important provisions. Chapter XI of the Code creates a number of criminal offences relating to official corruption and abuse of office. Severe penalties are provided. The provisions apply to the President, Ministers, members of Parliament, state servants, and members of the various disciplined services, as well as members of local government bodies, statutory authorities and their employees. They also apply to private persons who are implicated in official misconduct.

Codes of conduct for important officeholders

15.18 Some submissions suggested that in addition to these existing protections, the Constitution should also provide for a code of conduct setting specific standards for Ministers, members of Parliament and important state servants.

15.19 Codes of conduct are not new to Fiji. At present, Ministers in Fiji are subject to standards contained in guidelines issued by the Prime Minister. A decree of the Military Government, the Executive Council of Ministers - Responsibilities of Leadership Code Decree, 1987 also applied a code of conduct to Ministers of the Military Government.

15.20 Integrity codes, leadership codes and other kinds of codes of conduct are concerned with securing the public confidence in those to whom they apply. By providing rules these codes aim to prevent the exercise of public power or use of resources in a way which demonstrates a lack of integrity or which may cause that integrity to be called into question.

15.21 Conduct subject to a code may amount to the recognised criminal offences of corruption or abuse of office. It would include a person's conduct in

circumstances in which he or she faces a "conflict of interest". Such conduct is not presently subject to the sanction of the criminal law.

15.22 The term "conflict of interest" when applied to important government officials describes situations in which a person's public duties and private interests conflict, or would have the appearance of, or potential to, conflict. Codes may therefore set standards for both public conduct as well as private behaviour which may be related to the exercise of public duties. Very few codes set standards for private behaviour with no immediate relationship to the exercise of public power.

15.23 All codes of conduct contain a special focus on abuse of office and conflicts of interest which have a pecuniary aspect. The submissions show that people in Fiji are particularly worried about officials using their offices for personal gain and about private business or employment activities which could give rise to a conflict of interest.

15.24 Different codes of conduct deal in various ways with business and employment interests which may give rise to conflicts of interest. This is partly because business interests may take a number of forms. A person may be directly interested in a business through shares, a directorship, loans or advances made to a business or through other contractual relationships. Indirect interests may exist through holding companies, trusts or through family members or friends.

15.25 Additional complexities arise because business investment or outside employment may be necessary or unavoidable in the circumstances of a particular country. The salaries paid to members of Parliament may be relatively low and it may be essential for them to carry on outside employment or business activities. Alternatively, especially in smaller countries, officeholders may hold scarce skills or capital. They may also have interests in businesses, particularly family or community companies, which they might find difficult to divest. A blanket prohibition in either of these circumstances may prevent people of ability and integrity from seeking office, thereby depriving the people of their service.

15.26 Cultural factors also account for variations in integrity codes. What constitutes an abuse of office or a conflict in one culture may not be the same in another. Rather than being prohibited outright, traditional relationships, values, norms and expectations often need to be reconciled with the powers, resources and responsibilities of modern government in a sensitive and practical way.

15.27 Although it is generally agreed that Ministers, members of Parliament

and state servants should always avoid conflicts of interest and should never let private interests take precedence over the public interest, the matter is not clear-cut. Some conflicts of interest are unavoidable. A person's personal interests as a member of a particular social group, whether described by age, gender, occupation, marital status, ethnicity, area of residence or even sporting or social associations, are unavoidable and generally recognised. Indeed, members of Parliament are often legitimately called upon to articulate or protect the interests of such groups. Thus, in addition to prohibiting certain kinds of behaviour and prescribing procedures and rules designed to prevent situations where a conflict of interest may exist or appear to exist, codes of conduct may also prescribe ways to resolve conflicts where these are unavoidable.

15.28 The Commission considers the main purpose of a code of conduct for Fiji's leaders is to promote the public integrity of those who govern and to maintain public confidence in them. We believe that a code provides a basis upon which important officeholders can be held accountable for their conduct and activities. It reminds leaders and the public of the minimum ethical standards which are expected of these officers. A code also expresses the common ethical values, standards and expectations of the people. As such, it has an important symbolic purpose.

Integrity code

15.29 We propose that the Constitution should provide an integrity code containing general, broad standards of conduct for important officeholders. It should place a duty on Parliament to provide by Act for a more detailed integrity code which implements the standards contained in the Constitution.

15.30 We do not consider the present situation in which some standards of ministerial behaviour are contained in rules issued by the Prime Minister and others in conventions to be satisfactory. When ethical standards are enforceable largely by the Prime Minister, there is less public accountability and more room for public suspicion and speculation. When the suspicion and speculation is unfounded, this may unfairly undermine confidence in the Government and consequently its ability to govern. A constitutional or statutory code has the advantage of certainty and publicity.

15.31 In substance, the Constitution should provide that the President, the Vice-President, all Ministers, all members of Parliament, all constitutional office holders and such other persons as may be prescribed by Act shall conduct themselves in

such a way as not:

(a) to place themselves in positions in which they have or could have a conflict of interest;

(b) to compromise the fair exercise of their public or official functions and duties;

(c) to use their office for private gain;

(d) to allow their integrity to be called into question;

(e) to endanger or diminish respect for, or confidence in, the integrity of the Government of Fiji; or

(f) to demean their office or position.

15.32 By constitutional officeholders we mean all persons in the state services (excluding judicial offices), whose offices are established by the Constitution. We also include all persons appointed to commissions established by the Constitution. As we explain later in this Chapter, independent constitutional officeholders and members of commissions are removable only for serious misconduct. We propose that those removal provisions should be linked to the constitutional integrity code.

15.33 We do not propose that the constitutional integrity code should apply to judicial officers, although they should be subject to the provisions of the Act. We envisage that until an Act is passed, the constitutional standards would be enforceable through comment by Parliament, the media and the public. The Commission does not think it is in the interests of justice for the Constitution to appear to license public criticism of judicial processes.

15.34 We do not propose that other state servants and members and employees of statutory and local government bodies should be subject to the general constitutional code. Existing provision for their discipline or removal from office for breaching ethical standards exists at present under various Acts. If Parliament thinks it is desirable, then provision for these officers can be made under the proposed Integrity Act.

15.35 Our recommendation focuses on public conduct and the public integrity. We do not believe that it is necessary to make private conduct not affecting the exercise of public duties subject to the integrity code.

15.36 We propose a more detailed Integrity Act for several reasons. Unlike

constitutions which must be broad and general, Acts are able to deal in detail with the various forms which abuse of office or conflicts of interests can take. They can specify offences and penalties, which may not usually be provided in constitutions. In addition, Acts can place obligations and sanctions on private persons who are implicated in official misconduct. Constitutions, on the other hand, as we explained in Chapter 3, normally regulate only the Government and those who constitute it. Acts have the further advantage of being able to provide special investigatory or monitoring bodies and enforcement procedures and to provide a variety of different mechanisms for preventing or resolving the different kinds of conflicts of interest which can arise.

15.37 An Act may also make detailed and specific provisions to deal with the various kinds of conflicts of interest in ways which suit Fiji's circumstances. It may require divestiture of all or some business interests or prohibit all or only specific kinds of outside employment. It may require certain kinds of disclosure to be made, or disqualifications to apply, in respect of particular kinds of decisions. It may provide different requirements for different kinds of offices, depending on the particular decision-making powers and control over resources which are involved. Special rules should also be devised to avoid or resolve a clash between traditional culture and democratic ethical standards.

15.38 We received a number of submissions which proposed that an expanded Ombudsman's office or a new constitutional Corruption Commission should be responsible for enforcing ethical standards contained in any code of conduct. Without pre-empting the possibility of this occurring in the future, we do not consider that the Constitution should vest this jurisdiction specifically in the Ombudsman or establish a Corruption Commission. We believe that the mechanisms for monitoring, enforcing and investigating offences against the code must be designed very carefully after a full study of the experience in other countries, before being provided for in the Act.

15.39 We understand these submissions to be concerned that the person or body charged with implementation of the code should have constitutional independence. We propose that this concern should be dealt with by a general constitutional provision which confers freedom from direction and control on the person or body who is charged under the Act with monitoring compliance with the code and with investigation of breaches. It should also apply other constitutional measures which ensure the independence of constitutional officers and which we describe later in this chapter.

15.40 In providing mechanisms for the investigation of and prosecution for offences, the Act must allow the Director of Public Prosecutions and the Police to fulfil their respective constitutional roles.

15.41 Some Integrity Acts make important officeholders liable to monitoring, investigation or prosecution for offences only while they remain in office. Wrongdoers in those countries have therefore escaped investigation and charges by resigning from office. The submissions urged the Commission to ensure that any integrity code for Fiji should avoid this possibility. We endorse this concern.

RECOMMENDATIONS

503. The Constitution should contain an Integrity Code containing general, broad standards of conduct for important office-holders.

504. In substance, the Constitution should provide that the President, the Vice-President, all Ministers, all members of Parliament, all constitutional office-holders and such other persons as may be prescribed by Act shall conduct themselves in such a way as not:

(a) to place themselves in positions in which they have or could have a conflict of interest;

(b) to compromise the fair exercise of their public or official functions and duties;

(c) to use their office for private gain;

(d) to allow their integrity to be called into question; or

(e) to endanger or diminish respect for, or confidence in, the integrity of the Government.

505. The Constitution should place a duty on Parliament to provide a more detailed integrity code under an Act .

506. The mechanisms for monitoring, investigating breaches of, and otherwise enforcing, the code must be designed very carefully after a full study of the experience in other countries and should be provided for in the Act.

507. The Constitution should contain a general provision which confers freedom from direction and control on the person or body charged under the Act with investigating or monitoring compliance with the Code. It should also apply other measures

which assure independence to other constitutional officeholders.

508. The Act must allow for the Director of Public Prosecutions and the Police to fulfil their respective roles in respect of offences.

509. The provisions of the Act should ensure that important officeholders remain liable to monitoring, investigation and prosecution for offences even after they have left office.

CONSTITUTIONAL OFFICES TO SECURE ETHICAL AND ACCOUNTABLE GOVERNMENT

15.42 Fiji's constitutions, since 1970, have provided for special independent officers to keep government ethical and accountable. There is provision for an Ombudsman, whose function is to investigate maladministration by the Government and its instrumentalities. There is also provision for an Auditor-General charged with examining and reporting on the government's accounts. Both officers are traditionally officers of Parliament and are required to report to it. We now review the constitutional provisions relating to these officers.

THE OMBUDSMAN

Constitutional provisions

15.43 Chapter X of the 1990 Constitution is dedicated exclusively to the establishment of the office of the Ombudsman and provision for his or her functions and powers. Some procedural provisions are contained in the Ombudsman Act (Cap. 3). There is also an Ombudsman Decree, 1987 promulgated shortly after the abrogation of the 1970 Constitution, which re-established the office of Ombudsman. Although the 1990 Constitution subsequently made the necessary constitutional provision for the Ombudsman, the Decree appears to be still in force. As it is no longer necessary and contains some provisions which are inconsistent with the Constitution, it should be repealed.

15.44 The existing constitutional provisions are relatively complex. They set out the Ombudsman's powers, and the relevant procedures in great detail, as compared to the provisions which apply to other constitutional officers. Elsewhere we recommended that the Constitution should concentrate on stating general principles, leaving detailed statements of powers and procedures to Acts of Parliament. The case of the Ombudsman is somewhat unique. In view of this

office's quite extraordinary powers and the need to entrench these powers against legislative or executive interference, some detailed provision is necessary. In our view, the Constitution should contain only those provisions which are needed to define the Ombudsman's main constitutional functions and powers in respect of the Government and its officers and agencies. For all other matters, it should empower Parliament to make provision by Act.

Purpose of Ombudsmen

15.45 The Office of the Ombudsman is of Scandinavian origin. The Ombudsman investigates individual grievances against government administration. He or she may also be empowered to investigate an administrative matter on behalf of Parliament or on his or her own volition. The Ombudsman is authorised to make a finding generally as to the legality, reasonableness or justice of the matter complained of, and to make recommendations as to the appropriate remedial action which should be taken. These findings and recommendations are usually given to the state servant responsible for managing the relevant department or agency of the government. Unlike a court or tribunal, the Ombudsman has no power to order or direct. Although his or her recommendations are not mandatory, in the event that they are not followed, the Ombudsman has the power to report the matter to Parliament. The Ombudsman's power is therefore rightly described as the "power to persuade".

15.46 Because the Ombudsman was originally a response to the growing size and complexity of government's bureaucracy and as an adjunct to the democratic process, the traditional focus of the office is on the exercise of the government's executive power, specifically that involving state servants, rather than its legislative or judicial powers. In some countries, the ambit of the Ombudsman's investigative powers extends to statutory bodies and companies which perform some of the government's executive functions.

15.47 The Ombudsman, in our opinion, is a vital part of Fiji's constitutional structure. For those without easy access to their members of Parliament or for whom parliamentary or court action might not be feasible, the Ombudsman provides the only real redress for illegal or unreasonable state action. In particular, we are aware that for prisoners and detained persons as well as their family and friends, the Ombudsman provides one of the few available avenues of complaint. A large number of submissions supported the retention and strengthening of this office. We agree that it should be retained and given independence by the Constitution. As now, this independence should be expressed in terms of freedom from direction and control by any other person or authority.

Immunity from review

15.48 In addition to investing the Ombudsman with freedom from the direction and control of other persons or authorities, section 139(1) provides that the proceedings of the Ombudsman "shall not be called into question in any court of law". This means that unlike other constitutional officers, the proceedings of the Ombudsman are not subject to judicial review.

15.49 This provision is necessary because it reflects the Ombudsman's status as an office of Parliament. The Courts have traditionally declined to exercise jurisdiction over Parliamentary proceedings. In addition, the provision avoids the confusion and possible delay arising out of conflict between the respective jurisdictions of the Ombudsman and the Courts. As the Ombudsman has only recommendatory and reporting powers and is subject to a requirement to allow all involved persons to respond to a complaint, the inability to review the proceedings does not cause any substantial injustice. We therefore propose that this provision should be retained.

15.50 Later, we recommend that the Constitution should allow Parliament by Act to confer additional functions on the Ombudsman. In view of this, we propose that the Ombudsman's immunity from judicial review should apply only to proceedings arising out of his or her constitutional functions.

Title of Office

15.51 We received submissions proposing that the title of this office should be changed to "Ombudsperson" or some other gender-neutral name. Although the Commission fully supports the use of a non-discriminatory language, we none the less propose that the title 'Ombudsman' should be retained. We consider the term 'Ombudsperson' to be unduly cumbersome. Furthermore, the existing title has been in use for over twenty-five years and any change may be confusing.

Functions

15.52 The 1990 Constitution does not set out the basic functions of the Ombudsman in clear terms. These functions can be deduced from a careful reading of sections 135 and 138 of the 1990 Constitution, but it is essential that the Constitution state these functions clearly and positively. We review the existing provisions in the succeeding paragraphs and comment on matters which should be included in the statement of the Ombudsman's functions.

Action

15.53 Subsection 135(1) provides that the Ombudsman may investigate "any action" taken by "any officer or authority", covered by the section, in the exercise of the "administrative functions" of that officer or authority. Under subsection 135(10) 'action' is expressed to include any "failure to act."

15.54 Subsection 138(2) in setting out the conclusions which the Ombudsman may reach, to justify stating an opinion and making recommendations, indicates that "action" means "any act, omission, decision" or "recommendation". These are the main forms of administrative action. We consider that they should be included in the proposed section stating the function of the Ombudsman.

Administrative functions

15.55 The term "administrative functions" covers any administrative action taken in the exercise of executive power. It does not cover any exercise of the judicial or legislative powers of the state. It may include the action of ministers which have an administrative aspect, but it does not include political action of ministers which do not involve state servants. This is clear from the existing prohibition contained in subsection 135(7) against investigating the action of a minister certified to have been taken in his or her own deliberate judgement. The term has also become defined by the practice of the Ombudsman in Fiji, and elsewhere in the world. We believe it is a flexible term and should be retained.

Persons who may lodge complaints

15.56 Under subsection 135(1) of the 1990 Constitution, the Ombudsman may commence an investigation if a complaint is made that a private person or body of private persons has suffered injustice as a result of administrative action. Subsection 135(3) provides that the complaints may be by an individual or a body of persons, whether incorporated or not.

15.57 Subsection 135(4) provides that individual complaints must be made by a person aggrieved. However, where the person is dead or cannot "for any reason" act for himself or herself, the subsection permits the complaint to be made by the person's personal representative, a family member or any other person deemed suitable to represent him or her. Subsection 140(1)(b) of the Constitution also allows Parliament to make provision in an Act permitting complaints to be transmitted to the Ombudsman through a member of Parliament. Later we will discuss the separate ability of a parliamentarian to invite the Ombudsman generally to investigate any administrative action.

15.58 These provisions reflect the Ombudsman's basic function and apply some necessary procedural limitations. We propose that the Constitution should continue to vest the Ombudsman with the function of investigating complaints in relation to any private person or any body of persons. It should also continue to require that private complaints must be lodged by a person or persons affected, but should allow the Ombudsman the discretion to investigate on the complaint of another, if the person or persons affected cannot for any reason act for themselves. Parliament should continue to be authorised by the Constitution to make provision allowing individual complaints to be made through a member of Parliament.

15.59 At present, the Ombudsman is only empowered to commence an investigation on the complaint of an individual person or body of persons, and conversely a person or body of persons is only entitled to complain to the Ombudsman, if they have already *suffered* injustice as a consequence of an administrative action. We consider that this requirement as it applies is unnecessarily narrow. At the time when an action, decision, recommendation or omission is made or taken, any likely consequential injustice to a person or group of persons in the future may be apparent. Especially where a particular action is likely to have a general impact, we consider that early intervention may reduce or prevent the likely injustice and may make remedial action easier to achieve. Moreover, when injustice seems likely, it would appear to us to be itself unjust to require that it actually be suffered before an investigation can proceed. The Commission considers that the Constitution should allow personal complaints to be investigated if the person or persons are *affected* by an administrative action.

15.60 Under subsection 135(5), the Ombudsman cannot investigate a complaint unless the aggrieved person is (or was at the time of death), resident in Fiji, or the complaint relates to action taken in relation to the complainant while he or she was in Fiji, or in relation to rights or obligations that accrued or arose in Fiji.

15.61 It is not necessary to restrict the Ombudsman's jurisdiction in this broad way. The Ombudsman's jurisdiction is limited to reviewing the exercise of the powers of the Government of Fiji and its agencies. This power should be exercisable regardless of where the action is taken and where the affected person or persons reside. It should also be exercisable whether or not a "right or obligation" is involved. Increasingly, many Fiji citizens are taking up residence overseas for professional, educational or other personal reasons. Many of them continue to deal with the Government because they have family or property. Furthermore, with government encouragement, many overseas residents are investing in business and property and pay taxes in Fiji. The Commission believes that they too should have this avenue of redress for bureaucratic wrongs which they may suffer.

15.62 Subsection 135(3) disqualifies any government department or authority, and any authority constituted for the purposes of the public service or local government from making complaints. It also disqualifies "any other authority or body whose members are appointed by the President, or by a Minister or whose revenues consist wholly or mainly of moneys provided from public funds". By implication, the subsection does not disqualify individuals within those departments and authorities from lodging personal complaints.

15.63 The subsection reflects the fact that the Ombudsman exists principally to investigate complaints *against* administration on behalf of individuals who are affected in their *personal* capacities, or on behalf of Parliament and its members. It is not a part of the Ombudsman's functions to investigate complaints by state offices or agencies against each other. We consider that the Constitution should continue to require complaints to be made in respect of personal grievances. It should not, in effect, allow complaints to be initiated by the government bodies which are presently disqualified. We leave to the drafter the question whether it is necessary for the Constitution to contain this express exclusion.

Other Investigations

15.64 Under paragraphs (b) and (c) of subsection 135(1), the Ombudsman may also investigate any action taken by an officer or authority in the exercise of administrative functions, if invited to do so by a member of either House of Parliament or on his or her own motion. In these cases, no "complaint" is involved and the existing provisions which limit investigations initiated by "complaints" do not apply. Notably, in these circumstances, an investigation may proceed whether or not injustice has yet been suffered by anyone.

15.65 We consider that this relatively wide power is necessary and should be retained. In view of the recommendations for sector standing committees of the Bose Lawa which we make in Chapter 11, we consider that the Constitution should specifically also allow investigations to take place on the invitation of a sector standing or other Parliamentary committee.

15.66 The Constitution is not clear whether, after conducting an investigation on the invitation of a member of Parliament, the Ombudsman can report directly to the member, or whether he or her is restricted to the procedure set out in subsection 138(1). We propose that the Constitution should also allow the Ombudsman to report to the member or Parliamentary committee at whose invitation an investigation was commenced.

Ombudsman's Remedies

15.67 Under subsection 138(1), after conducting an investigation, the Ombudsman is entitled to find that the act, omission, decision or recommendation investigated was either:

- contrary to law;
- based wholly or partly on a mistake of law or fact;
- unreasonably delayed; or
- otherwise unjust or manifestly unreasonable,

15.68 If he makes any such finding, he is empowered to report his opinion and make recommendations to the principal officer of the relevant department or authority as to the course of remedial action which should be taken.

15.69 The reference to "law" would include the provision of the Constitution, in particular the Bill of Rights. We consider that these existing findings adequately empower the Ombudsman and should be retained.

15.70 The subsection specifically empowers the Ombudsman to give the relevant principal officer in respect of any matter investigated, an opinion that:

- that the matter should be given further consideration;
- that the omission should be rectified;
- that the decision should be cancelled, reversed or varied;
- that any practice on which the act, omission, decision or recommendation was based should be altered;
- that any law on which the act, omission, decision or recommendation was based should be altered;
- that any law on which the act, omission, decision or recommendation was based should be reconsidered;
- that reasons should have been given for the decision; or
- that any other steps should be taken.

15.71 In reporting this opinion to the principal officer, the Ombudsman may request the officer to notify him or her within a specified time of the remedial steps which are proposed. The Ombudsman must send a copy of his or her report and recommendations to the Prime Minister and to any other Minister concerned.

These are necessary powers which should be retained in the Constitution.

15.72 If, after a reasonable time, no "adequate and appropriate" remedial step appears to him or her to have been taken, the Ombudsman may, after considering the comments of the relevant department or authority, make a further report to both Houses of Parliament. This is the Ombudsman's ultimate weapon which should continue to be provided for under the Constitution.

Offices subject to investigation

15.73 Subsection 135(2) sets out in some detail, the categories of offices and authorities which the Ombudsman may or may not investigate. Paragraph (h) of the subsection allows Parliament to prescribe by Act other "officers or authorities" which are not covered by the subsection.

15.74 Those which are subject to his or her jurisdiction comprise all government departments and officers of those departments, the Police Force and its members, the Prisons Service as well as any other government service and all officers of those services. The subsection expressly includes any officer or authority empowered to make determinations as to government contracts.

15.75 The armed forces are not expressly included among government services subject to investigation by the Ombudsman. As the armed forces do not deal with the public on a day to day basis, we do not propose that they be made generally subject to investigation like other services. However, the Constitution should make it clear that the Republic of Fiji Military Forces and its officers are subject to investigation in regard to contracts, other than contracts of appointment, entered into on behalf of the Government.

15.76 The 1990 Constitution, for the first time, also made "local government bodies", "rural local authorities" and "statutory bodies not covered by the Ombudsman Act" subject to the constitutional jurisdiction of the Ombudsman. The last-mentioned reference appears to us to be ill-conceived. First, no statutory bodies appear to be "covered by the Ombudsman Act". Secondly, as a matter of legal principle, it seems to us that it is wrong to provide a residual constitutional provision to catch what is not covered by an Act, more so where the constitutional provision itself authorises the existence of Act. Lastly, the effect of the provision would seem to be that all bodies set up by statute, are to be subject to the investigating power of the Ombudsman, regardless of their functions and whether satisfactory redress procedures exist under the statute. The Commission believes that this is undesirable.

15.77 Many statutory bodies and their staff are responsible for implementing government policy and are as much involved in "administration" as government departments and their officers. However, some statutory bodies may exercise particular functions and powers which are not suited to investigation by the Ombudsman. They may also have adequate redress procedures provided for under their Acts. We believe a better approach would be for the Constitution to make statutory bodies generally subject to the Ombudsman, unless Parliament by Act prescribes that a particular statutory body should not be. This would allow Parliament the discretion to exempt a particular statutory body on a case-by-case basis.

15.78 Apart from this modification, we favour the retention of existing offices and authorities which are made expressly subject to the investigating jurisdiction of the Ombudsman.

15.79 We also favour retaining a constitutional provision allowing Parliament to prescribe additional bodies and offices which are to be subject to investigation by the Ombudsman. Increasingly in Fiji and elsewhere, government administration is being carried out through the vehicle of private companies. The wording of the provision therefore should be broad enough to allow it to make provision for companies which exercise government functions but may not strictly fall within the existing term "authority or officer". In view of the complexity of this area, provision for these bodies should be made on a case-by-case basis in an Act of Parliament rather than by an all-encompassing provision in the Constitution itself.

Exempt offices and authorities

15.80 The proviso to subsection 135(2) at present exempts various offices from the purview of the Ombudsman. Paragraphs (i) to (iv) reproduce, with a small nominal amendment, the authorities and officers who were exempt from investigation under the 1970 Constitution.

15.81 Paragraph (i) of the proviso exempts the President and his personal staff from investigation by the Ombudsman. Under the Constitution, the President is vested with largely formal functions. In most cases, he is required to act on the advice of, and sometimes after consultation with, Ministers or other specified persons. Subsection 88(3) of the 1990 Constitution provides that the question of whether he has so acted cannot be inquired into in a court of law. In a few cases, he is vested with power to act in his own deliberate judgement. In none of these cases do we consider the President to be exercising administrative functions of

the type which should be investigated by the Ombudsman. This exemption should be retained. For similar reasons, we would add the President's Council to this exemption.

15.82 Under paragraph (ii) of the proviso, all constitutional commissions and their staff are also exempt. We understand this exemption to be an aspect of their freedom from direction or control guaranteed them by the Constitution. However, the Constitution guarantees this independence only in respect of their constitutional functions. Existing Commissions have constitutional responsibilities for electoral matters, the prerogative of mercy and for state service appointments. Elsewhere we propose the establishment of new commissions to deal with human rights, Parliamentary emoluments and the appointments of constitutional officers. We also propose that the Native Lands Commission should be given constitutional status.

15.83 Parliament has, by Act, vested further administrative functions and powers in some constitutional commissions. The commissions do not enjoy constitutional independence in respect of their statutory functions which are not directly related to their constitutional ones. As drafted, the present constitutional exemption applies to any function of a commission, regardless of whether it is a constitutional or statutory function. In our view, the existing exemption is too wide. We propose that the Constitution should provide that constitutional commissions and their staff may not be investigated by the Ombudsman in relation to the exercise of any of their constitutional functions and such of their statutory functions as Parliament may exempt by Act. This will mean that statutory functions will be subject to review, unless Parliament has taken a deliberate decision to exempt particular functions.

15.84 Paragraph (iii) exempts from investigation, all other persons and authorities in the exercise of appointing, disciplinary, removal or pension powers over state offices. The provision covers any case in which a service commission has delegated any such power. It also covers the powers of the Commissioner of Police over non-gazetted police officers which we discussed in Chapter 14. This Commission considers that given the nature of these decisions, they are not appropriate for investigation by the Ombudsman. In Chapter 14, we recommended that Parliament should once more be empowered to set up a system of appeals against personnel decisions in the civil service. We consider that such a system will provide adequate redress for personal grievances in that area.

15.85 The Director of Public Prosecutions and those acting under his or her instructions by paragraph (iv) of the proviso are also not subject to investigation

by the Ombudsman. In view of the functions of that constitutional officer, and his or her subordinates as well as the need for definitive, independent decisions on prosecutions, we propose that this exemption should be retained.

15.86 The 1990 Constitution introduced specific exemptions applying to the Bose Levu Vakaturaga, the Native Lands Commission, the Native Fisheries Commission, the Native Lands Trust Board, the "Rotuma Island Council" and the "Banaban Island Council". The new provisions were aimed at exempting the main statutory bodies which are established by and operate under the provisions of the various Acts which are entrenched by the Constitution. We understand that, in part, they reflected a sensitivity about the relationship between modern democratic institutions and procedures on the one hand, and traditional matters and the institutions that are charged with responsibility for them on the other.

15.87 The need for an express exemption of these bodies became necessary as a result of the extension, in 1990, of the Ombudsman's responsibilities to statutory bodies in general. We received submissions proposing that some or all of the exemptions should be done away with.

15.88 Earlier, in Chapter 9, we proposed that the Constitution should provide for the composition and main functions of the Bose Levu Vakaturaga. None of those functions is administrative. As such it should continue to be exempt from the purview of the Ombudsman.

15.89 In Chapter 17, we also propose that the Native Lands Commission should become an independent constitutional commission, and discuss its functions. In view of our recommendation above, it would, by reason of its status as a constitutional commission, remain exempt from the Ombudsman's jurisdiction. There should no longer be a need for any specific exemption.

15.90 We do not consider that the continuing exemption of the Native Lands Commission will cause injustice or hardship. In Chapters 8 and 10, we proposed that the status of any person as a 'Fijian' for political or other constitutional purposes, should no longer be certified or determined by the Native Lands Commission. This will mean that the Native Lands Commission will no longer have a decision-making role in national political matters. As before, their decision will principally affect only those directly involved in the issue considered. We believe that our proposals for a system of appeals under the Act and for judicial review which we make in Chapter 17, provide ample redress for those who might be directly affected by decisions of the Native Lands Commission.

15.91 The Native Fisheries Commission is constituted by section 14 of the Fisheries Act (Cap. 158). It is charged with investigating and recording the title to, and boundaries of, customary fishing rights. The Act provides for appeals to an appeals tribunal by "any person aggrieved by any decision of the Commission". As legislation affecting "Fijian customary rights", the provisions are entrenched by section 78(1) of the 1990 Constitution. Unlike the Native Lands Commission, the Native Fisheries Commission is at present subject to challenge through judicial review. We consider the Commission to be a quasi-judicial body. As such, and in view of the existing system of appeals as well as availability of judicial review, we propose that it should remain outside the purview of the Ombudsman.

15.92 We understand that the references in subsection 135(1) to the 'Rotuma Island Council' and the "Banaban Island Council" are intended to mean the Council of Rotuma and Council of Leaders established by the Rotuma Act (Cap. 122) and the Banaban Settlement Act (Cap. 123) respectively. The Councils exist for the purposes of the separate administration of the communities on those islands. Each is charged with the good government of their community. Although they have legislative and advisory functions, they also have administrative functions and powers like any other local government body. As with other such bodies, their administration should in principle be subject to the investigation by the Ombudsman. We therefore propose that they should no longer be exempt in respect of the exercise of their administrative functions.

15.93 Under the Native Land Trust Act (Cap. 134), the Native Land Trust Board has various functions and powers regarding the leasing of native land. The Board is the biggest landlord in Fiji and the Commission understands that there are also proposals for the Board to administer leases of various categories of state land. Unlike other bodies which we have just considered, the Native Land Trust Board deals directly with a wide section of the public and many of its functions may be described as administrative. The Commission believes that for the better protection of individuals and groups of individuals, whether landlords or tenants, the Board should be subject to investigation by the Ombudsman in discharge of its administrative functions.

Ombudsman's discretions

15.94 Chapter X of the 1990 Constitution gives the Ombudsman a number of discretions. Subsection 139(2) gives him or her the absolute discretion to determine whether to initiate, continue or discontinue any investigation. It specifically confers on the Ombudsman the discretion to decide whether a complaint has been duly

made in accordance with the constitutional requirements. As we noted above, the proceedings of the Ombudsman may not be challenged in court of law. The Ombudsman therefore has exclusive power to define his or her own jurisdiction. These discretions are essential to the independent and effective exercise of the Ombudsman's functions. They should continue to be provided for in the Constitution.

15.95 Subsections 135(6) and (8) set out the circumstances in which the Ombudsman should decline to investigate a complaint. Subsection (6) begins by prohibiting him or her from investigating a complaint if the person or persons aggrieved has or had a right of appeal, reference or review to a tribunal under statute or a right to take legal proceedings in a court of law. It then allows the Ombudsman to conduct an investigation if he or she is satisfied that in the circumstances the person or persons cannot or could not avail themselves of the right or remedy or if a breach of any individual right protected by Chapter 2 of the Constitution may be involved. Although the section appears to state a prohibition, in effect, it gives the Ombudsman a necessary discretion whether to investigate a complaint in these circumstances. This discretion is all the more necessary in view of the significant expansion, since 1970, of administrative law procedures and remedies, to almost all government action.

15.96 We agree with the principle behind this provision, that the Ombudsman exists as an adjunct to the courts and other special bodies established by Parliament to deal with citizen's complaints. He or she should not pre-empt or interfere with other redress or remedies unless there is very good reason. Good reason exists where individuals are unable, through no fault of their own, to obtain other redress or where there has been an alleged breach of the fundamental standards contained in the Bill of Rights. The Commission proposes that the Constitution should continue to contain these principles.

15.97 Under subsection 135(8), the Ombudsman also has a discretion to decline to investigate any complaint if he or she considers:

- that the complaint is frivolous or vexatious or trivial;
- that the person aggrieved has insufficient interest in the matter complained of; or
- that the complaint has been delayed without reasonable cause for more than twelve months.

15.98 These powers are similar to those exercised by courts of law in respect of

legal proceedings. They are necessary to prevent abuse of the Ombudsman's powers. In view of the general discretions which we propose should be retained in the Constitution, this particular provision, which does not in any way limit the Ombudsman's powers but rather only amplifies them, should be contained in the Ombudsman Act.

Other prohibited inquiries

15.99 Under subsection 135(7), the Ombudsman may not investigate any action which the Prime Minister certifies in writing was taken personally by a Minister in his or her own deliberate judgement. By definition, such action would not involve any state servant and is not of the type with which an Ombudsman is traditionally concerned. Rather, redress lies through the political and Parliamentary processes and the rules regarding ministerial responsibility. Redress may also be available under the proposed integrity code. We consider that the substance of this provision should be retained.

Information

15.100 Additional restrictions also apply because of provisions allowing certain types of information and documents to be withheld from or by the Ombudsman.

15.101 Section 137 gives the Ombudsman wide power to require any minister, member or officer of any department or authority or any other person who, in the Ombudsman's opinion, is able to do so, to disclose any information or produce any document relevant to any investigation. The Ombudsman is expressly given the powers of the High Court in relation to the attendance and examination of witnesses and the production of documents. Although qualified by subsequent provisions, under subsection 137(3), any law which otherwise prohibits a state servant from disclosing official information does not affect their duty to supply the Ombudsman with any information or document. These laws would include the Official Secrets Act. The section also disallows the state, in relation to any document or evidence, from making any claim of state privilege which it would normally be able to make in a court of law. As all of these provisions regulate the relationship between Ombudsman and the Government and give the Ombudsman powers to obtain necessary information, they should continue to be provided for in the Constitution.

15.102 Subsection 137(6) preserves the ability of individuals to claim before the Ombudsman, any other type of privilege available in a court of law. This is a necessary protection. We believe that individuals should be in no worse position

than they would be in a court of law. We propose, however, that as this does not deal with the Ombudsman's powers in respect of the Government, the Constitution should allow the privileges of individuals to be provided for by Act.

15.103 Under subsection 137(4), information and documents relating to the proceedings of the Cabinet or any sub-committee may not be supplied to the Ombudsman. The subsection provides that any certificate issued by the Secretary to the Cabinet, with the approval of the Prime Minister, shall be conclusive for this purpose. We addressed the matter of Cabinet confidentiality in Chapter 12. Because it relates to another constitutional provision and is a limitation on the Ombudsman's power in relation to the Government, this matter should continue to be provided for in the Constitution.

Disclosure of information

15.104 Subsection 137(5) deals with disclosure of information or documents by the Ombudsman and his or her staff. The provision authorises the Attorney-General to give notice to the Ombudsman that it would be contrary to the public interest in relation to defence, external relations or internal security if a specified document or information, or information or documents belonging to a specified class were disclosed. In that case, although the Ombudsman is entitled to have access to the information or documents, the Ombudsman and his or her officers are prohibited from disclosing such documents or information to any person for any purpose. The Commission recognises that the state may have legitimate reasons for not disclosing information or documents relating to these matters. The ability to restrain the disclosure of such information should be retained in the Constitution.

Procedure in respect of investigations

15.105 Section 136 of the 1990 Constitution provides the procedure the Ombudsman is to follow in carrying out any investigation. Subsection (1) requires the Ombudsman to put the allegations to the principal officer of the department or authority concerned as well as to any person who is alleged to have taken or authorised the action in question. These persons are to be given an opportunity to comment on the allegations. The provision enshrines the principle of natural justice that everyone against whom an adverse finding or decision may be made should have the right to be heard.

15.106 Subsection 136(2), in a complex way, provides that all investigations by the Ombudsman should be conducted:

- in private;

- in accordance with procedures required in the Constitution;
- in accordance with the procedure specified in any Act passed by Parliament under its special, limited authority to make supplementary and ancillary provisions not inconsistent with the Constitution;
- subject to the Constitution and any such Act, in the manner which the Ombudsman considers appropriate.

15.107 Subsection 136(2) also specifically empowers the Ombudsman to obtain information from any person in such manner as he or she sees fit and to make such enquiries. It also authorises the Ombudsman to allow a person to be represented by a barrister and solicitor or some other person during an investigation.

15.108 These are important matters but the Constitution should only provide that the Ombudsman has a discretion as to how information is to be obtained and how an investigation is to proceed. It should also provide for persons implicated in a complaint to have a general right to be heard by the Ombudsman on the complaint. All other matters contained in this section should be provided for by Act.

Annual reports

15.109 In order to fulfil his or her role as an officer of Parliament, the Constitution should continue to require the Ombudsman, in addition to periodic reports which might be needed, to make an annual report to the President concerning the discharge of his or her functions over the previous year. It should require that the report shall be laid before the Bose Lawa and the Bose e Cake.

Additional functions and size

15.110 Some of the submissions which proposed a constitutional code of conduct also proposed that the Constitution should vest the Ombudsman's office with responsibility for monitoring and investigating breaches of the code. Others suggested that the Ombudsman's office should be given constitutional responsibility for monitoring access to official information. In view of these expanded functions, the submissions proposed that the Ombudsman's office should become an Ombudsman Commission consisting of a Chief Ombudsman and two others.

15.111 Earlier we proposed that a detailed integrity code of conduct should be

authorities. We also said that a proper comparative study of relevant experience of other countries should first be carried out. We acknowledged, however, the possibility that the Ombudsman might be conferred with additional functions under that Act. Later we also comment on the possibility of an Act giving the Ombudsman a role in access to official information.

15.112 In order to provide the necessary flexibility, and to cater for possible future growth in the number of complaints of maladministration made to the Ombudsman, the Constitution should provide for the existence of at least one office of Ombudsman, but expressly allow Parliament to establish other offices of Ombudsman by Act. It should also empower Parliament, in the event that other offices of Ombudsman are established, to provide by Act for the designation of one of them as the Chief Ombudsman responsible for the administration of the office and the co-ordination and allocation of the work between the Ombudsmen. The Constitution should also provide that subject to this, all powers and privileges conferred on the Ombudsman by the Constitution apply equally to each Ombudsman.

15.113 We do not propose that an Ombudsman Commission be established. Commissions are usually required to act collectively. We envisage that if any additional office of Ombudsman is established, the holder will act individually in respect of any complaint which he or she is investigating. This is no different from the manner in which High Court Judges consider most matters which come before them.

Appointment of Ombudsman

15.114 Subsection 134(2) of the 1990 Constitution provides that the Ombudsman is to be appointed by the President acting on the advice of the Prime Minister and in consultation with the Leader of the Opposition and those persons who appear to the President to be leaders of parties in the House of Representatives. The procedure reflects the Ombudsman's role as an officer of Parliament.

15.115 In Chapter 14, we recommended that the Constitution should provide for a Constitutional Offices Commission with responsibility for appointing the various constitutional officers. We discuss the reasons for and functions of that Commission in the next section of this Chapter. In Chapter 11, we also proposed the introduction of a system of sector standing committees of the Bose Lawa. In view of these recommendations, we also propose a change in the way in the

view of these recommendations, we also propose a change in the way in the Ombudsman is appointed.

15.116 We propose that the President should continue to appoint the Ombudsman but on the recommendation of the Constitutional Offices Commission, and with the concurrence of the Prime Minister and the approval of the sector standing committee of the Bose Lawa responsible for matters relating to administrative services.

15.117 In procedural terms, the Constitutional Offices Commission would be initially responsible for making a recommendation to the Prime Minister. The Prime Minister will be able either to concur in the recommendations or ask the Commission to reconsider its recommendation. In the event that the Prime Minister concurs, the recommendation should be placed before the sector standing committee. The committee will have authority only to approve or disapprove the recommendation. If approved, the Prime Minister would advise the President to make the appointment, but if the recommendation is not approved, the Constitutional Offices Commission would have to make a fresh recommendation.

15.118 This proposal follows with necessary modifications our earlier proposal in Chapter 13 for the appointment of judges. The principles regarding the scrutiny by the sector standing committee which we mentioned there would also apply in this case.

15.119 We are confident that the purpose behind the existing requirement to consult party leaders will be adequately catered for by sector standing committee.

15.120 When the office of Ombudsman is vacant, or if the holder of the office is for any reason unable to perform his or her functions, the Constitution should authorise the President to make an acting appointment on the recommendation of the Constitutional Offices Commission and with the concurrence of the Prime Minister tendered after the Prime Minister has consulted the Leader of the Opposition.

15.121 In order to avert the possibility of an acting appointee continuing for an indefinite period, we propose that only a superior judge should be qualified to be appointed to act as Ombudsman when the office is vacant. We see this as a way of ensuring that a recommendation for a substantive appointment is submitted to the sector standing committee in a timely manner.

Qualification and disqualifications for appointment

15.122 Under subsection 134(3) of the 1990 Constitution, a person is not qualified

to be appointed Ombudsman if he or she is a member of either House of Parliament or of any local authority, a candidate for election as a member of the House of Representatives nominated with consent, or a local government officer. Subsection 134(5) further provides that the Ombudsman shall vacate his office if any of these circumstances arises while holding office.

15.123 These qualifications are designed to ensure that the Ombudsman is non-partisan. We consider them necessary and propose that they should be retained in the Constitution.

15.124 Subsection 134(4) provides that the Ombudsman shall not *perform* the functions of any other public office. It also provides that the Ombudsman may not, without the approval of the Prime Minister, *hold* any other office of emolument or engage in any occupation for reward outside the duties of the office of Ombudsman.

15.125 These provisions are necessary to ensure that in receiving any complaint regarding any department or authority, the Ombudsman does not face a conflict of interest. The discretion vested in the Prime Minister allows for situations in which the person appointed to be Ombudsman may hold a concurrent appointment, for example as a judge, which it is not considered necessary to relinquish. The prohibition on performing another office's functions means that the Ombudsman can continue to hold the concurrent appointment, but must be devoted exclusively to the duties of Ombudsman. We propose that these provisions should be retained in the Constitution.

15.126 At present, the Constitution does not provide any affirmative qualifications, nor does it prescribe any retiring age. The Commission considers that this arrangement should continue. We are confident that the procedure which we propose will ensure that a person of appropriate calibre and ability will be appointed.

15.127 In the next section of this Chapter, we deal with the constitutional principles and rules relating to removal from office and other terms of office, salaries and resources, which should apply equally to Ombudsman and all other constitutional offices.

RECOMMENDATIONS

510. The Ombudsman Decree, 1987 should be repealed.

511. The office of Ombudsman should continue to be established

by the Constitution.

512. It should continue to provide that the Ombudsman shall not, in the exercise of his or her constitutional functions, be subject to the direction and control of any other person or authority.

513. The Constitution should continue to provide that no proceedings of the Ombudsman in exercise of constitutional functions shall be called in to question in any court of law.

514. The Constitution should state the Ombudsman's functions in clear terms. It should provide that it is a function of the Ombudsman to investigate any decision or recommendation made, or any act done or omitted by any officer or authority (to whom the power to investigate applies), in the exercise of the administrative functions of that officer or authority and affecting any person or body of persons, whether incorporated or not, in his or her or its personal capacity. In substance, it should not allow complaints to be initiated by government bodies which are presently disqualified.

515. The existing requirement that private persons must have suffered injustice as a consequence of an administrative act before their complaint can be investigated should not be retained. The Constitution should allow personal complaints to be investigated if the person or persons are "affected" by an administrative action.

516. It should continue to require that private complaints must be lodged by a person or persons affected, but should allow the Ombudsman a discretion to investigate on the complaint of another if the person or persons affected cannot for any reason act for themselves. Parliament should continue to be authorised by the Constitution to make provision allowing individuals' complaints to be made on their behalf by a member of Parliament.

517. The provisions contained in subsection 135(5), under which the Ombudsman cannot investigate a complaint unless the aggrieved person is (or was at the time of death), resident in Fiji or the complaint relates to action taken in relation to the complainant while he or she was in Fiji or in relation to rights or obligations that accrued or arose in Fiji should be done away

with.

518. The Constitution should continue to provide that the Ombudsman may investigate any action taken by an officer or authority in the exercise of administrative functions, if invited to do so by a member of either House of Parliament or on the Ombudsman's own motion. The Constitution should specifically allow investigations to take place on the invitation of a sector standing committee or any other committee of Parliament. It should allow the Ombudsman to report to the person or body at whose invitation an investigation was commenced.

519. The Constitution should continue to require the Ombudsman to find that the action, omission, decision, recommendation or practice investigated was either:

- **contrary to law;**
- **based wholly or partly on a mistake of law or fact;**
- **unreasonably delayed; or**
- **otherwise unjust or manifestly unreasonable,**

before being able to state an opinion and make recommendations.

520. When the Ombudsman makes a finding referred to in the previous recommendation, the Constitution should, in respect of any matter investigated, continue to empower him or her to give the relevant principal officer an opinion:

- **that the matter should be given further consideration;**
- **that the omission should be rectified;**
- **that the decision should be cancelled, reversed or varied;**
- **that any practice on which the act, omission, decision or recommendation was based should be altered;**
- **that any law on which the act, omission, decision or recommendation was based should be altered;**
- **that any law on which the act, omission, decision or recommendation was based should be reconsidered;**

- **that reasons should have been given for the decision; or that any other steps should be taken.**

521. **The Ombudsman should continue to be empowered to request the principal officer of the relevant department or authority to notify the Ombudsman within a specific time of the steps proposed to be taken or which have been taken. The Constitution should also empower the Ombudsman to make a report to both Houses of Parliament, if after a reasonable time, no adequate and appropriate remedial action appears to have been taken. Before so doing, the Ombudsman should be required to consider the comments of the relevant department or authority.**

522. **The requirement that the Ombudsman must send a copy of his or her opinion and recommendations to the Prime Minister and to any other Minister concerned should be retained in the Constitution.**

523 **Subject to the next recommendation, in substance, the existing offices and authorities which are made expressly subject to the investigating jurisdiction of the Ombudsman should be retained.**

524 **The Constitution should make statutory bodies subject to the Ombudsman, but should allow Parliament by Act to exclude a statutory body.**

525 **The Constitution should continue to allow Parliament to prescribe additional bodies and offices which are to be subject to investigation by the Ombudsman. The wording of the provision should be broad enough to provide for companies which exercise government functions but which may not strictly fall within the existing term "authority or officer".**

526 **The following persons and authorities should be exempt from investigation by the Ombudsman:**

- **The Bose Levu Vakaturaga;**
- **The President and his personal staff;**
- **The President's Council;**
- **All constitutional commissions, (including the Native Lands Commission) in the exercise of their**

constitutional functions and such of their statutory functions as Parliament by Act may prescribe;

- **All other persons and authorities in the exercise of appointing, disciplinary, removal or pension powers over state offices;**
- **The Native Fisheries Commission;**
- **The Director of Public Prosecutions.**

527. The Native Land Trust Board, Council of Rotuma and Council of Leaders on Rabi Island should no longer be exempt in respect of the exercise of their administrative functions.

528. The Constitution should continue to give the Ombudsman the absolute discretion to determine whether to initiate, continue or discontinue any investigation. It should also confer the Ombudsman with the discretion to decide whether a complaint has been duly made in accordance with the constitutional requirements.

529. The Constitution should provide that if the person or persons aggrieved has or had a right of appeal, reference or review to a tribunal under statute or a right to take legal proceedings in a court of law, the Ombudsman shall not proceed to investigate their complaint unless satisfied that the person or persons cannot or could not avail themselves of the right or remedy or that a breach of any individual right protected by Chapter 2 of the Constitution may be involved.

530. The Ombudsman's existing discretion to decline to investigate any complaint which he or she considers frivolous or vexatious or trivial, or where he considers that the person aggrieved has insufficient interest in the matter complained of, or where the complaint has been delayed without reasonable cause for more than twelve months should be provided for in an Act.

531. The Constitution should continue to provide that the Ombudsman may not investigate any action which the Prime Minister certifies in writing was taken by a minister acting in his or her own deliberate judgement.

532. The Constitution should continue to give the Ombudsman wide power to require any minister, member or officer of any department or authority or any other person who in the Ombudsman's opinion, is able to do so, to disclose any

information or produce any document relevant to any investigation.

533. It should continue to give the Ombudsman the powers of the High Court in relation to the attendance and examination of witnesses and the production of documents.

534. The Constitution should also continue to provide that any law which otherwise prohibits a state servant from disclosing official information does not affect their duty to supply the Ombudsman with any information or document.

535. The Constitution should continue to disallow the state from making, in relation to any document or information required by the Ombudsman, any claim of state privilege which might normally apply in a court of law.

536. The Constitution should authorise Parliament to provide in an Act for the ability of individuals to claim before the Ombudsman any other type of privilege available in a court of law.

537. The Constitution should continue to provide that information and documents relating to the proceedings of the Cabinet or any sub-committee of the Cabinet may be withheld from the Ombudsman following certification by the Secretary to the Cabinet, acting on the advice of the Prime Minister.

538. It should continue to authorise the Attorney-General to give notice to the Ombudsman that it would be contrary to the public interest in relation to defence, external relations or internal security if a specified document or information, or information or documents belonging to a specified class were disclosed. It should provide that in these circumstances those matters cannot be disclosed by the Ombudsman or his or her officers.

539. The Constitution should provide that the Ombudsman has a discretion as to how information is to be obtained and how an investigation is to proceed.

540. It should also provide for persons implicated in a complaint to have a general right to make comments to the Ombudsman on the complaint.

541. The Constitution should no longer provide for the other procedural matters contained in section 136. These should be

provided for by Act.

542. The Constitution should continue to require the Ombudsman to make an annual report to the President concerning the discharge of his or her functions, and to require that the report shall be laid before the Bose Lawa and the Bose e Cake.

543. In order to provide necessary flexibility, the Constitution should provide for the existence of at least one office of Ombudsman but expressly allow Parliament to establish other offices of Ombudsman by Act. The Constitution should also provide that, in the event that other offices of Ombudsman are established, Parliament should provide for the designation of one of them to be Chief Ombudsman responsible fort h e administration of the office and the co-ordination and allocation of the work between the Ombudsmen. The Constitution should also provide that subject to this provision for the Chief Ombudsman, all powers and privileges conferred on the Ombudsman by the Constitution apply equally to each Ombudsman.

544. The President should continue to appoint the Ombudsman. He or she should do so on the recommendation of the Constitutional Offices Commission, with the concurrence of the Prime Minister and the approval of the sector standing committee of the Bose Lawa responsible for matters relating to administrative services.

545. If the office of Ombudsman is vacant or the holder of the office is for any reason unable to perform his or her functions, the Constitution should authorise the President to make an acting appointment on the recommendation of Constitutional Offices Commission and with the concurrence of the Prime Minister, tendered after the Prime Minister has consulted the L e a d e r of the Opposition.

546. The Constitution should provide that only a judge of a superior court may be appointed to act as Ombudsman when the office is vacant.

547. The existing disqualifications for appointment should also be retained.

548. The existing provisions that the Ombudsman shall not perform

the functions of any other public office and that the Ombudsman may not, without the approval of the Prime Minister, hold any other office of emolument or engage in any occupation for reward outside the duties of the office of Ombudsman should be retained.

THE AUDITOR-GENERAL

Functions

15.128 Section 148 of the Constitution establishes the office of the Auditor-General as a public office and provides for its constitutional powers and functions. It is another vital part of the constitutional system for securing ethical and accountable government. Generally, the Auditor-General's function is to ensure accountability for public money and other property entrusted to all branches of the government.

15.129 Subsection 148(2) of the 1990 Constitution sets out the constitutional function of the Auditor-General. He or she is required to audit and report on "the public accounts of Fiji and of all courts of law, all authorities and officers of the Government". These include the accounts of statutory bodies other than those which, under an Act, are to be audited and reported on by some other person. Potentially, the Auditor-General's powers extend to all government spending, whether by ministers or state servants, the courts, the legislature or other agencies of government. Currently, the Auditor-General examines the accounts of all ministries and departments, city and town councils, rural local authorities, drainage boards, the Fijian Affairs Board, provincial councils and twenty-one of the existing thirty-one statutory authorities.

15.130 The Audit Act (Cap. 70) sets out the Auditor-General's actual duties. Section 6 of the Act requires him or her, on behalf of the Parliament, to inquire into and audit government accounts in the manner he or she deems necessary. It requires the Auditor-General to ascertain whether:

- the accounts have been faithfully and properly kept;
- all reasonable precautions have been taken to safeguard the collection of public moneys and that the laws, directions or instructions relating to them have been duly observed;
- expenditure has been properly authorised and applied to the purpose for which funds were appropriated by Parliament and has been otherwise properly accounted for; and that the regulations and

procedures applied are sufficient to secure an effective control over expenditure and that it has been incurred with due regard to economy and avoidance of waste and extravagance;

- adequate stores regulations and procedures have been made to ensure the proper receipt, issue and custody of stores and other property of whatsoever nature and that such regulations have been duly observed; and
- the provisions of the Constitution and Finance Act (Cap 69) and of any other law relating to money and stores subject to audit have been in all respects complied with.

15.131 Under the Act, the Minister responsible for finance may also require the Auditor-General to carry out any special audit which the Minister considers desirable in the public interest. The Auditor-General is also empowered at any time, on his or her own volition, to make to the Minister, for presentation to Parliament a special report on any matter incidental to the powers and duties under the Act.

15.132 The constitutional provisions do not specify any time-frame for the exercise of the Auditor-General's functions. In particular, the Constitution does not link the Auditor-General's functions with the annual Parliamentary authorisation procedures required by the Constitution which we review in Chapter 16 . A link is provided for under section 12 of the Audit Act (Cap. 70). Under that section, the Auditor-General is required to prepare and transmit to the minister responsible for finance, within 8 months of the end of each financial year (or longer, if a Parliamentary resolution permits), a report upon his or her examination and audit of all accounts relating to public moneys and property.

15.133 In view of the critical importance of the Auditor-General, the Constitution should continue to establish that office and state its basic functions. However, we consider that the Constitution would be improved if the Auditor-General's functions were specified in more detail, expressly linking them to the system of annual authorisation of spending. We consider that the constitutional statement of functions should go beyond accounts and also reflect the Auditor-General's role in relation to the control of public money and property.

15.134 We propose that the Constitution should provide that, at least once every financial year, the Auditor-General shall inspect and audit and report to Parliament on the:

- the public accounts of Fiji;

- the control of public money and property of Fiji;
- all transactions with or concerning public money or property of Fiji.

15.135 It should also require the Auditor-General to ascertain whether all transactions with or concerning public money or property have been authorised by or under the Constitution and any applicable law, and that all expenditure has been applied to the purpose for which it was authorised.

15.136 The provision should be drafted in a way which covers all branches, departments, agencies and instrumentalities of the Government, but should continue to allow statutory bodies to be exempted by Act.

Audit of state-owned companies

15.137 At present, the Auditor-General is not required to audit the accounts of any of the twelve incorporated companies in which the Government holds shares. These accounts are audited by professional accountants in the private sector appointed by the companies' boards. In his submission to the Commission, the Auditor-General pointed out that under present arrangements the accountability of such boards to Parliament is not assured as their auditors are not required to report to Parliament. The Auditor-General sought the constitutional power to review the audits of these private sector auditors and to report his findings to Parliament.

15.138 The Commission agrees with the principle that all public investment must be subject to Parliamentary scrutiny. We also agree that an accurate and full picture of the state of public finances is vital in a democratic society. However, the relative size of the Government's investments varies from company to company. Some companies are wholly-owned by the Government while in others it has only a small share. Some are owned through the intermediary of statutory corporations or as subsidiaries of another government-owned company. Again there is also great variety in the form of government investment in companies. Besides the investment of public money in the form of shares, the Government may also invest by lending money or may commit public money by issuing guarantees to lending institutions.

15.139 The principle that Parliament should be as fully informed as possible of all activities involving public money must also be balanced against the need for public enterprises to maintain their competitiveness in the marketplace. This competitiveness will in part depend on their ability to keep some details of their

financial status and activities confidential.

15.140 Given these complexities, the Commission believes that if the Auditor-General is to be given these additional functions it should be by an Act of Parliament. We recommend however that the Constitution provide that the Auditor-General shall have such additional functions and powers as may be prescribed by an Act of Parliament. This provision would authorise Parliament by Act to confer on the Auditor-General the function of conducting modern forms of audits such as efficiency audits and value-for-money audits.

Independence

15.141 Subsection 128(4) provides that in the exercise of his or her constitutional functions, the Auditor-General shall not be subject to the direction or control of any other person or authority. This independence is vital for the effective discharge of this office's functions. The Constitution should continue to contain this provision.

Access to Records, etc

15.142 To enable the Auditor-General to fulfil his or her constitutional functions, section 148(2) of the 1990 Constitution gives him or her and any other person authorised by the Auditor-General, access to all "records, books, vouchers, documents, cash, stamps, securities, stores or other government property in the possession of any officer". This is a necessary power that should be retained in the Constitution.

Reporting

15.143 Subsection 148(3) of the 1990 Constitution requires the Auditor-General to submit his or her reports to the Minister responsible for finance who in turn is required to cause them to be laid before each House of Parliament. Section 148 does not prescribe any time within which the Minister is required to table the reports in Parliament. Section 12 of the Act, however, requires the Minister to lay a report before Parliament within thirty days of receiving it or, if Parliament is not then in session, at its next meeting.

15.144 The section also authorises the Auditor-General "at any time, if he considers it desirable" to transmit a special report on any matter incidental to his or her powers and duties under the Act to the Minister "for presentation in like manner to Parliament".

15.145 The Commission proposes that the Constitution should continue to provide that the Auditor-General shall submit every report made in pursuance of constitutional functions to the Minister responsible for finance. In addition, it should require the Minister to lay the reports before Parliament within thirty days or, if Parliament is not then in session, at its next meeting. The Constitution should also require the Minister, if so required in any other special report of the Auditor-General, to lay that report before Parliament within the same period.

15.146 We received submissions proposing that the Constitution should provide that if the Minister fails to comply with the requirement to lay a report before the Parliament, the Auditor-General should be able to submit his report to the chairperson of the Public Accounts Committee. We do not think that this is necessary. In the very unlikely event that a Minister might not wish to lay a report before Parliament, the Auditor-General's ability to take or threaten court proceedings against the Minister, should ensure that this constitutional duty is fulfilled.

Appointment of Auditor-General

15.147 Earlier we made recommendations for the procedure to be followed in appointing the Ombudsman. As the Auditor-General is also an officer of the Parliament, we propose that the same procedure should apply, with modifications, to appointments to this office.

15.148 The Constitutional Offices Commission should have power to make recommendations for appointment. In this case, the concurrence of the Minister responsible for finance will be necessary. Similarly, it would be the sector standing committee of the Bose Lawa responsible for public accounts which would have the power to approve or reject a recommendation.

Acting appointments

15.149 In the event of a vacancy or the officeholder not being able to perform the office's functions, acting appointments should be made in the same way as a substantive appointment.

RECOMMENDATIONS

549. The Constitution should provide that the Auditor-General, at least once every financial year, shall inspect and audit, and report to Parliament on:

(a) the public accounts of Fiji;

(b) the control of public money and property of Fiji;

(c) all transactions with or concerning public money or property of Fiji.

It should also require the Auditor-General to ascertain whether all transactions concerning public money or property have been authorised by or under the Constitution and any applicable law, and that all expenditure has been applied to the purpose for which it was authorised.

550. The provision should be drafted in a way which covers branches, all departments, agencies and instrumentalities of the Government. It should continue to allow statutory bodies to be exempted by Act.

551. The Constitution should allow the Auditor-General to have such additional functions and powers as may be prescribed by an Act of Parliament.

552. The Constitution should continue to provide that the Auditor-General shall not be subject to the direction or control of any other person or authority.

553. It should confer on the Auditor-General and on any other person he or she authorises, access to all records, books, vouchers, documents, cash, stamps, securities, stores or other government property.

554. The Constitution should continue to provide that the Auditor-General shall submit every report made by him or her in pursuance of the constitutional functions to the Minister responsible for finance.

555. It should, in addition, require the minister to lay the reports before Parliament within thirty days or, if Parliament is then not in session, at its next meeting.

556. The Constitution should also require the Minister, if so required in any other special report of the Auditor-General, to lay that report before Parliament within the same period.

557. The Auditor-General should be appointed by the President acting on the recommendation of the Constitutional Offices Commission, and with the concurrence of the Minister responsible for finance and the approval of the sector standing committee of the Bose Lawa responsible for public accounts.

558 In the event of a vacancy in the office of Auditor-General or the officeholder not being able to perform the office's functions, acting appointments should be made in the same way as a substantive appointment.

MEASURES TO SECURE INDEPENDENCE

Constitutional Office Holders

15.150 In this section, we examine and make recommendations on appropriate provisions to secure independence for all independent constitutional office holders. As well as the Ombudsman and the Auditor-General, the 1990 Constitution also establishes the office of Director of Public Prosecutions and the Supervisor of Elections as independent constitutional offices. In addition, the Constitution gives the Commissioner of Police independence in regard to the use and operational control of the Police Force. In Chapter 12 , we proposed that the Solicitor-General should also be conferred with independence in respect of the politically sensitive functions of that office.

15.151 Where independence presently exists, it is conferred by an express statement in the provisions dealing with the particular officer, that in the exercise of all or particular constitutional functions, he or she "shall not be subject to the direction and control of any other person or authority". Under section 158 of the Constitution, apart from the proceedings of the Ombudsman, this independence is subject to the court's power to determine whether the independent officer has performed the protected functions in accordance with the Constitution and the law, or should not perform those functions.

15.152 In addition to this express grant of freedom from direction or control, the 1990 Constitution provides for additional measures to ensure the holders of the independent offices are insulated from certain kinds of political or other pressures which may cause their independence to be compromised.

15.153 It does so by providing special appointment and removal procedures as well as special provisions for terms and conditions of office including salaries.

Appointment

15.154 All constitutional offices, other than the Ombudsman, are at present appointed by one or other of the existing service commissions. As we explained in Chapter 14, service commissions exist in order to ensure that appointments to the state services are made on an impartial, non-partisan basis. In that chapter, we also recommended that the Constitution should establish a new service commission to be called the Constitutional Offices Commission. As its name indicates, the new Commission should have responsibility for the appointment and removal of persons holding constitutional office.

15.155 This proposal is in response to a number of submissions which sought the establishment of a special body to make appointments to existing independent constitutional offices as well as some others. All of the offices were perceived as exercising important state functions and powers, which require special protection from political interference. We agree that the nature and status of these offices warrant different treatment from other offices in the state services and see a separate Constitutional Offices Commission as reinforcing the independent nature of these offices.

Constitutional Offices Commission

15.156 The Commission should comprise a chairperson and two other members. Members should be subject to the general disqualifications and appointing procedure that we recommended in Chapter 14 as applicable to all service commissions. We do not propose specific constitutional qualifications but we envisage that the Chairperson and all members should be eminent people with significant experience in the public or private sector. They should be persons of high integrity with a record of distinguished service to the community.

Appointing functions

15.157 In addition to responsibility for recommending persons for appointment as Ombudsman and Auditor-General, we proposed in Chapters 10, 11 and 12, that subject to specified consultations, the Constitutional Offices Commission should have constitutional responsibility for making appointments to the following offices:

- The Solicitor-General;
- The Director of Public Prosecutions;
- The Secretary-General to Parliament;
- The Supervisor of Elections; and
- The Commissioner of Police.

15.158 We here propose that it should also have responsibility for appointing the Governor of the Reserve Bank of Fiji.

15.159 We include the Governor of the Reserve Bank because we received a number of submissions seeking an impartial way of making appointments to that office, which would ensure that the appointee is independent. The Reserve Bank, and its Governor in particular, are conferred with important functions which, in

the interests of Fiji's financial system and its economy, must be exercised in an independent manner.

15.160 In exercising its powers over the office of the Governor of the Reserve Bank, the Commission should be required by the Constitution to consult the minister responsible for finance and the Board of the Reserve Bank.

15.161 In view of our proposal that the Governor of the Reserve Bank should be appointed by the Constitutional Offices Commission, we also propose that the Constitution should contain a provision establishing that position. It should not provide that it is a "public office". This will mean that the Governor should remain an employee of the Reserve Bank rather than become a state servant. The existing qualifications for, and tenure of, this office should remain provided for under the Reserve Bank Act (Cap. 210).

15.162 We propose that the Act should provide that the Deputy Governor should perform the Governor's functions when there is a vacancy or an inability to perform the functions of office. If an acting appointment is considered necessary, the Act should also empower the Constitutional Offices Commission, with the concurrence of the Minister responsible for finance, to appoint a member of the Board to act as Governor.

Disciplinary control

15.163 As a general rule, apart from their power to appoint and remove, service commissions are conferred with responsibility for exercising disciplinary control over the holders of offices to which they may make appointments. The term, "disciplinary control" refers to the power to punish officeholders for minor infractions not serious enough to deserve removal. At present, no commission exercises disciplinary control over independent constitutional officeholders.

15.164 The possibility of disciplinary control has the potential to compromise these officeholders' independence. In view of the importance of these offices, and also the appointing procedure which we recommend, this Commission envisages that only persons of high personal integrity will be appointed. We therefore do not believe it is necessary to vest responsibility for disciplinary control in the Constitutional Offices Commission.

Removal

15.165 The Constitution contains various provisions governing the removal of independent constitutional offices.

15.166 Subsections 134(6) and section 130 of the 1990 Constitution, when read together provide that the Ombudsman may only be removed from office for "inability to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour". They provide an exclusive procedure for such removal.

15.167 If the President, acting in his own deliberate judgement, considers that the Ombudsman should be removed for either reason, he or she must appoint a tribunal to investigate the matter. The tribunal must consist of a chairperson and two other members, all of whom must hold or have held high judicial office in Fiji or any other country prescribed by Parliament. The tribunal is required to inquire into the facts and to advise the President whether or not the Ombudsman should be removed.

15.168 The provisions authorise the President to suspend the Ombudsman while the tribunal investigates and to revoke the suspension at any time. It is automatically revoked if the tribunal advises the President that the Ombudsman should not be removed.

15.169 Similar procedures apply for the removal of the Supervisor of Elections, the Director of Public Prosecutions and the Auditor-General under section 131 of the 1990 Constitution. In their cases, the service commissions which appointed them, exercise the various powers after first consulting the Prime Minister. The tribunals to consider the removal of these officers should comprise a minimum of three persons with judicial office or experience.

15.170 There is no purpose in providing for independent constitutional offices if they can be easily dismissed and replaced. We therefore recommend that the existing limited grounds and procedure for removing these officeholders should be retained and extended to all officers appointed by the Constitutional Offices Commission. We propose, however, that in expressing the ground of misbehaviour, the Constitution should make a link with the integrity code proposed above.

15.171 The Constitution should provide that the Constitutional Offices Commission shall have power to remove all constitutional officers. It should exercise the removal powers, at present, vested in the various service commissions and in the President.

15.172 Except in relation to the Governor of the Reserve Bank and the Secretary-General to Parliament, the Commission should be required to act after consulting

the Prime Minister. In addition, when exercising the power to remove the Solicitor-General and the Director of Public Prosecutions, the Commission should consult the Attorney-General. Before exercising its powers over the Ombudsman and the Auditor-General, the Commission should in addition to the Prime Minister consult the Leader of the Opposition .

15.173 Before exercising any of its removal powers over the Governor of the Reserve Bank, the Commission should consult the Minister responsible for finance as well as the Board of the Bank. In the case of the Secretary-General to Parliament, the Speaker and the President of the Bose e Cake should be consulted.

Tenure in office

15.174 The 1990 Constitution makes various provisions affecting the tenure of existing independent constitutional offices. Subsection 134(5)(a) gives the Ombudsman a fixed term of four years in office. The holder of that office may however be re-appointed for the same term in accordance with the general rule contained in section 153(1). Subsection 95(1) provides that the Commissioner of Police is to be appointed for a fixed term of five years but the Constitution is not clear whether the holder of this office may be re-appointed under the general rule.

15.175 Section 151 of the Constitution allows appointments of the Supervisor of Elections, the Director of Public Prosecutions and the Auditor-General to be made for a fixed term of *not less* than four years. These officers may therefore be appointed for a longer, or indefinite, term.

15.176 Under section 131(1) of the 1990 Constitution, the Supervisor of Elections, the Director of Public Prosecutions and the Auditor-General are required to retire at the age of fifty-five. The provision, however, allows the President, after consultation with the Prime Minister and the Public Service Commission, to permit the Auditor-General to continue in office for an additional six months to finish off any audits or reports which are still in progress.

15.177 The 1970 Constitution had provided for a retiring age of sixty years for these offices. It would seem that the reduction in the retiring age was to bring it into line with the general retiring age for all other civil servants. This general retiring age is not prescribed in the Constitution but is contained in a statute and can be easily amended.

15.178 Another change made by the 1990 Constitution was a new provision allowing the relevant Commission to re-appoint any of these officers after

retirement "for such period as it sees fit". The fact that re-appointments can occur means that the existing retirement age is not a strict one. It would seem that post-retirement re-appointments are not subject to the minimum term of four years. We consider that both aspects of this provision give great potential to compromise an officeholder's independence.

15.179 This Commission has seriously considered the question of the appropriate period of tenure for independent constitution officeholders. We have come to the conclusion that it is not desirable to all constitutional officeholders to have unlimited tenure in their office. We consider that periodically the body which appointed them should review their suitability for the position. We have sought to balance this principle with the recognition that these persons require reasonable security of tenure to be able to perform their functions independently.

15.180 We therefore propose that all constitutional officeholders appointed by or on the advice of the Constitutional Offices Commission should be appointed for fixed terms of five years but should be eligible for re-appointment.

15.181 We are aware that the combination of a fixed term of five years and a compulsory retirement age of fifty-five years may be unfair. This would occur if a person became eligible for appointment or re-appointment to one of these offices after he or she had turned fifty-one years but before fifty-five years. Our recommendation for fixed term appointments would mean that such a person could not be appointed or re-appointed.

15.182 One way of dealing with this potential problem would be to allow, in these circumstances only, a shorter contractual period ending on the day on which the person must retire. But this would be inconsistent with the principle that officeholders must have reasonable tenure in office.

15.183 We therefore propose the Constitution should no longer provide any retiring age for constitutional officers. We believe that the need to maintain consistency with the retiring age applying to the civil service should be given appropriate weight by the Constitutional Offices Commission when considering any appointment or re-appointment.

15.184 In view of the nature of the Auditor-General's functions and the time that an audit may take to complete, we also propose that the Constitution should allow the Constitutional Offices Commission, acting after consultation with the Prime Minister and the Minister responsible for finance, to permit the Auditor-

General to continue in office for a period not exceeding six months after the expiry of any contract.

Delegation

15.185 At present, the various commissions which appoint or remove independent constitutional officers may not delegate these powers. Similarly, the Constitutional Offices Commission should have no power to delegate.

Guaranteed Remuneration

15.186 The power to increase, reduce or withhold remuneration levels of any independent officeholder gives the person or authority holding that power the ability to influence the officeholder. This might undermine the ability of the officer to act independently.

15.187 Section 146 of the 1990 Constitution therefore provides that the salaries and allowances payable to independent officeholders must be prescribed by Act of Parliament. As we explain in Chapter 16, these salaries are "charged on the Consolidated Fund". This means that once fixed, unlike other expenditure, payment of these salaries does not require any further approval by Parliament.

15.188 These rules ensure that the salaries and allowances are set in an open and accountable way and cannot be used as a means to influence or victimise officeholders. We propose that they should continue to be provided in the Constitution. They should apply to the Ombudsman, Director of Public Prosecutions, the Auditor-General, the Solicitor-General, the Secretary-General to Parliament, the Commissioner of Police and the Supervisor of Elections. We do not include the Governor of the Reserve Bank because this office is not a public office. As such, the salary and allowances payable to the holder of this office are not paid out of the Consolidated Fund.

15.189 Under subsection 146(3), an individual officeholder's salary and terms and conditions of employment cannot be altered to his or her disadvantage during tenure in office. This means that if Parliament or another body exercises its power to reduce salaries and allowances, it cannot affect the holder of an office and will only take effect on a new appointment. This protection should apply to all the constitutional officers including the Governor of the Reserve Bank.

Guarantee of Resources

15.190 In Chapter 15, we have made recommendations regarding the exercise of the Public Service Commission's powers over the staff of the Ombudsman and the Auditor-General.

15.191 The Commission received some submissions proposing that the Constitution contain a general provision guaranteeing all independent constitutional officeholders control over the levels of staff and other resources so that they are able to perform their constitutional functions with effective independence. The submissions saw the Government's power to allocate resources as a potential means of thwarting the effectiveness and independence of these officers.

15.192 The Commission considered this question very carefully. It concluded that a constitutional provision to that effect would not be practical. At any one time, there are always competing priorities for the allocation of financial resources between the various activities and departments of the Government. There is also a similar competition for skilled human resources. These are matters of policy. In our view, the Government must have the ability, subject to Parliamentary approval, to decide how limited national resources are to be allocated.

15.193 Any constitutional guarantee in this area would necessarily have to be in broad terms. In many countries which have such general constitutional provisions, the Courts have continuously been drawn into the area of policy and politics by independent officers seeking more and better resources. This is not desirable.

15.194 In these circumstances, we believe that the existing constitutional statement that these officers are not to be "subject to direction and control" provides some protection at least from the strategic withdrawal of resources. The Privy Council in an appeal from Fiji indicated that in cases where resources are denied or are withdrawn by the Government with the clear purpose of undermining independence, the Courts would not be powerless to intervene.

RECOMMENDATIONS

559 The Constitutional Offices Commission should comprise a chairperson and two other members. Membership should be subject to the general disqualifications we recommend for all service commissions in Chapter 14. The chairperson and members should be appointed in accordance with procedures outlined in that Chapter.

560. In addition to responsibility for recommending candidates for appointment as Ombudsman and Auditor-General, and for appointing:

- **The Solicitor-General;**
- **The Director of Public Prosecutions;**
- **The Secretary-General to Parliament;**
- **The Supervisor of Elections; and**
- **The Commissioner of Police,**

the Commission should also appoint :

- **the Governor of the Reserve Bank of Fiji.**

Before appointing the Governor of the Reserve Bank, the Commission should be required to consult the Minister responsible for finance and the Board of the Reserve Bank.

561. The Constitution should contain a provision establishing the position of Governor of the Reserve Bank. The provision should not provide that this office be a public office. The existing qualifications for and tenure of this office should continue to be provided for under the Reserve Bank Act (Cap. 210).

562. The Reserve Bank of Fiji Act should provide that the Deputy Governor should perform the Governor's functions when the position is vacant or if when the Governor is temporarily unable to perform the functions of that office. If an acting appointment is necessary, the Constitutional Offices Commission should be empowered to appoint a member of the Board with the concurrence of the Minister responsible for finance.

563. The Constitutional Offices Commission should not have disciplinary control over the independent constitutional offices.

564. In substance, the Constitution should provide that an officer appointed by or on the recommendation of the Constitutional Offices Commission can only be removed for inability to perform the functions of his or her office (whether arising from infirmity of body or mind or any other cause) or misbehaviour.

565. **The existing tribunal procedure for removing independent officeholders should be retained. However, in expressing the ground of misbehaviour, the Constitution should make a link with the integrity code proposed above.**

566. **The Constitution should provide that for all constitutional officers, the Constitutional Offices Commission should exercise the powers at present vested in the various service commissions and in the President.**

567. **Before exercising any power in regard to the removal of the holders of any office other than the office of Secretary-General to Parliament or Governor of the Reserve Bank, the Commission should be required by the Constitution to consult the Prime Minister. For the Director of Public Prosecutions and the Solicitor-General, it should also be required to consult the Attorney-General. Before exercising the power to remove the Ombudsman and the Auditor-General, it should consult the Leader of the Opposition.**

568. **Before exercising any power to remove the Secretary-General to Parliament from office, the Constitutional Offices Commission should first consult the Speaker and the President of the Bose e Cake.**

569. **Prior to exercising its powers to remove the Governor of the Reserve Bank, the Commission should be required by the Constitution to consult the Minister responsible for finance and the Board of the Reserve Bank.**

570. **The Constitutional Offices Commission should not be permitted to delegate any of its powers.**

571. **The Constitution should provide that the Ombudsman, the Director of Public Prosecutions, the Solicitor-General, the Auditor-General, the Secretary-General to Parliament, the Supervisor of Elections and the Commissioner of Police shall be paid such salaries and allowances as may be prescribed by Parliament.**

572. **It should provide that the salary and allowances and the terms of office of all constitutional officers within the area of responsibility of the Constitutional Offices Commission may not be altered to their disadvantage after appointment.**

573. All constitutional officeholders within the area of responsibility of the Constitutional Offices Commission should be appointed for a fixed term of five years with eligibility for re-appointment.

574. The Constitution should allow the Constitutional Offices Commission, acting after consultation with the Prime Minister and the Minister responsible for finance, to permit the Auditor-General to continue in office for a period not exceeding six months after the expiry of his or her contract.

575. The Constitution should no longer stipulate any retiring age for constitutional officers.

INDEPENDENCE OF CONSTITUTIONAL COMMISSIONS AND TRIBUNALS

15.195 The 1990 Constitution also guarantees independence of action to members of independent constitutional commissions and tribunals established for special investigatory purposes.

15.196 The tenure of members of the various commissions is set by individual provisions applying to the particular commission. We have elsewhere made recommendations on this matter.

15.197 Under subsection 157(4), all constitutional commissions are not 'subject to the direction or control of any other person or authority, except where otherwise provided under the Constitution". The exception allows for those situations in which commissions are required to consult or obtain the concurrence of some other person. This provision is applied to constitutional tribunals by subsection 157(7).

15.198 Under section 146, the salaries and allowances of commissioners, like those of independent officers, are to be prescribed by Act and may not be altered to their disadvantage. This provision should be retained.

15.199 Section 130 sets out the procedure for the removal of Commissioners. It is the same procedure which we described above as applying, at present, to the Ombudsman. Although section 130 expressly applies only to the existing service commissions, other sections which deal specifically with other constitutional commissions at present apply the provisions of the section to those commissions.

15.200 By section 130, the power to remove a commissioner is vested in the President. Commissioners can only be removed for "inability to discharge the functions of office (whether arising from infirmity of body or mind or any other cause) or misbehaviour". We propose that these limited grounds should be retained, subject to a reference to the proposed integrity code.

15.201 They may be removed by the President only on the advice of a three-member tribunal especially appointed to investigate allegation of infirmity or misbehaviour. All the members of a tribunal to investigate a member of the Judicial Legal Services Commission must hold or have held high judicial office. In the case of a tribunal to investigate a member of any other commission the chairperson and one other member should be so qualified.

15.202 In exercising the powers of removal in relation to a member of the Judicial Legal Services Commission, the President must consult the Chief Justice, and for a Public Service Commissioner or a Police Service Commissioner, the Prime Minister must be consulted. Under subsections 47(5) and 51(4) of the 1990 Constitution, the President acts in his own deliberate judgement for the removal of members of the Constituency Boundaries and Electoral Commissions.

15.203 The procedure required by existing provisions should be retained. We propose, however, that only the chairperson and one member of a tribunal to investigate the removal of any commissioner should have judicial qualifications. We make this proposal in light of our earlier recommendations that the appointed member of the Judicial Service Commission need not be a judicial officer.

15.204 We also propose that the President should not be required to act in accordance with the advice of the Chief Justice in appointing and removing the appointed member of the Judicial Service Commission. In any case involving the removal of any member of a constitutional commission, the President should act in accordance with the advice of the Prime Minister, tendered after the Prime Minister has consulted the Leader of the Opposition.

RECOMMENDATIONS

580. The Constitution should continue to give all constitutional commissions and special constitutional tribunals freedom from the direction and control of any other person or authority except as otherwise provided by the Constitution.

581. The Constitution should provide that the salaries and allowances of all commissioners should be prescribed by Act of Parliament. It should also provide that these cannot be altered to a commissioner's disadvantage after appointment.

582. The Constitution should continue to provide that a member of a constitutional commission can only be removed for "inability to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause) or misbehaviour".

583. The tribunal procedure presently required for the removal of members of commissions should be retained, subject to changes we propose in the following recommendations.

584. The Constitution should require that the chairperson and at least one other member of a tribunal appointed to advise on the removal of a commissioner should hold or have held high judicial office.

585. The Constitution should provide that in any case involving the removal of any member of a constitutional commission, the President should act in accordance with the advice of the Prime Minister, tendered after the Prime Minister has consulted the Leader of the Opposition.

OFFICIAL INFORMATION

Submissions

15.205 The Commission received a number of submissions proposing that the Constitution should secure greater public access to official information. By "official information" we mean all information collected and kept by the Government as well as information about the Government's activities.

15.206 Some submissions sought to have a general right to official information included with the fundamental rights and freedoms in Chapter 2 of the Constitution.

Existing Law

15.207 At present, section 13 of the 1990 Constitution includes freedom to receive information within the ambit of an individual's freedom of expression. This seemingly broad right may, however, be limited by any law which makes provision

for the imposition of restrictions upon public officers. Under that limitation, many existing laws effectively restrict public access to official information.

15.208 The present law on official information in Fiji is almost wholly composed of statutes and rules introduced during colonial times. The main rules are found in the Official Secrets Act 1911, (a British colonial statute which was applied to Fiji as an imperial Act), the Public Records Act (Cap.108) and in the General Orders made by the Public Service Commission under statutory power. Other provisions for preserving confidentiality in specific areas exist in the Income Tax Act (Cap. 201), the Statistics Act (Cap. 71), the Factories Act (Cap. 99), the Employment Act (Cap. 92) and other Acts .

15.209 The policy underlying the general legislation assumes that official information is government property which should not be given to anyone without specific reason and authorisation. Those seeking information must take the initiative and provide a good reason, while those who supply it are required to inquire whether authority and justification exist. Until then, any official information remains an "official secret". Criminal or disciplinary sanctions apply for any information "wrongfully" communicated.

Principles

15.210 We do not believe that secretive policy is appropriate for an independent democratic nation like Fiji. The submissions reflect a growing desire among the people of Fiji for fuller information about the Government's policies and activities, both past and present. This desire has been recognised by the Government itself in its various announcements that it will conduct its business in an open and transparent manner. These developments in part are due to the changing opinion in many countries about the proper relationship between governments and those who they govern. It is now generally accepted that governments have a duty to keep citizens informed of their activities and to give clear reasons for their decisions.

15.211 There are compelling reasons for reversing the thrust of the present laws from the protection of official secrets to providing for access to official information. These include the need to ensure more open and transparent government; to secure a greater accountability of public office holders; to increase people's participation in public affairs; and to protect the rights and interests of individuals.

15.212 Access to official information is all the more important in view of the extent to which government officials direct and regulate economic as well as social activity in Fiji. In particular, the Government, as the principal agent of

development, is responsible for initiating many projects and policies which have a direct impact on people's lives. Fiji Islanders therefore have every reason for wanting to know what their government is doing or has done, and why.

15.213 Our reference to the need for more open, transparent governance is based on the principle that people need to be fully informed so that they can play their rightful part in the democratic system. The public is not really able to judge policies, electoral platforms and the performance of governments without full information. Conversely, a government cannot expect full support for difficult or controversial policies and projects unless those who are to be affected have access to all relevant information. If they do, controversial decisions can more easily be said to be made by the people. One country's Committee on Official Information put the matter in the following way:

> As the major force in national activity, the Government needs to have its aims broadly supported, its decisions understood and accepted. It is not to be expected that every one of these decisions will be popular, but the Government depends ultimately on public cooperation with the changes its decisions impose on people.

15.214 Many submissions which sought constitutional access to information reasoned that access is essential to ensure that politicians and administrations are accountable for their actions. We agree that without information, Parliament, the media and the public cannot properly scrutinise the actions of government or the reasons for those actions. We believe that unhealthy suspicion of government and its advisors can occur if decisions are reached without a full public explanation of how they have been reached.

15.215 In Chapter 3, we briefly described how Fiji faces the major challenge of adapting to rapidly-changing international economic conditions. We believe that a better information flow between government and the people, and the public discussion this will engender, will help achieve more creative and popular responses.

15.216 Elsewhere in the world, greater access to information has also been in response to concerns that individual citizens should know how much information on their personal affairs the government has collected and the need to have access to that information. The concerns arise, in part, because of the ability of modern technology to amass personal data on individuals. Many decisions affecting individuals may be based on personal information gathered in this way. For related reasons, in Chapter 9, we proposed that the Constitution should protect a right to personal privacy.

15.217 Official information about individuals may become available if they institute legal proceedings in respect of a particular decision. The Commission considers that recourse to legal process may not always be appropriate or available. We believe that, with some necessary exceptions, individuals should have a legal right to be told and if necessary, have corrected, any personal data held by the Government or its agencies.

15.218 For the foregoing reasons, we believe that as a basic principle, official information should be made available to the public unless there are good reasons to withhold it.

15.219 The Commission does not propose, however, that there be any constitutional provision on official information. We recognise that good public interest reasons may exist for keeping particular kinds of information confidential. These may include Fiji's internal and external security, public order, economic stability, commercial transactions, legal privilege (including client relationships), the privacy of individuals and the effective conduct of government business.

15.220 We also recognise that the existing laws and policies on official information are reflected in many longstanding practices and procedures of all Government departments and agencies. Considerable adjustments in these, as well as in the philosophies and attitudes of state servants will be necessary. We believe that any attempt at immediate administrative reform would not be workable.

15.221 We propose that the principle of access to official information should be implemented through an Official Information Act. The new Act should replace the Official Secrets Act.

15.222 The proposed Act should state the principle that official information should be made available to the public unless there are good reasons to withhold it. It should set out the grounds upon which information may be withheld. These grounds would coincide with the ones we stated earlier. The Act should allow for progressive application of the principle to different categories of information held by the Government.

15.223 The Act should also vest some person or authority with the function of hearing complaints from the public about the withholding of official information and resolving questions arising from these. In some countries, this function is performed by the Ombudsman. This option should be examined.

15.224 We envisage also that on the passage of the Act, some unit of the government will be charged with reviewing the practices of Government departments and agencies to ensure that official information becomes available to the public in accordance with the requirements of the proposed Act.

15.225 Necessary changes must also be made to the existing statutes and rules. We recognise that thorough legislative reform cannot be accomplished overnight. However, a good place to start immediately would be the Public Records Act (Cap. 108). The Act establishes the National Archives of Fiji and requires public records to be deposited there. Under the Public Records (Access) Regulations, public records are only available for public inspection if they have been in existence for thirty years. The thirty-year rule applies to any public record regardless of its subject matter. However, some records which have been classified as sensitive may be closed for an indefinite period and may only be inspected with the permission of the responsible Minister. The Act provides no systematic way of de-classifying closed records of this kind.

15.226 We see no reason why, except for security or other sensitive documents, official records should not be made available at a much earlier time. In the interest of promoting research, disseminating information and general public education, we recommend that all official records be made available to the public after 15 years unless there is a good reason to withhold them. The Act should further require the systematic and timely de-classification of closed public records once the need to withhold them no longer exists.

RECOMMENDATIONS

586. The Official Secrets Act should be replaced with an Official Information Act. The proposed Act should provide that official information should be made available to the public unless there is a good reason to withhold it.

587. The Act should set out clear grounds upon which information may be withheld. These grounds may include:

- **national security;**
- **public order;**
- **economic stability;**
- **commercial transactions;**
- **legal privilege;**

- **individual privacy;**
- **effective conduct of government business.**

588. It should allow for progressive application of the principle to different categories of information held by the Government.

589. With necessary exceptions, the Act should give individuals a legal right to be told and if necessary, have corrected, any personal data held by the Government or its agencies.

590. The Act should vest some person or authority with the function of hearing and resolving complaints from the public about the withholding of official information. On the passage of the Act, a unit or department of the government should be charged with reviewing the practices of Government departments and agencies to ensure that official information becomes available to the public in accordance with the requirements of the proposed Act.

591. Necessary changes must also be made to the other existing statutes and rules. The Public Records Act (Cap. 108) should be immediately reviewed and amended to bring it into line with the new principle of official information. The Act should provide that all official records should be made available to the public after 15 years unless there is a compelling reason to withhold them. It should also provide a system for the timely de-classification of closed records, once the reason for withholding them no longer exists.

16

PUBLIC REVENUE AND EXPENDITURE

16.1 Every government needs the power to raise and spend public money in order to pay for its own administration, for the services it provides and for its development activities. In this chapter, we review the provisions of the 1990 Constitution which govern how public revenue should be raised and spent. These are found in sections 71 to 73 and sections 141 to 147 of the Constitution.

SUBMISSIONS

16.2 Many submissions expressed concern, in a general way, about how public resources are utilised. They sought greater efficiency and accountability in the use of public funds, as well as new or strengthened institutions and rules to deter and punish their misuse, or the abuse of office or corruption. In the previous chapter, we made specific recommendations on how these could be addressed through a new integrity code and through independent constitutional institutions. Those institutions include the Auditor-General, whose function is to examine and report on the extent to which the Government has complied with the laws regulating public finance. We have also kept the concerns of the submissions in mind in reviewing the provisions which are the subject of this chapter.

16.3 Few submissions, however, directly addressed the provisions of the Constitution specifying the constitutional powers and processes to raise and spend public money. The lack of direct reference may partly be attributable to the lack of understanding of the meaning and effect of the provisions, and to the very technical way in which they are drafted. As with other chapters of the Constitution, we believe that public appreciation of the important safeguards provided by the public finance sections would be greatly enhanced if the provisions were written more simply.

Accrual accounting

16.4 The main submission which the Commission received on the finance provisions was from the Ministry of Finance. It sought to ensure that nothing in the Constitution would prohibit the progressive implementation of a new system of public accounting and budgeting which

it proposes to introduce throughout government. The reform has been generally referred to in public discussion as the accrual accounting system. The Ministry's proposed reform, however, goes further than merely changing in the way internal records of government transactions are kept.

16.5 At present all Government accounts are kept on what is called a cash basis. This means that they show government's expenses only when they are *paid for* in cash. In contrast the accrual system focuses on recording expenses as they are *incurred*, whether or not they have been paid for. All expenses for which money has been paid or is owed must be reflected in the accounts. Under the accrual system, the person accounting must also record, on a regular basis, expenses such as depreciation of assets which do not involve the expenditure of cash. It is generally acknowledged that the accrual system gives a fairer and more accurate picture of an entity's financial position at any particular time. Most business enterprises use the accrual system.

16.6 Consistently with the proposed change in internal government accounting practice, the Ministry of Finance also proposes to change the form in which the Government's budget estimates are presented to Parliament for approval, from a cash to an accrual basis. At present, the Constitution requires budgets to contain only estimates of the amount of cash revenue the government expects to receive and the amount of cash it expects to spend in the next financial year. By requiring all expenses which will be *incurred*, but not necessarily paid for, by the Government in any particular financial year to be presented to Parliament, the proposed budgeting system aims to give Parliament a fairer picture of the Government's overall financial position. It also aims to make Government more accountable for its use of public finance and give Parliament a greater degree of control.

16.7 The final part of the proposed reform which is relevant to the public finance provisions of the Constitution relates to appropriations. The Constitution requires the Government to seek Parliamentary authority to spend public money by presenting an appropriation bill. At present, in keeping with the traditional cash basis of public accounting, such a bill is required to contain the main heads of estimated cash expenditure set out in the annual budget estimates. When passed by Parliament, the bill becomes an Appropriation Act. It authorises the payment from Government funds of the cash needed to meet the estimated expenses. The expenditure

authorised in an Appropriation Act can only be spent in the year to which that Act applies. Under accrual budgeting, all expenses to be incurred by the Government in a financial year, whether or not to be paid for in cash in that financial year, must be authorised in the Appropriation Act for that year.

16.8 In addition to limited accountability and Parliamentary control, the present cash appropriation system has at least two other weaknesses. First, it permits and therefore encourages government departments, towards the end of the financial year, to incur expenses ahead of Parliamentary approval, in the hope that the necessary appropriation will have taken place by the time payment is due. Secondly, it encourages those who have overestimated their expenditure for the year, and in effect have a cash surplus, to look actively for ways to use the money before the authority to spend lapses at the year's end. It is therefore a disincentive to economy in the use of public resources.

16.9 The Ministry's proposals are only part of an overall review of the public financial system aimed at improving the operation of the government's accounting system, the accountability relationships within that system, and the incentives for more economic and efficient performance within government. The review is modelled on public sector reforms in other countries. However, much work remains to be done in devising the new financial rules and procedures necessary to implement the system in Fiji. Reform of state service management structures and consultation with the various service commissions and departments will also be necessary. In its submission, the Ministry of Finance explained that it proposes a phased implementation over a 5 year period beginning with a trial introduction in some departments.

16.10 In principle, the Commission supports all measures to improve the accountable, economic and efficient use of public funds. But we do not consider it necessary to recommend that the Constitution should expressly require or mandate the introduction of accrual budgeting and appropriation as a national practice. This is a matter for the Government and Parliament to decide after all necessary trials have been conducted, and after the supporting structures and rules appropriate to Fiji's conditions have been worked out. In due course, these can be provided by or under an Act of Parliament. However, there should be nothing in the Constitution which prevents the introduction of the proposed system, especially in a phased way.

16.11 In recent years, many new ideas have emerged about how best to manage the public sector and public finance in particular. More can be expected in the future. There should be no need to invoke the relatively complicated procedures for constitutional amendment every time improvements are to be adopted. The more detailed the rules in a constitution, the less flexibility governments and parliaments have in introducing desirable reform. The Constitution should therefore contain the fundamental principles governing public finance in Fiji. In addition, the Constitution should contain only basic procedural and accounting rules necessary to allocate clearly the responsibility for estimating and accounting for revenue and expenditure among the relevant state institutions and to ensure the disciplined and accountable use by the Government of public funds. It should leave the detail to Acts of Parliament and such subsidiary legislation as Parliament may authorise.

16.12 In view of the technicalities involved, we also propose that the drafting of new constitutional provisions governing public finance take place in close consultation with officials of the Ministry of Finance and other officials involved in public sector management.

RECOMMENDATIONS

592. The public finance chapter of the Constitution should be re-written to provide for public finance in a simple, non-technical way. The Constitution should state the fundamental principles which should govern public finance in Fiji. It should also provide only those basic procedural and accounting rules which are necessary to allocate clearly among the relevant state institutions, the responsibility for estimating and accounting for revenue and expenditure, and to ensure the disciplined and accountable use of public funds.

593. The drafting of new constitutional provisions governing public finance should take place in close consultation with officials of the Ministry of Finance and other officials involved in public sector management.

PUBLIC REVENUE AND EXPENDITURE

16.13 We now review the present constitutional provisions and make recommendations on the basic principles and procedures which should be contained in the Constitution.

Public revenue

16.14 Because it is the people who bear the burden of any taxation under threat of punishment, the general principle applicable to the raising of revenue is that no tax may be imposed or collected by the Government without the consent of the people's representatives in Parliament. Its corollary is the other well known principle that there should be no taxation without representation. Many countries, including Fiji, recognise a wider principle under which other specific ways of raising revenue, such as government borrowing must be authorised by Parliament. In some places, the raising of all public revenue in any form requires Parliamentary approval.

16.15 The Government's main sources of revenue are taxes and borrowing. Other sources include rents from state lands, fees for licences and government services, profits from the commercial activities of statutory bodies and state-owned companies, and proceeds from the sale of the state's assets. Foreign assistance also provides the Government with substantial sums of money.

16.16 The 1990 Constitution contains very few rules regarding the raising of public revenue. Chapter XI, which is devoted to public finance, mentions public revenue only twice. The first is in section 141 which is an accounting rule. It requires that all revenues or other moneys raised or received for the purposes of the Government, unless exempted by an Act of Parliament, must be paid into the Consolidated Fund. The other mention is in section 143(1) which requires the annual budget to include estimates of the revenues for the following financial year. Notably, it does not expressly require the estimates to be approved nor does it require that they be included in any bill.

16.17 The raising of revenue is covered in more detail in sections 71, 72 and 73 of the Constitution. They set out the specific roles and powers of the Cabinet, the House of Representatives and the Senate in relation to appropriation bills and other bills and motions providing for financial measures.

16.18 Our review of the constitutional provisions governing public revenue leads us to the conclusion that the existing provisions are inadequate. The Constitution does not anywhere state or require in clear terms that the raising of revenue whether generally or in any particular form, is subject to the approval and control of Parliament. We believe

that it would be improved if it contained a provision like that in the Constitutions of Papua New Guinea and Tuvalu. This states the principle that the raising of revenue by the Government, including the imposition of taxation and the raising of loans, is subject to the authorisation and control of Parliament, and should be regulated by an Act of Parliament.

16.19 We recommend the special mention of taxes and loans for several reasons. These are sources of revenue which most directly affect the citizens of Fiji. In addition to their direct impact on taxpayers, through their effect on the national economy, taxes also have a substantial indirect effect on all citizens' lives. Government borrowing, whether domestic or foreign, can have similar general impact, albeit in the longer term. Almost without exception, all loans will eventually have to be paid out of future taxes. In the meantime, interest has to be paid on the debt. The effect of loans on money supply and the general economy can also be considerable.

16.20 Our recommendations about taxes and loans merely state in an explicit way, principles already recognised in Fiji. All taxes are at present imposed by statute. Similarly there is an existing Act of Parliament, the Finance Act (Cap. 69), which authorises Government to borrow money. The Act sets out procedures for each loan including the requirement of authorisation by a resolution of the House of Representatives.

16.21 Under our proposal, however, Parliament's constitutional authority and control would be extended to cover other sources of revenue such as the sale of state assets. They would need to be regulated by or under an Act. We believe this is desirable to ensure accountability.

Public expenditure

16.22 All public money spent by the Government is classified as public expenditure. It is well-established that the Government may not spend public money without Parliament's consent. Most constitutional systems require the Government, at least once every year, to seek Parliamentary authority to spend money by presenting estimates of revenue and expenditure for the next financial year in its 'annual budget'. The authority to spend for the year is conveyed in an Appropriation Act passed by Parliament.

16.23 These principles are central to Parliament's role and its control over the Government. The requirement that there must be an appropriation

at least once annually means that the Government cannot govern unless it continues to have the confidence of the people's representatives in Parliament. Furthermore, because almost all of the government's policies and programmes require the raising and expenditure of revenue, the debate on an Appropriation Bill gives members of Parliament the opportunity to scrutinise the Government's policies and hold it accountable for its activities.

16.24 If the amount appropriated in accordance with the estimates of expenditure proves inadequate, further Parliamentary approval is sought through the supplementary appropriation procedure.

16.25 The Constitution contains far more detailed rules about public expenditure than public revenue. Nevertheless, as with public revenue, the Constitution does not state the basic principle that the spending of public money is also subject to authorisation and control by Parliament and should be regulated by an Act of Parliament. We consider that the Constitution should state in a single provision that the raising of revenue by the Government, including the imposition of taxation and the raising of loans, and the spending of money, shall be under the authority and control of Parliament and shall be regulated by an Act.

RECOMMENDATION

594. The Constitution should provide that the raising of revenue by the Government, including the imposition of taxation and the raising of loans, and the spending of money by the Government, shall be under the authority and control of Parliament and shall be regulated by an Act.

GUARANTEES

16.26 The Constitution does not at present make any provision for guarantees issued by the Government, although it frequently issues guarantees for money or credit advanced to statutory bodies and state-owned companies.

16.27 Authority exists under the Finance Act (Cap 69). Section 149 of the Act empowers the Government to "guarantee the financial liability of any person in respect of a loan or otherwise" with "authority of a resolution of the House of Representatives".

16.28 The Government's liability under a guarantee is contingent. This means that liability will only arise if the body or person whose debt is guaranteed fails to perform their obligations. Once this occurs, however, the Government's liability automatically becomes a debt due to the person who advanced the money or credit. As we explain later, this debt is a "charge on the Consolidated Fund". As such, Parliament is not required to authorise the payment of public money which is necessary to honour the guarantee.

16.29 The contingent liability existing under Government guarantees can be considerable. Since this liability may eventually be met out of public funds without further authorisation by Parliament, we consider that the Constitution should contain a general provision ensuring that Parliament has a role in the issue and regulation of government guarantees.

16.30 The Constitution should provide that the issue by the Government of any guarantee of the financial liability of any person shall be under the authority and control of Parliament and shall be regulated by an Act. As now, it should leave Parliament the discretion to prescribe, in the Act, the procedures to be followed for authorising guarantees.

RECOMMENDATION

595. The Constitution should provide that the issue by the Government of any guarantee of the financial liability of any person shall be under the authority and control of Parliament and shall be regulated by an Act.

ANNUAL BUDGETS AND APPROPRIATIONS

16.31 Earlier we noted the important principle that estimates of all government revenue and expenditure for any financial year must be prepared by the Government and laid before both Houses of Parliament before the beginning of that financial year. This principle is reflected in section 143(1) of the Constitution which specifically charges the minister responsible for finance with the duty of ensuring that it is complied with.

16.32 Section 143(2) requires the heads of expenditure contained in the budget (apart from charges on the Consolidated Fund) to be included in an appropriation bill which is to be introduced into the House of Representatives. Appropriation bills seek to authorise that expenditure and to appropriate the necessary money out of the Consolidated Fund.

16.33 We have already referred to the Ministry of Finance's proposal to introduce accrual budgeting and appropriation. We are informed that although the term "revenues" currently used in section 143(1) is capable of meaning either cash or accrued revenue, the existing term "expenditure" refers only to cash payments. To that extent, the budget, in the form required, precludes budgeting and appropriation on an accrual basis.

16.34 We propose that the Constitution continue to contain a provision requiring the Government to present a national budget to the Bose Lawa and the Bose e Cake before the beginning of each financial year. The budget should contain estimates of its revenues and expenses for that year, and other such information as might be required by or under an Act of Parliament. The provision should be flexible enough to allow the progressive introduction of the proposed accrual accounting reforms as well as any other subsequent reforms that are in accordance with recognised accounting practices in the public sector.

16.35 We propose using the word *expenses* in the provision because we are informed that it is capable of referring to either cash expenses or all cash and incurred expenses.

16.36 The Constitution should also contain a provision requiring annual appropriation bills to be introduced in the Bose Lawa. The provision should be general enough to ensure that, as a minimum, the bills contain the matters presently required. But it should allow Parliament to pass an Act requiring other matters to be contained in appropriation bills. The procedure for the passage of appropriation bills is dealt with, when later, in respect of finance, the respective roles of the Cabinet, the Bose Lawa and the Bose e Cake are discussed.

RECOMMENDATIONS

596. The Constitution should contain a provision requiring the Government to present a national budget to the Bose Lawa and the Bose e Cake before the beginning of each financial year.

597. The Constitution should require the budget to contain estimates of all government revenues and expenses for the year. It should require it to contain any other information that may be required by or under an Act of Parliament. The language of the provision should be flexible enough to permit the introduction

of the proposed accrual accounting reforms as well as any other subsequent reforms, in accordance with recognised accounting practices in the public sector.

598. The Constitution should also require annual appropriation bills to be introduced in the Bose Lawa.

599. The Constitution should require appropriation bills, as a minimum, to contain the Government's estimated expenditure for the following year.

600. The Constitution should allow Acts of Parliament to prescribe the level of detail at which estimates are to be specified and to prescribe other matters, including estimates of the year's accrued expenses, which should be contained in appropriation bills.

SUPPLEMENTARY APPROPRIATIONS

16.37 Supplementary appropriations are provided for by subsections 143(3) and (4) of the 1990 Constitution. These are needed if any estimated head of expenditure contained in an annual Appropriation Act proves insufficient for the purpose, or if a need arises for expenditure for an unanticipated purpose. One or more supplementary appropriations are thus likely to be needed every year. The provisions allow a supplementary appropriation to be sought either before or after the money has been spent.

16.38 The latter possibility does not provide as wide a licence as might appear. The person or persons responsible for the unauthorised spending would be liable to penalties under the general law, especially if subsequently supplementary appropriation is not approved. In our view, the Constitution should continue to provide for supplementary appropriations in this flexible way.

16.39 The provisions at present provide an expedited procedure for supplementary appropriations compared to that required for annual appropriations. We deal with the desirable procedure for dealing with supplementary appropriations later.

RECOMMENDATION

601. The Constitution should continue to provide for supplementary appropriations in a general way which allows Parliament to approve both unanticipated and unauthorised spending.

THE CONSOLIDATED FUND

16.40 The Consolidated Fund established by section 141 is a vital part of the mechanisms for ensuring Parliamentary control over public finance. The section requires that, with two exceptions, all revenues or other moneys received by the Government are to be paid into and form one Consolidated Fund. The first exception allows revenues to be paid into some other fund established for a particular purpose, if this is permitted by or under a law. The second exception applies to revenue received by an authority which is permitted by or under any law to retain money in order to meet its own expenses.

16.41 Section 142 sets out the exclusive circumstances in which withdrawals may be lawfully made from the Consolidated Fund or other special public funds. Money may not be "withdrawn" unless it is to meet expenditure that is either "charged on the Fund by the Constitution or by another law", or has been authorised either by an Appropriation Act or by a supplementary estimate approved by the House of Representatives, or in accordance with section 144 of the Constitution. The last-mentioned section provides for the situation in which an Appropriation Act has not been passed by the beginning of a financial year. We discuss it in detail later. Any withdrawal from the Consolidated Fund must be in the manner prescribed by a law.

16.42 Lastly, the section provides that the deposit with a bank, or the Crown Agents, of any moneys forming part of the Consolidated Fund, or its investment in securities in which trustees generally are allowed by law to invest, or the making of advances to departments from the Fund , are not to be considered withdrawals from the fund. The section also provides that moneys cannot be withdrawn from the special funds outside the Consolidated Fund, unless the issue has been authorised by or under a law. It does not require the manner of withdrawal of these funds to be prescribed.

16.43 The references in the section to expenditure which is "charged" upon the Fund and to expenditure which needs to be authorised by Appropriation Acts and supplementary estimates, reflect the traditional distinction in Westminster constitutional law between two types of public expenditure. Those expenses described as "charges upon the Consolidated Fund" are deemed to have a single, continuous Parliamentary authorisation. Once an expense is charged on the Consolidated Fund by the Constitution or an Act of Parliament, Parliament need not give any further authority to pay. These expenses are therefore not subject to the requirement of annual appropriation. We discuss the constitutional charges on the Consolidated Fund below. All other expenditure is traditionally classified as "supply services" and is constitutionally subject to the annual appropriation procedure.

16.44 Although the Constitution refers to 'withdrawals' from the Consolidated Fund, it is not an actual central bank account or treasury. This is made clear by the provision allowing any money forming "part of the Consolidated Fund" to be deposited with banks, or invested in trustee securities, or advanced, without having to be treated as a withdrawal.

16.45 Instead the Consolidated Fund is a device to achieve three important purposes. First, it is a means of implementing the principle that any expenditure of public money is subject to either continuous or annual Parliamentary approval. In that sense, it is a constitutional method of securing Parliamentary control of the use of public funds. Secondly, it provides a convenient way of accounting for payments out of Government funds, especially for audit purposes. Thirdly, it effectively requires that, apart from exceptional special accounts, the Government should keep one running central cash account in its books of account. This ensures that it is able to keep abreast of its liquidity position and that Parliament is informed of that at least annually.

16.46 In the light of these important purposes, we consider that sections 141 and 142 should be replaced by less technical provisions reflecting the basic principles and rules which they contain. We set out these principles in the following paragraphs.

16.47 To control the use of public money, the Constitution, in addition to the general principle applicable to spending, should also state the principle that no money of or under the control of the Government shall be spent except as provided by the Constitution or by or under an Act.

16.48 To ensure that this spending, as well as all money received is properly accounted for, the Constitution should also require that all money of or under the control of the Government shall be dealt with and properly accounted for in accordance with the law and in accordance with generally accepted accounting principles in the public sector.

16.49 Finally, to ensure that there is a central cash account, the Constitution should continue to provide for a Consolidated Fund into which, subject to an Act of Parliament, all public money shall be paid. It should continue to provide that no money from the Consolidated Fund may be spent

- except to meet expenses which are charged on the Fund by the Constitution or by or under an Act of Parliament,
- where the spending has been authorised by an Appropriation Act or a Supplementary Appropriation Act or
- in advance of appropriation as authorised by the Constitution. We explain our reference to 'Supplementary Appropriation Acts' when we deal with the procedure for supplementary appropriation.

16.50 The Constitution should continue to allow Acts of Parliament to provide for other public funds not forming part of the Consolidated Fund to be administered and dealt with in accordance with Acts of Parliament.

16.51 By shifting the focus to the concept of 'spending' rather than 'withdrawals' from the Consolidated Fund, it should no longer be necessary to include special constitutional authorisation to open bank accounts, hold trustee investments or advance money to departments.

RECOMMENDATIONS

602. The Constitution should state that no money of or under the control of the Government shall be spent except as provided by the Constitution or by or under an Act.

603. The Constitution should also state in general terms that all money of, or under the control of, Government shall be dealt with and accounted for in accordance with the law and generally accepted accounting principles in the public sector.

604. The Constitution should continue to provide for a Consolidated Fund into which, subject to any Act of Parliament, all public money shall be paid. It should also provide that no money forming part of the Fund may be spent except

- **to meet expenses which are charged on the Fund by the Constitution or by or under an Act of Parliament**
- **where spending has been authorised by an Appropriation Act or Supplementary Appropriation Act, or**
- **in advance of appropriation as authorised by the Constitution.**

605. The Constitution should provide that Acts of Parliament may make provision for all other public funds not forming part of the Consolidated Fund. It should require these to be administered and dealt with in accordance with Acts of Parliament.

CHARGES ON CONSOLIDATED FUND

16.52 Subsection 146(2) of the Constitution charges the salaries of all judges, independent commissioners and independent officers on the Consolidated Fund. As earlier explained, expenditure charged on the Fund does not need *annual* parliamentary approval. A once-off approval is given when Parliament prescribes these salaries. If these salaries and allowances required annual approval, this would leave the recipients continuously open to pressure from persons in the executive government and the legislature. The provision is an important aspect of constitutional independence and should be retained in the Constitution.

16.53 All debt charges for which Fiji is liable, as well as all civil service and judicial pension payments due from the Government, are charged on the Consolidated Fund by sections 147(1) and 132(4) of the 1990 Constitution. The provision charging public debt on the Consolidated Fund is an important assurance to the country's creditors, both locally and internationally, that the timely repayment of the country's debt which has been lawfully incurred will not depend on political forces in Parliament. Pensioners should have a similar assurance. We therefore recommend that the Constitution should continue to charge this expenditure on the Consolidated Fund.

RECOMMENDATIONS

606. The Constitution should continue to charge the Consolidated Fund with the salaries of the Judiciary and all independent constitutional office holders and commissioners.

607. All debt charges for which Fiji is liable, as well as all civil service and judicial pension payments due from the Government, should also remain charged on the Fund.

POWERS AND PROCEDURE IN RESPECT OF APPROPRIATION AND OTHER MONEY BILLS

16.54 While the Westminster principle that Parliament has authority and control over public revenue and expenditure is broadly true, in bicameral systems it is overlaid by other constitutional principles and procedural rules dividing authority between the Cabinet and the two Houses of Parliament. The roles and powers of each institution have a historical basis. They reflect the specific application in the area of public finance of the principle of the separation of powers. Some rules have the effect of avoiding deadlock between the institutions of government.

16.55 The rules at present contained in the Constitution are largely adaptations of the rules in England. Erskine May, the leading authority on English parliamentary practice, describes that practice, in the following terms:

> The Crown demands money, the Commons grant it, and the Lords assent to the grant: but the Commons do not vote money unless it be required by the Crown; nor do they impose or augment taxes, unless such taxation be necessary for the public service, as declared by the Crown through its constitutional advisers.

16.56 In Fiji's context, three general principles apply at present. The first is that proposals imposing or increasing taxes, or increasing or imposing charges on public revenue, or authorising any spending, or adversely affecting any debt due to the Government, must be recommended by a Minister on behalf of the Cabinet. This principle is embodied in section 71 of the Constitution. It reflects the responsibility of the Government for the management of the country and its finances. It also demonstrates the control which the Cabinet has over expenditure and taxation since it prevents back-bench Members of Parliament from proposing additional expenditure or taxation. In the absence of the Cabinet's recommendation, neither House can proceed on any such bill or motion. Members

of the House of Representatives but not the Senate, are always free, however, to propose reductions in taxation, charges or appropriations without Cabinet approval. This exception is vital to debate in the House of Representatives on the Government's proposals.

16.57 Secondly, any proposal to raise or spend public money must be introduced in the House of Representatives. The principle is explicitly stated in section 143(2), in regard to annual appropriation bills. It is implicit, but not clearly stated in sections 71, 72 and 73 in regard to other financial bills generally. The rule arose out of the historic struggles of the English House of Commons. It also follows from the fact that the Prime Minister and most, if not all, of his or her Ministers, sit in the Lower House.

16.58 Thirdly, and following on from the first two principles, the Senate has no right to propose any finance or money bills under the Constitution. Nor may it amend finance bills passed by the House of Representatives. It is restricted only to passing, delaying or rejecting them. Under section 72, however, any rejection or delay of any appropriation bill by the Senate is only effective for a maximum of two days. The provision allows an appropriation bill passed by the House of Representatives to be presented to the President for assent, if it is not passed by the Senate without amendment "by the end of the day after the day on which it was sent to the Senate". Under section 73, other money bills can be similarly held up for a maximum of 21 days. The House of Representatives may, however, waive its privileges and resolve to reconsider the bill. These rules have been contained in the Constitution since 1970 and are well established in our system of government in Fiji.

16.59 We support the retention of the rules requiring the Cabinet's initiative on money matters. We favour, however, a more flexible provision than the present section 71. In view of our recommendations in Chapter 11 regarding sector standing committees, it is essential that the new constitutional rules are broad enough so as not to unduly hinder the work of the committees. Almost all bills, regardless of their subject matter, require some spending of public money for their implementation. It would seem that the rule as presently drafted would require ministerial endorsement of a committee's proposals on any bill, even if only a small increase in government spending was involved. We believe that the constitutional rules should be written so that committees can report on bills referred to them and make proposals in the House without need for ministerial endorsement.

16.60 We have already recommended in Chapter 11 that the Bose e Cake should have no power to *initiate* legislation. This would include finance bills of any form.

16.61 In light of our proposal for an elected Bose e Cake the Commission has considered the question whether any change is desirable in the respective powers of the Bose Lawa and the Bose e Cake to *consider* finance bills. The present rules reflect the relative importance of the Lower House in the Fiji system of government and the present situation that, as in England, the Upper House is not elected. Apart from this, we understand the real practical significance of the rules to be the avoidance of deadlock between the two Houses of Parliament. This is especially important with regard to appropriation bills, since without supply, government services cannot be paid for.

16.62 On the other hand, an appropriate balance must be struck with the new purposes and functions of the elected Bose e Cake. In our scheme, the Bose e Cake will continue to be a House of review. Essentially, it is to play a watchdog role over the Bose Lawa and the Government. Its members will represent the interests of the people of Fiji as members of provinces and otherwise unrepresented groups, and, if necessary, seek the reconsideration by the Bose Lawa of any proposal that they might consider to have an adverse impact on those interests. We discussed this role in Chapter 11 in making recommendations about the distribution of the legislative power between the two Houses in passing ordinary legislation.

16.63 Because an annual appropriation bill provides the financial authority for the Government's programmes for the next financial year, it is likely to have a greater impact on the interests which are to be represented in the Bose e Cake than most ordinary legislation. We therefore considered whether the Bose e Cake should have the power to amend an appropriation bill or other money bills. However, the Cabinet's responsibilities for public finance depend on retaining the confidence of the Lower House. To avoid deadlock, the Commission considers that the Bose e Cake should continue to have only a delaying power over appropriation and other money bills.

16.64 Nevertheless, in recognition of its new role as an elected House, the period for which it is constitutionally entitled to consider appropriation bills should be extended from the existing two days to seven days beginning on the day on

which the Bill was presented to the Bose e Cake. This extension will allow more meaningful and effective debate on the Government's appropriation proposals than at present, in a way which does not risk undue interruption of government services.

16.65 We propose that the present twenty-one day delay for other money bills should be retained.

16.66 Earlier, we noted that under the present rules, if the Senate rejects or delays an appropriation bill or other financial bill for the prescribed periods, the Government may present the bill for Presidential assent, unless the House of Representatives earlier resolves to waive its privileges and reconsider the bill. We propose that this rule be retained in the Constitution.

RECOMMENDATIONS

608. The Constitution should provide that any proposals to raise or spend public money may be introduced only in the Bose Lawa.

609. The Constitution should continue to provide that any proposal:

- **imposing or increasing taxes**
- **increasing or imposing charges on public revenue**
- **authorising or increasing any spending, or**
- **adversely affecting any debt due to the Government**

cannot be proceeded upon in the Bose Lawa without the recommendation of a Minister acting on behalf of the Cabinet.

610. The Constitution should allow Members of the Bose Lawa to propose reductions in taxation, charges and appropriations.

611. The provisions should be drafted in such a way that the work of the proposed sector standing committees of the Bose Lawa will not be hampered.

612. The Constitution should continue to provide that the Bose e Cake should have no power to amend appropriation bills and other money bills.

613. The period for which the Bose e Cake should have the right to consider or delay any appropriation bill should be seven days beginning on the day the bill was sent to that House.

614. For other money bills, the existing period of twenty-one days should be retained.

615. After the relevant period has elapsed, the Government should have the right to present an appropriation or other money bill for the President's assent, unless the Bose Lawa has, in the meantime, resolved to reconsider the bill.

PROCEDURE FOR SUPPLEMENTARY APPROPRIATIONS

16.67 Subsections 143 (3) and (4) of the Constitution allow Government to follow an expedited procedure for the approval of supplementary appropriations. Supplementary estimates may be laid only before the House of Representatives, and the expenditure may be authorised by a motion approved by resolution in that House alone. If this procedure is followed, a supplementary appropriation bill containing all supplementary spending authorised by resolutions during the year is required to be debated by both Houses as soon as practicable after the end of the financial year.

16.68 The present provisions mean that the Senate may be denied any opportunity to debate supplementary spending until well after the money has been spent. The provisions may also provide an incentive for a Government to keep controversial spending proposals, on which they can expect adverse Senate comment, out of the annual appropriation act which it is required to present to both Houses.

16.69 In view of the new role envisaged for members of the Bose e Cake, we recommend that the present rule allowing supplementary spending to be authorised solely by resolutions of the House of Representatives should be done away with. All supplementary appropriations should be authorised by a Supplementary Appropriation Act passed by both Houses of Parliament. Like annual appropriations, such acts would be subject to the seven day delay rule in or by the Senate.

RECOMMENDATIONS

616. The Constitution should no longer provide for any supplementary appropriation to be authorised by a resolution of the Bose Lawa alone. Supplementary spending should be authorised by Supplementary Appropriation Acts to be introduced into both Bose Lawa and the Bose e Cake.

617. The Bose e Cake should have the right to consider or delay a supplementary appropriation bill for seven days.

AUTHORISATION OF EXPENDITURE IN ADVANCE OF APPROPRIATION

16.70 At present, section 144 of the Constitution provides for the eventuality of an Appropriation Act not being passed by the beginning of a financial year. If this happened in the absence of a special rule, it would mean that no government spending could take place, and government services would come to a halt. To avoid this, the section allows the Minister responsible for finance to authorise such spending as is "necessary to carry on the services of the Government". This authority may continue for a maximum period of four months, during which time the relevant Appropriation Act should be passed. The Minister's powers must be exercised in accordance with any limits or conditions imposed by a law.

16.71 The ability to spend money in advance of appropriation is important. This was demonstrated in 1994 when the Appropriation Act for that year was defeated in the House of Representatives. We are informed that the present formula referring to "expenditure necessary to carry on the service of Government" without reference to any monetary limit caused some uncertainty. It was difficult to decide how much of ordinary government expenditure was 'necessary' in those terms.

16.72 We are concerned that because the present provision places a time, rather than a monetary, limit on spending, it would allow a Government to be far more liberal in its spending during this period than Parliament might have permitted. A more precise limitation on the amount which may be spent is preferable to the existing time limitation. As four months on average translates to one-third of a Government's budget, we propose that this fraction be used. The limitation, in our view, should also have some relationship to previous Parliamentary approvals.

16.73 We therefore favour the retention of the Minister's authority but subject to the limitation that the spending which he or she may authorise may not exceed one-third of the total expenditure of the Government authorised by Parliament for the previous year. Of course, the Minister's authority should lapse once the Appropriation Act for the year is finally passed.

RECOMMENDATION

618. Subject to an Act, the Minister responsible for finance should continue to have power, to authorise spending, if the Appropriation Act for any financial year has not come into force by the beginning of the year. However, the provision should limit the total amount which he or she can spend to one-third of the total authorised expenditure of the Government for the previous financial year. Under this section the authority to spend should lapse when the Appropriation Act comes into force.

CONTINGENCIES FUND

16.74 Section 145 of the 1990 Constitution allows Parliament to establish a Contingencies Fund out of which money can be advanced to meet urgent, unforeseen and unbudgeted expenditure. Such a fund now exists under the authority of the Finance Act (Cap. 71). We do not see any real need for the Contingencies Fund to be provided for in the Constitution. The general constitutional authority to establish special funds under an Act, which we have recommended already, constitutes sufficient authority for the establishment and maintenance of the Contingencies Fund. We therefore recommend that the Constitution should no longer make express provision for a Contingencies Fund.

RECOMMENDATION

619. The Constitution should no longer make express provision for a Contingencies Fund.

17

PROTECTED RIGHTS OF COMMUNITIES AND GROUPS

17.1 In Chapter 3, the Commission discussed the criteria in its Terms of Reference requiring it to consider how constitutional arrangements for the Fiji Islands could guarantee the rights, protect the interests and take account of the concerns of indigenous Fijians and Rotumans and all other ethnic groups. We described, in broad terms, the nature of those rights, interests and concerns.

17.2 In reviewing the 1990 Constitution and making proposals for new constitutional arrangements, we have already identified many ways in which the Constitution protects the rights and promotes the interests of groups. In some cases we have recommended that the provisions should be strengthened, in order to carry out that purpose more effectively. The constitutional protections for group rights and interests go far beyond those dealt with in this chapter.

17.3 Here, our purpose is to discuss a range of matters in which certain communities and groups have rights and interests distinct from those of other members of society: land, fisheries, minerals, chiefly titles, the arrangements for the governance of the community, the customary law and methods of dispute settlement. The communities and groups concerned are Fijians, Rotumans, the Banaban community living on Rabi Island, and landowners, including those who are landlords of agricultural land, and their tenants.

17.4 The chapter is concerned with the substantive rights that should be recognised and protected by the Constitution and the techniques that should be used for this purpose. One of those techniques is the "entrenchment" of the legislation making provision for the matters in question. The Constitution provides that the legislation cannot be amended or repealed by an ordinary Act of Parliament passed by a majority of the members present and voting. A special procedure and a higher majority are required. The entrenched legislation is protected against amendment in much the same way as the Constitution itself. In this chapter we make recommendations about which Acts should continue to be entrenched. The procedures which should be followed to amend either the Constitution or the entrenched legislation are dealt with in Chapter 20.

GROUP RIGHTS AND EQUALITY UNDER THE LAW

17.5 The legislation applying to "Fijians", "Rotumans" and "the Banaban community" describes the persons to whom it applies by reference to their "race" or "ethnic origin". In Chapter 7 we proposed that these attributes should be included among the grounds on which discrimination is prohibited. We recommended tha"discrimination" should continue to mean the imposition of disabilities or restrictions, or the conferment of privileges or advantages on a prohibited ground. Accordingly, a law is not discriminatory unless, because of their race or ethnicity, it subjects members of a race or ethnic community to disabilities or restrictions to which persons of other races or ethnic communities are not subjected, or accords them privileges or advantages not accorded to persons of other races or communities.

17.6 The Commission found no legislation which gives the Fijian, Rotuman or Banaban communities *privileges or advantages* which are not accorded to members of other races. The statutory regimes, and, to the extent recognized by those regimes, the customary law of those communities, are either neutral in comparison with the way in which the law treats other races and ethnic communities or imposes on the members of the group disabilities or restrictions to which persons of other races and communities are not subjected.

17.7 For example, the legislation recognizing the existence of customary Fijian land and fishing rights, and Rotuman land rights, and vesting freehold land in Rabi Island in trust for the members of the Banaban community, recognizes the property rights of those groups in accordance with Fijian, Rotuman or Banaban custom. The fact that other racial or ethnic communities or groups do not have customary land or fishing rights and that, if they own land, or rights in land, they do so under a different system of tenure does not, in itself, impose burdens on or create privileges for either the indigenous or the non-indigenous communities.

17.8 Therefore, the only question that arises about discrimination on the grounds of race or ethnic origin is whether there is good reason for any disabilities or restrictions to which members of the Fijian, Rotuman or Banaban community are or may be subjected under the legislation applying to those communities. If so, the legislation should be protected against invalidity under the Bill of Rights. If not, provision should be made to ensure that the legislation - and especially regulations made under the legislation - conform with the Bill of Rights.

17.9 No such questions arise in discussing the rights of "landowners", "landlords" or "tenants". The issues are primarily ones of policy, though the policy must be determined within the parameters of the law.

RIGHTS IN RESPECT OF LAND AND CHIEFLY TITLES

Fijian land

17.10 Section 3 of the Native Lands Act (Cap. 133) provides that native lands, as defined, shall be held by "native Fijians" according to native custom as evidenced by usage and tradition. The term "native Fijian" is not defined, but the Act does not apply to Rotuma. Subject to the Act and to regulations made by the Fijian Affairs Board, native lands may be cultivated, allotted and dealt with by native Fijians as amongst themselves according to their native customs. All courts of law are to decide any dispute about tenure amongst native Fijians according to those regulations or native custom or usage "which shall be ascertained as a matter of fact by the examination of witnesses".

17.11 A Native Lands Commission has the duty of ascertaining what lands are the property of mataqali or other divisions or subdivisions of the people and the boundaries of those lands. Details of the names of the owners and the boundaries are to be recorded in a register (the Vola ni Kawa Bula). The Native Lands Commission is also to decide disputes as to ownership. There is a right of appeal against its decisions on ownership to an Appeals Tribunal.

Fijian chiefly titles

17.12 Under the Native Lands Act, the Native Lands Commission is also to decide disputes arising between native Fijians "as to the headship of any division or subdivision of the people having the customary right to occupy and use any native lands". There is no provision for any appeal from such a decision, but the Act does not state that the decision is final.

Functions of the Native Lands Commission under the 1990 Constitution

17.13 Under the 1990 Constitution, the Native Lands Commission was given the additional functions of

- certifying registration or eligibility for registration in the Vola ni Kawa Bula for constitutional purposes (sections 42, 49 and 156);
- advising the Electoral Commission "where necessary" (section 53(3));
- giving "opinions" or "decisions" on "matters relating to and concerning Fijian customs, traditions and usages or the existence, extent or application of customary laws" (section 100(4)).

17.14 It was provided that the Native Lands Commission's opinions or decisions on the last mentioned matter and on disputes about headship "shall be final and conclusive and shall not be challenged in a court of law". The courts have interpreted this provision as meaning that no opinion or decision of the Native Lands Commission on headship or on any matter concerning custom can be challenged in a court, by way of appeal or judicial review.

17.15 The Commission received submissions seeking some means of reviewing decisions of the Native Lands Commission on headship. That matter is now often contested, at least in part because headship is relevant to the distribution of the rents received in respect of Fijian land. The Commission also received submissions seeking a new, full-scale inquiry into the ownership and boundaries of land to determine which lands are "native lands" and which mataqali or other divisions or subdivisions of the people own particular parcels.

Recognition of Fijian title to land

17.16 The recognition of native title by the Native Lands Act is an important guarantee of the rights of Fijians to their remaining land, which amounts to approximately 83% of the land area of Fiji. It is not the *source* of that title, which is to be found in native custom as evidenced by usage and tradition. Under the doctrine of aboriginal title, recently reinforced by the *Mabo* decision in Australia, the common law recognises the customary land rights of an indigenous people. However, the common law does not protect those rights from legislative interference. That is why it is important that the Native Lands Act should not be capable of amendment by the ordinary law. The provision for its entrenchment should be retained.

17.17 The Native Lands Act is subject to the State Acquisition of Lands Act. In Chapter 7 we recommended that the Constitution should not permit the taking of land under that Act except on a small scale, for a public work, and then subject to stringent safeguards.

The Native Lands Commission

17.18 We consider that the Native Lands Commission's functions of determining the title to land and its boundaries and deciding questions about headship are so important that the Commission should be constituted by the Constitution, instead of by the Native Lands Act. That would give it all the protections conferred on other constitutional commissions. The Constitution should make provision for the following matters:

- The Commission should consist of three members, any two of whom may sit to hear and determine a particular matter.
- Its members should be appointed by the President on the recommendation of the Bose Levu Vakaturaga.
- The current system of using assessors should be retained.
- There should be no provision for ex officio members, and the Minister responsible for Fijian Affairs should no longer have the power to designate a single Commissioner or some other person to hear a dispute.
- The Constitution should provide that, in the exercise of its powers, the Commission shall not be subject to the direction or control of any other person or authority, except by way of appeal or judicial review.
- The rules about disqualification for membership of the Commission or for appointment to public office or eligibility to be a candidate for election to Parliament within three years of ceasing to hold office as a member should be those applying to other constitutional commissions, as described in Chapter 14.
- The Secretary of the Commission should be a public officer.

17.19 The functions given to the Commission by the 1990 Constitution in respect of a person's eligibility to be registered on the Fijian roll or to stand for a Fijian communal seat will no longer be required, in view of our recommendation in Chapter 10 that the right to be registered on a roll for a Fijian reserved seat constituency should not be determined by reference to the Vola ni Kawa Bula. For the reasons explained below, we also consider that the Commission should not have the power to give opinions or decisions on matters relating to custom, except so far as is necessary to determine the matters for which it is responsible under the Native Lands Act.

17.20 Accordingly, the Constitution should confer on the Commission essentially the same functions and powers as it has under the Native Lands Act in relation to the title to land and its boundaries and questions of headship. They should be described in modern language that sets out their nature clearly in a manner that is generally acceptable to indigenous Fijians.

17.21 The Constitution should provide that provision may be made by Act for appeals against decisions of the Native Lands Commission on matters concerning

either the title to land and its boundaries or on questions of headship. The Native Lands Act should be amended to constitute an Appeals Tribunal for this purpose, along the lines of that provided for in section 7 of that Act. The Appeals Tribunal should continue to consist of three members, but the opportunity should be taken to review the method of appointing them.

17.22 Decisions of the Appeals Tribunal should be final in the sense that there should be no right of appeal to the courts on the *merits* of the decision. However, the courts should have the power of judicial review in respect of the decisions both of the Native Lands Commission and of the Appeals Tribunal. Judicial review is a process by which those affected by decisions of a public authority may challenge the legality or the fairness of the procedure followed in hearing the parties and making the decision. If a court finds a defect in the procedure, it sets aside the decision and requires the authority to rehear and redetermine the matter. It would normally be hard to obtain judicial review of a decision of an authority hearing a matter at first instance unless rights of appeal have first been exhausted.

17.23 We believe that, in these ways, the parties to disputes brought before the Native Lands Commission will have access to a system of dispute settlement that meets the public interest in certainty and finality, as well as in ensuring that justice is done to individuals.

17.24 The Commission has considered these competing aspects of the public interest in responding to the desire expressed in some submissions for a wholesale redetermination of what land should be regarded as native land, and the boundaries between the holdings of the different land-owning units. We are of the opinion that the need for certainty and finality outweighs the benefits of reopening what were, in the main, land transactions occurring before cession in 1874. Those transactions were thoroughly investigated by the colonial government. It upheld only freehold titles considered to have been properly acquired with the agreement of the landowners. Fortunately, Fijians have not suffered the loss of their land in the ways inflicted upon the indigenous peoples of other Pacific states by governments whose main aim was to ensure the availability of land for large-scale settlement. The Commission considers that there should be no comprehensive review of what land is native land or of existing titles or boundaries.

The Native Land Trust Act

17.25 The Native Land Trust Act (Cap. 134) vests "the control" of all native land in the Native Land Trust Board established by that Act and requires the Board to administer the land for the benefit of the Fijian owners. As a consequence,

the Fijian owners may not alienate native land except to the State, or charge or encumber it. Subject to the State Acquisition of Lands Act, the Forests Act, the Petroleum (Exploration and Exploitation) Act and the Mining Act, native land may not be leased or sold or otherwise disposed of except by the Board.

17.26 The Board may set aside any portion of land as a "native reserve". Land within a native reserve may be leased only to native Fijians. Land not included in a native reserve may be leased by the Board only if the Board is satisfied that it "is not being beneficially occupied by the Fijian owners and is not likely during the currency of such lease ... to be required by the Fijian owners for their use, maintenance or support". There is no requirement that the Fijian owners consent to the lease or its terms, or that they be consulted.

17.27 To meet its expenses, the Board is empowered to retain not more than 25% of rents received. We were informed that the income from this source is not sufficient to meet the Board's expenses. It is necessary for the Government to appropriate additional funds.

17.28 The Commission received a number of submissions from Fijian landowners that the powers of the Native Land Trust Board were too great. They thought that, in entering into or renewing leases of land, it should be bound by the views of the landowners. The percentage of rents retained to meet the Board's expenses was also considered excessive. It was suggested that the Native Land Trust Act should be thoroughly examined with a view to its amendment or repeal. On the other hand, the Commission received submissions that, in the interests of the tenants of agricultural land (most, but by no means all, of whom are Indo-Fijians) and of good race relations, there should be security of tenure of agricultural land for a sufficiently long term to encourage good husbandry and land improvement, as well as to meet the need of tenants for reasonable certainty.

17.29 The Commission considers that the existence of the Native Land Trust Board, with its powers to grant leases of land on behalf of the landowners, goes to the heart of land policy in the Fiji Islands. The Act seeks to strike a balance between the fact that the bulk of the land remains in the ownership of indigenous Fijians, and, on the other, the need to ensure its use in the interests of the economy of the whole country, not only by Fijians, but also by members of other communities. The security of tenure that can and should be provided to tenants under leases granted by the Board is vital to any investment involving the use of land.

17.30 The mechanism of allowing alienations of native land only through the Native Land Trust Board does involve the sacrifice of control by the Fijian owners. This has implications for the enjoyment of the right to equality under the law without discrimination, as well as practical consequences. We consider that, at the practical level, there should be ongoing efforts to ensure that the Board, so far as possible, acts in consultation with land owners or at least keeps them informed. The question of the source and level of the funding of its operations should be kept under review, as should its accountability for all aspects of its operations. We discussed the general principle of accountability in Chapter 15.

17.31 The Native Land Trust Act imposes on Fijians "disabilities and restrictions" not applying to the owners of freehold land. (We consider below the similar restrictions placed on Rotumans and members of the Banaban community.) Should it be protected against invalidity on the ground of inconsistency with the right of every one to equality under the law and freedom from discrimination?

17.32 At present the Native Land Trust Act is protected under section 16(5)(a) which is a blanket provision applying to all law which was in force immediately before 23 September 1966 and has continued in force ever since. We have recommended the repeal of this provision on the understanding that, if the entrenched legislation to which it applies requires protection, that protection should be given explicitly.

17.33 A prior question is whether the giving of such protection would be in conformity with the international standards. Those standards do not give extensive recognition to a right to property, because, in some states, all or most property is or was owned by the state, not individuals. However, they do recognise that a right to own property includes the right to dispose of the property. This was acknowledged by the Government of Fiji in declaring its succession to the *Convention on the Elimination of all forms of Racial Discrimination*. In doing so, it affirmed the following reservation:

> To the extent, if any, that any law relating to ... land in Fiji which prohibits or restricts the alienation of land by the indigenous inhabitants may not fulfil the obligations referred to in article 5(d)(v), the Government of Fiji reserves the right not to implement the ... provision ... .

17.34 We have considered the restriction on the alienation of Fijian land in the light of the two international instruments dealing with the rights of indigenous peoples: *ILO Convention 169 on Indigenous and Tribal Peoples* and the Draft *Declaration on the Rights of Indigenous Peoples*. The thrust of those instruments

is that restrictions on the right of indigenous peoples to deal with their land, other than in the ways permitted by their own land-tenure systems, may be justified in the interests of protecting their rights to land in the long term. However, land policies should be determined only with the full participation of the indigenous peoples themselves.

17.35 In the light of all these factors, the Commission considers that the Native Land Trust Act should continue to be entrenched by the Constitution. It should be consequentially amended so far as is necessary to take account of the constitution of the Native Land Commission by the Constitution and its status as a constitutional commission. All aspects of the operation in practice of the Act, "for the benefit of the Fijian owners", as well as the country as a whole, should be kept under constant review within the framework proposed below in relation to all matters affecting agricultural land.

17.36 The section of the Bill of Rights affirming the right to equality under the law and freedom from discrimination on prohibited grounds, including those of race and ethnic origin, should permit the limitation of that right for the purpose of imposing, by or under a law, restrictions on the alienation of land held in accordance with Fijian custom, or permitting the temporary alienation of such land without the consent of the owners. A draft provision for this purpose was included in Recommendation 185. For ease of reference it is reproduced below.

Rotuman land and chiefly titles

17.37 The Rotuma Lands Act (Cap. 138) was enacted to bring about the simplification and registration of customary title to land in Rotuma and to prohibit the alienation of land to non-Rotumans, except by way of lease for not more than 21 years. Rotumans may not deal with land without the written consent of the District Officer who is required to be satisfied that the disposition is not at variance with the basis of land tenure specified in the Act. There is a right of appeal from decisions of the District Officer in relation to land to the Commissioner of the Eastern Division, sitting with two assessors appointed by the Rotuma Council. He may hear the parties if he thinks fit. His decision is final.

17.38 Under section 18(1) of the Rotuma Act (Cap. 122), "District Chiefs shall continue to be elected in accordance with Rotuman custom as heretofore". The Minister may in his discretion remove a District Chief from office. A person so removed is not eligible for re-election without the Minister's consent.

17.39 Although the Commission received submissions from the Rotuma Council and other Rotumans, they did not raise any matter concerning land tenure or the

election of District Chiefs. The Rotuma Lands Act should continue to be entrenched. Because it places restrictions on the alienation of Rotuman land, it should be protected against the consequences of inconsistency with the Bill of Rights in the same way as the Native Land Trust Act.

Banaban land

17.40 Prior to independence, the British Government purchased Rabi Island, which was freehold land, for the purpose of establishing a permanent home for the Banaban community formerly living on Banaba (Ocean Island) in Kiribati. Their own island had been rendered infertile by the phosphate mining operations of the British Phosphate Commissioners. The Government of Fiji has honoured the arrangements then made for the holding of the land on Rabi Island for the benefit of the Banaban community and for their governance.

17.41 The Banaban Lands Act (Cap. 124) vests Rabi Island in freehold in the Council of Leaders constituted under the Banaban Settlement Act (Cap. 123) to be held on trust for all members of the Banaban community. The Council may allot portions of land to members of the Banaban community. The land so allotted ("Banaban land") is to vest in the persons registered as the owners "such rights, privileges, powers and obligations in relation to such land as are incidental to Banaban custom" as may from time to time be determined by the Land Court set up under the Act. Banaban land may not be disposed of, by sale, lease or otherwise, to anyone other than a member of the Banaban community. The Council may grant leases of, or licences over, other land on Rabi Island but may not otherwise dispose of it.

17.42 The Banaban Lands Act should continue to be entrenched. Because it places restrictions on the alienation of the land on Rabi Island, it, too, should be protected against the consequences of inconsistency with the Bill of Rights in the same way as the Native Land Trust Act and the Rotuma Lands Act.

The Agricultural Landlord and Tenant Act

17.43 Although the Agricultural Landlord and Tenant Act (Cap. 270) (ALTA) is an important part of the machinery governing the lease of native lands for agricultural purposes, it applies not only to native lands, but, with minor exceptions, to all agricultural land in Fiji. It does not apply in Rabi Island or Rotuma.

17.44 The Act established transitional measures for giving security of tenure to persons in occupation of agricultural land and created statutory terms of either ten

or thirty years, with a right to one further extension of twenty years. It also provided ongoing rules about the form of agricultural leases, the terms and conditions to be implied in such leases by law, including provision for periodic rent reviews, and, on the termination of the lease, the payment of compensation by the landlord for the value of improvements made by the tenant with the landlord's consent. ALTA set up machinery for valuing land and improvements and regulating relations and determining disputes between landlords and tenants. It therefore offers essential protections to both parties.

17.45 As indicated in Chapter 3, some of those most concerned about the expiry of the leases created under the provisions of ALTA assumed that ALTA itself expires, along with the leases to which it relates. That is not the case. While some of its provisions may be in need of review, the statutory regulation of the terms of agricultural leases, and machinery for their implementation, will remain in force and continue to be needed. The Agriculture Landlord and Tenant Act should continue to be entrenched.

The consideration of land issues

17.46 The Commission received a large number of submissions about land issues, many going well beyond matters relevant to a review of the Constitution. It is beyond our Terms of Reference to comment in detail on issues of substance, unless it is proper to deal with them in the Constitution. We should like to emphasize, however, that it will not be possible to achieve racial harmony and national unity, or build the mutual confidence and trust needed to achieve the goal of multi-ethnic government, unless land issues are resolutely addressed in a calm way. All communities must be willing to listen to the concerns of others and respond to them sensitively.

17.47 Many submissions expressed the view that land issues "ought to be taken out of politics". They saw as wholly destructive a perception that Fijian land ownership might be at risk unless Fijians have a dominant position in Parliament and Government. On the other hand, some submissions urged that the full use of land, in ways that preserve its fertility for the benefit of future generations, is vital to Fiji's economic prosperity. At the human level, too, those who are not, and will never be, landowners need to have a sense that reasonable steps will be taken to give them access to suitable land, not perhaps as individuals, but certainly as a community. Those are the kinds of matters that political leaders are expected to solve.

17.48 We make three proposals about ways of reconciling the apparent contradictions between these viewpoints. First, the procedure for amending the

entrenched legislation about land and other matters should make it as clear as possible that it will never be changed without the agreement of the communities and groups it protects. In particular, the Bose Levu Vakaturaga should have power to veto any amendment of the entrenched legislation protecting Fijian rights and interests in land and other matters, or the rights and interests of Rotumans or of the Banaban community. Recommendations for this purpose are made in Chapter 20.

17.49 Secondly, we have the impression that there is not a good flow of accurate information from the Government or the departments and statutory bodies which have the responsibility for general policies about matters affecting land and its application in the particular case. We cannot help feeling that we would not have received the submissions we did about land matters, particularly the policies and procedures for the renewal of leases of agricultural land, if people had been better informed.

17.50 Nothing gives greater opportunity for rumour and mistrust than a lack of accurate information about Government's policies and proposed actions in this area. In responding to people's anxieties, politicians tend to be seen as exploiting the situation for political purposes. Although it is not a matter for inclusion in the Constitution, we wish to emphasise the need for a steady flow of clear, accurate, well-coordinated, up-to-date and reasonably detailed information about what Government and the bodies working under its direction are doing, and planning to do, in the sensitive areas concerning the renewal, termination or grant of new ALTA leases, not only of native land but also of State land.

17.51 That comment leads to our third point. We consider that land policy is a matter on which broad agreement should be reached among all political parties and all communities. There is a need to apply the duty under the recommended *Compact* to take account of the interests of all communities. There should not be a feeling that the Government will implement its own policies, even if they do not reflect general agreement. Once settled by a process of negotiation and agreement, the policies should not be changed without further agreement, even if there is a change of government. In other countries it has been possible for political parties of all persuasions to reach agreement on important long-term policy questions on which people's security depends.

17.52 The policy directions about the use of land in the Fiji Islands cannot be set solely by a Commission of Inquiry or a Committee. They have to be worked out behind closed doors by the political leaders, with the help of knowledgeable

experts and perhaps someone who can act as a facilitator or conciliator in helping the political leaders reach agreement. They will need a mandate from those whom they represent. With goodwill and patience, agreement should be possible. Underlying apparent conflicts between the interests of landowners and those of tenants is a shared interest in the well-being and prosperity of Fiji.

17.53 Accordingly, we suggest that steps should be taken to reach an accord among all political parties and communities in the Fiji Islands on policies relating to the use of land and the renewal or grant of leases for agricultural purposes. The terms of such an accord, once reached, should be given wide publicity.

17.54 The recognition of chiefly title involves the application of custom. We deal with that matter below.

RECOMMENDATIONS

620. Instead of being constituted by the Native Lands Act, the Native Lands Commission should be constituted by the Constitution, with all the protections conferred on other constitutional commissions.

621. The Commission should consist of three members, any two of whom should be permitted to hear and determine a particular matter. They should be appointed by the President on the recommendation of the Bose Levu Vakaturaga. The current system of using assessors should be retained. There should be no provision for ex officio members, and the Minister responsible for Fijian Affairs should no longer have the power to designate a single Commissioner or some other person to hear a dispute.

622. The Constitution should provide that, in the exercise of its powers, the Commission shall not be subject to the direction or control of any other person or authority, except by way of appeal or judicial review.

623. The rules about disqualification for membership of the Commission, or for appointment to public office, or eligibility to be a candidate for election to Parliament within three years of ceasing to hold office as a member, should be those applying to other constitutional commissions.

624. The Secretary of the Commission should be a public officer.

625. The Commission's functions should be those of determining the ownership of native land and the boundaries of parcels, as well as questions of headship. It should not have the power to give opinions or decisions on matters relating to custom, except so far as is necessary to determine those matters.

626. The Constitution should provide that provision for appeals against decisions of the Native Lands Commission on matters concerning either the title to land and its boundaries or on questions of headship may be made by Act. The Native Lands Act should be amended to constitute an Appeals Tribunal for this purpose along the lines of that provided for in section 7. The Appeals Tribunal should continue to consist of three members, but the opportunity should be taken to review the method of appointing them.

627. There should be no right of appeal to the courts on the *merits* of decisions of the Appeals Tribunal. However, the courts should have the power of judicial review in respect of the decisions both of the Native Lands Commission and of the Appeals Tribunal.

628. The Native Lands Act should be consequentially amended so far as is necessary to take account of the constitution of the Native Lands Commission by the Constitution and its status as a constitutional commission.

629. All aspects of the operation in practice of the Native Land Trust Act, "for the benefit of the Fijian owners", as well as the country as a whole, should be kept under constant review within the framework proposed below in relation to all matters affecting agricultural land.

630. The section of the Bill of Rights affirming the right to equality under the law and freedom from discrimination on prohibited grounds, including those of race and ethnic origin, should permit the limitation of that right, by or under a law, for the purpose of imposing restrictions on the alienation of land held in accordance with Fijian custom, or permitting the temporary alienation of such land without the consent of the owners.

631. There should be no comprehensive review of what land is native land or of existing titles or boundaries.

632. The Rotuma Lands Act and the Banaban Lands Act should be protected against the consequences of inconsistency with the Bill of Rights in the same way as the Native Land Trust Act.

633. The following Acts should continue to be protected against amendment by ordinary Act of Parliament, by means of constitutional entrenchment:

the Fijian Affairs Act;
the Fijian Development Fund Act;
the Native Lands Act;
the Native Land Trust Act;
the Rotuma Act;
the Rotuma Lands Act;
the Banaban Lands Act;
the Banaban Settlement Act; and
the Agricultural Landlord and Tenant Act.

634. The Bose Levu Vakaturaga should have a power to veto any amendment of the entrenched legislation protecting Fijian rights and interests, or the rights and interests of Rotumans or the Banaban community.

635. There should be a steady flow of clear, accurate, well-coordinated, up-to-date and reasonably detailed public information about what Government and the bodies working under its direction are doing, and planning to do, in the sensitive areas concerning the renewal, termination or grant of new ALTA leases of native and State land.

636. Steps should be taken to reach an accord among all political parties and communities in the Fiji Islands on policies relating to the use of land and the renewal or grant of leases for agricultural purposes.

FISHING RIGHTS

17.55 Only the customary fishing rights of indigenous Fijians have been recognised explicitly by statute. The Fisheries Act (Cap. 158) authorises the Minister for Fijian Affairs to set up a Native Fisheries Commission to inquire into and record the existence and boundaries of customary fishing rights "in each province of Fiji" which "are the rightful and hereditary property of native owners", whether mataqali or other divisions or subdivisions of the people. It is an offence

for any person to take fish in any registered area unless that person is a member of the ownership group and is fishing otherwise than by way of trade or business. There is an exception for recreational fishing by any person, and licences to fish may be granted to any person by the Commissioner of the relevant Division in his discretion, after consulting the owners of fishing rights which may be affected.

17.56 By its terms, the provision does not apply to Rotuma, but it does apply to Rabi Island. For their subsistence fishing, the Banaban community have to get the permission of the chiefs of Cakaudrove who control the fishing rights there.

17.57 The Fisheries Act is not expressly entrenched by the Constitution, but is one which would come within the reference in section 78 of the 1990 Constitution to "a bill ... which affects Fijian land, customs or customary rights". It is therefore protected against amendment by an ordinary Act of Parliament. Customary fishing rights should continue to be protected by a constitutional provision to this effect, as proposed in Chapter 20.

RECOMMENDATION

637. The provisions of the Fisheries Act which recognise and protect Fijian customary fishing rights should continue to be protected against amendment by ordinary Act of Parliament under constitutional provisions which give a veto power to the Bose Levu Vakaturaga in respect of Bills affecting Fijian land or customary rights.

MINERALS

17.58 Section 9(7) of the 1990 Constitution created a new right of landowners and owners of customary fishing rights to the royalties or proceeds from minerals extracted from the subsoil. The provision allows the state to keep a proportion of the royalties, as well as to recover the costs of administering "exploration and extraction". The proportion to be retained by the State is to be "as may be approved by the Cabinet from time to time". This arrangement allows the State, as owner of the mineral resources, to control extraction, but at the same time ensures that the landowners and owners of fishing rights receive income from this activity. The Commission received a number of submissions urging the retention of the provision. Some people wanted it to be made even more favourable to the owners of affected land or fishing rights.

17.59 In most countries, the state asserts rights of ownership over minerals in the subsoil. It controls exploration and exploitation and earns revenue through the payment of royalties. Most people making submissions accepted the legitimacy of such arrangements as they apply in Fiji. The Commission considers that the interests of the owners of the surface of the land or of fishing rights should continue to be recognised. However, there are other important interests which should also be taken into account.

17.60 One is the need to make sure that the state does not grant any person the right to exploit minerals in the subsoil without taking approved measures to prevent environmental damage. There needs to be careful monitoring to ensure that the measures are put in place and maintained, and that they are adequate for the purpose. Consideration should be given to setting up a contingencies fund so that, if environmental damage should occur despite all precautions, money will be available to repair the damage or pay compensation to those who suffer loss.

17.61 The Commission considers that the Constitution should recognise the right of landowners or the owners of customary fishing rights to an equitable share of the royalties received by the state in respect of minerals extracted from the subsoil. The share that is considered "equitable" from time to time should be fixed by law. It should not be a matter for the Cabinet. The Constitution should set out the matters to be taken into account in determining what is an equitable share. They should include the following:

- other benefits which the owners are likely to receive as a result of the exploitation;
- the risks of environmental damage to the land or fishing rights of the owners;
- the risks of environmental damage to the land or fishing rights of persons other than the owners;
- any legal obligation of the state to contribute to a fund to meet the cost of preventing or repairing any environmental damage caused by the exploitation, or of compensating any person who has suffered loss as a result of such damage;
- the cost of administering the exploitation right; and
- the need for the benefits of the exploitation to contribute to general revenue.

17.62 The Commission also received submissions seeking to extend the rights of the owners of native land to minerals, or the royalties from minerals, in the continental shelf. Interest was also expressed in sharing the revenue from the exploitation of the fish and other living resources in the 200 mile exclusive economic zone. The Commission considers that there is not the same justification for sharing the revenues from the resources of these areas as there is in the case of resources in the subsoil of the land, and those parts of the seabed over which there are customary fishing rights. Historically, the Fijian people confined their subsistence fishing to the waters enclosed within the protective reefs. The revenue from resources beyond those limits should belong exclusively to the state.

RECOMMENDATIONS

638. The Constitution should not permit the state to grant any right to extract minerals from the subsoil unless, as a condition of that right,

- **(a) approved measures are taken to prevent environmental damage, and**
- **(b) consideration has been given to establishing a fund for the purpose of meeting the cost of further measures necessary to prevent, repair or compensate for any environmental damage that may nevertheless occur.**

639. The owners of land or of a registered customary fishing right should be entitled to an equitable share, fixed by law, of royalties received by the state in respect of minerals extracted from the subsoil of their land or the seabed in the area covered by their customary fishing rights. In determining what is an equitable share, account should be taken of

- **(a) other benefits which the owners are likely to receive as a result of the exploitation;**
- **(b) the risks of environmental damage to the land or fishing rights of the owners;**
- **(c) the risks of environmental damage to the land or fishing rights of persons other than the owners;**
- **(d) any legal obligation of the state to contribute to a fund to meet the cost of preventing, repairing or compensating for any environmental damage;**

(e) the cost of administering the exploitation right; and

(f) the need for the benefits of the exploitation to contribute to general revenue.

THE GOVERNANCE OF COMMUNITIES

Indigenous Fijians

17.63 The Fijian Affairs Act (Cap. 120) creates a number of institutions and a detailed system for the governance of Fijians. Under section 2

> "Fijian" includes every member of an aboriginal race indigenous to Fiji and also includes every member of an aboriginal race indigenous to Melanesia, Micronesia or Polynesia living in Fiji who has elected to live in a Fijian village.

17.64 The Fijian Affairs Act constitutes the Great Council of Chiefs. In Chapter 9 we recommended the constitution of the Bose Levu Vakaturaga under the Constitution, and made proposals about its future role.

17.65 The Act also creates the Fijian Affairs Board. It, too, has an advisory role, but in addition,

> may, subject to the approval of the Minister, make regulations to be obeyed by all Fijians, providing for the peace, order, welfare and good government of Fijians.

The only such regulations in force at the present time appear to be the Fijian Affairs (Safety at Sea) Regulations.

17.66 Without prejudice to the generality of this plenary power of governance over Fijians, the Board, subject to the approval of the Minister, has the express power, among others, to constitute Provincial Councils and other councils and provide for their powers, duties and functions, including the imposition of rates and fees.

17.67 The Fijian Affairs Act constitutes Provincial Councils for each province. Subject to the approval of the Board, a Provincial Council may make by-laws for the health, welfare and good government of Fijians residing in or being members of the community of a province, and, subject to the approval of the Minister, may impose rates on such Fijians. Most, if not all, provinces have made what appear to be fairly uniform Public Health (Villages) By-laws.

17.68 The Fijian Affairs (Provincial Council) Regulations allow provinces that so wish to levy a land rate on all land "of whatsoever tenure, including freehold land but excluding all land within a town, owned by Fijians within the province". Pending the adoption of a land rate, a Provincial Council may, by resolution, impose a provincial rate upon every male Fijian between the ages of 21 and 60 registered as a land owner of the province. The fact that the bulk of the members of Provincial Councils are elected appears to be closely linked with the creation of this power to tax.

17.69 The Fijian Affairs Board may establish councils for any area in any province. Those councils may, subject to the approval of the Provincial Council, make orders for the good government of Fijians in, or being members of the community of, that area. The powers of the Board, the Provincial Councils and other councils to create offences punishable by fines or imprisonment, or both, is laid down on a carefully graded scale.

Fijian Development Fund Act

17.70 The Fijian Development Fund Act (Cap. 21) sets up a fund created by a levy on sales of copra or coconuts. Producers remain the beneficial owners of the amount standing to their credit in the fund and may borrow from it for approved purposes.

Rotumans

17.71 The Rotuma Act (Cap. 122) sets up the Council of Rotuma. It consists of the chiefs of the seven districts and one elected member from each of the districts, together with the District Officer. The most senior medical and agricultural officers are to be advisory members unless the Council resolves otherwise. The Council has advisory functions in relation to Rotuma and administers the Rotuma Development Fund.

17.72 The main income of this fund is a levy of up to 10% which the Council may impose on the sale price of all primary produce produced by Rotuman producers in Rotuma. The whole of the fund, less administration expenses, is required to be directed exclusively towards the promotion of the development, welfare and advancement of Rotumans. It may be spent outside as well as inside Rotuma. Up to $20,000 in total may be paid into a Rotuma Agricultural and Industrial Loan Fund which the Council may establish, and from which loans may be made to Rotumans for agricultural and industrial purposes.

17.73 The Rotuma Council has the power to make Rotuma Regulations relating to the peace, order and good government of the Rotuma community and to be obeyed by "all members of the Rotuman community in Rotuma". "Rotuman community" means the indigenous inhabitants of Rotuma and also any Fijian resident on Rotuma. Regulations made by the Rotuma Council become law only if approved by resolution of Parliament.

The Banaban community

17.74 The Banaban Settlement Act establishes a Council of Leaders with the power, subject to the prior approval of the Minister, to make regulations to provide for the peace, order and good government of the Banaban community. With the approval of the Minister of Finance, the Council may borrow money secured on the property and revenues of the Council, including the royalties and other moneys accruing to the Banaban community in respect of minerals mined by the British Phosphate Commissioners on Banaba.

17.75 The Act establishes a Banaban Trust Fund to be administered by a Board consisting of the members of the Council. The Board is to invest the capital consisting of $A10 million. The income is to be transmitted to the Council to be expended in promoting the social and economic welfare of the Banaban community. There is also a Rabi Island Fund into which is paid the other income of the Council.

17.76 By the Rabi Islands Regulations (Application) Order, the regulations specified in the schedule to the Order are to be obeyed by Fijians while on Rabi Island. It seems doubtful, however, whether the Council has the power to make regulations applying to anyone other than a member of the Banaban community as defined. The purported application of regulations to Fijians may therefore be ultra vires and void.

17.77 A Banaban Settlement (Amendment) Bill has recently been passed by Parliament. (At the time of writing it had not received the President's assent.) The purpose of the Bill is to overcome problems arising out of divisions within the Council of Leaders and to strengthen the administration of the Banaban Trust Fund. The Senate refused to pass an earlier version of the Bill on the ground that it was inconsistent with the prohibition in the Constitution of discrimination on the ground of sex. That version had provided that only men over the age of sixty could be members of the Council of Leaders.

17.78 The final version of the Bill also omitted words which would have extended the meaning of "Banaban community" to include persons not descended from a former indigenous inhabitant of Banaba but who were "accepted as members

of the Banaban community in accordance with Banaban custom". This development means that, apparently without realising the implications, Parliament failed to take the opportunity of authorising the Council of Leaders to make regulations applying to persons not of Banaban descent who have been absorbed into the community. It strengthens the view expressed above that the Rabi Islands Regulations (Application) Order, purporting to apply to Fijians on Rabi Island the regulations made by the Council, is ultra vires and void.

The effect of making laws for communities

17.79 The regulations, rules or by-laws which may be made under the Fijian Affairs Act, the Rotuma Act or the Banaban Settlement Act apply to persons described by reference to their race. The law is to be "obeyed" by "Fijians" or by "all members of the Rotuman community resident in Rotuma" or to be "made for the peace, order and good government of the Banaban community". In substance, the laws made for the persons to whom they apply may take two forms. They may create offences and impose a fine or imprisonment for their breach, or impose a tax, either on land or produce or on a per capita basis.

17.80 The laws creating offences serve, or are capable of serving, four distinct purposes:

- First, they are for the local government of the area where the particular community is living. They are a substitute for local authority by-laws applying on a territorial basis. Thus they set standards for the construction of buildings, sanitation and other local matters and for the use of small boats beyond the protective reefs. The taxing laws raise revenue for what is, in effect, regional or local authority administration.
- Secondly, because neither Fijian magistrates nor the Rabi Island Court are empowered to apply the ordinary criminal law, the laws can set up a mini-criminal justice system which duplicates the ordinary law and can be enforced through local courts.
- Thirdly, they can enforce values which, if infringed, are disruptive in a small community, for example, by making adultery a criminal offence.
- Fourthly, they can be a vehicle for enforcing the communal allocation of tasks within a village, for example those required to produce crops for subsistence or sale.

The actual or potential creation of these four kinds of laws applying to persons on the basis of their race gives rise to practical and policy questions as well as issues of principle.

17.81 First, the provision for systems of law based on race assumed that the communities in question would remain isolated and homogeneous. People of other races would not be involved. However, this assumption is ceasing to be true. Increasingly, members of other races are taking up residence within local communities. The Banaban community has tried to deal with this problem, though probably ineffectively. The Rotuma Act goes a certain distance by providing that a member of the Rotuman community includes any Fijian resident on Rotuma. However, it does not cater for members of other ethnic communities. As more people belonging to other ethnic communities take up residence in Fijian villages, Rotuma or on Rabi Island, either through intermarriage or because they have been permitted to reside there, the application of laws on a personal, rather than a territorial, basis will become increasingly problematic.

17.82 Secondly, the law relating to "Fijians" is capable of applying to Fijians wherever they may reside. To what extent can and should Fijians be forced to remain within, or return to, the traditional communal system of the village or be free to live elsewhere as individuals, with good results or bad? The provisions of the Bill of Rights recognising the right to freedom of movement of all citizens within Fiji bears on this question.

17.83 Thirdly, the system of law created under the authority of the Fijian Affairs Act, the Rotuma Act and the Banaban Settlement Act is regulatory. It is enforced by provisions making it a criminal offence not to obey the regulation concerned. To the extent that the laws applying to particular communities are similar in content to local authority by-laws, they raise no issues of principle. If, however, the separate laws are there solely to facilitate their enforcement by special courts, they raise a fundamental question about whether there is good reason to set up separate systems of law and separate courts for particular communities. We come back to this question below, in considering the provision made in the Constitution for Fijian courts.

17.84 Fourthly, to the extent that the separate systems of law impose on particular individuals, by reference to and by reason of their race, disabilities or restrictions not applying to members of other races, they are inconsistent with the constitutional right to equality under the law and freedom from discrimination on the grounds of race or ethnic origin. To the extent that the separate systems impose disabilities or restrictions, or confer privileges or benefits on another prohibited ground, for example, a person's sex or gender, they are discriminatory on that ground also.

17.85 It would be wrong to give the impression that Fijians, Rotumans and members of the Banaban community are at present weighed down by a network of *particular* laws that are discriminatory, though a few examples can be found. The concerns are more

- the perpetuation of a system of separate laws based on the race of those to whom they apply, with little or no option, at least in law, for members of the affected group to "opt out";
- the increasing likelihood that the members of the group to whom race-based laws apply will no longer live apart from members of other races; and
- a possible move to counter these and other problems arising from the impact of the money economy, and other social and cultural changes, by attempting to "put back the clock" to the days when communal living, in isolation from others and in accordance with traditional values, was the accepted pattern.

17.86 For the time being, however, the Fijian Affairs Act, the Rotuma Act and the Banaban Settlement Act are needed in their present form to recognise the identity of the community concerned and set up machinery for their governance. Those Acts should continue to be entrenched. The Fijian Affairs Act should be consequentially amended to reflect our recommendation for the constitution of the Bose Levu Vakaturaga in the Constitution instead of in the Act.

17.87 Provision should also be made for protecting regulations made under the three entrenched Acts from being void on the ground of inconsistency with the right to freedom from discrimination. To deal with this need in relation to Fijians, section 16 of the 1990 Constitution contained a new subsection (6) providing as follows:

> Nothing contained in or done under the authority of any regulations made under the Fijian Affairs Act shall be held to be inconsistent with or in contravention of this section to the extent that the regulation in question makes provision for the peace, order, welfare and good government of Fijians.

This provision gives blanket protection to any regulations which may be made under the Fijian Affairs Act after 25 July 1990, not only so far as they may be discriminatory on the ground of race, but also so far as they may discriminate on the ground of sex or any other ground prohibited by section 16(2). As yet, no new regulations have been made.

The international standards concerning the governance of groups

17.88 The Commission considered the approach taken in section 16(6) in the light of the international human rights standards. These standards do not prohibit group differentiations as such. However, they do state very clearly that no one may be discriminated against on the ground of race. They also make it clear that indigenous peoples are entitled to a full measure of human rights and fundamental freedoms.

17.89 Article 5 of the *Convention on the Elimination of All Forms of Racial Discrimination*, to which, as already mentioned, Fiji is a party, requires States Parties to

> guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:
>
> (a) The right to equal treatment before the tribunals and all other organs administering justice;
>
> ...
>
> (d) Other civil rights, in particular:
>
> (I) the right to freedom of movement and of residence within the border of the State;
>
> ...
>
> (e) Economic and social and cultural rights, in particular:
>
> (I) the rights to work, free choice of employment, just and favourable conditions of work, just and favourable remuneration;

The Government of Fiji accepted these provisions without reservation.

17.90 As the international focus has shifted from the prevention of large-scale racial discrimination to the protection of vulnerable groups, including indigenous peoples, there is more emphasis on the duty of the State to respond to their different needs. Nevertheless, Article 3 of *ILO Convention 169 on Indigenous and Tribal Peoples* provides:

> 1. Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. The provisions of the convention shall be applied without discrimination to male and female members of these peoples.
>
> 2. No form of force or coercion shall be used in violation of the human rights and fundamental freedoms of the peoples concerned including the rights contained in this Convention.

17.91 Article 2 of the Convention stresses the importance of the self-identification of the group as indigenous or tribal. The provision seems aimed

primarily at preventing states from denying to a group its indigenous or tribal status, but it also has implications for the right of an individual to identify himself or herself as a member of the group, or to refrain from doing so, in the exercise of the right to freedom of association.

17.92 Both these ideas appear again in the draft *Declaration on the Rights of Indigenous Peoples*, Article 8 of which provides:

> Indigenous peoples have the *collective and individual* right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such.

Similarly, Article 9 provides:

> Indigenous *peoples and individuals* have the right to belong to an indigenous community or nation, in accordance with the customs of the community or nation concerned. No disadvantage of any kind may arise from the exercise of such a right.

(Emphasis added in each case)

17.93 As a pointer to the way in which indigenous identity is to be reconciled with the enjoyment of other rights, the draft Declaration states in Article 1: Indigenous peoples have the right to the full and effective enjoyment of all human rights and fundamental freedoms recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law. Other significant rights of indigenous peoples include those to maintain and strengthen their legal systems (Article 4), and the individual rights to life, physical and mental integrity, liberty and security of the person (Article 6).

17.94 The *Convention on the Elimination of All Forms of Discrimination Against Women*, to which Fiji is a party, defines discrimination against women as meaning any distinction, exclusion or restriction made on the basis of sex which denies women human rights and fundamental freedoms on a basis of equality with men. (Article 1). The Government of Fiji entered a reservation to Article 2(a) of the Convention which would have required it to take all appropriate measures

> to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

17.95 Even so, Fiji is bound by other provisions of the Convention which require it, among other things, to

- take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women (Article 2(f)); and to
- take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men (Article 3);
- take all appropriate measures to eliminate discrimination against women in rural areas ... (Article 14).

The Beattie Commission *recommendation*

17.96 The *Beattie Commission* was required by its Terms of Reference to inquire into the structure and operation of the judicial system of Fiji, including "the Fijian Courts". As we have shown in Chapter 13, a court does not exist in isolation. It is given jurisdiction in respect of certain matters, and over certain persons. Often, it is required to apply a particular body of law. The *Beattie Commission* therefore devoted a section of its report to the content of the draft Fijian Affairs (Court) Regulations then under consideration by the Government. Those Regulations are intended to create a body of law to be enforced by the proposed Fijian courts. The Beattie Commission recommended:

> The Fijian Affairs (Courts) Regulations should be critically examined to consider which of those in draft form do not contravene the provisions of the Constitution. Those that do so contravene or otherwise conflict with the tenets of human rights should not be introduced; they should be deleted from any proposed regulations (Recommendation 79(e)).

This Commission endorses that recommendation, but notes that it did not take account of the fact that section 16(6) of the Constitution denies to indigenous Fijians affected by regulations made under the Fijian Affairs Act the protection of the right to freedom from discrimination on the grounds prohibited by section 16(2).

17.97 We consider that section 16(6) should be repealed. In its place, the Constitution should provide that the right to equality under the law and freedom from discrimination on a prohibited ground may be limited by laws providing for the governance of Fijians, the Rotuman community or the Banaban community, and of other persons living as members of a Fijian community, the Rotuman community or the Banaban community, only if those laws comply with certain

further conditions. They must not discriminate against a person on any other prohibited ground, such as sex, gender or age, and they must not deny to any person any other human right or fundamental freedom recognised by law.

17.98 The draft provision for this purpose recommended in Chapter 7 is reproduced below. We return to the question of the law applying to Fijians, particularly law creating criminal offences, in considering section 122 of the Constitution establishing Fijian courts.

17.99 We described above the conceptual and policy problems involved in maintaining a body of law applying to a group of persons identified by reference to their race or ethnic origin. In essence, they raise the question whether the governance of Fijian villages, Rotuma and Rabi Island should, in the longer term, continue to be based on a body of law applying to persons identified by their race or ethnicity, or should instead be based on the concept of local government legislation applying to all persons living within a particular area. Such a radically different approach would obviously need very careful consideration. However, we believe it is one that should be borne in mind in making decisions in the meantime about the exercise of the existing powers to make laws applying to Fijians, Rotumans and the Banaban community.

RECOMMENDATIONS

640. The Fijian Affairs Act should be consequentially amended to reflect the recommendation for the constitution of the Bose Levu Vakaturaga in the Constitution instead of in the Act.

641. The Constitution should provide that the right to equality under the law and freedom from discrimination on a prohibited ground may be limited by laws providing for the governance of Fijians, the Rotuman community or the Banaban community, and of other persons living as members of a Fijian community, the Rotuman community or the Banaban community, if those laws

- **(a) do not discriminate against any person on any prohibited ground other than race or ethnic origin, and**
- **(b) do not deny to any person any other human right or fundamental freedom recognised by the Constitution or by law.**

Section 16(6) of the 1990 Constitution, validating all regulations made under the Fijian Affairs Act, should be repealed.

642. **Consideration should be given to the question whether the governance of Fijian villages, Rotuma and Rabi Island should, in the longer term, continue to be based on a body of law applying to persons identified by their race or ethnic origin, or should instead be based on the concept of local government legislation applying to all persons living within a particular area. That possibility should be borne in mind in making decisions in the meantime about the exercise of the existing powers to make laws applying to Fijians, Rotumans and the Banaban community.**

THE CUSTOMARY LAW

17.100 The Native Lands Act, the Rotuma Lands Act, the Banaban Land Act and the Fisheries Act recognize and give the force of law to the customs of the Fijian, Rotuman and Banaban peoples governing the holding and use of land, fishing rights and chiefly titles. Indirect effect is also given to custom in the provisions of the Native Land Trust (Leases and Licences) Regulations dealing with the distribution of the net proceeds from the lease or sale of native lands.

17.101 Section 100 of the 1990 Constitution made additional provision for the application of the customary law. Subsection (1) takes the form of an instruction to Parliament, in the exercise of its power to make laws for the peace, order and good government of Fiji (section 61), to "make provision for the application of laws, including customary laws". Subsection (2) contains further directions to Parliament about legislating for that purpose. Subsection (3) provides:

> Until such time as an Act of Parliament otherwise provides, Fijian customary law shall have effect as part of the laws of Fiji:
>
> Provided that this subsection shall not apply in respect of any custom, tradition, usage or values [sic] that is, and to the extent that it is, inconsistent with a provision of this Constitution or a statute, or repugnant to the general principles of humanity.

17.102 The purpose of the section was clearly to give a higher status to the customs and values of Fijians in the country's legal system, but its actual effect, especially of subsection (3), is problematic. The contexts in which people making submissions saw custom as important concerned matters to do with respect for

chiefly leadership, the conduct of ceremonies and other protocol, rather than those affecting legal rights and duties.

17.103 The application of Fijian custom concerning holding and use of land, fishing rights and chiefly titles and the sharing of the proceeds from the use of those resources is already clearly established by entrenched legislation. We consider that this approach should continue to be followed if it is desired to apply custom as a matter of law to other aspects of the lives of Fijians, Rotumans or the Banaban Island community. The substance of section 100(1) and (2) allowing for the application of custom by Act should be retained, but section 100(3) should be repealed.

17.104 The application of custom by Act would provide certainty about the matters which are to be governed by custom. However, care needs to be taken to allow sufficient flexibility, so that it is possible to apply the customs of different communities, or different territorial areas. There is also a need to avoid freezing custom at a particular time. It should be allowed to retain its capacity to adjust to changing circumstances, as it invariably does over time.

17.105 Another way of applying the values reflected in custom is by absorbing them into the general law applying to all citizens. That has already been done in the case of reconcilable offences, a matter to which we return below in discussing the provision made in the 1990 Constitution for Fijian courts. There may be room to incorporate customary values in other areas as well. For example, in Chapter 7, we suggested that, in some cases, a requirement that an offender live in his or her village or at some other fixed address for a period may be a more suitable penalty than a custodial sentence.

17.106 Finally, an important issue in providing for the application of custom is how far its application should be made subject to the Bill of Rights. In making the customary law part of the law of Fiji, section 100(3) provides that the customary law is subject to the Constitution. Like its predecessor in the 1970 Constitution, the Bill of Rights in the 1990 Constitution accommodates custom in several ways.

17.107 Section 7(3)(e) makes it clear that any labour reasonably required as part of reasonable and normal communal or other civic obligations is not caught by the constitutional prohibition of forced labour. We have recommended that this provision be retained.

17.108 Section 16(3)(d) protects the customary law against possible invalidity on the ground that it is inconsistent with the right to freedom from discrimination.

It validates any law

> for the application of the customary law with respect to any matter in the case of persons who, under that law, are subject to that law.

That provision gives comprehensive protection to the customary law, even if it discriminates on the ground of race, sex or any other ground prohibited by section 16(2). We consider that this protection is too wide.

The international standards concerning the application of customary law

17.109 *ILO Convention 169 on Indigenous and Tribal Peoples* provides as follows:

> Article 8
>
> 1. In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.
>
> 2. These peoples shall have the right to retain their own customs and institutions, *where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights*. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.
>
> ...
>
> Article 9
>
> 1. *To the extent compatible with the national legal system and internationally recognized human rights,* the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected.
>
> 2. The customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases.
> (Emphasis added)

17.110 The draft *Declaration on the Rights of Indigenous Peoples* is much less specific. The relevant provisions have already been referred to in paragraphs 92 and 93.

17.111 We consider that, in general, the customary law should continue to be subject to the Bill of Rights. However, an exception should be made if the customary law is inconsistent with the right to equality under the law and freedom from discrimination. In that context, a distinction should be made among the matters to which the customary law relates. Even if the customary law relating to

- the holding, use or transmission of land or fishing rights; or
- the distribution of the produce or proceeds of land, fishing rights or minerals; or
- the entitlement of any person to a chiefly rank or title

is discriminatory on a prohibited ground, it should not be open to challenge. It is generally accepted that custom in these matters should not be disturbed. The customary law applying to other matters should be protected against challenge, but only if it does not deny to any person to whom it applies any other fundamental right or freedom, including the right to freedom from discrimination on any prohibited ground other than race or ethnic origin.

17.112 The practical effect is that the entrenched Acts providing for the application of custom to land, fishing rights or chiefly titles would not be regarded as inconsistent with the right to freedom from discrimination even if that custom could be regarded as discriminatory on a prohibited ground, for example, sex or gender. However, laws providing for the application of custom to other matters would not be protected if the custom discriminated on such a ground.

RECOMMENDATIONS

643. The substance of section 100(1) and (2) of the 1990 Constitution, allowing for the application of custom by Act, should be retained, but section 100(3), providing that, until such time as an Act of Parliament otherwise provides, Fijian customary law shall have effect as part of the laws of Fiji, should be repealed.

644. The customary law relating to

(a) the holding, use or transmission of land or fishing rights, or

(b) the distribution of the produce or proceeds of land, fishing rights or minerals, or

(c) the entitlement of any person to a chiefly rank or title

should not be open to challenge, even if it is discriminatory on a prohibited ground. The customary law applying to other matters should be protected against challenge by reason of discrimination on the ground of race or ethnic origin, as long as it does not deny to any person to whom it applies any other fundamental right or freedom, including the right to freedom from discrimination on any other prohibited ground.

645. Section 16(3)(d), protecting all customary law against possible invalidity on the ground that it is inconsistent with the right to freedom from discrimination, should be repealed.

DRAFT CONSTITUTIONAL PROVISIONS

17.113 In Chapter 7, we put forward, for inclusion in the Bill of Rights, a redrafted provision affirming the right to equality under the law and freedom from discrimination. For ease of reference we reproduce here the subsections allowing the limitation of that right by laws restricting the alienation of land by Fijians, Rotumans and members of the Banaban community, providing for their governance, and for the application of their customs:

(8) A law, or an administrative action under the authority of a law, may limit the right affirmed in this section, for the purpose of

(a) providing for the application of the customs of Fijians, Rotumans or the Banaban community to the holding, use, transmission, or distribution of the produce or proceeds of land, fishing rights or minerals, or to the entitlement of any person to any chiefly title or rank; or

(b) imposing any restriction on the alienation of land or fishing rights held in accordance with Fijian, Rotuman or Banaban custom, or permitting the temporary alienation of such land or fishing rights without the consent of the owners;

(9) To the extent permitted by subsection (10), a law, or an administrative action under the authority of a law, may limit the right affirmed in this section, for the purpose of providing for

(a) the governance of Fijians, the Rotuman community or the Banaban community and of other persons living as members of a Fijian community, the Rotuman community or the Banaban community, or

(b) the application to persons referred to in paragraph (a) of Fijian, Rotuman or Banaban custom respectively, in respect of any matter other than those referred to in subsection (8)(a) or (b).

(10) A limitation for a purpose referred to in subsection (9) is valid only if it

(a) accords to every person to whom it applies the right to equality before the law without discrimination on any prohibited ground, other than the race or ethnic origin of that person or members of that community, and

(b) does not deny to any such person any other human right or fundamental freedom recognised by law.

THE ADMINISTRATION OF JUSTICE

17.114 Just as there is provision in the law for the governance of Fijians, Rotumans and members of the Rabi Island community, so also there is provision for applying the laws made for their governance - and in some cases, all or part of the ordinary law as well - through special courts. The assumption behind the creation of special courts for a particular community is that they will give its members better access to the administration of justice. However, that assumption needs to be tested by reference to the following questions:

- Have modern means of transport had the effect of enabling the people of once physically remote places to obtain access to the ordinary courts?
- What special laws are required for the governance of the community?
- Are there factors which make the ordinary courts unsuitable to administer justice to the community concerned, through the application of either the special law or the ordinary law?
- If so, could something be done to make them more suitable for that purpose?
- Are there ways of resolving disputes within the community other than by bringing them before a court?

We look at those questions in examining the current arrangements for courts for Fijians, and for Rotuma and Rabi Island.

Fijian courts

17.115 Under the Fijian Affairs Act, the Minister responsible for Fijian Affairs has the power to appoint fit and proper persons to be Fijian magistrates with the jurisdiction and powers conferred upon them by or under the Act. There are no restrictions on the extent to which civil jurisdiction may be so conferred, but criminal jurisdiction is limited to offences against regulations, by-laws and orders made under the Act.

17.116 The Act constitutes tikina courts for every tikina, consisting of a Fijian magistrate sitting alone. It also constitutes provincial courts for each province. These "shall be composed of three members, of whom two shall be Fijian magistrates and the third either a Fijian magistrate or a District Officer". There is a right of appeal from tikina courts to the provincial court in all but trivial cases. There is a further right of appeal from provincial courts to what is now the High Court in civil and criminal matters. The powers and procedure of tikina and provincial courts are laid down in the Fijian Affairs (Courts) Regulations. The conduct of appeals is governed by the Fijian Affairs (Appeals) Regulations. In addition, the Legal Adviser to the Fijian Affairs Board may revise the findings, sentences or orders of a Fijian court, subject to safeguards for the accused person.

17.117 We mention these matters to show that, although the courts which could be constituted under the Fijian Affairs Act were separate, and did not administer the ordinary criminal law, they could be empowered to administer the civil law. They were also fully integrated into the general court system. The inability of the courts concerned to administer the ordinary criminal law was in effect overcome by making regulations under that Act a Criminal Offences Code. The Code duplicated a number of the provisions of the ordinary law contained in the Penal Code.

17.118 In 1967, it was decided to repeal the Criminal Offences Code and bring justice to Fijians through the ordinary courts. The move reflected the fact that the 1966 Constitution had, for the first time, made provision for a Bill of Rights in Fiji. As has been seen, Fijians, like everyone else, are entitled to the protections afforded by a Bill of Rights, specially against deprivation of liberty and in the trial of criminal offences. Because the whole system of Fijian administration was enforced through offence provisions, it too, was dismantled.

17.119 Clearly, the new arrangements have not been wholly satisfactory from a Fijian viewpoint. This dissatisfaction accounted for the inclusion in the 1990 Constitution of specific provision for Fijian courts. Section 122 provides that there shall be Fijian courts having such jurisdiction and powers as may be prescribed by Parliament, which is also to make provision for the presiding officers of Fijian courts, their qualifications and tenure of office. Clearly, these courts were intended to be quite different from the courts provided for in Fijian Affairs Act. However, the constitutional provision has proved difficult to implement, principally because there has been no clear policy about the body of law that Fijian courts are to administer.

17.120 The *Beattie Commission* discussed at length the submissions received on the question of Fijian courts and the minimum safeguards required to ensure that they operate fairly. However, that Commission clearly regarded itself as bound by section 122 of the Constitution providing for Fijian Courts.

17.121 This Commission fully accepts that there are problems at present in ensuring that Fijians, particularly in the remoter rural areas, have access to an adequate and "user-friendly" system of administering justice. However, we have considerable reservations about the idea of creating a separate body of law applying to Fijians, so that it can be administered in Fijian courts. We think it would be undesirable to duplicate offences already punishable under the Penal Code. Conversely, we think that, with the exceptions we discuss below, offences under the Penal Code should be tried in the ordinary courts.

17.122 Like everyone else, Fijians charged with the commission of criminal offences are entitled to all the protections afforded by the Bill of Rights. We think that this would be hard to achieve if a separate system for trying criminal offences were to be established. Similar considerations apply to the exercise of civil jurisdiction. The *Beattie Commission* made a number of recommendations aimed at improving the quality of the Magistrates' Courts, particularly in dealing with family law matters. Fijians are entitled to the benefits of the improved system.

17.123 We therefore propose a two-pronged approach:

> strenuous efforts should be made to improve the way in which the Magistrates' Courts deliver justice in the outer islands and other remote parts of Fiji; and
>
> a new system of voluntary dispute settlement should be set up under which people should be permitted to settle their disputes and make appropriate reparation in accordance with Fijian traditional practices.

We deal with each of these approaches in turn.

Improving the accessibility of the Magistrates' Courts

17.124 We consider that arrangements should be made for Magistrates to hold courts more frequently in the outer islands and other remote areas, and in a wider range of places. Courts do not need to be held only in courthouses or other official buildings. Experience elsewhere has shown that, without affecting the dignity or efficiency of a court, it is possible for it to hold hearings in places where people feel more at home than they do in an unfamiliar setting.

17.125 Section 51 of the Magistrates' Courts Act should be amended to provide that hearings may be held in languages other than English, but, to facilitate appeals, the record should continue to be kept in English. There is no reason why Magistrates serving predominantly Fijian areas should not be required to be fluent speakers of the Fijian language.

17.126 The tradition of circuit courts is an old and honourable one. We consider that it should be adapted so that Magistrates in the main centres regularly go on circuit, in order to bring prompt and accessible justice to Fijians wherever they live, if the matter is one that ought to be dealt with by a court. Fijians should be able to feel that the Magistrates' Courts are as much their courts as any "Fijian" court.

Traditional methods of dispute settlement

17.127 On the other hand, we think that there is a lot to be said for the idea that many comparatively minor matters do not need to be dealt with by a court, but can be settled in other ways. This has been recognised in the Fiji Islands by requiring both civil and criminal matters to be settled by reconciliation if possible, and by the recent establishment of Small Claims Tribunals. We think this approach should be encouraged by recognising explicitly that, if people voluntarily settle their dispute in accordance with traditional Fijian practices, the settlement will be a bar to criminal or civil proceedings in the courts.

17.128 Naturally, safeguards will be required. Such settlements should be a bar only to prosecution for offences coming within section 163 of the Criminal Procedure Code. That section provides, that, in the case of the offences to which it applies, and if the case is "substantially of a personal or private nature and ... not aggravated in degree", the court may promote reconciliation and encourage and facilitate its settlement in an amicable manner, on terms approved by the court. It may then order the proceedings to be stayed or terminated.
The offences to which the section applies are entry upon property with intent to commit an offence, wilful and unlawful destruction of, or damage to, property, common assault and assault causing actual bodily harm.

17.129 This list may need some modification. We accept the recommendation of the *Beattie Commission* that domestic violence cases should be dealt with in the ordinary courts. Traditional processes tend to put undue pressure on women to withdraw criminal charges and leave them in situations of continually being subjected to domestic violence. This point was made to us in submissions. On the

other hand, there seems no need to limit the type of civil claim that may be settled through the traditional processes.

17.130 However, even if the parties agree to settle a claim, there needs to be provision for setting aside settlements on the grounds of public policy. That would enable the courts to release a person from a settlement that was manifestly onerous or involved some act contrary to basic principles of humanity, such as agreement to submit to an act that would itself be a criminal offence, such as mutilation. The analogy is with the recognition of an award made by an arbitral tribunal set up by agreement among the parties. Legislation provides that such an award is a bar to civil proceedings on the same facts and between the same parties, unless the terms of the award are contrary to public policy or the law provides that the dispute is not one which may be settled by private arbitration.

17.131 We envisage the appointment of Fijian conciliators in all the larger villages, to whom people can turn if they desire to take advantage of the traditional dispute settlement process. They should be persons of standing in the community, should receive training in their duties, especially about the type of case suitable for settlement in this way, should be required to make a record both of the facts and the terms of the settlement, and should be paid a suitable honorarium for carrying out their duties. All parties would need to agree voluntarily to take part in and be bound by the traditional process. The facilitator, to be called by an appropriate Fijian name, should have a role both in facilitating agreement to submit to the traditional process and also agreement on the settlement itself.

17.132 Initially, the system should apply only to disputes involving Fijians, but, if it is successful, persons who are not Fijians should be permitted to agree to the application of the traditional process, in disputes with Fijians, or with one another. For that reason, the scheme should be set up by Act of Parliament, not by regulations under the Fijian Affairs Act.

17.133 If the settlement reached involves the payment of money, the performance of work or other ongoing obligation, it should not be directly enforceable in the courts, but a party who claims that the settlement has not been honoured should be able to pursue in the courts, or by complaint to the police, the remedy that would have been available if there had been no traditional settlement. If the other party claims that the terms of the settlement were fulfilled, and that the court action is therefore barred, the court will have to make a finding as to whether or not that is the case. If it is not, reparation already made should be taken into account in the sentence or award of the court.

17.134 If the parties do not agree to use the traditional method of dispute settlement, the matter will, if necessary, have to be the subject of criminal or civil proceedings in the ordinary courts.

17.135 No doubt there are other details which will need thinking through, but we believe that the proposed arrangements will enable full use to be made of the traditional Fijian ways of settling disputes and achieving reconciliation between the parties. They should go some way towards meeting the needs that prompted the provision for reintroducing Fijian courts.

17.136 In summary, we think there are better alternatives than setting up Fijian courts enforcing law applying only to Fijians, under a system parallel to the ordinary law and the regular courts. The existing court system should be made more responsive to the needs of Fijians. Section 122 of the 1990 Constitution, establishing Fijian courts, should be replaced by a provision that the settlement of disputes in accordance with traditional Fijian processes of dispute settlement should be recognised, under conditions prescribed by Act.

RECOMMENDATIONS

646. Strenuous efforts should be made to improve the way in which the Magistrates' Courts deliver justice in the outer islands and other remote parts of Fiji. Courts should be held more frequently and in a wider range of places.

647. Section 51 of the Magistrates' Courts Act should be amended to provide that hearings may be held in languages other than English, but, to facilitate appeals, the record should continue to be kept in English. Magistrates serving predominantly Fijian areas should be required to be fluent speakers of the Fijian language.

648. Section 122 of the 1990 Constitution, establishing Fijian courts, should be replaced by a provision that the settlement of disputes in accordance with traditional Fijian processes of dispute settlement should be recognised, under conditions prescribed by Act. Such an Act should provide for the following matters:

(a) **Settlements should be a bar only to prosecution for reconcilable offences coming within section 163 of the Criminal Procedure Code, with the exception of domestic violence, as recommended by the *Beattie Commission*.**

(b) **There should be provision for setting aside settlements on the grounds of public policy.**

(c) **Fijian conciliators should be appointed in all the larger villages, to facilitate agreements to use the traditional processes and the settlement itself. They should be persons of standing in the community, should receive training in their duties, should be required to make a record both of the facts and the terms of the settlement, and should be paid a suitable honorarium**

(d) **Initially, the system should apply only to disputes involving Fijians, but, if it is successful, persons who are not Fijians should be permitted to use it. The scheme should be set up by Act of Parliament, not by regulations under the Fijian Affairs Act.**

(e) **The settlement reached should not be directly enforceable in the courts, but a party who claims that it has not been honoured should be able to pursue in the courts, or by complaint to the police, the remedy that would have been available if there had been no traditional settlement. It should be a defence that the terms of the settlement were fulfilled, and that the court action is therefore barred. Even if the action is not barred, reparation already made should be taken into account in the sentence or award of the court.**

649. **If the parties do not agree to use the traditional method of dispute settlement, the matter should, if necessary, be the subject of criminal or civil proceedings in the ordinary courts.**

Courts in Rotuma

17.137 The Rotuma Act establishes a District Officer's Court of which the District Officer (DO) is, ex officio, a magistrate with the same jurisdiction in civil and criminal cases as a second class magistrate. The DO may also try charges of indictable offences unless punishable by death. He is required to do so as nearly as possible in the same manner as if the trial were before a judge sitting alone in the High Court. After the conclusion of the evidence and the address if any of the accused, he remits the case, with notes of the evidence, to the Chief Justice who considers the case and decides on the verdict. If that is "guilty" the Chief Justice decides on the sentence. The verdict and sentence are then transmitted to the DO who reads it to the accused in open court. If necessary it is translated to the accused and that fact certified on the record.

17.138 That system of bringing justice to Rotuma was justifiable when the only transport between that island and the rest of Fiji was by schooner, but it is not adequate now that there is a regular air service to Rotuma. The *Beattie Commission* expressed the view that the District Officer's Court, combining in the one person executive and judicial functions, is undesirable in legal principle. That Commission suggested that it would be in the interests of the people of Rotuma to have the same access to the regular court system as other people in Fiji. They should be consulted about such a change.

17.139 This Commission agrees with that approach. It would not be surprising, however, if the people of Rotuma wished to keep open the possibility of holding a court on that island at any time, without waiting for a Magistrate to come from Fiji. There seems no need to take an "either ... or" approach. But more serious cases, and certainly indictable offences, should be dealt with in the regular courts. The people of Rotuma should also be invited to consider whether there is a traditional system of dispute settlement which could be given recognition, along the lines of our proposals about the recognition of traditional Fijian processes for settling disputes and achieving reconciliation.

RECOMMENDATIONS

650. As suggested by the *Beattie Commission*, the people of Rotuma should have the same access to the regular court system as other

people in Fiji, specially in more serious cases including the trial of indictable offences. They should be consulted about such a change.

651. In addition, ways should be explored of enabling a court to be held in Rotuma at any time, to deal with minor matters, without waiting for a Magistrate to come from Fiji. The people of Rotuma should also be invited to consider whether there is a traditional system of dispute settlement which could be given recognition, along the lines of the recommended system for recognising traditional Fijian processes for settling disputes.

Courts for the Banaban community

17.140 The Banaban Lands Act makes provision for Banaban custom concerning land tenure to be determined by the Land Court set up under that Act. The Land Court is to consist of the person appointed by the Minister to be the tribunal under the Banaban Settlement Act and four assessors appointed by the Council.

17.141 Under the Banaban Settlement Act, the responsible Minister, with the prior approval of the Council, may appoint a fit and proper person to be the Rabi Island Tribunal. A Rabi Island Court is constituted, consisting of the tribunal and such other person or persons as the Minister may appoint. An appeal, without leave, lies from the Rabi Island Court to a resident Magistrate who has the same powers as the High Court when hearing an appeal from a Magistrate's court. The decision of a Magistrate's court in relation to appeals is final and conclusive.

17.142 Under the Banaban (Rabi Island Court) Regulations, the jurisdiction of the Court, which may be exercised by the Tribunal, is limited to the enforcement of the regulations made by the Council and the power to bind persons over to keep the peace. It appears that any more serious matters would be dealt with by the ordinary courts. We were not told of any dissatisfaction with these arrangements and do not propose any change.

RECOMMENDATION

652. The existing arrangements for a Rabi Island Court and a Banaban Land Court should not be changed.

THE FUTURE RELATIONSHIP BETWEEN ROTUMA AND FIJI

17.143 The Commission received several submissions from Rotumans, both in Rotuma and in Suva. Some raised the question of possible independence for Rotuma, or self-government in free association with Fiji, along the lines of the relationship between the Cook Islands and New Zealand. There should be no question of Rotuma being forced to remain an integral part of the Republic of the Fiji Islands if that is contrary to the freely expressed wish of a majority of the Rotuman people. However, we are satisfied that, as one submission put it, any change of status would be "premature and unrealistic". The option is one that the Government should be willing to discuss with the people of Rotuma if they wish to pursue it.

17.144 We believe that, without moving to a new constitutional relationship, much could be done to give Rotuma greater autonomy in matters of local concern. The law-making power under the Rotuma Act should be enlarged, so that it is not necessary for all Rotuma Regulations to be confirmed by resolution of Parliament before they become law. A main concern for small islands, whether an integral part of a larger state as Rotuma is now, or in a looser form of association, is the extent to which they can count on financial support from the "mainland" for the infrastructure and services that, on their own, they could not afford. This issue was raised in a number of submissions.

17.145 One submission suggested the allocation to Rotuma of the resources, or the revenue from the resources, of that part of Fiji's exclusive economic zone measured from the outer limits of the territorial sea surrounding Rotuma. While we acknowledge that small islands should obtain some benefit from the fact that their very existence is of advantage to the state because it extends the exclusive fishing zone, we see difficulties in allocating the resources of the zone among the people of all islands and coastal areas that could make a similar claim on the basis of their geographic position.

17.146 It seems better that the question of funding should be dealt with more simply, applying the recommended constitutional principle that the interests of all communities must be taken into account and any differences settled by negotiations in good faith. We think there is scope for some grant funding for Rotuma which leaves the Rotuma Council the freedom to settle its own priorities in deciding how the funds should be used.

17.147 One submission sought the creation of a special section of a Department to deal with Rotuman affairs. That would enable the Government to focus more sharply on Rotuman concerns. It is not a matter that can be dealt with in the

Constitution but we mention it so that the Government may consider it.

17.148 The Commission has proposed that the Constitution should provide for Rotuma and Rotumans in the following ways:

- the Bose Levu Vakaturaga should include one member elected by the Rotuma Council;
- voters registered as Rotumans should elect one member to fill a reserved seat in the Bose Lawa;
- voters resident in Rotuma should elect one member to the Bose e Cake; and
- provision should be made for the entrenchment of the Rotuma Act and the Rotuma Lands Act, for the protection of laws recognising Rotuman custom, and for the improvement of access to the regular courts, in the manner proposed in this chapter.

17.149 Rotumans are estimated to be about 2% of the total population of the Fiji Islands. We have recommended the allocation to Rotumans of one reserved seat in the Bose Lawa, despite the fact that, on a population basis, no community would be entitled to a reserved seat unless its members amount to 4% of the population. Nevertheless, we consider the allocation justified because Rotumans are at present separately represented in the House of Representatives. The fact that only the people living in Rotuma will be eligible to elect a member to the Bose e Cake will recognise the special interests of the inhabitants of that island, as distinct from those of Rotumans living in other parts of the Fiji Islands.

RECOMMENDATIONS

653. There should be no change in Rotuma's status as an integral part of the Republic of the Fiji Islands as long as that coincides with the freely expressed wish of a majority of the Rotuman people.

654. Rotuma should be given greater autonomy in matters of local concern. The law-making power under the Rotuma Act should be enlarged, so that it is not necessary for all Rotuma Regulations to be confirmed by resolution of Parliament before they become law.

655. In settling the level of funding for Rotuma, the recommended constitutional principle that the interests of all communities must be taken into account and any differences settled by negotiations in good faith should be applied.

656. Consideration should be given to some grant funding on a basis which gives the Rotuma Council the freedom to use the funds in accordance with its own priorities.

18

LOCAL GOVERNMENT

18.1 In earlier chapters, we have been concerned largely with reviewing and making recommendations on how government institutions and the exercise of political and administrative power at the national level might be improved. In this chapter, we deal with government at the local level.

18.2 We use the term 'local government' in a broad sense. It is a convenient way of addressing the submissions which, in various ways, proposed reform in the way government power is exercised in particular areas, whether by locally elected or appointed bodies or by departments of the national government.

PRINCIPLE OF LOCAL GOVERNMENT

18.3 The Commission recognises the almost universal desire of human beings to organise themselves into small units so that they can collectively control matters that affect their daily lives. From time immemorial, Fijians have organised themselves into villages in which they have run their affairs as a community and have endeavoured to reach collective decisions for the common good. The same desire underlies the concept of local government. A local form of government allows the people of an area, linked by a community of interest or a common dependence on services or amenities, to identify themselves as an integrated community and thereby manage their common interests and dependence in an orderly and meaningful way.

THE 1990 CONSTITUTION AND LOCAL GOVERNMENT

18.4 At present, the Constitution does not establish or require the establishment of any local government body or area, although it does contain some limited recognition of existing local government institutions. Through its entrenchment of the Fijian Affairs Act (Cap. 120), the Rotuma Act (Cap. 122) and the Banaban Settlement Act (Cap. 123), the Constitution indirectly guarantees the existence of the various councils established by or under those Acts. The Fijian village, tikina and provincial councils, the Council of Rotuma and the Council of Leaders on Rabi Island are all local government institutions in the sense described above. Another reference is found in section 135, which gives the Ombudsman jurisdiction to investigate the administrative action of local government bodies and rural local authorities. Other provisions also disqualify members and employees of defined

local authorities from appointment to various independent constitutional commissions.

SUBMISSIONS

18.5 The submissions addressed four matters. A few sought to change Fiji's system of government to a federal system. Another group addressed the system of municipal councils which exists under the Local Government Act (Cap. 125). Some of these sought a constitutional guarantee of the existence of local government and its autonomy from the national government. Others considered that indigenous Fijians were under-represented on the councils and sought a constitutional reservation of seats for their community. Finally, a number of submissions sought to give a constitutional and democratic basis to advisory councils which are informal bodies consulted by the Government's district administration about local activities of the national government. The advisory councils are not established or recognised by statute, and members are selected and informally appointed by the district administration.

A FEDERAL STATE?

18.6 A small number of submissions sought to have Fiji's system of government changed from the existing unitary system to a federation comprising either the existing Fijian provinces, or the traditional '*vanua*', which were loosely organised prior to Cession, or the Divisions which exist for the national government's administrative convenience.

18.7 In a federal system, a country is divided into smaller units usually called 'states' for the purposes of government. Each unit has its own government with its own elected legislature and executive. It may also have its own system of courts. Law-making, taxation and administrative powers are divided by the country's constitution between the federal government and the governments of the component states. Each usually enjoys quite significant powers and in almost all cases, the state governments enjoy a large measure of autonomy. State powers usually cannot be intruded upon nor withdrawn by the federal government without a constitutional amendment. In federal systems, the powers enjoyed by the federal government are treated as having been granted to it by the states. This reflects the fact that in most cases the states were independent prior to the federation, which was usually created by a constitution agreed to by the states. Therefore, unless a power has been specifically granted to the federal government by the states under the federal constitution, it usually is considered to remain with the states. This division of powers is supervised by the country's courts with

jurisdiction in constitutional matters.

18.8 In contrast, under a unitary system of Government, local governments are created, and their powers are granted by laws made at the national level. To varying degrees, the national government also retains supervisory control over the local governments.

18.9 The Commission believes that there is no need to create a federal system in Fiji. It is true that historically the country was formed as a single country from various areas which previously were independent centres of power. However, it has existed and prospered as a unitary state for over 100 years. The relatively small number of submissions seeking a change from the unitary system shows that few people believe that any such change is necessary.

RECOMMENDATION

657. The Republic of the Fiji Islands should continue to be a unitary state.

EXPRESS CONSTITUTIONAL RECOGNITION OF LOCAL GOVERNMENT?

18.10 We have referred to the lack of any direct recognition of local government in the 1990 Constitution. The Commission received submissions from officers of various municipal councils seeking a constitutional provision that will recognise or mandate the existence of local government in Fiji. They also proposed that the Constitution should guarantee local government bodies, in particular municipal councils, more autonomy from the central government.

18.11 Municipalities and their councils exist under the Local Government Act (Cap. 125). The Act, which was passed shortly after independence, consolidated and amended the various colonial ordinances which governed towns and townships. On the initiative of local people, an area may be declared by the responsible Minister to be a city, a town or a district. Each of these is classified as a 'municipality' under the Act and is entitled to equal application of the provisions of the Act.

18.12 In this context, a district is a municipality of any size, which is not a city or a town. It bears no necessary relationship to the very large districts into which

Fiji is divided for the national government's administrative purposes. The provision for district municipalities allows those in rural areas who wish to constitute themselves into a local government area to do so.

18.13 With the status of municipality comes the opportunity to elect a council democratically. Once an area is declared a city or town, a council must be elected within 6 months, and for a district, within 2 years. In all cases, the Electoral Commission is charged with responsibility for prescribing the number of councillors and deciding on wards. Voting in municipal elections is done on a different basis, and according to different qualifications, from those for Parliamentary elections.

18.14 The Act grants municipal councils the general power to promote the welfare and convenience of the people of the municipality and to preserve their amenities. It empowers them to make by-laws for these purposes. In general, councils control matters such as health and sanitation, building and planning, business licensing, and the streets, parks and markets within their municipalities. In order to meet the costs of government, municipal councils are authorised to impose rates on land within their boundaries and may impose fees and charges for services. However, they may not impose personal or other taxes.

18.15 Under the Act, the councils are subject to a great deal of supervision from the national government. Ministerial approval is required to make or amend by-laws, or impose or revise fees and charges, and otherwise to spend or raise money. The Act also gives the Minister power to investigate the affairs of any council and to dissolve the council in specified circumstances.

18.16 Some of the submissions which we received on local government expressed dissatisfaction with the level of ministerial approval required under the Local Government Act. They stated that the existing audit requirements and the Minister's powers to investigate and dismiss councils provide sufficient supervisory control over them, and all other aspects of ministerial control should be abolished. It was believed that the autonomy which the submissions seek would best be achieved by constitutional provisions recognising the principle of local government in Fiji and by appropriately providing for their autonomy. These submissions referred the Commission to the "International Declaration of Local Self Government" made by the International Union of Local Authorities.

18.17 While the Commission supports the principle of local government, we do not favour any constitutional recognition of local government nor any provision

guaranteeing them autonomy from the national government.

18.18 Our own focus has been on the Constitution as a national document concerned with the interests of Fiji citizens as a whole, with distributing powers among the branches of the national government and placing certain restrictions on their exercise. Insofar as we have recommended any provision which deals with local government institutions, we have done so either because this has been necessary in defining the qualifications for, and powers of, national institutions, or for protective reasons. In the latter case, we have done so only in respect of those which have a long history of constitutional recognition.

18.19 Municipalities already have a firm statutory basis and we know of no threat to their continued existence. The Commission received proposals on this matter exclusively from local government officials. We also note that in spite of the fact that the Local Government Act (Cap. 125) allows district municipalities to be established in rural areas, none have been established there. This indicates to us that autonomous local government is not, at present, a major concern of the people of the Fiji Islands.

18.20 Local government should not be addressed in the Constitution, without a comprehensive review of the status and powers of municipalities and the other different types of local government bodies that exist for various purposes in Fiji. Such a review would need to be wide-ranging. In Chapter 17, we indicate that increasingly, people other than "Fijians" as defined in the Fijian Affairs Act, are living in Fijian villages. Many regulations under that Act set building and sanitation standards which should apply not only to "Fijians" but to other inhabitants. We have proposed a review of that Act to address this problem, among others.

Reserved council seats?

18.21 The Commission received submissions from indigenous Fijians seeking reserved seats for their community on the various town and city councils. Some submissions were made on the basis that Fijians were under-represented in proportion to the number eligible to vote in the municipality. Other submissions sought a guaranteed minimum number of seats, regardless of the proportion of eligible voters. Prior to the introduction of the Local Government Act in 1972, town council seats were elected on an ethnic basis.

18.22 In Chapter 9 we have set out our views about the reservation of Parliamentary seats for ethnic communities. In particular, we stressed the necessity

of moving away from ethnicity as a basis for political organisation. For the same reasons, we do not favour a provision reserving any council seats for ethnic communities.

18.23 To the extent that any group or party might perceive itself to be unfairly represented on any council, the Commission believes that this situation can best be remedied by proper organisation and campaigning, and by ensuring that its supporters register and turn out to vote.

RECOMMENDATIONS

658. The Constitution should not expressly recognise local government or guarantee local government autonomy.

659. No seats on municipal councils should be reserved for any community or group.

ADVISORY COUNCILS

18.24 The Commission received submissions that advisory councils should become elected bodies with a statutory or constitutional basis. We have already expressed our opinion that the Constitution should not expressly provide for local government bodies. The principle would apply equally to advisory councils.

18.25 However, because of the important role advisory councils have in the Government's provision of development and other services in rural areas, we believe that, in principle, the proposal for elected councils having a statutory basis merits further examination by the Government.

RECOMMENDATION

660. The Constitution should not provide for advisory councils.

REVIEW OF LOCAL GOVERNMENT

18.26 In considering the submissions about local government, the Commission concluded that there should be a broad and comprehensive review of local government in Fiji.

18.27 As we have already noted, the system of rural local government provided for under the Local Government Act apparently has never been utilised. At the same time, we received submissions for elected district advisory councillors. The identification of workable, democratic means of organising rural dwellers both

for the purpose of local self-government and for the purpose of representing their interests in the local activities of the national government should be included in the Terms of Reference for the review. The review should be carried out by an independent and broadly representative body. We envisage that the review, in light of modern needs, will re-examine the organisation, functions and powers of all the existing types of local government bodies presently provided for by law. It should also examine the operation of those which exist without a statutory basis. It should do so with a view to streamlining functions and powers so that unnecessary duplication, division and cost are avoided.

18.28 Such a review should also look at the extent to which local government needs to be supervised by central government. Given that the Local Government Act was passed shortly after independence, its provisions may reflect a degree of caution that is no longer appropriate.

18.29 It is desirable to maintain a uniform electoral system for all government elections. By 'electoral system' we mean the qualifications for voters, as well as the system by which votes are counted and translated into seats. Uniformity avoids voter confusion and makes the administration of elections easier and less costly. In many neighbouring countries, the same qualifications and rolls are used for both national and municipal elections. In view of our own recommendations for changes in Parliamentary elections, any review should include consideration of this issue.

RECOMMENDATION

661. The Government should commission a broad and comprehensive review of all local government arrangements in Fiji to be carried out by an independent and broadly representative body. The review should, in light of modern needs, re-examine the organisation, functions and powers of all the existing local government bodies provided by law. The Terms of Reference should include a review of the Local Government Act (Cap. 125). Ministerial supervisory powers over local government and electoral arrangements should also be re-examined. It should also include a review of the operation of those bodies which exist without a statutory basis. The reviewing body, among other things, should be required to inquire into appropriate democratic systems of local government for rural areas.

19

EMERGENCY POWERS

19.1 It is well recognised that any government's first duty is to ensure the security of the state and the safety of its citizens, if either is threatened by events within the state or outside its borders. The ordinary powers of the police, border control authorities and officials of local and central government are available for this purpose. In most circumstances, nothing more is required.

19.2 Occasionally, however, an extraordinary danger threatens or occurs, such as a severe cyclone. Then, special powers may be needed for three reasons:

- to harness, in a coordinated way, the collective energies of the different state services, as well as ordinary citizens, to combat the danger and deal with its aftermath;
- to allow the executive to exercise additional powers, including the power to make regulations dealing with matters that would ordinarily be left to Parliament, and perhaps over-riding the laws made by Parliament;
- to permit either Parliament or the executive to make laws or regulations which, in normal times, would be unconstitutional because they interfere with the rights of citizens in ways not permitted by the Bill of Rights.

19.3 Usually, constitutions deal only with the last of these matters. They allow the Government, by law, to derogate from some rights in time of grave emergency. Other rights, like the right to life and freedom from torture, remain sacrosanct. To the extent that legal authority is required for the first two purposes listed above, that authority is conferred by ordinary Act of Parliament, in anticipation of a possible emergency.

EMERGENCY POWERS UNDER THE 1990 CONSTITUTION

19.4 The approach just outlined was implicit in the provisions of the 1970 Constitution. The only references to emergencies were for the purpose of allowing certain rights to be limited more extensively in time of "public emergency". That term was defined as meaning any period during which Fiji was engaged in any war, or there was in force a proclamation by the Governor-General declaring that a state of emergency existed.

19.5 The 1970 Constitution did not give the Governor-General any express power to declare a state of public emergency. The underlying assumption was that Parliament would enact laws permitting the Governor-General to make such a declaration in certain specified circumstances. The declaration would provide the trigger for the exercise of extraordinary powers by the executive, to the extent authorised by Parliament and by the Bill of Rights, taking account of all the limitations on those rights, including the permitted derogations in time of public emergency. However, no legislation conferring emergency powers has ever been enacted in Fiji.

19.6 The 1990 Constitution sought to fill the perceived gap. It re-enacted the provisions of the Bill of Rights allowing for derogations from certain rights in time of emergency, and all the accompanying safeguards. However, it included two new provisions which potentially sweep away the safeguards in the Bill of Rights.

19.7 Section 162 gives Parliament the power to pass an Act which recites that action has been taken or threatened by any substantial body of persons, whether inside or outside Fiji-

(a) to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property;

(b) to excite disaffection against the President or the Government;

(c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence;

(d) to procure the alteration, otherwise than by lawful means, of anything by law established; or

(e) which is prejudicial to the security of Fiji.

Any provision of such an Act "designed to stop or prevent that action" is valid, even if it is inconsistent with the Bill of Rights or is "otherwise outside the legislative power of Parliament". Such an Act may be annulled by Parliament by resolution, but without prejudice to anything done under it, or Parliament's power to pass a new Act under the section. An Act can be passed at any time, not only during a state of emergency.

19.8 Section 163 gives the President the power to issue a Proclamation of Emergency, if "satisfied that a grave emergency exists whereby the security or economic life of Fiji is threatened." If Parliament is not sitting, the President is

required to summon it as soon as practicable. Until Parliament sits, the President may promulgate decrees having the force of law, if satisfied that immediate action is required. In exercising those powers, the President is required by section 88(1) to act in accordance with the advice of the Cabinet or a Minister acting under the authority of the Cabinet.

19.9 A Proclamation of Emergency or a decree that is not approved by Parliament lapses after six months, if not sooner annulled by Parliament. Any Parliamentary approval remains in force only for six months, but may be renewed for successive six month periods. Section 163(5) provides that no decree or Act of Parliament passed while a Declaration of Emergency is in force shall be invalid on the ground of inconsistency with any provision of the Constitution. Such a decree or Act lapses at the end of six months after a Proclamation of Emergency ceases to be in force, if it could not otherwise have been validly made.

19.10 A number of submissions expressed concern about the breadth of the powers conferred by these provisions. Both had their origin in the Malaysian Constitution which came to independence under the shadow of communist insurgency involving actual hostilities. To combat that situation, Parliament was given wider powers than it normally had under the federal constitution, which divided legislative authority between the central legislature and those of the states. The executive was given the power to proclaim a state of emergency and exercise legislative powers, subject to a measure of parliamentary control. Section 163 incorporates the more extensive provisions for the supervision of declarations of public emergency by Parliament which had been included in the 1970 Constitution. However, the Malaysian provisions preserved the application of some, though not all, individual and group rights protected by that country's constitution. Sections 162 and 163 of the 1990 Constitution did not include such safeguards.

A NEW APPROACH TO EMERGENCY POWERS

19.11 Even with their additional safeguards, the Malaysian provisions do not, in our opinion, provide a model for the type of provision which should be included in the Fiji Constitution. There has been no parallel in this country to the situation which confronted the authorities in Malaysia before and in the early years of independence and has coloured the approach to emergency powers and related matters ever since. The Commission considers that it is necessary to approach the question of emergency powers in the Fiji Islands afresh, starting from first principles.

19.12 Safeguards are included in the Bill of Rights for the very purpose of protecting the rights of citizens in a time of public emergency. In general, those

safeguards reflect the international standards. The Constitution should provide clear guidance about the circumstances in which emergency powers can derogate from the Bill of Rights, and the extent to which derogations are permissible. In doing so it should strengthen the present provisions for supervision by the Bose Lawa, in order to ensure, so far as possible, that the executive does not misuse the emergency powers it needs to have.

19.13 From this perspective, section 162 is not needed. The provision that an Act within its terms is valid, even if it would otherwise be outside the powers of Parliament, is not necessary in a unitary state like the Republic of Fiji in which Parliament does not share the legislative power with other legislatures. The power to over-ride anything in the Bill of Rights is not limited to the exercise of powers in time of emergency, and is in any case unjustifiable. A recital in an Act that there is a situation requiring the powers conferred by the Act does not empower the courts to determine whether that recital has any factual basis. Section 162 should be repealed and not replaced.

19.14 Section 163 should be evaluated to see if it, or some other provision, needs to be included in the Constitution, to clarify the source and extent of executive power to take the measures necessary to deal with various kinds of emergency.

THE SOURCE OF EMERGENCY POWERS

The common law

19.15 The imperative need to secure the survival of the state in all circumstances has led to the recognition, in the common law, of various sources of power that the executive may call upon in an emergency. They are the prerogative, state necessity, common law necessity and martial law. In an extreme case, the state might act without any lawful authority, and then promote an Act of Indemnity. In the absence of powers expressly conferred by Parliament or the Constitution, the state will, if necessary, seek to justify its actions by reference to these sources of power.

19.16 However, the authority for them is vague, and their scope ill-defined. The exercise of power under them is not, in general, subject to safeguards. Acting without authority in the expectation that Parliament will enact retrospective indemnifying legislation, if necessary by way of constitutional amendment, is objectionable in principle and should certainly not be relied upon as a matter of course.

The Constitution or statute

19.17 The Commission considers that, although the Constitution should not expressly exclude the possible sources of emergency powers under the common law, the powers needed in the Fiji Islands to deal with emergencies should, in principle, be conferred either by Parliament or by the Constitution. As to the choice between those alternatives, we have a strong preference for leaving it to Parliament to confer emergency powers.

19.18 It is virtually impossible to frame a constitutional provision that will, on the one hand, confer sufficient powers to deal with every conceivable situation that might have the character of "a grave emergency ... whereby the security or economic life of Fiji is threatened", and, on the other, prevent the executive from invoking drastic powers in a situation where their use is not justified. Under section 163, there is no limitation of any kind on the things that may be done by decree before Parliament sits, or by Parliament itself.

19.19 That could be remedied by including provisions that there are to be no derogations from certain rights, and facilitating intervention by the courts to determine whether there is in fact a situation calling for the exercise of emergency powers. The fact remains that a general emergency power, even with these safeguards, would impose few restraints on a government supported by a majority in the Bose Lawa, if it decides to advise the President to issue a Proclamation of Emergency and assume wide emergency powers.

19.20 We therefore propose that section 163 should be repealed. Instead, the constitutional provisions dealing with emergency powers should be based on the expectation that Parliament, in the exercise of its ordinary legislative power, will, by Act, confer on the President the power to proclaim a state of emergency in the Fiji Islands, or any part of them, in such circumstances as the Act prescribes. While the state of emergency is in force, the President should have such power as the Act confers to make emergency regulations.

19.21 The requisite Act or Acts should be passed in anticipation of a future emergency. The regulation-making powers given by the Act will remain in abeyance until triggered by the declaration of a state of emergency of the type to which the Act applies. In exercising the powers conferred by Act, the President should, as now, be required to act on the advice of the Cabinet or a Minister.

Sector emergency legislation

19.22 Parliament could, of course, pass an Emergency Powers Act that is just as wide in its scope as section 163. Most countries have had such legislation on the statute book at one time or another. It has all the disadvantages of a comprehensive constitutional power to deal with emergencies. However, leaving Parliament to confer emergency powers gives it the option of enacting "sector" emergency legislation. This is the modern approach to the grant of emergency powers. It enables the special powers granted to the executive to be specially tailored to the particular type of emergency. For example, the powers necessary to deal with a natural disaster and its aftermath are quite different from those that would be required in the case of actual or threatened armed conflict or civil insurrection.

19.23 The sector approach means that adequate powers can be granted to deal with each different type of emergency situation, but it is not possible to invoke far-reaching powers in situations where there is no need for them. Another advantage is that the powers which the executive is likely to need in a particular type of emergency can more easily be foreseen. For the most part, they can be conferred by Parliament in the legislation itself, in advance of the emergency. They do not have to be conferred hastily by emergency regulations, with the risk that, under the stress of the emergency, wider powers will be conferred than those which are strictly necessary.

19.24 Despite the advantages of the sector approach, we do not think that the Constitution should require legislation to confer emergency powers in a particular form. Parliament should be free to adopt the sector approach if it thinks fit. It should also consider including in all emergency legislation safeguards analogous to those which we now propose should be provided by the Constitution, if any derogation from the protections normally afforded by the Bill of Rights is to be permitted.

RECOMMENDATIONS

662. The Constitution should provide clear guidance about the circumstances in which emergency powers can derogate from the Bill of Rights, and the extent to which derogations are permissible. It should strengthen the present provisions for supervision of the exercise of emergency powers by the Bose Lawa if they involve such derogations.

663. Section 162 of the 1990 Constitution, giving Parliament the power to pass certain Acts, even if they are inconsistent with the Bill of Rights, should be repealed.

664. Although the Constitution should not expressly exclude the possible sources of emergency powers under the common law, the powers needed in the Fiji Islands to deal with emergencies should, in principle, be conferred either by Parliament or by the Constitution.

665. Section 163, giving the President the power to issue a Proclamation of Emergency, if "satisfied that a grave emergency exists whereby the security or economic life of Fiji is threatened", and conferring unlimited powers on the executive and Parliament, should be repealed.

666. The constitutional provisions dealing with emergency powers should be based on the expectation that Parliament, in the exercise of its ordinary legislative power, will, in anticipation of foreseeable emergencies, confer on the President the power to proclaim a state of emergency in the Fiji Islands or any part of them, in such circumstances as the Act prescribes.

667. Parliament should be encouraged to enact "sector" emergency legislation, enabling the emergency powers granted to the executive to be specially tailored to the particular type of emergency and incorporating some provision for monitoring by the Bose Lawa, but there should be no constitutional requirement to this effect.

668. A power conferred by Act to make emergency regulations should remain in abeyance until triggered by the declaration of an emergency.

THE CONSTITUTIONAL SAFEGUARDS

The Bill of Rights

19.25 Whether emergency powers are conferred by Parliament itself, or by regulations made by the executive in the exercise of a legislative power delegated by Parliament, emergency powers must be subject to the same constitutional safeguards. The first question is the extent to which those powers should be consistent with the Bill of Rights.

19.26 In most cases, there will be no difficulty in achieving consistency. As we have shown in Chapter 7, most rights may be limited by or under laws for the purposes prescribed, often on very wide grounds. For example, we have proposed that it should remain possible to limit the rights to freedom of expression, freedom of assembly and freedom of association, by a law "in the interests of defence, public safety, public order, public morality or public health" as long as the law can be shown to be reasonably justifiable in a democratic society. That standard is a flexible one. What may not be reasonably justifiable in normal times may well be justifiable in time of emergency. The Constitution should not confer any power to derogate in time of emergency from rights which can be limited on broad grounds. This approach, taken in the Bill of Rights in the 1970 Constitution and carried through into the 1990 Constitution, should be maintained.

The international standards

19.27 The extent to which, in time of emergency, the Constitution should authorise derogations from other rights, going beyond the relatively narrow limitations permitted in ordinary times, is a matter governed by the international standards. Article 4(1) of the *International Covenant on Civil and Political Rights* provides as follows:

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

19.28 Article 4(2) provides that no derogations may be made from the Articles of the Covenant recognising the right to life, the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, the right not to be held in slavery, the right not to be imprisoned merely on the ground of inability to fulfil a contractual obligation, the right not to be subjected to retrospective punishment, the right to recognition as a person before the law, and the right to freedom of thought, conscience and religion. There are very similar provisions in Article 15 of the *European Convention on Human Rights* on which Fiji's Bill of Rights is based.

19.29 The following points emerge from the international jurisprudence about

the meaning of a "public emergency which threatens the life of the nation":

- There must be an actual or imminent emergency.
- Its effects must involve the whole nation.
- The continuance of the organised life of the nation must be threatened.
- The crisis or danger must be exceptional, in that the normal limitations of rights permitted for the maintenance of public safety, public health and public order are inadequate.
- The procedure for declaring a state of emergency must be clearly laid down. It must
  - provide for a formal proclamation or notification, and
  - involve the political organs of the state, that is Parliament and the Government.

International law allows to states a wide margin of appreciation in judging the presence of an emergency and the nature and scope of the measures necessary to avert or deal with it.

19.30 We consider that, in permitting derogations from the Bill of Rights in time of emergency, the Constitution should comply with the international standards. Those standards deal with two matters: the kind of emergency situation in which derogations are permissible, and the rights from which no derogations should be permitted in any circumstances.

Constitutional provisions permitting derogations

19.31 In granting or exercising emergency powers, Parliament and the executive should be able to derogate from the Bill of Rights only to the extent permitted by the Constitution. The Constitution should not permit any derogations unless a number of conditions are satisfied.

The nature of the emergency

19.32 The first condition should be the need for a belief on the part of the Cabinet, on reasonable grounds, that by reason of the actual or imminent situation within the Fiji Islands described in a proclamation of a state of emergency, the life of the Republic of the Fiji Islands is threatened, and that the situation is of such proportions or danger that it cannot be dealt with effectively by the exercise of powers conferred by law, in conformity with the Bill of Rights. Such a provision

would allow the need for emergency powers derogating from the Bill of Rights to be tested in the courts. The case law shows that the courts will usually be reluctant to substitute their judgment for that of the executive, but, even so, the possibility of challenge provides a safeguard.

19.33 The provision will allow Parliament to confer emergency powers in other, lesser situations not threatening the life of the nation, but in those cases, derogations from the Bill of Rights will not be permitted. To go back to our earlier example, there is no reason why emergency powers to deal with natural disasters should provide for a person's detention without trial on suspicion of being involved in a subversive activity.

The grant of the necessary powers by Parliament

19.34 The Constitution should permit derogations from the Bill of Rights only if the following further conditions have been met, among others:

- Parliament, acting on the advice of the Cabinet, has by Act conferred on the President, the power to proclaim a state of emergency in the circumstances referred to above;
- the President has issued such a proclamation;
- any emergency powers derogating from the Bill of Rights have been conferred by Act, or by the executive in the exercise of a power to make emergency regulations conferred by Act.

Parliamentary supervision of the exercise of emergency powers

19.35 Section 163 of the 1990 Constitution has the merit of providing for Parliamentary supervision of proclamations of emergency and the assumption of emergency powers. The Constitution should continue to require that supervision by providing that no derogations from the Bill of Rights are permitted unless the following conditions are met:

- The proclamation of the state of emergency remains in force only for an initial period of three months or such shorter time as it may specify.
- Immediate notice of the proclamation of the state of emergency must be given to the public and to the Bose Lawa, or, if the House is not then sitting, it must be summoned to sit as soon as practicable and be given notice of the proclamation as soon as it sits.

- The state of emergency terminates if not confirmed by resolution of the Bose Lawa within five sitting days from the date on which notice of it is given to the House.
- The state of emergency may be continued in force by proclamation for further periods of not longer than six months, if the continuation is confirmed by the Bose Lawa. (The number of renewals is not limited.)
- The Bose Lawa may revoke the state of emergency at any time. A motion that a state of emergency be revoked takes effect without a vote if parliamentary time is not made available for its consideration within three days of the date on which notices of motion are given by at least 18 members of the Bose Lawa.
- Emergency regulations cease to be in force as soon as the state of emergency terminates.
- All emergency regulations must be laid before the Bose Lawa within two days of being made, if the Bose Lawa is then sitting, or, if it is not, on the first day on which it next sits. The House may amend or revoke them at any time.
- A motion that emergency regulations be amended or revoked takes effect without a vote if parliamentary time is not made available for its consideration within three sitting days of the date on which notices of motion are given by at least 18 members of the Bose Lawa.

19.36 To make these rules effective, the Constitution should include procedures for bringing forward a session or a meeting of Parliament or a sitting of the Bose Lawa, if the President has proclaimed a state of emergency and it is desired to exercise powers derogating from the Bill of Rights. Section 80(5) already provides that

> If, after a dissolution and before the holding of the next following general election of members of the House of Representatives, the Prime Minister advises the President that, owing to the existence of a state of war or of a state of emergency in Fiji or any part thereof, it is necessary to recall Parliament, the President shall summon the Parliament that has been dissolved to meet.

The substance of this provision should be retained. It should include an express reference to "a state of national emergency" as well as any other state of emergency.

Permitted derogations

19.37 During a state of emergency proclaimed in compliance with the constitutional requirements listed above (a "state of national emergency"), the Constitution should permit some interference with certain rights, subject to prescribed safeguards. The affected rights are those to personal liberty, freedom from forced labour, not to be deprived of property, and to freedom of movement. For the reasons explained below, the existing power to derogate in an emergency from the right to equality under the law and freedom from discrimination on a prohibited ground should be repealed.

19.38 Section 6(7) of the 1990 Constitution permits the right to personal liberty to be limited by a law that

> authorises the taking during a period of public emergency of measures that are reasonably justifiable for the purpose of dealing with the situation that exists in Fiji during that period.

Section 17 (1) provides that, where a person is detained under such a law,

> (a) he shall, as soon as reasonably practicable and in any case not more than seven days after the commencement of his detention, be furnished with a statement in writing, in a language that he understands, specifying in detail the grounds upon which he is detained;
>
> (b) not more than fourteen days after the commencement of his detention, a notification shall be published in the Gazette stating that he has been detained and giving particulars of the provision of law under which his detention is authorised;
>
> (c) not more than one month after the commencement of his detention and thereafter, during his detention at intervals of not more than six months, his case shall be reviewed by an independent and impartial tribunal established by law and presided over by a person appointed by the Chief Justice from among persons qualified to practise as barristers and solicitors in Fiji;
>
> (d) he shall be afforded reasonable facilities to consult a legal representative of his own choice who shall be permitted to make representations to the tribunal; and
>
> (e) at the hearing of his case by the tribunal he shall be permitted to appear in person or by a legal representative of his own choice.

19.39 Section 17(2) provides that, on any review, the tribunal may make recommendations concerning the necessity or expediency of continuing the detention, to the authority by which it was ordered, but unless it is otherwise provided by law, that authority shall not be obliged to act in accordance with any such recommendations. Section 17(3) provides that nothing in the section entitles a detained person to legal representation at public expense.

19.40 The Constitution should give an express power to derogate from the right to personal liberty for the purpose of taking, during a state of national emergency, such measures authorised by law as are reasonably justifiable for the purpose of dealing with the situation described in the proclamation of the national emergency. This formulation allows the courts to determine the reasonableness of the measures in the circumstances.

19.41 A detained person should continue to have the substantive rights provided by section 17(1) and (2), and, in addition, the procedural rights referred to in Recommendation 95 (d), (e), (g) (j), from which no derogation should be permitted. Those recommendations deal with the right of every detained person to legal aid, to have a family member or friend notified about the fact of detention, to habeas corpus, and to be treated with humanity and respect for their inherent dignity.

19.42 Section 7(3) qualifies the right not to be required to perform forced labour by excluding from the definition of "forced labour"

> any labour required during a period of public emergency or in the event of any other emergency or calamity that threatens the life or well-being of the community, to the extent that the requiring of such labour is reasonably justifiable, in the circumstances of any situation arising or existing during that period or as a result of that other emergency or calamity, for the purpose of dealing with the situation.

19.43 The substance of this provision should be kept, but not its approach which gives no constitutional protection, apart from that of "reasonableness", to a person whose labour is required during an emergency or calamity, even if no state of emergency has been declared. We believe that, if it is desired to use the labour of members of the public on a non-voluntary basis, it should be necessary to declare a state of national emergency. In language corresponding to that giving power to derogate from the right to personal liberty, the Constitution should give an express power to derogate from the right to freedom from forced labour, for the purpose of taking, during a state of national emergency, such measures authorised by law as are reasonably justifiable for the purpose of dealing with the situation described in the proclamation of the national emergency.

19.44 Section 9(2) modifies the normal protections against the taking of property by the state. It establishes a special regime to ensure the payment of compensation, and to protect in other ways the interests of the owner or other affected person, if the state takes possession of property compulsorily "during a period of public emergency, or in the event of any other emergency or calamity that threatens the life or well-being of the community".

19.45 The right not to be deprived of property is not an internationally protected human right (though international law does set conditions for the taking of property). Accordingly, we do not think that provision for a less rigorous regime for compensation after property has been requisitioned during a state of emergency, or in calamitous situations where no state of emergency has been declared, should be regarded as a "derogation" from the Bill of Rights. The substance of section 9(2) should be retained as a permissible limitation of the right not to be deprived of property, in situations including, but not limited to, a state of national emergency.

19.46 Neither the 1970 nor the 1990 Constitution conferred any power to derogate from the right to freedom of movement in an emergency, but that was because section 15 enables the right to freedom of movement to be quite drastically limited by law on wide grounds at any time. Under section 15(1) it is possible to limit the freedom of movement of a named individual. The Commission considers that such a power should not be available, except during a period of emergency. It therefore recommended the repeal of that subsection.

19.47 In substitution, the Constitution should give an express power to derogate from the right to freedom of movement, during a state of national emergency, for the purpose of imposing by law such restrictions on any person's freedom of movement or residence within the Fiji Islands, or right to leave the Fiji Islands, as are reasonably justifiable for the purpose of dealing with the situation described in the proclamation of the national emergency. A person whose freedom of movement is restricted in these circumstances should have the same substantive and procedural rights as a person who has been detained during a state of national emergency.

19.48 Section 16, conferring protection from discrimination on the grounds prohibited by the section, provides, in subsection (3)(g), that the right to freedom from discrimination may be limited by a law making provision

> for authorising the taking during a period of public emergency of measures that are reasonably justifiable for the purpose of dealing with the situation that exists in Fiji during that period.

This provision is in conflict with that part of Article 4(1) of the *International Covenant on Civil and Political Rights* which provides that measures taken in derogation of the rights recognised by that Covenant (other than rights in respect of which no derogation is permitted) must not "involve discrimination solely on the ground of race, colour, sex, language, religion or social origin". We think that this is a very important protection in a multi-ethnic country.

19.49 It should not be possible, during a period of national emergency, to take, on a discriminatory basis, measures derogating from other rights. A number of countries took such measures during World Wars 1 and 2, when they interned those of their own citizens who originally came from "enemy" countries, for no other reason than that. There was no suggestion that, as individuals, they were in any way disloyal. These measures are now generally recognised as having been unjustified and wrong.

19.50 We consider that section 16(3)(g) of the 1990 Constitution should be repealed. It should not be possible, during a time of national emergency, to deprive any persons of liberty or restrict their freedom of movement simply on a ground such as their race, ethnic origin or place of origin. If there is a need for measures directed against persons or groups of a particular race, ethnic origin or place of origin, then those measures should conform with what we have called the "standard" limitation of the right to equality under the law and freedom from discrimination. Having regard to their nature and to special circumstances pertaining to the person or group, the measures must be shown to be reasonably justifiable in a democratic society.

19.51 As we have explained, more drastic measures are likely to be found reasonably justifiable in a democratic society in time of national emergency than in ordinary times. The powers of the state to take effective measures during a state of national emergency will not be unduly fettered.

19.52 For the sake of clarity, the Constitution should provide that no derogations from the Bill of Rights are permitted other than those for which it expressly provides.

Other international obligations

19.53 Article 4(1) of the *International Covenant on Civil and Political Rights* allows states to derogate from protected rights (other than rights in respect of which no derogation is permitted) "provided that such measures are not inconsistent

with their other obligations under international law". The most relevant obligations are likely to be those arising under the 1949 *Geneva Conventions for the Protection of the Victims of Armed Conflict and Additional Protocols 1 and 2* to those Conventions. The Republic of the Fiji Islands is a party to the Conventions but not the Protocols. If the Government were ever faced with a situation within Fiji amounting to "armed conflict not of an international character", it would be bound, under common Article 3 of the four Conventions, to observe certain minimum standards of humane conduct towards those involved.

19.54 The Government might therefore be faced with a choice between taking, during a state of national emergency, measures which not only involve derogations from the Bill of Rights but also point to the existence of an armed conflict, or dealing with the matter as a civil disturbance. In the first situation, the obligations under the Geneva Conventions may limit the measures the Government is free to take. If the matter is dealt with as a civil disturbance, without invoking the more extreme powers that could become available in a national emergency, the persons concerned will have to be treated as persons suspected of having committed offences. All the constitutional protections will apply. Even in this situation, however, members of the armed forces could be used to assist the police in the manner explained in Chapter 12.

19.55 The country's international obligations therefore provide some protections to its citizens, even when the Government, by declaring a state of national emergency, has given itself power to derogate from the Bill of Rights in ways permitted by the Constitution. That document should provide that no law may authorise the exercise of an emergency power involving such a derogation, if that exercise would be inconsistent with the obligations of the Republic of the Fiji Islands under international law.

RECOMMENDATIONS

669. The Constitution should not confer any power to derogate in time of emergency from rights under the Bill of Rights which can be limited on broad grounds.

670. In permitting derogations from other constitutionally protected rights in time of emergency, the Constitution should comply with the international standards.

671. The Constitution should not permit any derogations from the Bill of Rights unless all the following conditions are satisfied:

(a) The Cabinet has reasonable grounds for believing that, by reason of the actual or imminent situation within the Fiji Islands described in a proclamation of a state of emergency, the life of the Republic of the Fiji Islands is threatened, and that the situation is of such proportions or danger that it cannot be dealt with effectively by the exercise of powers conferred by law, in conformity with the Bill of Rights.

(b) Parliament has, by Act, conferred on the President, acting on the advice of the Cabinet, the power to proclaim a state of emergency in the circumstances referred to in paragraph (a).

(c) The President has issued such a proclamation.

(d) Any emergency powers derogating from the Bill of Rights have been conferred by Act, or by the executive in the exercise of a power to make emergency regulations conferred by Act.

(e) Provision has been made for the exercise of the supervision of the Bose Lawa in the following manner:

- **The proclamation of the state of emergency remains in force only for an initial period of three months or such shorter time as it may specify.**
- **Immediate notice of the proclamation of the state of emergency must be given to the public and to the Bose Lawa, or, if the House is not then sitting, it must be summoned to sit as soon as practicable and be given notice of the proclamation as soon as it sits.**
- **The state of emergency terminates if not confirmed by resolution of the Bose Lawa within five sitting days from the date on which notice of it is given to the House.**
- **The state of emergency may be continued in force by proclamation for further periods of not longer than six months if the continuation is confirmed**

by the Bose Lawa. (The number of renewals is not limited.)

- The Bose Lawa may revoke the state of emergency at any time. A motion that a state of emergency be revoked takes effect without a vote if parliamentary time is not made available for its consideration within three days of the date on which notices of motion are given by at least 18 members of the Bose Lawa.
- Emergency regulations cease to be in force as soon as the state of emergency terminates.
- All emergency regulations must be laid before the Bose Lawa within two days of being made, if the Bose Lawa is then sitting, or, if it is not, on the first day on which it next sits. The House may amend or revoke them at any time.
- A motion that emergency regulations be amended or revoked takes effect without a vote if parliamentary time is not made available for its consideration within three sitting days of the date on which notices of motion are given by at least 18 members of the Bose Lawa.

672. The Constitution should include procedures for bringing forward a session or a meeting of Parliament or a sitting of the Bose Lawa, if the President has proclaimed a state of emergency and it is desired to exercise powers derogating from the Bill of Rights. The substance of section 80(5) providing for the summoning, in such circumstances, of the members of the former House, after a dissolution and before the next following general election, should be retained.

673. The Constitution should permit the following derogations from the Bill of Rights during a state of emergency proclaimed in compliance with the constitutional requirements (a "state of national emergency"):

(a) It should confer an express power to derogate from the right to personal liberty and the right to freedom from forced labour for the purpose of taking, during a state

of national emergency, such measures as are authorised by law and are reasonably justifiable for the purpose of dealing with the situation described in the proclamation.

(b) It should provide that a person detained under a derogation from the right to personal liberty should continue to have the substantive rights provided by section 17(1) and (2), requiring the review of the justification for the detention by a tribunal with recommendatory powers, unless an Act provides that the recommendations are binding. In addition, the detained person should have the procedural rights referred to in Recommendation 95 (d), (e), (g) and (j), from which no derogations should be permitted. (Those recommendations deal with the right of every detained person to legal aid, to have a family member or friend notified about the fact of detention, to habeas corpus, and to be treated with humanity and respect for their inherent dignity.)

(c) It should give an express power to derogate from the right to freedom of movement for the purpose of imposing , during a state of national emergency, such restrictions on any person's freedom of movement or residence within the Fiji Islands, or on any person's right to leave the Fiji Islands, as are authorised by law and are reasonably justifiable for the purpose of dealing with the situation described in the proclamation. A person whose movements are restricted under a derogation from the right to freedom of movement should have the same substantive and procedural rights as a person who has been detained during a state of national emergency.

674. The Constitution should provide that no other derogations from the Bill of Rights are permitted in any circumstances.

675. Section 9(2), which establishes a special regime to protect the interests of the owner or other affected person if the state compulsorily takes possession of property during a period of public emergency, or other emergency or calamity, should not be regarded as a "derogation" from the Bill of Rights. Its

substance should be retained as a permissible limitation of the right not to be deprived of property, in situations including, but not limited to, a state of national emergency.

676. Section 16(3)(g), providing that the right to freedom from discrimination may be limited by a law authorising the taking, during a period of public emergency, of measures that are reasonably justifiable for the purpose of dealing with the situation that exists in Fiji during that period, should be repealed. If, during a state of national emergency, there is a need for measures directed against persons or groups of a particular race, ethnic origin or place of origin, those measures should be shown to be reasonably justifiable in a democratic society, having regard to their nature and to special circumstances pertaining to the persons or groups concerned.

677. The Constitution should provide that no law may authorise the exercise of an emergency power involving a derogation from the Bill of Rights if that exercise would be inconsistent with the obligations of the Republic of the Fiji Islands under international law.

20

THE CONSTITUTION AS SUPREME LAW: ITS ALTERATION OR REVIEW ALTERATION OF THE ENTRENCHED LEGISLATION

20.1 In this Chapter, the Commission reviews:

- section 2 of the 1990 Constitution which gives the Constitution the status of 'supreme law';
- section 77 which governs how the Constitution may be altered;
- section 161 which provides for periodic constitutional review; and
- section 78 which requires special legislative procedures to be followed for legislation altering the entrenched Acts which protect recognised special interests and rights of the indigenous Fijian, Rotuman and Banaban communities or which otherwise affects Fijian land, customs and customary rights.

SUPREME LAW

20.2 Section 2 of the 1990 Constitution provides that the Constitution shall be "the supreme law of Fiji". As such, "if any other law is inconsistent with .. [the] ... Constitution that other law shall, to the extent of the inconsistency, be void".

20.3 As indicated in Chapter 3, one purpose of a constitution is to set out the fundamental conditions upon which individuals and groups within a country broadly agree to be governed. Constitutions usually provide limits on government by establishing and distributing powers between different branches, institutions or offices of the government. Constitutional rules limit how each must perform its functions in the governmental process and what each may do. Constitutions also limit government's powers by conferring individual and group rights against certain kinds of governmental action.

20.4 Accordingly, a constitution contains the standards and rules against which all government action, including legislative action, must be judged. If a constitution is to fulfill this purpose, it must override any inconsistent law, whether made before or after the Constitution.

20.5 We propose that the Constitution should continue to be the supreme law of Fiji and that if any other law is inconsistent with it, to the extent of the inconsistency, that law shall be void.

RECOMMENDATIONS

678. The Constitution should continue to provide that it is the supreme law of Fiji and that if any other law is inconsistent with it, to the extent of the inconsistency, that law shall be void.

ALTERATION OF THE CONSTITUTION

Reasons for Entrenchment

20.6 Written constitutions usually provide that their provisions can only be altered following a special procedure. When special procedures are required for alterations, a constitution or a law is said to be 'entrenched'. In part, entrenchment confers a constitution's status as supreme law.

20.7 Because the Constitution is a law, although of a special kind, the power to pass constitutional amendments is usually vested in the legislature. In the Westminster system, the executive controls a majority of seats in the legislature. Unless more stringent procedures than normal are required to be followed, the legislature and, in particular, the executive through its control of the legislature may easily remove the limitations on their own powers. They may do so by removing the checks and balances, the accountability mechanisms or the protected rights contained in the Constitution.

20.8 Furthermore, a constitution exists to provide for an enduring basis for government. Stable rules should exist for deciding how the governmental processes, in particular the democratic process, should work. As we said in Chapter 3, people expect the basic rules of government to outlast the lives of particular parliaments or administrations, just as the rules of a game outlast a particular match.

20.9 People recognise however, that as circumstances change, so some change in the rules may become necessary or desirable. The procedure for constitutional change must strike a balance. It should not make it easy for the legislature or the executive to do away with constitutional limitations on governmental power at their whim. At the same time, it should not impede necessary or desirable change.

20.10 Since a constitution should express the broad agreement of the people of a country, the special procedures for its amendment must be such that cannot be achieved in haste. The procedures must give rise to publicity as well as time for public consideration and debate. They must ensure that all individuals and groups in the community are given the opportunity, either in person or through their representatives, to participate in any discussion and decision on constitutional change. They should also require a significant number of people to consent to any change either individually or through their representatives.

Types of Special Procedures

20.11 Almost all constitutions contain special requirements as to the manner in which an amendment is to be passed. Compared to that required for ordinary legislation, the support of a larger majority of the legislature is usually required for a constitutional amendment. The size of the majority is normally such as to ensure that there is widespread agreement for change among the representatives in the legislature of different groups. Sometimes constitutions also require as part of the amendment process the participation or approval of the public or other existing or special bodies representing the interests of special groups.

20.12 Requirements as to the manner in which a constitutional amendment should be approved are often supplemented by a requirement concerning the form an amendment must take in order to be effective.

20.13 Because different chapters or parts or provisions of a constitution may be considered to be more important than others, or affect particular bodies or groups more than others in the state, different amendment procedures may apply to different parts of the Constitution.

Power of Parliament

20.14 Subsection 77(1) of the 1990 Constitution declares that Parliament may alter the Constitution in accordance with the procedures laid down in that section. The provision repeats section 67(1) of the 1970 Constitution. In part, the 1970 provision reflected the now historical relationship between England and Fiji. The 1970 Constitution was made and brought into force in England by Order of Queen Elizabeth II, acting in Council. The Order established Fiji's Parliament and granted that Parliament its legislative power. Section 67(1) was necessary to make it clear that the Constitution could be amended by the new Parliament instead of by the Queen acting by further Orders-in-Council.

20.15 The section, however, also reflects the two otherwise implicit principles which we referred to earlier. First, alterations to the Constitution must be effected by laws made in exercise of the state's legislative power. That power is at present vested in the three components of Parliament: the House of Representatives (to be re-named the Bose Lawa), the Senate (to be re-named the Bose e Cake) and the President. Secondly, any exercise of the legislative power to alter the Constitution must be in accordance with special rules laid down by the Constitution itself.

20.16 Although it is no longer strictly necessary, we leave to the drafter the question whether it is desirable that the Constitution continue to contain a provision like section 77(1). In principle, however, we agree that the Constitution should continue to invest Parliament with the power to alter its provisions but only in accordance with special procedures contained in the Constitution. We set out our proposals for those procedures below.

Meaning of 'Alteration'

20.17 Although it is customary to speak of "amending the Constitution", subsection 77(8) of the 1990 Constitution uses the wider term 'altering of the Constitution".

20.18 Under paragraph 77(8)(a), the "Constitution" is defined for this purpose to include not just the Constitution itself or any individual provision of it, but also any other subsequent law which "alters" the Constitution or any one of its provisions. The prescribed procedure must therefore be followed in making any law which alters the Constitution, and also in making any subsequent alteration to that law.

20.19 Paragraph (b) defines what is to be considered to be an "alteration" of the Constitution. This is deemed to include:

- any law repealing the Constitution or any particular provision, with or without re-enactment or replacement;
- any modification of a provision;
- any insertion of a new provision;
- any suspension of the Constitution or any provision;
- any termination of that suspension;
- any legal provision that is repugnant to or otherwise inconsistent with the Constitution.

20.20 We consider this an exhaustive list of the ways in which a constitution may be altered. We propose that, in substance, this provision should be retained.

Special Form of Alteration

20.21 The 1990 Constitution introduced a new requirement about the form that any constitutional alteration must take. Subsection 77(2) requires that a provision of the Constitution can only be altered by an Act of Parliament that is expressed to be an Act to alter the Constitution.

20.22 Acts of Parliament may be inconsistent with the Constitution in ways which are not immediately apparent. The new provision ensures that none of the provisions of the Constitution can be overridden by what would otherwise *appear* to be an ordinary law, even if it were passed with the required special majority. In other words, it is intended to ensure that no constitutional provision is altered without clear notice of an intention to alter the Constitution. Proposals for legislation which in any way alter a provision of the Constitution have to be identified to Parliament and the public, and debated in those terms.

20.23 The Commission considers this a desirable safeguard. We propose that the Constitution should continue to provide that it can only be amended by a law made by Parliament which states that it is a law to alter the Constitution.

Special Majority

20.24 Subsections 77(3),(4) and (5) of the 1990 Constitution provide different majority requirements for different Chapters and provisions of the Constitution. Under subsections 77(3) and 77(4), most of what might be called the 'key' provisions of the Constitution can be altered only if the altering law is supported by at least two-thirds of the members of each House. These are the provisions which limit the powers of the executive and the legislature and which establish accountability mechanisms. They include those granting fundamental rights and citizenship. They also include the provisions which establish the judiciary and independent constitutional offices and vest them with powers. The rules by which members of Parliament are elected, and by which governments are chosen and go out of office are also subject to this higher special majority. Under the 1970 Constitution, these provisions were subject to a special majority of at least three-quarters of all of the members of each House.

20.25 Under subsection 77(5), other provisions, which are largely procedural or govern the privileges of the legislature, can at present be amended with the support of a simple majority of all of the members of each House. Previously, the

required majority for the alteration of these provisions was at least two-thirds of all the members of each House.

20.26 At present, the Bose Levu Vakaturaga, has the power to nominate twenty-four members of the Senate. Subsection 77(7) requires the support of at least eighteen of these twenty-four Senators to be included among the special two-third majority for any alteration of sections 55(1) (a), and 78(1) and section 77(7) itself. Subsection 77(3) applies the same requirement for Chapter XV of the 1990 Constitution. This 'veto' power which the Bose Levu Vakaturaga enjoys through its nominated Senators does not extend to any other provision of the Constitution.

20.27 The veto which the Senators enjoy over subsection 77(7) itself, is called a "double entrenchment". Its effect is that none of the veto powers can be withdrawn without the consent of the Senators who enjoy it.

20.28 Subsection 55(1)(a) provides the Bose Levu Vakaturaga with its power to nominate the twenty-four senators. Section 78(1) which we review later in this Chapter, gives eighteen of the Senators the power to veto legislation altering any of the entrenched Acts or otherwise affecting Fijian land, customs and customary rights. Like the veto they enjoy over subsection 77(7), the veto over subsection 78(1) effects a double entrenchment.

20.29 Chapter XV of the Constitution contains the transitional provisions which were necessary to provide for consequential changes brought about by the declaration of Fiji as a republic and by the new Constitution. The provisions are not in any way vital nor do we consider that they in any way affect any special interest of the Fijian people or the Bose Levu Vakaturaga itself. In any event, their effect was limited to the day the Constitution came into force. Their force appears to be now spent.

20.30 The existing alteration requirements for alteration of the 1990 Constitution reflect the present composition of Parliament. At present, the membership of both Houses is presently reserved according to specified ethnic criteria described in earlier chapters. We proposed significant changes to the number and distribution of Parliamentary seats reserved for ethnic groups. We have also recommended a largely elected Bose e Cake in which can be represented the interests of Fiji Islanders as residents of provinces and members of otherwise under-represented groups can be represented. Under our proposals, the Bose Levu Vakaturaga will no longer make any nominations to the Upper House. Instead we have recommended that this leading body should take its rightful place within the Constitution and directly within the constitutional process.

20.31 Clearly, the special majority provisions presently contained in section 77 will no longer be pertinent to a future Parliament constituted in accordance with our recommendations. The Commission therefore has given a great deal of thought to the special amending procedures that should apply to a future Parliament.

Proposed Procedure for Altering the Constitution

20.32 In carrying out this review and in framing our recommendations, this Commission has adopted the general approach that only important fundamental principles, rules, offices and institutions should be provided for in the Constitution. In a number of chapters, we proposed that various matters provided for by the 1990 Constitution which are not fundamental should be provided for by Acts. In view of this approach, we consider that it will no longer be necessary for the Constitution to provide for two different sized majorities for "key" and "non-key" provisions of the Constitution. Apart from the additional veto power of the Bose Levu Vakaturaga over particular sections of the Constitution which we identify below, and a special expedited procedure for urgent amendments, we propose that one special Parliamentary procedure should be followed for any alteration to any provision of the Constitution.

20.33 In considering what the appropriate majority and procedure should be, the Commission has borne in mind:

- the likely future composition of both Houses of Parliament;
- the need to maintain an effective separation of powers and accountability;
- the need for the effective protection of the constitutionally protected rights of the various communities and of individuals;
- the need to allow popular will to be expressed;
- the need for broad support for any change to the Constitution;
- the need for some flexibility.

20.34 We propose that any bill to alter the Constitution should be required to be passed by both the Bose Lawa and the Bose e Cake. It should require the support of at least two-thirds of all of the members of each House. This requirement will ensure that no alteration is passed without the broad support of a significant number of the people of Fiji .

20.35 The Constitution should require that, in accordance with traditional Parliamentary practice, any bill to alter the Constitution shall be read and voted

on at least three times in the Bose Lawa. The Constitution should provide that a bill to alter the Constitution must be supported by the votes of not less than two-thirds of all of the members of the Bose Lawa on the final vote as well as on the vote immediately preceding the final vote . It should require both the final vote, and the vote preceding it, to take place only after an opportunity has been given for full debate in the Bose Lawa.

20.36 In order to allow public opinion to be taken into account, it should provide that the final vote, and the vote immediately preceding it, must take place during different meetings of the Bose Lawa and must be separated in time by at least two months. It should also require that the bill must have been referred to the relevant sector standing committee of the Bose Lawa before the mandatory debate preceding the final vote.

20.37 We believe that two months between the final vote and the vote immediately preceding the final vote is an appropriate period for public discussion and comment.

20.38 We have also proposed that the bill should at some stage be referred to a sector standing committee of the Bose Lawa. We do not propose that the Constitution should require a process of formal public consultation in every case but envisage that this will be a matter for the committee to decide in the circumstances. Following the report of the committee, the bill should be returned to the House.

20.39 In order to allow for expedited passage of an urgent amendment to the Constitution which has wide support, the Constitution should allow the Bose Lawa to waive the requirements that the last two votes must be held in at different meetings separated by at least sixty days and that the bill must be referred to a sector standing committee. It should provide that these requirements may be waived if the Prime Minister certifies that the amendment is so urgent and important that the requirements should not complied with and if the waiver is supported by a resolution supported by the votes of at least three-quarters of the members of the Bose Lawa. It should also provide that a bill to alter the Constitution for which these requirements have been waived shall not be passed by the Bose Lawa unless it is again supported at the final vote by the votes of at least three-quarters of all of the members of the Bose Lawa.

20.40 No additional procedural requirements should be required to apply in the Bose e Cake other than the requirement that a bill to alter the Constitution

shall not be passed by the Bose e Cake unless it is supported at the final voting thereon by the votes of two-thirds of all of the members of that House.

20.41 The Constitution should also provide that the President shall not assent to any bill which alters the Constitution unless it is accompanied by certificates signed by the Speaker and by the President of the Bose e Cake certifying that the procedures required by the Constitution have been followed in their respective Houses.

Veto Power of the Bose Levu Vakaturaga

20.42 Elsewhere we have proposed that the Bose Levu Vakaturaga should no longer nominate Senators to protect the special interests of the Fijian people. We here propose how the veto powers formerly vested in the Senators should be exercised.

20.43 The Constitution should give the Bose Levu Vakaturaga a veto power over any bill to alter:

- the section which provides for the special entrenched legislation;
- the sections which establish the Bose Levu Vakaturaga and set out its composition and constitutional functions;
- the section which gives landowners and owners of customary fishing rights a right to a portion of the royalties from mineral extraction;
- the provision which gives it a veto over alterations to the foregoing sections.

20.44 If a bill to alter any of these provisions of the Constitution is passed with the required majority in the Bose Lawa and the Bose e Cake, the Constitution should require that before the bill is produced to the President for assent, it should first be referred to the Bose Levu Vakaturaga. The Constitution should provide that the President shall not assent to any such bill unless it is approved by consensus of the Bose Levu Vakaturaga, or failing that by the support, at a vote, of at least two-thirds of all the members of that body. It should require the Chairperson of the Bose Levu Vakaturaga to certify to the President that the Bose Levu Vakaturaga has approved the bill in accordance with the constitutional requirements.

20.45 Under these recommendations, the Bose Levu Vakaturaga will exercise a direct veto power over the section of the Constitution which entrenches the

special legislation affecting Fijians, Rotumans and Banabans. In our proposals for the membership of the Bose Levu Vakaturaga, we have made necessary provision for members representing the Rotuman and Banaban communities.

20.46 Since, under our proposals, there will no longer be any need or right to nominate Senators, there is no need to maintain a veto power over the provisions governing membership of the Bose e Cake. Instead we propose that the Bose Levu Vakaturaga will exercise a veto power over the provisions guaranteeing its own existence and constitutional powers.

20.47 We have also given the Bose Levu Vakaturaga a veto over the provision guaranteeing rights to landowners and owners of customary fishing rights to a portion of mineral royalty rights.

20.48 For reasons which we gave earlier, we have not proposed that any special veto exist over Chapter XV.

20.49 We have also proposed that the provisions giving the Bose Levu Vakaturaga power to veto any alteration to the specified sections should continue to be doubly entrenched.

20.50 We envisage that the Bose Levu Vakaturaga will continue to act by consensus. We propose the two-thirds majority only to cater for a situation in which a small number of members, by refusing to support any otherwise popular alteration, may effectively exercise a veto of their own. In all cases, however, the Bose Levu Vakaturaga itself retains the collective ability to decide whether any matter should be put to a vote.

RECOMMENDATIONS

679. In principle, Parliament should be empowered to alter the Constitution in accordance with special procedures which should be contained in the Constitution.

680. The substance of section 77(8) which defines an alteration to the Constitution should be retained.

681. The Constitution should require that any bill to alter the Constitution should state that it is a bill for that purpose.

682. Any bill to alter the Constitution should be required to be passed by both the Bose Lawa and the Bose e Cake.

683. The Constitution should require that no bill to alter the Constitution shall be passed by the Bose Lawa unless it has

been read and voted on at least three times in that House. It should provide that such a bill must be supported by the votes of not less than two-thirds of all of the members of the Bose Lawa on the final vote as well as on the vote immediately prior to the final vote. It should require both these votes to be preceded by a full opportunity for debate in the Bose Lawa.

684. The Constitution should provide that the final vote and the vote immediately preceding it must take place during different meetings of the Bose Lawa and must be separated in time by at least two months.

685. It should also require the bill to be referred to the relevant sector standing committee of the Bose Lawa at some time before the mandatory debate preceding the final vote. It should require that the third and final vote should not take place until the committee has reported back to the House.

686. In order to allow for expedited passage of a widely-supported urgent amendment to the Constitution, the Constitution should allow the Bose Lawa to waive the requirements that the last two votes be held in different meetings and be separated by at least sixty days and that the bill be referred to a sector standing committee. It should provide that these requirements may be waived if the Prime Minister certifies that the amendment is "so urgent and important" that the requirements should not be complied with and if the waiver is supported by a resolution passed by the votes of at least three-quarters of the all members of the Bose Lawa. It should also provide that a bill to alter the Constitution for which the requirements were waived, shall not be passed by the Bose Lawa unless it is again supported at the final vote by the votes of at least three-quarters of all of the members of the Bose Lawa.

687. The Constitution should require that a bill to alter the Constitution shall not be passed by the Bose e Cake unless it is supported at the final voting thereon by the votes of two-thirds of all of the members of that House. No additional constitutional requirements should apply in the Bose e Cake.

688. The Constitution should give the Bose Levu Vakaturaga a veto power over any bill to alter:

- **the section which provides for the special entrenched**

legislation;

- **the sections establishing the Bose Levu Vakaturaga and setting out its composition and constitutional functions;**
- **the section giving landowners and owners of customary fishing rights a right to a portion of the royalties from mineral extraction;**
- **the provisions which gives it a veto power over alterations to the foregoing sections.**

689. **If any bill to alter any of these provisions of the Constitution is passed with the required majority in the Bose Lawa and the Bose e Cake, the Constitution should require that before the bill is produced to the President for assent, it should first be referred to the Bose Levu Vakaturaga. The Constitution should require that the President shall not assent to any such bill unless it is approved by consensus of the Bose Levu Vakaturaga or failing that by the support at a vote of two-thirds of all the members of that body. It should require the Chairperson of the Bose Levu Vakaturaga to certify to the President that the Bose Levu Vakaturaga has approved the bill in accordance with the constitutional requirements and provide that the President may not assent in the absence of that certificate.**

REVIEW OF THE CONSTITUTION

20.51 Section 161 of the 1990 Constitution requires that the whole of the 1990 Constitution (other than section 164) should be reviewed within seven years of its promulgation and every tenth year thereafter. This Commission and this report are responses to the first of those requirements.

20.52 The general rule is that no express constitutional provision is necessary to authorise a review of a country's constitution. As part of its ordinary powers, a government or a legislature can itself review or commission a review of the country's constitution at any time. At any time it can also do the same for only a part of the constitution. The purpose of section 161 is therefore not to authorise a review but to impose an obligation to carry one out at the specified intervals, and to require that every such review should be directed to all of the provisions of the Constitution.

20.53 As said earlier, although a Constitution should have an enduring quality, changing national circumstances may require the re-examination of various provisions. We also recognise that under the Westminster system, those who are

in the best position to initiate review and alteration, that is the executive government who are in majority in the Lower House, may have the least reason to consider whether any review or alteration of the constitution is necessary or desirable. After all, the existing constitutional rules will have brought them to power.

20.54 At the same time, we are aware of the resources and effort involved in a full-scale constitutional review. We are aware that reviews can cause anxiety and uncertainty among the people of a country and so undermine the stability which the constitution's enduring nature is intended to provide.

20.55 If the provisions of the 1990 Constitution are replaced by other provisions broadly acceptable to all of the people of Fiji, we propose that the existing mandatory requirement for full reviews of the Constitution at least once in each ten years, should not continue. Instead the Constitution should place the duty on Parliament to consider, every ten years, whether a review of the Constitution or any part of the Constitution is necessary or desirable. This will ensure that the matter is raised and given due consideration by the people's representatives at regular intervals.

RECOMMENDATIONS

690. If the provisions of the 1990 Constitution are replaced by other provisions which are broadly acceptable to all the people of Fiji, the existing mandatory requirement for full reviews of the Constitution at least once in each ten years, should not be retained. Instead the Constitution should place the duty on Parliament to consider, every ten years, whether a review of the Constitution or any part of the Constitution is necessary or desirable.

SECTION 164: IMMUNITY PROVISIONS

20.56 Section 164 of the 1990 Constitution grants criminal and civil immunity to the persons who led or participated in the two military *coups d' etat* in 1987. Subsection 164(5) provides that the section shall not be reviewed or amended by Parliament. In view of this provision, we have not reviewed the contents of, and make no proposals for changes to, section 164.

20.57 In carrying out our review of all the other provisions of the Constitution, we have made many recommendations on how they should be changed to meet Fiji's present and future needs. We envisage that these recommendations, if broadly acceptable to the people of Fiji and its leaders, will form the basis of a wholly new Constitution. In that event, and in view of the inability of Parliament ever to

amend section 164, we envisage that when all other provisions of the 1990 Constitution are repealed and replaced in a new constitutional document, section 164 will remain the sole remaining section of the 1990 Constitution.

ENTRENCHED LEGISLATION

20.58 Section 78 of the 1990 Constitution sets out special procedures which must be followed before Parliament can pass a law which alters any of the eight Acts listed in subsection (1) or which otherwise "affects Fijian land, custom and customary rights". It also prescribes a special procedure involving a higher special majority for amending the Agricultural Landlord and Tenant Act (Cap. 270).

20.59 Because special procedures are required, these Acts are generally referred to as "the entrenched Acts". For convenience, we deal separately with the requirements which apply to the eight Acts specified in subsection (1) and those which apply generally to any legislation which "affects Fijian law, customs and customary rights". We also deal separately with the procedure for altering the Agricultural Landlord and Tenant Act.

Alteration of Acts Specified in Subsection (1)

20.60 The Acts listed in subsection 78(1) are:

- the Fijian Affairs Act (Cap. 120);
- the Fijian Development Fund Act (Cap. 121);
- the Native Lands Act (Cap. 133);
- the Native Land Trust Act (Cap. 134);
- the Rotuma Act (Cap. 122);
- the Rotuma Lands Act (Cap. 138);
- the Banaban Settlement Act (Cap. 123);
- the Banaban Land Act (Cap. 124).

20.61 The Acts protect the special interests of Fijians, Rotumans and Banabans. The Commission discussed them in Chapter 20 and recommended that they continue to be entrenched. We here propose the procedures under which they may be altered.

20.62 Under subsection 78(1) of the 1990 Constitution an alteration to any of these entrenched Acts requires only a majority of votes of all the members of each House. However, in the Senate, this support must include eighteen of the twenty-

four Senators nominated by the Bose Levu Vakaturaga.

20.63 We propose that the Constitution should continue to provide that these Acts may be altered by a bill supported by a majority of all of the members of each House. Consistently with our proposal for the exercise by the Bose Levu Vakaturaga of a veto power over particular sections of the Constitution, the Commission recommends that if such a bill is passed by both Houses, the Constitution should require that before it is presented to the President for assent, it should first be referred to the Bose Levu Vakaturaga for approval. That approval should be expressed either through consensus or through at least two-thirds votes of all of the members of the Bose Levu Vakaturaga.

20.64 The Constitution should provide that the President shall not assent to any such bill unless the Chairperson of the Bose Levu Vakaturaga has certified that the Bose Levu Vakaturaga has approved the amendment in accordance with the constitutional requirements. It should also require certificates from the Speaker and the President of the Bose e Cake that the bill has been passed by an absolute majority of their respective Houses.

20.65 As proposed earlier, the members of the Bose Levu Vakaturaga representing the Rotuman and Banaban communities should participate in the consideration of bills to amend their respective Acts.

20.66 In proposing that, as now, only an absolute majority of all members of each House should be required for amendments to the entrenched Acts, we are aware that this will mean that amendments may be passed with relative ease. Subject to the safeguarding veto of the Bose Levu Vakaturaga, we believe that the absolute majority requirement will allow the Government a degree of flexibility to bring about necessary changes to the Acts, which it did not enjoy under the 1970 Constitution. We are confident that the Bose Levu Vakaturaga will effectively protect the interests of the communities for whose benefit the Acts exist.

Definition of 'Alteration'

20.67 'Alteration' is defined in the same wide way as in the provision dealing with constitutional amendment. It would therefore include any law which might not be directly related in nature or subject matter, but which is nevertheless inconsistent with, or repugnant to, a provision of one of the entrenched Acts. The definition would also entrench all subsequent alterations to the specified Acts. We propose that in substance the definition should be retained.

Form of Alteration

20.68 Subsection 78(3) attempts to provide a similar requirement to subsection 77(2), as to the form of any alteration to the entrenched Acts. It requires that the entrenched "laws" referred to in the "preceding subsection" may be altered only by an Act expressed to be an Act to alter that law. The preceding subsection (2), however, only refers to the Agricultural Landlord and Tenant Act. The other Acts are referred to in subsection (1). The limited reference appears to be inadvertent.

20.69 For the same reasons we gave in relation to subsection 77(2), we favour the inclusion in the Constitution of a requirement that a bill to alter *any* of the entrenched Acts must contain a statement that it is a bill to alter that Act.

Other Legislation Affecting Fijian Interests

20.70 A significant change made by the 1990 Constitution was that the veto power of the Senators nominated by the Bose Levu Vakaturaga was extended beyond the entrenched Acts and the Fijian interests specifically protected by those Acts to any other bill which "affects Fijian lands, customs or customary rights".

20.71 It is apparent that this extension was motivated by a desire to protect other Fijian interests not already protected by the entrenched Acts. One example is the Fijian customary fishing rights protected under the Fisheries Act.

20.72 Although we agree that the Bose Levu Vakaturaga should continue to have a veto power over any legislation affecting Fijian land, custom and customary rights, we consider that the broad thrust of the present provision and, in particular, the breadth of the word "affects" poses practical problems. Many routine general bills can "affect" Fijian land, customs or customary rights in indirect or non-contentious ways. A general taxation statute or a land-use statute regulating agricultural practices and applying to all land are possible examples.

20.73 One problem with the present provision is that it may allow a person who is being prosecuted for an offence against such an Act to claim that the Act is invalid because it is one which 'affects' Fijian land but did not get the required approval of the Bose Levu Vakaturaga. Such retrospective invalidation may cause great inconvenience and uncertainty, especially in relation to things already done under the Act.

20.74 We consider that the existing difficulties with the provision can be overcome if the constitutional safeguard was expressed in procedural terms. We propose that this general part of section 78(1) be replaced by provisions which empower the Attorney-General to certify that a bill is one affecting Fijian land, custom and customary rights otherwise than by alteration of one of the entrenched

Acts. The Constitution should provide that if the Attorney-General so certifies, that bill shall, after it is passed by the Bose Lawa, and the Bose e Cake be referred to the Bose Levu Vakaturaga for its consideration. The procedures and rules which we propose for alterations to the entrenched Acts will then apply.

20.75 Our proposal represents only a minimum requirement. We envisage that any government will bear in mind the Bose Levu Vakaturaga's ultimate veto and will consult it well before any such bill is introduced into the House. Provision for this initial consultation is at present contained in the Fijian Affairs Act, which we have proposed should remain entrenched.

20.76 The Constitution should make the Attorney-General's certificate conclusive. It should require that bills which affect Fijian land, customs or customary rights but which are not alterations to one of the entrenched Acts should be required to be referred to the Bose Levu Vakaturaga only in cases where the Attorney-General has so certified. The Constitution should not allow any Act, other than one altering one of the entrenched Acts, to be challenged after it has come into effect on the basis that it should have been, but was not, referred to the Bose Levu Vakaturaga.

20.77 Administrative arrangements should be made to ensure that the Chairman and the Secretariat of the Bose Levu Vakaturaga receive copies of all bills. We envisage that in a rare case in which, through inadvertence, a relevant bill is not certified, they will take the necessary steps to bring the matter to the attention of the Attorney-General before it is assented to by the President. We also envisage that in any such case, indigenous Fijian members of both Houses will also point out whether a bill will require reference to the Bose Levu Vakaturaga.

Agricultural Landlord and Tenant Act

20.78 The entrenchment of the Agricultural Landlord and Tenant Act protects the interests of tenants of all agricultural land including native land as well as the interests of the landowners, again including native landowners.

20.79 The duality of interests and the need for broader support for alteration is at present recognised by subsection 78(2) of the 1990 Constitution. Under that subsection, a higher majority is required. Any alteration to the Act requires the support of two-thirds of the members of each House. In the Senate this support must include that of eighteen Senators nominated by the Bose Levu Vakaturaga.

20.80 We recommend that this Act should continue to require the support of at least two-thirds of all of the members of the Bose Lawa and the Bose e Cake. The

Constitution should also require a bill altering this Act to be referred to the Bose Levu Vakaturaga in the same way as a bill to amend any of the other entrenched Acts. It should also require a certificate to be provided by the Speaker, the President of the Senate and by the Chairperson of the Bose Levu Vakaturaga that the constitutional requirements have been complied with before the President may assent to such a bill.

RECOMMENDATIONS:

691. **The Constitution should continue to require that any bill to alter any provision of:**

- **the Fijian Affairs Act (Cap. 120);**
- **the Fijian Development Fund Act (Cap. 121);**
- **the Native Lands Act (Cap. 133);**
- **the Native Land Trust Act (Cap. 134);**
- **the Rotuma Act (Cap. 122);**
- **the Rotuma Lands Act (Cap. 138);**
- **the Banaban Land Act (Cap. 124); and**
- **the Banaban Settlement Act (Cap. 123),**

may be passed by a majority of the votes of all of the members of each House.

692. **The substance of the existing definition of an alteration should be retained.**

693. **The Constitution should contain a requirement that a bill to alter any of the entrenched Acts must contain a statement that it is a bill to alter that Act.**

694. **If any bill to alter one of the specified Acts is passed by both Houses, the Constitution should require that before it is presented to the President for assent, it should first be referred to the Bose Levu Vakaturaga for its approval. That approval should be expressed either through consensus or through a majority of two-thirds of the votes of all of the members of the Bose Levu Vakaturaga. The Constitution should provide that the President shall not assent to any such bill unless the Chairperson of the Bose Levu Vakaturaga has certified that the Bose Levu Vakaturaga has approved the amendment.**

695. **We propose that the general part of section 78(1) which requires any bill otherwise affecting Fijian land, customs and customary practices should be replaced. The new provisions should empower the Attorney-General to certify that a bill is one affecting Fijian land, custom and customary rights otherwise than by alteration of one of the entrenched Acts. The Constitution should provide that if the Attorney-General so certifies, that bill shall, after it is passed by the Bose Lawa and the Bose e Cake be referred to the Bose Levu Vakaturaga for its consideration. The procedures and rules which we propose for alterations to the entrenched Acts will then apply in the Bose Levu Vakaturaga.**

696. **The Constitution should make the Attorney-General's certificate conclusive. It should require that bills which affect Fijian land, customs or customary rights but which are not alterations to one of the entrenched Acts, be referred to the Bose Levu Vakaturaga only in cases where the Attorney-General has so certified. The Constitution should also not allow any Act, which is not an alteration to an entrenched Act, to be challenged on the basis that it should have been referred to the Bose Levu Vakaturaga.**

697. **We recommend that any alteration to the Agricultural Landlord and Tenant Act should continue to require the support of at least two-thirds of all of the members of the Bose Lawa and the Bose e Cake. The Constitution should also require a bill altering this Act, to be referred to the Bose Levu Vakaturaga in the same way as a bill to amend any of the other entrenched Acts. It should also require certificates to be provided by the Speaker, the President of the Senate and by the Chairperson of the Bose Levu Vakaturaga that the constitutional requirements have been complied with, before the President may assent to such a bill.**

Your Excellency:

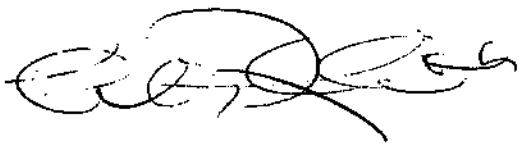
We have now completed the task entrusted to us to the best of our ability and in accordance with our Terms of Reference. We have done so with as much care and sensitivity and thoroughness as we could muster. Our report, like the Constitution we have reviewed, is a seamless document. Each of its component parts is inextricably linked. Its full import will be grasped only if it is read in its totality. Only then will the vision that has informed our work become fully apparent. We trust that the people of the Fiji Islands will receive our report in this spirit.

Your Excellency, it is our hope that this report will be the first essential step in the journey towards a strong and united future for all the people of the Fiji Islands.

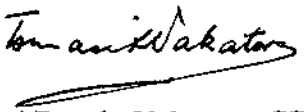
God Bless the Fiji Islands

We have the honour to be

Your Excellency's obedient servants



Sir Paul Reeves, Chairman
GCMG, GCVO, QSO, KSt.J



Tomasi Rayalu Vakatora, CF
Member



Brij Vilash Lal, PhD
Member

APPENDIX A

THE COMMISSION'S RECOMMENDATIONS

Chapter 2: Constitutional Foundations

1. The primary goal of Fiji's constitutional arrangements should be to encourage the emergence of multi-ethnic governments.

2. The Constitution should continue to be based on the Westminster system of parliamentary government.

3. Power-sharing should be achieved through the voluntary cooperation of political parties, or increased support for a genuinely multi-ethnic party.

4. The people of Fiji should move gradually but decisively away from the communal system of representation. They should adopt electoral arrangements which encourage parties to seek the support of other communities as well as their own.

5. Backbench members of all parties should have the opportunity to take part in sector standing committees which monitor every aspect of the government's responsibilities.

6. The Constitution should

   (a) recognise the important role of the Bose Levu Vakaturaga;

   (b) protect individual human rights and the rights of groups, including rights to and in land;

   (c) require social justice and affirmative action programmes for the Fijian and Rotuman communities as well as for other disadvantaged communities and groups.

7. The Constitution should be based on the principle that the interests of all communities must be recognised and protected. It should explicitly recognise the protective function of the principle that the interests of the indigenous Fijians are paramount, on the understanding that it does not involve the relegation of the interests of other communities.

Chapter 3: Purposes and Underlying Values

8. The Constitution should:

   (a) enable the people of Fiji to make a fresh start in providing for the government of their country;

   (b) be generally acceptable to all citizens;

   (c) control the actions of governments;

   (d) guarantee the rights of individuals and groups;

   (e) promote important values such as the rule of law and the separation of powers;

(f) act as an enduring basis for government.

(g) be written in accessible language and translated into Fijian and Hindi.

9. In order to promote racial harmony and national unity and the economic and social advancement of all communities; take account of the international standards concerning individual and group rights; and guarantee the rights, protect the interests and meet the concerns of the indigenous Fijian and Rotuman people and those of all other communities and groups, the Constitution should:

(a) ensure that the office of Head of State and national symbols, such as the flag and the national anthem, have a unifying force: they should recognise the unique history and character of Fiji;

(b) provide a basis on which all citizens can describe themselves by a common name;

(c) encourage every community to regard the major concerns of other communities as national concerns;

(d) increase investor confidence by providing greater political certainty and reassuring all citizens that they and their children have a secure future in the Fiji Islands;

(e) provide for the election of the Lower House of Parliament on the basis of equal suffrage;

(f) retain some communal representation, based on the distribution of communities in the total population, as a transitional measure;

(g) maintain the separation of church and state, while reflecting the importance of Christianity and all other spiritual traditions present in Fiji;

(h) recognise the equal rights of all citizens.

10. The Constitution should recognise the principle that, in order to resolve any conflicts of interest among communities and groups in Fiji, the parties should negotiate in good faith in an endeavour to reach agreement. All communities should affirm their willingness, in such negotiations, to apply the paramountcy of Fijian interests as a protective principle, with the object of ensuring that those interests are not subordinated to the interests of other communities.

Chapter 5: National Identity and Goals

11. The name of the state should be "The Republic of the Fiji Islands".

12. Readmission to the Commonwealth, of which the Queen is the Head, would reestablish links with Her Majesty.

13. The citizens of the state should have the right to use the common name of "Fiji Islanders" if they so wish, and should be encouraged to do so, but it is not necessary to make provision for this in the Constitution.

14. The Constitution should continue to describe the state as "sovereign". In the expectation that the people wish to put in place a fully democratic system of government, the Constitution should also describe the state as "democratic".

15. Section 1 of the 1990 Constitution should be redrafted to read as follows:
"The Republic of the Fiji Islands is a sovereign, democratic state."

16. A separate section of the Constitution should prescribe the form of Oath of Allegiance. The form of Oath (or Affirmation) in Schedule 1 of the 1990 Constitution should be amended to provide for the swearing of allegiance to "the Republic of the Fiji Islands", without mention of "the people".

17. The members of all communities should be encouraged to learn one another's languages, but this should not be seen as detracting from the importance of learning English.

18. An early provision of the Constitution should state that the Fijian, Hindi and English languages have equal status.

19. The Constitution should provide that members of the public dealing with government departments and other central or local government offices and statutory boards have the right, in the head office of the department, office or board, and in those divisional, district and local government offices where

(a) there is a significant demand for communications with or services from that department or body in any one or more of those languages, or

(b) because of the nature of the department or body, it is reasonable to provide for communications with or services from that department or body,

to conduct their transactions in Fijian, Hindi or English, either directly or though a competent interpreter.

20. Section 66 of the 1990 Constitution should be amended to provide that the official languages of Parliament are Fijian, Hindi and English. A speech made in any one of those languages should be simultaneously translated into each of the other two. The records of parliamentary debates and committee proceedings should be kept in the language used by the member concerned, with a translation into English if the member spoke in Fijian or Hindi. Documents such as Bills, Acts, Resolutions and Reports should be in English unless the relevant House or Committee resolves that they should, in addition, be in Fijian or Hindi or both, or in any other language spoken in Fiji.

21. The Constitution itself should be adopted in three versions, Fijian, Hindi and English. It should provide that each version is equally authentic, but if there is any apparent discrepancy between one version of a provision and another version or versions, regard must be had to all the circumstances that tend to establish the true intent and meaning of that provision.

22. The *Preamble* to the Constitution should be brief, clearly expressed and broadly acceptable to all citizens.

23. It should state that the people of the Fiji Islands give themselves their Constitution.

24. It should deal mainly with the history of Fiji's multi-ethnic society, and its shared beliefs and values.

25. The wording of the Preamble should be based on the following draft:

WE, THE PEOPLE OF THE FIJI ISLANDS,

Seeking the blessing of God who has always watched over these islands, Recalling the events in our history that have made us what we are: especially the settlement of these islands by the ancestors of the indigenous Fijian and Rotuman people; the arrival of forbears of subsequent settlers, including Pacific Islanders, Europeans, Indo-Fijians, Chinese and many others; the adoption and enduring influence of Christianity and its contribution, along with that of other faiths, to the spiritual life of Fiji; and the separate cession of these islands by the High Chiefs of Fiji and Rotuma to Her Majesty Queen Victoria,

Recognising that the descendants of all those who chose to make their homes in these islands now form our multi-ethnic society,

Acknowledging the contribution of all ethnic communities to the well-being of that society, and the rich variety of their faiths, traditions, languages and cultures,

Taking pride in the development of our economy and political institutions, our accession to independence and our common citizenship,

Committing ourselves anew to living in harmony and unity, promoting the economic and social advancement of all communities, respecting their rights and interests, and strengthening our institutions of government,

Reaffirming our recognition of the human rights and fundamental freedoms of all individuals and groups, safeguarded by adherence to the rule of law, and our respect for human dignity and the importance of the family,

GIVE OURSELVES THIS CONSTITUTION.

26. The Constitution should contain a section described as a *Compact* among the people of the Fiji Islands. It should reassure all ethnic communities that their rights and interests will still be protected, even if changes are made to the electoral arrangements. It should also provide guidance to political leaders and parties.

27. The *Compact* should record the people's recognition of the principles on which the conduct of government is based. It should also refer to the rights of ethnic communities and individuals under other provisions of the Constitution in the areas likely to be of greatest concern to them.

28. The courts should have no jurisdiction to enquire into the application of the principles or the recognition of the rights referred to in the *Compact*, except so far as these principles and rights are recognised by other provisions of the Constitution or other law.

29. The *Compact* should be based on the following draft:

***Compact* among the people of the Fiji Islands**

The people of the Fiji Islands recognise that, within the framework of this Constitution and the other laws of the Republic, the conduct of government is based on the following principles:

(1) The rights of all individuals, communities and groups must be fully respected.

(2) These rights include those protecting the ownership of Fijian land according to Fijian custom, the ownership of freehold land, and the observation of the rights and obligations of landlords and tenants under leases of agricultural land. They also include the rights of all persons to practise their religion freely and to retain their language, culture and traditions.

(3) The rights of the Fijian and Rotuman people include their right to governance through their separate administrative systems, as well as to take part in the government of the Republic along with all other citizens.

(4) As citizens, the members of all communities enjoy equal rights, including the right to make their permanent homes in the Fiji Islands.

(5) The rights of citizens include the right to form and join political parties, to take part in political campaigns, and to vote and be a candidate in free and fair elections of members of Parliament held by secret ballot and, ultimately, on the basis of equal suffrage.

(6) The formation of a government that commands the support of a majority in the lower house of Parliament depends on the electoral support received by the various political parties or pre-election coalitions, and, if it is necessary or desirable to form a coalition government from among competing parties, depends on the compatibility of their policies and their willingness to come together to form or support a government.

(7) In forming a government, and in that government's conduct of the affairs of the nation through the promotion of legislation or the implementation of administrative policies, full account should be taken of the interests of all communities.

(8) To the extent that the interests of different communities are seen to conflict, all the interested parties should enter into negotiations in good faith in an endeavour to reach agreement.

(9) In such negotiations, the paramountcy of Fijian interests as a protective principle should continue to apply, so as to ensure that the interests of the Fijian community are not subordinated to the interests of other communities.

(10) Affirmative action and social justice programmes to secure effective equality of access to opportunities, amenities or services for the Fijian and Rotuman people, as well as for other communities, for women as well as men, and for all disadvantaged citizens or groups, should be based on an allocation of resources broadly acceptable to all ethnic communities.

Application of the *Compact*

(1) The application of the principles or recognition of the rights referred

to in the *Compact* shall not, by virtue only of this section, be called in question before any court or other authority.

(2) The *Compact* may be taken into account in interpreting and applying any other provision of this Constitution or other law.

30. The Constitution should contain a provision about its interpretation, based on the following draft:

Interpretation of this Constitution

(1) This Constitution applies to circumstances as they arise from time to time in the Republic of the Fiji Islands.

(2) Its meaning is to be ascertained from the text, read in its context and in the light of its purpose, taking into account the spirit of the Constitution as a whole.

31. Those charged with the task of interpretation should bear in mind that, in ascertaining context, purpose and spirit, regard should be paid to all relevant matters including any international instruments on which particular provisions are based, and the values expressed in the Constitution itself.

Chapter 6: Citizenship

32. The basic rules about acquisition and loss of Fiji citizenship should continue to be provided for in the Constitution.

33. The Constitution should provide explicitly for the making of laws by Parliament to give effect to the rules in the Constitution and to supplement them to the extent provided, in ways consistent with the Constitution.

34. A new and comprehensive Citizenship Act, consistent with the recommended new constitutional provisions, should be prepared at the same time as the constitutional provisions themselves, and should enter into force on the same date.

35. The new constitutional and statutory provisions should take full account of the international instruments designed to avoid statelessness and should be consistent with international human rights principles.

36. Any new constitutional provisions about citizenship should provide that every person who was a citizen of Fiji immediately before their effective date continues to be a citizen.

37. The Constitution should provide that every child born in Fiji after the effective date is a citizen of Fiji at the date of birth, unless, at that date, one of the child's parents possesses diplomatic immunity and neither parent is a citizen of Fiji.

38. A child found in Fiji should be taken as having been born in Fiji, in the absence of proof to the contrary.

39. The Constitution should provide that every child born outside Fiji after the effective date has the right to become a citizen of Fiji by registration, if, at that date, either parent was a citizen of Fiji.

40. The Constitution should continue to provide that an adult citizen of Fiji automatically loses that citizenship if he or she voluntarily acquires another citizenship, or voluntarily retains another citizenship in the circumstances referred to in Recommendations 11 or 12.

41. An adult person's involuntary acquisition of another citizenship, through marriage or a change in the law of another country with which the person has a connection, should not deprive the person of his or her Fiji citizenship, unless the person fails to renounce the other citizenship within 12 months of becoming aware of it, or of being required to renounce it by the Minister responsible for citizenship, whichever first occurs.

42. A child who, at birth, or by the action of a parent or guardian before he or she attained the age of 21, acquired both Fiji citizenship and the citizenship of one or more other countries, should automatically lose his or her Fiji citizenship on attaining the age of 22, if he or she has not, after attaining the age of 21 and before attaining the age of 22, renounced all other citizenships.

43. The procedures for the grant of Fiji citizenship by registration or naturalisation should continue to require an adult applicant to renounce the applicant's existing citizenships, but it should be recognised that, under the law of the country concerned, the renunciation of a foreign citizenship may be permitted only after the actual grant of Fiji citizenship.

44. If, for the purpose of retaining or acquiring Fiji citizenship, a person is unable effectively to renounce the citizenship of another country under its law, the Constitution should permit that person to make a declaration of intention not to exercise any of the benefits of that citizenship under conditions provided by law.

45. In view of the recommendations already made for the loss, by operation of the Constitution, of the Fiji citizenship of an adult person who remains or becomes a citizen of another country, it should not be possible, on that ground alone, to deprive such a person of his or her citizenship of Fiji.

46. The Constitution should entitle an adult person who was formerly a citizen of Fiji to be registered as a citizen if he or she has been lawfully present in Fiji for an aggregate of 3 out of the 5 years immediately preceding the application for registration.

47. A former citizen should have a constitutional right to enter Fiji and reside here, subject to compliance with the conditions applicable to other persons granted the right to enter and reside in Fiji.

48. A person should be permitted to renounce his or her Fiji citizenship only if he or she has attained the age of 21 years, and is a citizen of another country from the date of birth or has been granted the citizenship of another country by registration or naturalisation.

49. The Constitution should entitle a citizen of another country who is or has been married to a Fiji citizen to be registered as a citizen, if he or she has been lawfully present in Fiji for an aggregate of 3 out of the 5 years immediately preceding the application for registration and complies with other conditions imposed by the Constitution or by Act in the interests of national security or public policy.

50. The foreign wife or husband of a Fiji citizen should have a constitutional right to enter and reside in Fiji, subject to compliance with the conditions applicable to other persons granted the right to enter, reside and work in Fiji.

51. The Constitution should entitle a child adopted by a Fiji citizen when the child was under the age of 19 years to be registered as a citizen. Provision for the recognition in Fiji of an adoption under foreign law should be made by Act.

52. The Constitution should entitle a natural-born child of a Fiji citizen to be registered as a citizen if the child was under 21 when the parent first became a citizen.

53. The Constitution should provide that applications for registration under these provisions may be made by an adoptive or natural parent or a legal guardian, if the child is under 21 at the time of the application. If the child is 21 or over, he or she may make the application but will be entitled to registration only if he or she has been lawfully present in Fiji for an aggregate of 3 out of the 5 years immediately preceding the date of the application. Before registration as a citizen, the adopted or natural-born child of a Fiji citizen should have a constitutional right to enter and reside in Fiji, subject to compliance with the conditions applicable to other persons granted the same rights.

54. The Constitution should continue to make provision for the grant of citizenship by naturalisation.

55. It should specify that, to become eligible for naturalisation, a foreign citizen needs to have been lawfully present in Fiji for an aggregate period of five out of the ten years immediately preceding the application for naturalisation.

56. The Constitution should not specify which Minister should be responsible for decisions about citizenship. That should flow from the assigned responsibility for administration of the new citizenship legislation.

57. Immigration should not be dealt with in the Constitution but should remain a matter of government policy within the framework of the Immigration Act. In view, however, of the link between immigration policy and grants or extensions of work permits or refugee status, and a foreign citizen's eventual eligibility for citizenship by naturalisation, the Minister responsible for immigration should be assisted in these matters by an advisory body. The body could be set up under the Immigration Act or by administrative action. The Minister should not be bound to accept its recommendations, but his or her annual report to Parliament should disclose the number of cases in which its recommendations were not followed. The existing arrangements for consultation about whether people with special skills are needed from overseas should be retained.

58. The provisions of the Constitution about the ways in which Fiji citizenship can be acquired should be exhaustive. It should not permit Parliament to confer a right to citizenship by Act, either by direct grant or by the exercise of a discretion.

59. The Constitution should specify only the main conditions for registration as a citizen and criteria for naturalisation. It should, however, permit other reasonable conditions or criteria to be imposed by Act.

60. In those cases where the Constitution requires a foreign citizen to spend an aggregate period of time in Fiji before becoming entitled to, or eligible for, citizenship, it should permit provision to be made by Act excluding periods during which the person was present in Fiji for reasons that conflict with the purpose of imposing the qualifying period in that case.

61. The Constitution should provide that no person may be deprived of his or her Fiji citizenship otherwise than by operation of the Constitution itself, for the avoidance of multiple citizenship, or under a provision made by Act providing for deprivation on the grounds referred to in Recommendation 62.

62. The Constitution should authorise Parliament to provide by Act for a person to be deprived of citizenship in the following cases only:

(a) where citizenship by registration or naturalisation was obtained by fraud, false representation or the concealment of any material fact; or

(b) where, as a condition of retaining or acquiring Fiji citizenship, a person, who is a citizen of another country and is unable under its law to renounce its citizenship, has declared an intention not to exercise the benefits of that citizenship, but nevertheless exercises a right pertaining exclusively to the citizens of that country.

63. The Constitution should provide that an Act conferring power to deprive a person of his or her Fiji citizenship in the circumstances referred to in Recommendation 62 must provide for that power to be exercised through procedures which are in conformity with the rules of natural justice.

64. For the avoidance of doubt and possible statelessness, the transitional provisions of the Constitution should include declaratory provisions to the following effect:

Notwithstanding anything in Chapter IV of the 1990 Constitution,

(a) a person born in Fiji in the period beginning on 28 September 1987 and ending on 24 July 1990 is to be taken as having become a citizen of Fiji at the date of birth;

(b) a person born outside Fiji in the period beginning on 28 September 1987 and ending on 6 October 1987 is to be taken as having become a citizen of Fiji at the date of birth if his or her father was a citizen on that date and was not himself born outside Fiji;

(c) a person born in Fiji in the period beginning on 25 July 1990 and ending on the day before the effective date is to be taken as having become a citizen of Fiji at the date of birth if that person would otherwise be stateless.

Chapter 7: Bill of Rights

65. The Constitution should continue to contain a statement of judicially enforceable individual rights and freedoms. It should be called the Bill of Rights.

66. Wherever possible, particular rights and freedoms should be affirmed in positive terms.

67. In view of its function of protecting the rights and freedoms of individuals and groups from undue interference by the state, the Bill of Rights should expressly bind the legislative, executive and judicial branches of government at all levels: central, divisional, district and local, as well as all bodies exercising legislative, executive or judicial powers in relation to any ethnic community, and all persons acting in the performance of the functions of any public office or any public authority.

68. The Bill of Rights should not expressly bind private persons to a greater extent than it does already. However, its terms should not exclude its possible application to other actions of private persons if appropriate. The courts should take account of the developing international jurisprudence on this question.

69. If serious human rights abuses by private persons are found to exist in the Fiji Islands, the Government should address them by ordinary legislation.

70. The Bill of Rights should not conflict with the international human rights standards and should give effect to them where appropriate.

71. The main emphasis should be on clarifying the scope of rights and freedoms already recognised. However, the Constitution should provide that the people retain all other rights and freedoms recognised by the law of the Republic, even though they are not set out in the Bill of Rights.

72. The Bill of Rights should continue to affirm the rights and freedoms of all "persons" (whether citizens or not), within the wide meaning of that term as defined in the Interpretation Act. This definition enables individual rights to be invoked by or for the benefit of groups.

73. In the few cases where rights are conferred on all "citizens" rather than all "persons", the exclusion of non-citizens should be evaluated in the light of the Commission's recommendations that certain categories of foreign citizens should have a constitutional right to enter and reside in Fiji while waiting to qualify for registration as citizens.

74. It should be made clear that the Bill of Rights applies, not only to persons "in Fiji", but also in any circumstance in which the law of the Republic of the Fiji Islands applies to persons outside the Republic.

75. Where the language in which a right or freedom is expressed limits its scope or application, the limitation should be retained only if essential for the purposes of clarity.

76. Where the Bill of Rights permits a right or freedom to be limited by law for a specified purpose, the power to impose limitations for that purpose should be retained only if clearly necessary.

77. Each statement of a right or freedom should continue to specify exhaustively all the purposes for which it can be limited by law. To avoid excessive detail, those purposes should, so far as possible, be described in general terms.

78. Where limitations can be imposed by law for purposes described in broad language, and in any other case where the courts should be required to look in a qualitative way at the nature and extent of limitations for a particular purpose, the Bill of Rights should continue to provide that the law and anything done under it will not be valid unless "reasonably justifiable in a democratic society".

79. That test should not be made stricter, as has been done in some developed countries. However, despite the lower standard of justification required in Fiji, the courts in Fiji should look to the developing jurisprudence of other countries for guidance about the methodology of applying the test in the circumstances of the Republic.

80. The formulation of the test should make it clear that, if a law or something done under it is found to limit a right or freedom, the state has the burden of proving that the limitation is reasonably justifiable in a democratic society.

81. To avoid the risk of misinterpretation, the Bill of Rights should be introduced by a simple statement affirming without description or qualification the rights and freedoms it sets out.

82. Unless otherwise provided for good reason, the Bill of Rights should continue to apply to all the law of Fiji, whether enacted before or after its entry into force. If, in a particular case, there are likely to be substantial problems in giving effect to recommended changes involving an expansion of a right or freedom, the entry into force of the new provision should be expressly deferred for a specified period not exceeding two years, to enable the existing law to be brought into compliance.

83. The responsibilities of the courts to apply and enforce the Bill of Rights should be taken into account in judicial selection and training.

84. Without trespassing on the responsibility of the courts to enforce the Bill of Rights, the Constitution should create a Human Rights Commission with the functions of

(a) educating the public about the nature and contents of the Bill of Rights, including its origins in the international instruments and the responsibilities of United Nations bodies and member states in promoting respect for human rights;

(b) making recommendations to Government about matters affecting compliance with human rights, including compliance with the international standards and the desirability, on occasions, of seeking an opinion from the Supreme Court on the effect of particular provisions of the Bill of Rights; and

(c) exercising such other functions in relation to human rights as may be conferred on the Human Rights Commission by Act. These might include functions under any legislation enacted to deal with serious abuses of human rights by private persons.

85. The Human Rights Commission should consist of three members, of whom one should be the Ombudsman, ex officio, and one should be a person who is, or is qualified to be, a judge of the High Court.

86. The Bill of Rights in the 1990 Constitution should be thoroughly revised to take account of the foregoing recommendations, as well as the recommendations on particular rights and freedoms set out below. It should have a clearer structure and be written in a simpler style, enabling it to be read and understood more easily by the people of the Fiji Islands. Consideration should be given to seeking comments on the draft of a new Bill of Rights from a panel of experts inside and outside the Republic, before its adoption by Parliament.

87. The Constitution should affirm in positive terms that everyone has the right to life, without spelling out the content of the right.

88. The present provision qualifying the right to life by permitting the execution of a person sentenced to death for committing a criminal offence should be repealed. The Constitution should prohibit the imposition of the death penalty under the law of the Republic. Section 99(6) should be consequentially amended.

89. Without including provision to that effect in the Constitution, the policy in relation to the commutation of sentences of imprisonment for life or for a term of years should ensure that an offender serves a proportion of the sentence commensurate with the nature of the crime committed.

90. The Constitution should continue to provide that the right to life is not infringed by a person's death as a result of the use of force for the purposes specified in section 5(2) of the 1990 Constitution, if a law permits the use of an amount of force that is reasonably justifiable in the circumstances and the amount of force actually used does not exceed that limit.

91. It should also provide that the right to life is not infringed by the death of a person as a result of "a lawful act in the course of armed conflict", rather than "a lawful act of war".

92. The Constitution should affirm in positive terms, that everyone has the right to personal liberty.

93. To provide certainty, it should continue to list comprehensively the grounds on which a person may be deprived of liberty. The existing grounds should be retained, with the following exceptions:

(a) Arrest or imprisonment for debt or failure to fulfil contractual obligations should be expressly prohibited.

(b) Imprisonment for non-payment of a fine should be prohibited. In default, a sentence of community service should be substituted.

(c) Imprisonment for a failure to pay tax or maintenance should be prohibited, except in cases of wilful default by a person who had the means to pay.

(d) The provision in section 6(1)(e) authorising a law permitting a person to be deprived of liberty merely on reasonable suspicion of being about to commit a crime should be repealed. A consequential change should be made to the wording of section 6(3)(b).

(e) The power to deprive a person of liberty in time of emergency in section 6(7) and the safeguards conferred on such a person by section 17 should be dealt with in a separate provision on emergency powers.

94. The Constitution should require the state to show that a law permitting a person to be deprived of personal liberty on any of the grounds referred to in section 6(1) is reasonably justifiable in a democratic society.

95. The Constitution should continue to recognise all the existing rights of arrested or detained persons, but some should be spelt out or supplemented as follows:

(a) A person arrested or detained upon reasonable suspicion of having committed a criminal offence should have the right to be informed of the nature of any charges against him. Such a person, if not charged, should have the right to be promptly released.

(b) A person who is arrested or detained, or questioned by the police in a coercive situation on suspicion of having committed a criminal offence, as well as a person who has been charged, should have a right to consult a lawyer, and to be informed of that right as soon as it arises, as well as of the right to legal aid, as formulated in paragraph (d) below.

(c) A person suspected of having committed a criminal offence who wishes to consult a lawyer should not be questioned, or further questioned, until he or she has had a reasonable opportunity to exercise that right; should be entitled to

consult the lawyer of his or her choice, subject to any reasonable restrictions as a condition of being granted legal aid; and should be afforded prompt and adequate opportunity to consult the lawyer in private, in the place where he or she is being detained or questioned.

(d) A person who is arrested or detained, or is being questioned by the police in a coercive situation on suspicion of having committed a criminal offence, or has been charged, should have the right to be provided with the services of a lawyer under a scheme for legal aid, if he or she does not have sufficient means to engage a lawyer and substantial injustice would otherwise result.

(e) If a person is arrested or detained, the police or other authority holding the person should be required to inform a relative or friend of that person as soon as practicable. A detained person should have the right to reasonable opportunities to receive visits from family members or friends, a religious counsellor or a social worker. He or she should be informed of this right as soon as practicable.

(f) A person arrested on the order of a court or on suspicion of having committed a criminal offence should have the right to be brought before a court no later than 48 hours from the time of arrest, or, if that is not reasonably possible, as soon as possible thereafter.

(g) Everyone who is arrested or detained should have the right to have the validity of the arrest or detention determined by way of habeas corpus, and to be released if the arrest or detention is not lawful.

(h) When a person is first brought before a court after arrest, the court should be required to order his or her release on reasonable terms and conditions pending trial, unless there is just cause for continued detention. Persons ordered to be detained pending trial should, so far as practicable, be kept apart from persons who have been convicted and are serving sentences of imprisonment.

(i) Every person arrested, detained or questioned by the police in a coercive situation, on suspicion of having committed a criminal offence, should have the right to refrain from saying anything and to be informed of that right.

(j) Every person deprived of liberty should have the right to be treated with humanity and with respect for their inherent dignity. A child who is deprived of liberty should, so far as practicable, be detained separately from adults, unless that is not in the child's best interests.

96. The Constitution should continue to provide that no person shall be held in slavery or servitude or be required to perform forced labour.

97. It should expressly exclude from the definition of forced labour any work reasonably required of a person sentenced to imprisonment, whether or not related to the hygiene or maintenance of the prison.

98. The substance of section 7(3)(a), (c) and (e) should be retained but the power to require the use of labour in an emergency in paragraph (d) should be dealt with in a separate provision on emergency powers.

99. The Constitution should continue to provide that no person shall be subjected to torture or to inhuman or degrading punishment or other treatment.

100. It should expressly prohibit "disproportionately severe" punishment or other treatment.

101. It should also expressly prohibit scientific or medical experimentation on any person without that person's informed consent.

102. The Constitution should continue to protect all persons against the compulsory taking of their property by an agency of the state. However, it needs to be clarified that a "taking" is something directed to a particular property or type of property, because the state wishes to use that property itself, or control its use by its owner. A "taking" should not include every circumstance in which the state may become involved in enforcing the general law by measures which may result in depriving a person of property.

103. The Constitution should permit the taking of property only on the following conditions:

(a) It must be taken only under an empowering law.

(b) The acquiring authority must give reasonable notice to the owner and any other persons whose interests are affected of the intention to take the property.

(c) The High Court must authorise the taking.

(d) The taking must be for a purpose specified in the Constitution.

(e) If the taking is authorised, the acquiring authority must pay prompt and adequate compensation.

(f) If the acquiring authority is unable to reach agreement with the owner about the amount of compensation payable, the amount must be fixed by the High Court.

(g) The acquiring authority must pay the reasonable costs of the owner in connection with the High Court proceedings or any appeal to a higher court.

104. The present provision permitting the state to take property compulsorily on the ground that the taking is necessary or expedient "in the interests of its utilisation in such a manner as to promote the public benefit" should not apply to land. A provision permitting the taking of land for the more limited purpose of a public work or other public amenity should be substituted.

105. The definition of "public purposes" in section 2 of the State Acquisition of Lands Act should be amended to bring it into line with the permitted grounds for a taking of land under the Constitution as amended.

106. As a further safeguard, the Constitution should require the High Court to be satisfied that the particular public good to be served by taking the property in question outweighs any hardship caused to the owner.

107. The grounds on which property may be taken should include the case where a taking is necessary or expedient in the interests of preserving property of national, archaeological, palaeontological, historical, cultural, architectural or scenic value. The right to prompt and adequate compensation should be modified in such cases by requiring the High Court to take account of the need to ensure the preservation of the heritage of the Republic of Fiji at a cost which the nation can afford, without placing an unjust burden on the owner of the property concerned. Section 9(5)(b)(v) should be consequentially repealed.

108. The need for the state to share with the owners of land or customary fishing rights any royalties received from the extraction of minerals from the subsoil of the land or seabed,

and the taking of property in an emergency, should be the subject of separate constitutional provisions which do not form part of the Bill of Rights.

109. Section 9(5)(a)(i) and (ii), and (vii), so far as they relate to laws permitting the temporary holding of property for the purposes of an examination, investigation, trial or inquiry, should become permissible limitations of a separate right to be protected against unreasonable searches or seizures, so far as those laws are shown to be reasonably justifiable in a democratic society.

110. The substance of the remaining provisions of section 9 should be retained, unless they are the product of excessive legal caution about validating laws unconnected with the taking of property or the spelling out of matters of detail which can be left to implementing legislation.

111. All laws limiting the right to protection against the deprivation of property, or administrative action taken under such laws, should be shown to be reasonably justifiable in a democratic society.

112. The Constitution should expressly recognise the right of everyone to freedom from unreasonable searches and seizures.

113. Without affecting the generality of that provision, the Constitution should provide that any search or seizure must be authorised by law. Such a law should provide either for the obtaining of a search warrant on the ground that there is reasonable and probable cause to believe that the search will reveal evidence of the commission of a criminal offence, or, if the law permits search of a person or of property without obtaining a warrant, that law should be one in the interests of defence, public safety, public order, public morality or public health, and should be shown to be reasonably justifiable in a democratic society.

114. The substance of section 10(2)(a), (b),(c) and (d), so far as those provisions do not relate to search or seizure, should become part of a separate provision recognizing the right to privacy.

115. The Constitution should affirm, as a separate right, that everyone has the right to reasonable privacy of personal and family life.

116. A person's right to freedom from interference with his correspondence, at present recognised in section 13(1) as an aspect of the right to freedom of expression, should be regarded as an aspect of this right to privacy. The reference to "correspondence" should be expanded by adding a reference to "communications".

117. A person's right not to be subjected to the entry by others on his premises, at present recognised by section 10(1), should also be regarded as an aspect of the right to privacy.

118. The permitted limitations of a person's right to reasonable privacy of personal and family life should be based on those at present set out in section 10(2) and also in section 13(2), in each case so far as relevant. All laws limiting the right to privacy, or administrative action taken under such laws, should be shown to be reasonably justifiable in a democratic society.

119. The power to authorise "an officer or agent of the government, or of a local authority, or of a body corporate established by law for public purposes" to enter on premises for the specified purposes should be extended to include private persons or corporations supplying public utilities to the premises under contract.

120. Section 11, entitled "Provisions to secure protection of law" should be separated into

two separate sections. The first section should affirm that all persons are equal before the law and have a right to the fair trial of both criminal and civil cases in which they may be involved. It should spell out certain requirements for a fair trial which apply in both criminal and civil cases. The second section should spell out the minimum guarantees required to secure a fair trial in criminal cases.

121. The section applying to all trials should refer expressly to the following essential elements of the right to a fair trial:

(a) Everyone who is charged with a criminal offence or is a party to a civil dispute about a legal right or obligation has the right to have the case determined by an appropriate court or other tribunal.

(b) The court or tribunal should be established by law and be independent and impartial.

(c) The persons concerned should be given a fair hearing within a reasonable time.

122. The hearings of courts and tribunals established by law should be open to the public. The provision that, in civil cases, the parties may agree that the hearing should be held in private refers to private arbitral tribunals and should be repealed. The Constitution should apply only to courts, and to other tribunals established by law.

123. The discretion to exclude the public in both criminal and civil cases should continue to rest with the court or tribunal itself, exercising powers conferred by law for the purposes referred to in section 11(10)(a) and (b), but with the addition of a requirement that the law and anything done under it should be shown to be reasonably justifiable in a democratic society.

124. The parties or other witnesses should have the right to give evidence and be questioned in a language that they can adequately understand and use for the purposes of communication. The defendant in a criminal case, and all the parties in a civil case, should have the right to follow the proceedings in a language that they adequately understand. The right should apply to persons who are unable to understand because their hearing is impaired. It should arise if the persons concerned cannot adequately understand or communicate in the language used in any part of the trial.

125. The Constitution should provide that the services of competent interpreters, including persons able to communicate in sign language, should be provided as required, without cost to the witnesses or parties.

126. The section applying to criminal trials should guarantee to the defendant the following minimum procedural rights:

(a) Every person who is charged with a criminal offence should be presumed to be innocent until proved guilty beyond reasonable doubt, or until he or she has pleaded guilty and the plea has been accepted by the court.

(b) The Constitution should provide that wrongfully obtained evidence is inadmissible, unless the interests of justice require it to be admitted.

(c) Everyone who is charged with a criminal offence should have the right to be informed as soon as reasonably practicable, in writing and in a language that they understand, of the nature of the offence with which they are charged and also of the allegations of fact on which the charge is based, in sufficient detail to be able to answer the charge.

(d) Every person who is charged with a criminal offence should be given adequate time and opportunities for the preparation of a defence. He or she should have a right of access, in person or through a legal representative, to all statements by witnesses held by the prosecution, whether or not the prosecution plans to call them. There should be no right to be provided with copies.

(e) The Constitution should continue to provide that everyone has the right to defend themselves in person, or at their own expense by a legal representative of their choice. They should also have the right to be provided with the services of a lawyer under a legal aid scheme if they do not have sufficient means to engage a lawyer and substantial injustice would otherwise result. Defendants should be informed of these rights at the time of being given written notice of the nature and grounds of the charge.

(f) The substance of section 11(2)(e) and (11)(b) about the right of the defendant or his or her legal representative to examine or cross-examine witnesses should be retained.

(g) The defendant's right of access to the record under section 11(3) should be retained.

(h) Every person convicted of a criminal offence should have a right of recourse by way of appeal to, or review by, a higher court.

(i) The Constitution should continue to provide that the trial must not take place in the absence of defendants, unless the conduct of the defendant makes it impracticable to continue the trial in their presence or the defendants consent to the trial in their absence, but the failure to appear of persons charged with an offence punishable by imprisonment should not be taken as consent to the trial taking place in their absence.

(j) The Constitution should retain the substance of the provision in section 11(4) that a person may not be convicted of a criminal offence if the conduct was not an offence at the time it was committed, or be punished by a more severe penalty than that applying at the time of its commission. If the penalty is reduced between the time of the commission of the offence and the time at which offenders are sentenced, they should have the benefit of the lesser penalty.

(k) The Constitution should retain the substance of the provision in section 11(5) that prevents a person being tried more than once for a criminal offence arising out of the same conduct. However, the Constitution should make it clear that the prosecution cannot appeal against an acquittal, except for the purpose of clarifying the law for the future without affecting the outcome of the particular case.

(l) The substance of the provision in section 11(6) which provides that no person shall be tried for a criminal offence if it is shown that a competent authority has granted him a pardon for that offence should be retained.

(m) The substance of section 11(7) which provides that no person who is tried for a criminal offence shall be compelled to give evidence at the trial should be retained.

(n) The Constitution should require a child taking part in a criminal trial, either as defendant or as a witness, to be treated in a manner which takes the child's age into account.

127. Instead of regarding freedom of thought and of religion as aspects of freedom of conscience, the Constitution should treat each aspect separately. It should positively affirm that everyone has the right to freedom of religion, conscience, thought and belief, including the freedom to change their religion or beliefs.

128. The Constitution should continue to recognise, but separately from the individual freedoms just mentioned, the freedom of everyone, either alone or in community with others, and both in public and in private, to manifest and propagate their religion or belief through worship, teaching, practice and observance.

129. It should recognise the subsidiary right of any community or group maintaining an educational or training institution to hold religious observances, or to provide religious instruction as part of any education or training they provide, whether or not that institution is wholly or partly funded by the state, and the associated right of young persons not to be required to receive religious instruction or to participate in religious observances relating to a religion that is not their own.

130. It should also continue to recognise the right of everyone not to be compelled to take an oath contrary to his or her religion or belief or to take an oath in a manner contrary to his or her religion or belief.

131. There should be no power to limit the right to individual freedom of religion, conscience, thought and belief.

132. The freedom of everyone, either alone or in community with others, to manifest and propagate his or her religion or belief in worship, teaching, practice and observance should be subject to limitation by a law, or action taken under a law, for the purpose of protecting the rights and freedoms of other persons, as provided in section 12(6)(b), and also in the interests of public safety, public order, public morality or public health, as provided in section 12(6)(a). The present power to impose limitations in the interests of "defence"should be repealed. In each case the law should be one that can be shown to be reasonably justifiable in a democratic society.

133. The Constitution should recognise a new and separate right, not only of religious communities, but also of ethnic, social, linguistic and other communities, to establish, maintain and manage educational or training institutions.

134. The community or group which establishes such an institution should have the right to manage it, whether or not the cost of maintaining it is partly met by the state.

135. Except so far as may be necessary to maintain the special character of an educational or training institution, it should be open to all qualified students, without discrimination on any ground prohibited by section # (Right to equality under the law and freedom from discrimination), on such conditions as may be established by law.

136. The right to establish and maintain educational or training institutions should be subject to limitation by law for the purpose of imposing relevant standards or qualifications, but only so far as such laws can be shown to be reasonably justifiable in a democratic society.

137. The Constitution should affirm that everyone has the right to freedom of expression including the freedom to hold opinions, to receive and impart ideas and information without interference and the freedom to seek ideas or information.

138. The Constitution should not make specific provision about the form in which people are free to express themselves.

139. It should be specifically provided that freedom of expression includes freedom of the press, in terms that make it clear that the freedom extends to all media, but subject to the right of persons injured by inaccurate or offensive media reports to have a correction published on reasonable conditions established by law.

140. The Constitution should continue to require that all laws limiting the right to freedom of expression for a purpose authorised by the Constitution are reasonably justifiable in a democratic society.

141. The existing grounds on which laws may limit the right to freedom of expression for the purpose of protecting the rights and freedoms of others and the public interest should be retained.

142. The Constitution should be amended to permit the freedom of expression of public officers to be limited by law only for the purpose of imposing reasonable restrictions in order to secure their impartial and confidential service.

143. It should be further amended to permit the right of freedom of expression to be limited by laws forbidding improper criticism of traditional offices or institutions only for the purpose of preventing ill-will between different races or communities.

144. The permissible limitations of the right to freedom of expression should be expressed by a provision on the following lines:

> A law, or an executive or administrative action under the authority of a law, may limit the right to freedom of expression
>
> (a) in the interests of defence, public safety, public order, public morality or public health; or
>
> (b) for the purpose of protecting the reputations, privacy, or rights and freedoms of other persons, preventing the disclosure of information received in confidence, or improper attacks on the dignity of respected offices or institutions in a manner likely to promote ill will between different races or communities, maintaining the authority and independence of the courts, imposing reasonable restrictions on public officers in order to secure their impartial and confidential service or regulating the technical administration of communications;
>
> but only to the extent that the limitation is shown to be reasonably justifiable in a democratic society.

145. Freedom of assembly and freedom of association should no longer be linked for the purpose of affording them constitutional protection.

146. The Constitution should positively affirm that everyone has the right to freedom of peaceful assembly.

147. It should continue to confer a power to limit the right to freedom of peaceful assembly by a law, or administrative action under its authority, in the interests of defence, public safety, public order, public morality or public health or for the purpose of protecting the rights and freedoms of others, if the law or the action taken under it can be shown to be reasonably justifiable in a democratic society.

148. The existing laws imposing such limitations in the interests of public safety and public order should be reviewed, with a view to removing the power to prohibit an assembly in advance, on the grounds of public order. The need for a prior permit should be limited to assemblies in a public place. The only purpose of such a permit should be the imposition of reasonable conditions as to the time and place of the assembly, in order to protect the interests of other members of the public.

149. The Constitution should be amended to permit the right to freedom of peaceful assembly to be limited by laws imposing reasonable restrictions on public officers only for the purpose of securing their impartial service.

150. The Constitution should affirm in positive terms that everyone has the right to freedom of association. The right to associate should be described as being "for political, economic, labour, cultural, sports or other purposes".

151. The right to form or belong to trade unions or other associations for the protection of a person's interests, already recognised as an aspect of the right to freedom of association, should become part of a separate right to organise and to bargain collectively.

152. The Constitution should continue to confer a power to limit the right to freedom of association by a law, or administrative action under its authority, in the interests of defence, public safety, public order, public morality or public health or for the purpose of protecting the rights and freedoms of others, if the law or the action under it can be shown to be reasonably justifiable in a democratic society.

153. The power to impose restrictions on the right of public officers to freedom of association under section 14(2)(c) should be amended to permit the imposition only of such reasonable restrictions as are necessary to secure their impartial service.

154. The Constitution should recognise a separate right to organise and bargain collectively. The new right should continue to affirm that the right of everyone to freedom of association includes the right of everyone to form or join trade unions or other associations for the protection of their interests, whether as a worker or an employer.

155. The Constitution should recognise that everyone has the right to fair labour practices.

156. It should also recognise the right of both workers and employers to organise and to bargain collectively.

157. The Constitution should confer in respect of the new right the same powers to limit it by a law, or administrative action under the authority of a law, as already apply in respect of the right to freedom of association. Limitations should be permitted in the interests of defence, public safety, public order, public morality or public health or for the purpose of protecting the rights and freedoms of others, if the law or the action taken under it can be shown to be reasonably justifiable in a democratic society.

158. The Constitution should also permit the limitation of the right for the purpose of imposing reasonable restrictions on members of the armed forces or the police force.

159. Under the heading of "Right to freedom of movement", the Constitution should affirm the following rights:

(1) Every citizen of the Republic of the Fiji Islands has the right to enter and reside in the Republic, and the right not to be expelled from the Republic.

(2) Every citizen and every other person lawfully in the Republic of the Fiji Islands has the right to move freely throughout the Republic and the right to leave the Republic.

(3) Every citizen, and every other person who has been granted a right to reside in the Republic of the Fiji Islands has the right to reside in any part of the Republic.

(4) Every person who is not a citizen of the Republic of the Fiji Islands but is lawfully in the Republic has a right not to be expelled from the Republic except under a decision taken on grounds prescribed by law.

160. The rights of citizens in paragraph (1) should be capable of being limited by law only for the purposes of permitting their extradition, or the removal of children who have been abducted from another country, for the purpose of restoring them to the lawful custody of a parent or guardian. In each case the removal should require the order of a court. The power of removal for these purposes should apply to non-citizens as well as citizens. The power to remove a person to serve a sentence of imprisonment in another country should apply only to non-citizens. With amendments to give effect to these recommendations, the substance of section 15(3)(g) should be retained.

161. The substance of section 15(2), permitting restrictions on any aspect of a person's freedom of movement if that person is lawfully detained, should be retained.

162. The substance of section 12(3)(e) which permits the right of freedom of movement to be limited, so far as may be necessary to give effect to restrictions imposed under the law of the Republic on the acquisition or use by any person of any property in Fiji, should be retained, but its purpose should be made clearer.

163. Section 15(3)(a), which permits restrictions to be imposed by or under a law on the freedom of any individual person to move freely throughout Fiji, to reside in any part of Fiji or to leave Fiji, if the restriction is reasonably required in the interests of defence, public safety or public order, should be repealed.

164. The Constitution should retain the power conferred by section 12(3)(b) to impose by or under a law restrictions on the right to move freely throughout Fiji, to reside in any part of Fiji or to leave Fiji of persons generally, or any class of persons, whether citizens or not, in the interests of defence, public safety and public order, public morality or public health, if the law can be shown to be reasonably justifiable in a democratic society.

165. The purposes for which such restrictions may be imposed should include the protection of the economy, ecology or distinctive culture of a particular area.

166. As a way of challenging the *policy* of a restriction, rather than its *legality* (which can be challenged in the courts), the Constitution should include a requirement to set up a tribunal of the kind provided for in section 15(4) at the request of a person whose freedom of movement has been restricted as a member of a class to which the restriction applies. The proposed Judicial Service Commission, rather than the Chief Justice, should be empowered to appoint its members.

167. In view of the recommendation that a non-citizen should have no constitutional right to enter Fiji, the only special power required to deal with non-citizens is a power to make laws permitting their expulsion from Fiji on prescribed grounds. Section 15(3)(d) should be amended accordingly.

168. Section 15(3)(c), authorising laws restricting the freedom of movement within Fiji or the freedom to leave Fiji of any person, either to ensure that person's appearance before a court at a later date for trial or other proceedings, or in consequence of that person being found guilty of a criminal offence, should be retained.

169. The Constitution should retain the substance of section 15(3)(h), allowing the making of a law under which a person's right to leave Fiji may be restricted if reasonably required to secure the fulfilment of any obligation imposed on that person by law, so long as the enabling law and the action taken under it can be shown to be reasonably justifiable in a democratic society. The power to prevent a person who owes unpaid tax or maintenance from leaving Fiji should be limited to the case where there has been wilful default by a person who had the means to pay and an order restricting that person's freedom to leave Fiji has been made by a court.

170. Section 15(3)(f) should be amended to permit laws imposing restrictions on the freedom of movement of public officers only for the purpose of imposing and enforcing reasonable terms and conditions of their employment.

171. The Constitution should affirm that all persons are equal under the law. It should continue to provide that they have a right to freedom from discrimination on any ground prohibited by the Constitution.

172. The Constitution should retain the elements of the present test of what is discriminatory, in section 16(1) and (2), but should express it more simply and clearly.

173. The right to equality and freedom from discrimination on a prohibited ground should apply to the rights conferred by the Bill of Rights itself and to the application of all other provisions of the Constitution, unless, in the particular case, there is good reason expressly to exclude its application. The present introductory words in section 16(1), making the right subject to all other provisions of the Constitution, should be repealed.

174. The Constitution should continue to prohibit discrimination on the grounds of race, sex, place of origin, political opinions, colour, religion, or creed. The new grounds of ethnic origin, gender, language, economic status, age and disability should be added. The right to freedom from discrimination should not be widened by adding a reference to "any other ground".

175. The Constitution should continue to affirm, but in positive terms, the right of all persons under section 16(7) to freedom from discrimination in respect of access to the specified places of public resort, whether the proprietor of such places is the state or a private person. A right of access without discrimination to public services, such as transport, should be included. The proprietor of a place or service for the use of the general public should be required to provide access for disabled persons to the extent provided by law.

176. The Constitution should retain the substance of section 16(3)(e) validating any law which limits the right to equality under the law and freedom from discrimination on a prohibited ground if, having regard to its nature and to special circumstances pertaining to persons affected by , or excluded from, the law, it is reasonably justifiable in a democratic society. That should be regarded as the "standard" test for limiting the right. The Constitution should permit limitations for specific purposes only if strictly necessary.

177. Section 16(8), which makes it possible to limit certain other rights and freedoms affirmed by the Constitution on a discriminatory basis, should be repealed.

178. Section 16(3)(f), which prohibits laws setting standards or qualifications for office in the service of the state from discriminating expressly on a prohibited ground, but permits them to be discriminatory in their effect, should be repealed.

179. Section 16(4)(b), which prohibits any challenge to the exercise of a discretion relating to the institution, conduct or discontinuance of criminal proceedings, on the ground that it is discriminatory, should be reworded to allow such a challenge but permit the enactment of a law authorising the exercise of the discretion to take account of traditional processes in the Fiji Islands for the settlement of disputes.

180. Section 16(5), validating all law in force before 23 September 1996 and continuously in force ever since, should be repealed. To the extent necessary, the section should separately and specifically protect against inconsistency with the right to freedom from discrimination the legislation entrenched by section 78 of the 1990 Constitution. Any other pre-1966 law basic to the administration of Fiji should be amended to conform with the right to freedom from discrimination or be capable of being upheld as a permitted limitation of that right under the standard test.

181. During a period of two years after their introduction, the Constitution should protect against challenge for inconsistency with the recommended new, prohibited grounds of discrimination; ie, *language*, *birth*, *economic status*, *age* and *disability*, all law in force immediately before the date on which those grounds were introduced and remaining in force continuously after that date.

182. The substance of section 16(3)(a), barring challenges to Appropriation Bills on the ground that they are discriminatory, should be retained.

183. The substance of section 16(3)(b) should be retained in a revised form permitting the enactment of laws under which persons who are not citizens of the Republic may be subjected to a disability or restriction or entitled to a privilege or advantage not applying to citizens.

184. The substance of section 16(3)(c), permitting different personal law, with respect to such matters as adoption, marriage, divorce, burial, devolution of property on death, to apply to the members of different ethnic communities, should be retained. Such law should be shown to be reasonably justifiable in a democratic society.

185. Section 16 as a whole should be replaced by a provision on the following lines:

> **# Right to equality under the law and freedom from discrimination**
>
> (1) All persons are equal under the law, and have the right to freedom from discrimination on the ground of race, ethnic origin, sex or gender, birth, place of origin, political opinions, colour, religion, creed, language, economic status, age or disability.
>
> (2) Accordingly, no law, and no executive or administrative action of the state, may of itself or in its effect, impose disabilities or restrictions, or confer privileges or advantages, on any person or the members of any group on a prohibited ground.

(3) Everyone has the right of access, without discrimination on a prohibited ground, to shops, hotels, lodging-houses, public restaurants, eating houses, places of public entertainment, services for the use of the general public such as transport, and places of public resort maintained wholly or partly out of public funds or dedicated to the use of the general public.

(4) The proprietor of a place or service referred to in subsection (3) is required to facilitate reasonable access for disabled persons to the extent provided by law.

(5) No law, or administrative action under the authority of a law, shall be held to be inconsistent with the right to freedom from discrimination on the grounds of language, birth, economic status, age or disability, during the period of two years after the date on which discrimination on those grounds was first prohibited by this Constitution, if the law was in force immediately before that date and has remained in force continuously after that date.

(6) Except as otherwise provided in subsections (8) and (9) or section # (Social Justice and Affirmative Action), a law, or an administrative action under the authority of a law, may limit the right affirmed in this section, for the purpose of imposing a disability or restriction or conferring a privilege or advantage on a person or group on a prohibited ground, but only if, having regard to its nature and to special circumstances pertaining to the person or group, the limitation is shown to be reasonably justifiable in a democratic society.

(7) A law, or administrative action under the authority of a law, is not to be taken as limiting the right affirmed in this section by reason only of the fact that it

(a) appropriates the revenues or other funds of the Republic of the Fiji Islands;

(b) imposes on persons who are not citizens of the Republic a disability or restriction, or confers on such persons a privilege or advantage, not imposed or conferred on persons who are citizens;

(c) permits any person who exercises a discretion vested in that person to institute, conduct, or discontinue civil or criminal proceedings in any court to take account of traditional procedures in the Fiji Islands for the settlement of disputes; or

(d) makes provision with respect to adoption, marriage, divorce, burial, devolution of property on death or other like matter as the personal law of any person or the members of any group, but only so far as that law is shown to be reasonably justifiable in a democratic society.

*(8) A law, or an administrative action under the authority of a law, may limit the right affirmed in this section, for the purpose of

(a) providing for the application of the customs of Fijians, Rotumans or the Banaban community to the holding, use, transmission, or distribution of the produce or proceeds of land or fishing rights, or to the entitlement of any person to any chiefly title or rank; or

(b) imposing any restriction on the alienation of land or fishing rights held in accordance with Fijian, Rotuman or Banaban custom, or permitting the temporary alienation of such land or fishing rights without the consent of the owners;

*(9) To the extent permitted by subsection (10), a law, or an administrative action under the authority of a law, may limit the right affirmed in this section, for the purpose of providing for

(a) the governance of Fijians, the Rotuman community or the Banaban community and of other persons living as members of a Fijian community, the Rotuman community or the Banaban community, or

(b) the application to persons referred to in paragraph (a) of Fijian, Rotuman or Banaban custom respectively, in respect of any matter other than those referred to in subsection (8)(a) or (b).

*(10) A limitation for a purpose referred to in subsection (9) is valid only if it

(a) accords to every person to whom it applies the right to equality before the law without discrimination on any prohibited ground, other than the race or ethnic origin of that person or members of that community, and

(b) does not deny to any such person any other human right or fundamental freedom recognised by law.

* Gives effect to recommendations discussed and made in Chapter 17.

186. The Constitution should continue to give a person claiming that his or her rights or freedoms under the Bill of Rights have been contravened, or are likely to be contravened, a direct right to apply to the High Court for redress.

187. The High Court should continue to have original jurisdiction, and jurisdiction on a reference from a lower court, to determine claims that the Bill of Rights has been contravened. In conferring that jurisdiction, regard should be had to the outcome of the review recommended by the Commission of Inquiry on the Courts of Fiji (1994), about how the jurisdiction of the High Court should be defined.

188. The Constitution should continue to allow a lower court to refer a question as to the contravention of the Bill of Rights, arising in a case before it, to the High Court for determination, and require it to do so if either of the parties so requests.

189. The Attorney-General should be given standing to intervene in a case before any court in which a question concerning the Bill of Rights (or other provisions of the Constitution) arises, whether or not some other officer or organ of the state is a party, in order to ensure that the constitutional issues are fully argued. The court should also have the power in those circumstances to join the Attorney-General as a party.

190. The Constitution should not include special provisions about standing or class actions in relation only to cases concerning the enforcement of the Bill of Rights, but should be framed in terms which continue to allow those cases to be disposed of, taking account of any changes in the general law of the Republic on those matters.

Chapter 8: Ethnic and Social Justice

191. The Constitution should require the Government to put in place not only affirmative action programmes for the benefit of the Fijian and Rotuman people, but also similar programmes for other ethnic communities, and for women, and for all other disadvantaged citizens or groups in the Republic of the Fiji Islands.

192. The Constitution should include new provisions for this purpose. Sections 18 and 21 should be repealed.

193. The new provisions should treat on exactly the same basis, programmes for affirmative action for the benefit of communities or groups identified by their *race, ethnic origin* or *gender*, and individuals who need assistance on account of their *economic status*, *age* or *disability* - all of which are recommended as prohibited grounds of discrimination under the Bill of Rights.

194. The programmes for the purposes mentioned should be required to be "reasonable and necessary" for securing "effective equality of access" to education and training, land and housing, participation in commerce and all aspects of service of the Republic of the Fiji Islands, at all levels, and to other opportunities, amenities and services essential to an adequate standard of living.

195. The Constitution should authorise the limitation of the right to equality under the law and freedom from discrimination on a prohibited ground for the purpose of putting in place affirmative action and social justice programmes on the condition that each programme is authorised by an Act of Parliament.

196. Such an Act must specify the goals to be achieved by the programme, the persons or groups it is intended to benefit, and the means through which the goals are to be achieved. The Act must also set out the performance measures for judging the efficacy of the programme in achieving its goals, and the criteria for selecting the individuals who will be entitled to the privileges or advantages. The selection criteria must be applied without discrimination on a prohibited ground not relevant to the identity of the benefited group or the application of the selection criteria.

197. The Constitution should lay down monitoring and reporting requirements enabling the Government and Parliament to assess the efficacy of each programme.

198. An Act authorising a particular programme will lapse automatically after 10 years (if it has not sooner been repealed or expired), but the programme may be re-enacted, with or without amendment, unless the benefited persons or groups have demonstrably ceased to be in need of such a programme.

199. The Constitution should provide that no programme may directly or in its effect deprive any person not entitled to its benefits of a position, place in an educational or training institution or right to carry on a business or profession or any other opportunity, amenity or service to which he or she has already become entitled.

200. The Constitution should not reserve particular appointive positions in the service of the state for members of a particular ethnic community. Nor should it specify the proportions in which particular ethnic communities should be represented in the public service or other state services.

201. The Constitution should include a provision that will point to the need to take appropriate affirmative action to improve the qualifications and training of members of particular ethnic communities so as to enlarge the pool of eligible candidates if those communities are found to be under-represented in any aspect of the service of the state, or at any level of that service.

202. The question of whether there is a need to establish affirmative action programmes to equip more women for appointment and promotion in the service of the state should be kept under constant review.

203. Government should explore the possibilities for entering into fruitful partnerships with a range of non-governmental organisations, as a way of implementing effective affirmative action and social justice programmes, with the object of encouraging practical help to be given and accepted freely, across racial lines.

204. The recommended constitutional provisions should be based on the following draft:

 # Social justice and affirmative action

(1) The Government of the Republic of the Fiji Islands shall establish programmes which are reasonable and necessary to ensure for the Fijian and Rotuman people and other ethnic communities, and for women as well as men, and for all other disadvantaged citizens or groups of citizens, effective equality of access to

(a) education and training,
(b) land and housing,
(c) participation in commerce and all aspects of service of the Republic of the Fiji Islands at all levels, and
(d) other opportunities, amenities or services essential to an adequate standard of living.

(2) A programme for the purposes of this section is valid notwithstanding the fact that it confers privileges or advantages on persons or members of a group on one or more of the grounds on which discrimination is prohibited by section # (*Right to equality under the law and freedom from discrimination*), if the programme complies with subsections (3) and (4).

(3) The programme must be authorised by an Act which specifies:

(a) the goals of the programme and the identity of the persons or groups it is intended to benefit;

(b) the means by which those persons or members of the benefited group are to be assisted to achieve the goals;

(c) the performance measures for judging the efficacy of the programme in achieving its goals;

(d) if the programme is for the benefit of a group, the criteria for the selection of the members of the group who will be entitled to participate in the programme.

(4) The participants in a programme for the benefit of a group must be selected without discrimination on any ground referred to in section #, other than a ground relevant to their membership of the group or the application of the selection criteria.

(5) The administering department or other agency must monitor the efficacy of the programme by reference to the specified performance measures. The responsible Minister must make an annual report to Parliament on the results revealed by the monitoring.

(6) Unless it has sooner expired in accordance with its terms or has been repealed, an Act authorising a programme for the purposes of this section expires on the tenth anniversary of its entry into force, but the programme may be re-enacted, subject to compliance with subsection (2), unless the benefited persons or groups have demonstrably ceased to be in need of such a programme.

(7) No programme for the purposes of this section shall, of itself or in its effect, deprive any person not entitled to its benefits of any position or seniority in any aspect of the service of the Republic, place in an educational or training institution, scholarship or other financial support, right to carry on any business or profession or to enjoy any other opportunity, amenity or service to which that person has already become, and would otherwise remain, entitled.

 # Definitions

In this Chapter, "service of the Republic of the Fiji Islands" means service in any capacity on appointment by the President, the Cabinet, a Minister, a Commission or any public officer, or by resolution of Parliament or any Committee of Parliament, or by or on behalf of any local authority, whether or not the appointee is remunerated wholly or partly by public money, but does not include service as a member or employee of a body provided for in an Act referred to in section # (*Entrenched legislation*).

Chapter 9: Institutions of Government

205. The Constitution should provide that the chiefly council, known as the Bose Levu Vakaturaga, shall continue to exist, with the composition, functions and powers provided for in the Constitution.

206. The Bose Levu Vakaturaga should consist of 46 members, made up as follows:

Ex officio members:	The President; The heads of the traditionally recognised confederacies of Kubuna, Burebasaga and Tovata; The minister responsible for Fijian affairs;
Appointed members:	Twenty members selected by the heads of the three confederacies jointly; Five members, being persons of wide knowledge and experience in business, the professions, or other fields, nominated by the Chairperson of the Council and confirmed by the BLV as a whole;
Elected members:	Fourteen members, each of whom shall be separately elected by each Provincial Council; One member elected by the Council of Rotuma; A person elected by the Rabi Island Council should be invited to attend when matters relating to the Banaban Land Act or the Banaban Settlement Act are under discussion.

207. The terms of appointed and elected members should be three years. There should be no formal qualifications for membership, apart from those of the members to be nominated by the Chairperson. Other aspects of membership should be dealt with as proposed in paragraphs 9.19 - 9.21.

208. The BLV should elect one of its members as Chairperson as the first item of business at its first meeting after the regular election of members by the Provincial Councils. Other aspects of its procedure should be provided for as proposed in paragraphs 9.22 - 9.23.

209. The Constitution should provide that the functions of the Bose Levu Vakaturaga are to advise the Government of the Republic of the Fiji Islands principally on any matter relating to the well-being of the Fijian people but also matters affecting the nation as a whole, whether referred to it by the Minister or the Fijian Affairs Board, or taken up by the Bose Levu Vakaturaga on its own initiative.

210. The Bose Levu Vakaturaga should also have the functions later recommended concerning the nomination of candidates for the office of President, and the approval of Bills altering the entrenched legislation relating to Fijians, Rotumans and the Banaban community, or any other Bill certified by the Attorney-General as affecting Fijian land or customary rights.

211. The Constitution should authorise Parliament to confer additional functions on the Bose Levu Vakaturaga by Act, so far as those functions are consistent with its recommended duty to act independently.

212. The Constitution should provide that the Bose Levu Vakaturaga shall not be subject to the direction or control of any other person or authority in the exercise of its functions.

213. As a facet of its independence from government, arrangements should be made for the Bose Levu Vakaturaga to have reasonable autonomy in matters relating to its secretariat and funding.

214. The Indo-Fijian community should be encouraged to explore informally the possibility of forming a body to bring together its religious and other community leaders on a widely representative basis for the purpose of regular consultations with Government. If such a body proves to be broadly supported, consideration should be given to providing it with a statutory or constitutional base.

215. The Constitution should provide expressly that the President is the Head of State of the Republic of the Fiji Islands.

216. It should continue to give the President the title of Commander-in Chief (which does not confer any powers of actual command).

217. The Constitution should provide expressly that the office of President symbolises the unity of the Republic.

218. The role of the President under the Constitution should continue to parallel the former role of the holder of the office of Governor-General, as proposed in later recommendations.

219. The Constitution should make provision for the office of Vice-President.

220. It should provide that the office of President shall be held by an indigenous Fijian and the office of Vice-President shall be held by a member of another ethnic community.

221. Candidates for each office should be required to be citizens of the Republic who have had a distinguished career in any aspect of national or international life, whether in the public or the private sector, and have the other qualifications required of candidates for election as members of Parliament. However, a person holding another public office should not be required to resign from it before accepting nomination for the office of President or Vice-President, but election to either office should automatically terminate his or her service in any other public capacity.

222. On each occasion when the election of a President is necessary, the Bose Levu Vakaturaga should be required to nominate not fewer than three and not more than five candidates.

223. Each candidate accepting nomination by the Bose Levu Vakaturaga should be required to nominate, as his or her choice of candidate for Vice-President, an eligible person belonging to another community.

224. The Constitution should provide that the members of the Bose Lawa and the Bose e Cake should sit together as an Electoral College for the purpose of electing, as President and Vice-President, one of the pairs of candidates nominated for those offices.

225. The election should be by secret ballot, held without prior debate, and conducted under the preferential system known as the alternative vote, under the general supervision of the Electoral Commission.

226. The President and the Vice-President should hold office for a term of 5 years. Before taking office, they should each take the Oath of Allegiance and an Oath for the due execution of their respective offices. Each should be eligible for election for a second term but not more.

227. The Vice-President should be empowered to discharge all or any of the functions of the office of President whenever the office of President is vacant, or the President is for any reason unable to discharge that function. If neither the President nor the Vice-President is available to discharge a function of the President, it should be performed by the Speaker.

228. If the office of President becomes vacant, the Vice-President will not succeed to that office, but will discharge the functions of the office until a new President and Vice-President are elected.

229. If the office of Vice-President becomes vacant, the President should be required to nominate another eligible person to be Vice-President. The nomination should be required to be confirmed by the positive votes of not less than 51% of the members of the Electoral College taking part in the vote.

230. The Constitution should provide for the removal of the President or Vice-President by the Electoral College, on the grounds of infirmity of body or mind making it impossible to carry out the functions of the office, or gross misconduct in or affecting the performance of the functions of the office. The Prime Minister should continue to have the responsibility of setting the processes for investigation and removal in train, if he or she has reason to believe that either ground may apply.

231. Allegations of gross misconduct should continue to be investigated by a Tribunal and allegations of infirmity should continue to be investigated by a Medical Board, as proposed in paragraphs 9.70 - 9.71. From the time at which a Tribunal or a Medical Board is appointed, the President should be taken as unable to perform the functions of the office.

232. The Prime Minister should be required to decide whether there is good reason to submit the report of the Tribunal or Medical Board to the Electoral College for its consideration. If so, the Electoral College should be free to debate the report. Removal should require the positive vote of three fourths of the members of the Electoral College present and voting.

233. Parliament should be empowered to make provision by Act for any matter incidental to the nomination, election, terms and conditions of office or removal of the President or Vice-President.

234. The Constitution should continue to make provision for a President's Council as a forum in which the President can discuss issues of national importance with a group of distinguished citizens.

235. It should provide that the Council will meet with the President in private and keep its proceedings confidential, unless the President, with the concurrence of the Prime Minister, decides otherwise.

236. The Council should be a standing body consisting of 10 to 15 citizens who have achieved distinction in the professions, commerce, industry, agriculture, cultural activities, social service, religion or the service of the state, but should not include serving members of Parliament or state servants. It should meet as and when convened by the President, but not less than once a year. The appropriation for the Office of the President should include reasonable funding for its operation.

237. The Constitution should maintain the present system under which a government must have the support of a majority in the Bose Lawa. It should do so in the expectation that the proposed changes in the arrangements for the election of the members of the Bose Lawa will encourage the emergence of multi-ethnic parties or coalitions with the necessary support to form a government.

238. The Constitution should continue to require the President, acting in his or her own deliberate judgment, to appoint as Prime Minister the member of the Bose Lawa who appears to the President best able to command the support of the majority of the members of that House. There should be no stipulation about that member's ethnicity.

239. The Constitution should also continue to provide that the President appoints the other members of the Cabinet on the advice of the Prime Minister.

240. The Constitution should not make any express provision about the ethnicity of either the Prime Minister or the other members of the Cabinet.

241. It should be clearly understood that, in exercising the power to appoint a Prime Minister, the President will take account of the electoral support received by the various parties and other relevant factors, including the outcome of negotiations about the formation of a government, the identity of the Prime Minister and the composition of the Cabinet.

242. The constitutional role of the Opposition should be respected for its essential contribution to democratic government. The emergence of multi-ethnic Oppositions, as well as multi-ethnic Governments, should be encouraged.

243. The Constitution should continue to provide for the office of Leader of the Opposition. On the assumption that the provision under which the President chooses and appoints the Leader of the Opposition under section 97 of the 1990 Constitution is generally acceptable, its substance should be retained.

244. The special responsibilities of the Leader of the Opposition should be recognised explicitly by including that office in the list of office-holders whose salaries, allowances and benefits ought to be set through constitutionally prescribed processes.

245. The need for broad agreement with the Opposition in decisions of a constitutional nature should be reflected in those provisions of the Constitution concerned with the appointment of high officers of state and other institutions intended to function independently of government, as well as the special majorities required to amend the Constitution or the entrenched legislation.

246. The Opposition should be represented at ceremonial state occasions. The possibility of achieving a multi-partisan approach to important issues on which it is important to achieve long-term consistency of policy should be explored.

247. A bicameral Parliament should be retained as a way of allowing citizens to be represented in Parliament on a different basis and so providing better opportunities for all interests to be taken into account.

248. The Constitution should provide that there shall be a Parliament for the Republic of the Fiji Islands, consisting of the President, the Bose Lawa and the Bose e Cake.

249. The provision making it clear that the President has no discretion to refuse assent to Bills should be retained.

250. The Bose e Cake should become a mainly elected body in which the 14 provinces should be represented on a basis of equality by members elected by all citizens resident in the province. There should also be an elected member representing Rotuma. In addition, there should be provision for a small number of appointed members to represent communities and groups which would otherwise be under-represented or not represented in Parliament.

251. The Bose Lawa should continue to consist of 70 members.

252. Approximately two-thirds of the seats should no longer be reserved for particular communities but should become open seats, candidates for which should be elected by the voters of all communities.

253. As a transitional measure, approximately one-third of the seats should be reserved for particular communities.

254. In the light of the recommendation that the retention of reserved seats should be transitional, no reserved seats should be allocated to communities or groups at present not separately represented.

255. Citizens of Pacific Island origin should again vote with members of the Fijian community rather than as general voters.

256. Citizens of mixed descent should have the option of regarding themselves as members either of their father's community or their mother's community for voting purposes (but not for any other constitutional purpose, and without any effect on any matter relating to the ownership of land).

257. The President should be empowered, in the exercise of his own deliberate judgment, to appoint six members to the Bose e Cake to represent communities or groups that would otherwise be under-represented or not represented in Parliament.

258. The allocation of reserved seats among communities should be based on population figures but should also take account of historical and other factors that have affected the present and past allocations of such seats.

259. Although the recommended arrangements for the filling of reserved seats restrict to some degree individual freedom to determine personal identity for representation purposes, and may be found to deviate slightly from the principle of equal suffrage when the results of the forthcoming census are known, they should, as a transitional measure, be recognised as being within the "margin of appreciation" that international law allows to states in applying the international human rights standards.

260. The seats in the Bose Lawa should be allocated as follows:

Reserved seats:	Fijians (including Pacific Islanders)	12
	Indo-Fijians	10
	General voters	2
	Rotumans	1
	Open seats:	45
	Total	70.

261. The recommended proportion of open seats to reserved seats in the Bose Lawa should be regarded as the minimum necessary to allow them to act as an encouragement to the development of multi-ethnic politics.

262. The 45 open seats should be filled by voting in 15 three-member heterogeneous constituencies - that is constituencies in which there is a mixed population made up of members of the different ethnic communities.

263. The provinces should no longer be the constituencies for the Fijian reserved seats, but, as already recommended, they should become the basis for representation in the Bose e Cake.

264. The constituency boundaries for all seats in the Bose Lawa should be drawn so as to divide the Fiji Islands into the requisite number of territorial constituencies for each category of seats. As far as possible, each constituency for a reserved seat should contain an equal number of inhabitants belonging to the community whose seat it is. Similarly, each constituency for an open seat should, as far as possible, contain an equal number of inhabitants regardless of their community. The drawing of constituency boundaries should ensure that the inhabitants of every constituency are effectively represented, taking into account geographical features, the boundaries of existing administrative and recognised traditional areas, means of communication and density and mobility of population, and, in the case of the open seats, the criterion referred to in Recommendation 196.

265. All elections of candidates for seats in the Bose Lawa and the Bose e Cake should be held under the preferential system known as the alternative vote.

266. The Bose e Cake should have 35 members, comprising 28 members elected to represent the provinces, one member elected to represent Rotuma and 6 members appointed by the President to represent communities and groups which would otherwise be under-represented or not represented in Parliament. The two members representing each province and the member representing Rotuma should be elected by all voters resident in the province or in Rotuma.

267. To assist the President in exercising the power to appoint 6 persons as members of the Bose e Cake to represent communities or groups who are otherwise under-represented in Parliament, the Electoral Commission, after each general election, should be required to provide the President with an analysis of the composition of both Houses, indicating the gender of their members, and their ethnicity and other relevant characteristics, as far as is known from the information available to it. The President should also be free to consult informally about possible appointments.

Chapter 10: Parliamentary Elections

268. The details of conducting elections by the preferential system of voting known as the Alternative Vote, should be provided for in an Electoral Act. Among other things, that Act should make provision for the following matters:

(a) In elections for the 3-member open seats in the Bose Lawa, the first, second and third preferences given to each candidate should be added together, before the candidate with the lowest number of votes is eliminated.

(b) Votes should be treated as formal if voters express preferences for at least 75% of the candidates.

(c) There should be rules for preserving the validity of the ballot paper, so far as possible, even if candidates fail to number preferences in the correct numerical sequence.

(d) If the requisite number of candidates has not reached the quota when all the preferences have been distributed, those with the highest number of votes should be deemed elected.

(e) In the elections for all seats, an "above the line / below the line" ballot paper should be used. In the top part of the ballot paper voters should be given the opportunity to vote on a "ticket" basis, indicating support for the candidates in an order of preference registered by a party, coalition of parties or independent candidate. If the voter wishes to indicate a different order of preferences, he or she should be free to do so by putting numbers beside the names of the candidates in the bottom part of the paper.

(f) The Electoral Act should require the Electoral Commission to ensure that voters are given full information about the consequences of choosing a particular ticket.

(g) The Act should also provide that, if a ballot paper is marked both above and below the line, it should not for that reason alone, be treated as informal. If the preferences indicated below the line are otherwise formal, they should be regarded as the expression of the voter's intentions and counted accordingly. If, however, the preferences below the line are themselves informal, the vote for the party ticket, if formal, should be treated as expressing the voter's choice.

269. In applying the criteria for the determination of constituency boundaries for seats in the Bose Lawa set out in Recommendation 264, the distribution of members of communities, when relevant, should be determined by reference to the classification of the inhabitants of the Fiji Islands for census purposes as Fijians or Pacific Islanders, Indo-Fijians, Rotumans, and persons not belonging to any of those ethnic communities.

270. The boundaries of the provincial constituencies in the Bose e Cake should be the provincial boundaries prescribed under the Fijian Affairs Act. The boundaries of the Rotuma constituency should be those referred to in the definition of "Rotuma" in the Rotuma Act.

271. The task of determining the boundaries of constituencies for the election of members of the Bose Lawa should continue to be carried out by a Constituency Boundaries Commission. The Constitution should require the Constituency Boundaries Commission to determine the initial boundaries of all constituencies.

272. The Constitution should require the Constituency Boundaries Commission, in the year following each census, to review the boundaries of all constituencies and decide whether or not they require revision to take account of changes in the distribution of the population as a whole or of the members of any community. If so, it should redetermine the constituency boundaries accordingly. The Constituency Boundaries Commission should be empowered to review and redetermine all or any constituency boundaries at any other time, if it has reason to think that such a review and revision might be desirable on the grounds mentioned.

273. After the Constituency Boundaries Commission has reviewed constituency boundaries on any occasion, it should be required to report its findings to Parliament with an explanation of the reasons why it has decided either to redetermine boundaries, or not to do so.

274. The procedures to be followed by the Constituency Boundaries Commission should be prescribed by Act. Among other things, the Act should require the Constituency Boundaries Commission to give notice of its proposed determinations and hear objections before making a final determination.

275. The Constituency Boundaries Commission's determinations of constituency boundaries should continue to be final. Judicial review should be available to test whether it has acted within its powers and in accordance with the prescribed procedures.

276. The Constituency Boundaries Commission should be a standing commission with a membership entirely separate from that of the Electoral Commission. It should consist of three members holding office for terms of three years. The Chairperson should be a person who is, or is qualified to be, a judge of a superior court in the Fiji Islands, and should be appointed by the President acting in his or her own deliberate judgment, after consultation with both the Prime Minister and the Leader of the Opposition. The two other members should be appointed by the President on the nomination of the Prime Minister and the Leader of the Opposition respectively.

277. No person should be qualified to be a member of the Constituency Boundaries Commission if at any time during the four years preceding appointment he or she has been a member of Parliament or an elected member of the council of any municipality, as defined in the Local Government Act (Cap. 125). A serving member of any state service, including the police and the military forces, should also be disqualified.

278. The constituencies for seats in the Bose Lawa should be named after well-known physical features, like mountains or rivers, or after local flora and fauna, as in the examples supplied.

279. There should be a clear constitutional right to be registered as a voter, as well as to vote.

280. Everyone should have the right to be registered as a voter and to vote at the age of 18 (though a person should still need to attain the age of 21 before becoming a candidate).

281. A person should be disqualified from being or remaining registered as a voter

(a) if the person has not been resident in the Republic at any time during the preceding two years, unless his or her absence was for a reason prescribed by law; or

(b) if the person is serving a sentence of imprisonment for a period of twelve months or more imposed by a court of the Republic of the Fiji Islands, or is under a sentence of death, or is serving a sentence of imprisonment for a period of twelve months or more, other than a suspended sentence, imposed by a court in any other country prescribed by law; or

(c) if, in accordance with the law of the Republic, the person has been found to be of unsound mind; or

(d) if, in accordance with the law of the Republic, the person is disqualified from voting on the ground of a conviction for an offence connected with elections.

282. The Constitution should not require a person to have a period of prior residence in Fiji in order to qualify for registration.

283. In view of the Commission's recommendations that Fiji citizens will lose that citizenship automatically if they become citizens in another country, the ground for disqualification in Section 49(3)(a) of the 1990 Constitution is unnecessary in the context of the right to be registered as a voter, to become a candidate and to be a member of Parliament.

284. The Constitution should make it clear that a registered voter must be entered on a roll for a reserved seat constituency, an open seat constituency and a provincial constituency.

285. The rules about who is entitled to register on a roll for a reserved seat constituency belonging to a particular community should continue to be included in the Constitution, but all other rules about when a person becomes entitled to be registered in one constituency rather than another should be left to legislation.

286. The Electoral Act should provide, among other things, that the right to be entered on the roll for reserved, open seat or provincial constituencies should continue to be based on residence in that constituency. As a general rule, a person should be regarded as having become resident in a constituency only after having resided there for six months, but, to avoid hardship, it should allow bona fide residence to be established on the basis of other evidence.

287. The Constitution should deal only with the right to be entered on a roll for a Fijian reserved seat constituency. It should not define a "Fijian" for any other purpose.

288. A person should be entitled to be registered on the roll for a Fijian reserved seat constituency if descended, through either the male or the female line, from an indigenous inhabitant of the Fiji Islands (other than Rotuma) or any other island in Melanesia, Micronesia or Polynesia.

289. A person should be permitted to register on the roll for an Indo-Fijian reserved seat constituency if descended, through either the male or the female line, from a person who was originally from of the sub-continent of India.

290. A person who is descended, through either the male or the female line, from an indigenous inhabitant of Rotuma should have the right to be entered on the roll for the Rotuman reserved seat constituency.

291. The right to be registered on the roll for a general reserved seat constituency should be open to all persons who are not entitled to register on a roll for a Fijian, Indo-Fijian or Rotuman reserved seat constituency, or, if they have the option of registering on such a roll by reason of descent through the male or the female line, but not both, have chosen not to exercise it.

292. The Constitution should make it clear that no one may be registered on the roll for more than one reserved seat, open seat or provincial constituency.

293. The Constitution should require the Electoral Commission, the Supervisor of Elections and all other officers concerned with the registration of voters to take all steps reasonably necessary to ensure that all persons who are eligible to be registered as voters are in fact so registered.

294. It should be left to Parliament to decide whether it is necessary to impose an obligation on eligible citizens to apply for registration.

295. The Constitution should provide that every person who is a registered voter has the right to vote in the manner prescribed by law in every election in a constituency on the roll for which that person is registered, unless that person is disqualified from voting on the grounds provided in the Constitution.

296. The Electoral Commission and the Supervisor of Elections should make every effort, with the help of modern technology, to ensure that registered voters have ample opportunities to cast their votes without undue inconvenience or hardship. It should be left to Parliament to decide whether it is also desirable to impose on registered voters a legal obligation to vote.

297. The Constitution should continue to provide that registered voters are disqualified from voting on any ground which would have disqualified them from remaining registered as a voters, or if, in accordance with the law of the Republic, they are disqualified from voting by reason of responsibilities in connection with the conduct of the election.

298. The Constitution should clearly state that every registered voter who has attained the age of 21 years is eligible to be nominated as a candidate for election as a member of the Bose Lawa or the Bose e Cake, unless that person is disqualified on a ground provided in the Constitution.

299. The Constitution should provide that only a person registered on a roll for a Fijian, Indo-Fijian, Rotuman or general reserved seat constituency is eligible to be nominated as a candidate for a reserved seat of the relevant community. There should, however, be no constitutional requirement that a person can be nominated for a particular constituency only if on the roll for that constituency.

300. The Constitution should provide that all persons holding an office in the service of the state coming within the terms of the present definition of "public office" (which should include the office of the Commander of the Fiji Military Forces) should be treated as having vacated that office immediately before the time at which their signed nomination as a candidate for election as a member of the Bose Lawa or the Bose e Cake is filed. It should also provide that office-holders appointed to the Bose e Cake by the President will be treated as having vacated office immediately before being so appointed.

301. There should be a further provision that persons whose nominations as candidates for election as a member of the Bose Lawa or the Bose e Cake have been filed become disqualified for election to that office if, with their consent, they are appointed to an office in the service of the state.

302. Sitting members of either House of Parliament should be regarded as vacating office as members if they file a nomination as a candidate for another seat, either in the same House or the other House.

303. A person who has held office as a member of the Electoral Commission, the Constituency Boundaries Commission, the Parliamentary Emoluments Commission, or the Constitutional Offices Commission or as Supervisor of Elections should be disqualified from being a candidate for election as a member of Parliament for a period of four years after ceasing to hold that office.

304. The grounds of disqualification should continue to include any ground which would disqualify a person from being or remaining registered as a voter or from voting, and the fact that a person is an undischarged bankrupt.

305. The Constitution should include as a ground of disqualification the fact that the person has any such interest in a contract entered into by the Government of the Republic of the Fiji Islands as may be prescribed by law.

306. The Constitution should also make it clear that a person should be disqualified from being a candidate if any ground for disqualification applies to that person at the time of filing his or her nomination or becomes applicable at any time after that date and before the declaration of the results of the poll.

307. The maximum term of Parliament should be four years from the date of the first sitting of Parliament after a general election. Parliament should be able to extend its life by up to a year during a state of national emergency.

308. The automatic dissolution of Parliament on the expiry of its term or any earlier dissolution by the President acting on the advice of the Prime Minister, should have the effect of dissolving both the Bose Lawa and the Bose e Cake.

309. The Constitution should provide that, not later than 7 days after the day of the dissolution of Parliament, the President, acting on the advice of the Prime Minister, shall issue the writs for the election of members to fill all reserved and open seats in the Bose Lawa and all provincial seats in the Bose e Cake.

310. The Constitution should provide that the last date for filing nominations must be not more than 14 days after the date of the issue of the writs, and that polling must commence not more than 30 days after the last date for filing nominations.

311. The Constitution should provide that no by-election to fill a vacancy need be held if there is less than six months between the date on which the vacancy arises and the date on which Parliament will stand dissolved automatically.

312. The Electoral Commission should continue to be given general responsibility for, and the power to supervise, the registration of voters for the election of members of Parliament and the conduct of the election of the President and Vice-President, and of the members of the Bose Lawa and the elected members of the Bose e Cake. It should continue to have such powers and functions as may be prescribed by law in relation to other elections.

313. The main rules for the registration of voters and the conduct of Presidential and Parliamentary elections should be contained in a comprehensive Electoral Act. The Electoral Commission should have the power to make regulations only in respect of administrative matters. The requirement that proposed electoral legislation should be referred to the Electoral Commission and the Supervisor of Elections for comment should be retained.

314. The Electoral Commission should consist of a Chairperson and four other members, who should hold office for terms of four years. The Chairperson should be a person who is, or is qualified to be, a judge of a superior court of the Republic of the Fiji Islands, and should be appointed by the President, acting in his own deliberate judgment. The four other members should be appointed by the President on the advice of the Prime Minister acting after consultation with the Leader of the Opposition.

315. Sitting members of Parliament, members of the councils of municipalities under the Local Government Act (Cap. 125), candidates for any of those offices nominated with their consent, public officers and local government officers should be disqualified from membership.

316. The Public Service Commission should delegate the power to appoint election officers to the Electoral Commission.

317. In addition to its obligation to make an annual report to the President and Parliament, the Electoral Commission should be empowered to make such a report whenever it considers that matters have arisen which ought to be brought to their attention.

318. The Constitution should provide that, under the general direction of the Electoral Commission, the Supervisor of Elections has administrative responsibility for the registration of voters for the election of members of Parliament, and the conduct of the election of the President and Vice-President, and of the members of the Bose Lawa and the elected members of the Bose e Cake, as well as such other elections as may be prescribed by law. The Supervisor of Elections should be appointed by the Constitutional Offices Commission recommended below. Otherwise the substance of section 52 of the 1990 Constitution should be retained.

319. The Constitution should provide that the validity of the election of the President and Vice-President, or of any person declared elected as a member of Parliament can be called in question by means of an election petition, on the ground that the election, or the declaration of the result of the election, was unlawful.

320. The Constitution should provide that an election petition can be brought only within a period of six weeks after the declaration of the result of the poll, except in the case of fraud, when time should run from the date of its discovery.

321. Any person entitled to vote in the election to which the petition relates, and any person who was a candidate or who claims to have had the right to be a candidate at that election, and the Solicitor-General should have standing to bring an election petition.

322. The Solicitor-General should have standing to intervene if not a party. The person whose election is complained of should be the respondent, and if the election petition complains of the conduct of a returning officer or the Electoral Commission or the Supervisor of Elections, they should also be respondents.

323. The decision of the High Court on an election petition should continue to be final. An election petition should be the exclusive means of questioning the outcome of an election

324. There should be a separate provision allowing an interested person to bring a proceeding in the High Court, at any time after a person has been declared elected as a member of Parliament, claiming that the member's seat has become vacant, or, if it is so provided, that the person should cease to perform the functions of a member pending the determination of that question.

325. Any other member of Parliament, and any registered elector, whether or not registered on the roll for the member's constituency, should have standing to bring such a proceeding. The Solicitor-General, if not a party, should also have standing to bring such a proceeding or to intervene. The decision of the High Court should be final. The poceeding should be the exclusive means of challenging the retention of office by a member of Parliament.

326. The Constitution should continue to provide that the seats of all members of Parliament become vacant upon a dissolution of Parliament. The substance of the present provisions that, after Parliament has been dissolved, a Prime Minister or Ministers may be appointed from among persons who were members of Parliament immediately before the dissolution should be retained.

327. The Constitution should continue to provide that the seat of a member becomes vacant if he or she resigns the seat. The resignation should be effective when received by the Speaker or by the President of the Bose e Cake, as the case requires:

328. The Constitution should provide that the seat of a member becomes vacant

(a) if the member is not, or has ceased to be, a citizen of the Republic of the Fiji Islands;

(b) if the member is absent from two consecutive meetings of the Bose Lawa or the Bose e Cake without the permission of the Speaker or the President of the Bose e Cake, as the case requires;

(c) if the member is an undischarged bankrupt;

(d) if the member is under a sentence of imprisonment for a period of twelve months or more, other than a suspended sentence, imposed by a court in the Republic or is under a sentence of death, or of imprisonment for a period of twelve months or more, other than a suspended sentence, imposed by a court in any other country prescribed by law;

(e) if, in accordance with the law of the Republic, the person has been found to be of unsound mind;

(f) if, in accordance with the law of the Republic, the person is disqualified from voting on the ground of a conviction for an offence connected with elections;

(g) if, with the member's consent, he or she is appointed to an office in the service of the state;

(h) if, with the member's consent, he or she is nominated as a candidate for election to another seat in Parliament;

(i) if the member has any such interest in a contract entered into by the Government of the Republic of the Fiji Islands as may be prescribed by Act;

(j) if the member resigns from the registered political party for which he or she was a candidate at the time of election to Parliament, or, by reason of conduct in or relating to the proceedings of Parliament, the member is in breach of the rules concerning party discipline contained in the constitution of such a party, and is for that reason expelled from the party, under the rules about expulsion contained in that constitution, and in conformity with the requirements of natural justice.

329. Paragraph (j) should be qualified by providing that the reference to "proceedings of Parliament", for the purposes of the paragraph, do not include proceedings in a select committee of the Bose Lawa or the Bose e Cake, or a joint select committee of those Houses. It should be supplemented also by a provision that the member's seat becomes vacant when the Speaker or the President of the Bose e Cake, as the case requires, receives a certificate signed by the President and the Secretary of the party, setting out the details of the member's resignation or expulsion from the party. But if the member wishes to challenge the validity of the expulsion in the courts the member should be relieved of parliamentary functions until the expulsion is overturned or that remedy is exhausted, whichever is the later.

Chapter 11: Functioning of Parliament

330. The Constitution should make the following provisions for sessions of Parliament:

(a) the President, acting on the advice of the Prime Minister, should be required to appoint, as the date for the commencement of the first session of Parliament after any general election, a date not more than thirty days after the date for the commencement of polling prescribed in the writs.

(b) Otherwise, sessions of Parliament should commence at a time appointed by the President on the advice of the Prime Minister, but there should not be an interval of more than six months between the end of one session and the first sitting of Parliament in the next session.

(c) During the period when Parliament is not in session, the President should be empowered to call a session in the exercise of his own deliberate judgment if he is so requested in writing by not less than one-quarter of the members of the House of Representatives on the ground that it is necessary for the two Houses of Parliament to consider without delay a matter of public importance. A "matter of public importance" should be regarded as including a no-confidence motion.

331. The Constitution should provide that, if, while Parliament is in session, more than two months have elapsed since the last meeting of the Bose Lawa, the Speaker should be required to call such a meeting for a date not less than two weeks after receiving a written request to do so from not less than one-quarter of the members of the Bose Lawa, on the ground that a specific matter of public importance requires urgent consideration.

332. The substance of section 79(6), allowing the sittings of each House to be held in accordance with its Standing Orders, should be retained.

333. Whenever the office of Speaker is vacant, a Speaker should be elected by the Bose Lawa from among persons who are not members of that House but are qualified to be candidates for election as members of Parliament. The Speaker should be required to take the Oath of Allegiance before entering on the duties of the office.

334. The office of Speaker should become vacant on the day immediately preceding the first day on which the House meets after a general election. It should also become vacant

(a) if the Speaker resigns from office, or

(b) in any circumstance in which, if the Speaker were a member of the House, his or her seat would become vacant, or

(c) if the House removes the Speaker from office by a resolution supported by not less than two-thirds of the total number of its members.

335. The Bose Lawa should elect a Deputy Speaker from among its members, other than a Minister or Assistant Minister. The Constitution should provide that, if the Speaker is unable to exercise any of the functions of that office, they may be exercised by the Deputy Speaker.

336. The office of the Deputy Speaker should become vacant on the day immediately preceding the first day on which the House meets after a general election. It should also become vacant if the Deputy Speaker resigns from office, vacates his or her seat in the House, is appointed as a Minister or an Assistant Minister, or is removed from office by a resolution supported by not less than two-thirds of the total number of its members.

337. If neither the Speaker nor the Deputy Speaker is available to preside over a sitting of the House, the Constitution should permit the members of the House to elect one of their number to preside over the sitting.

338. The Constitution should provide that the President of the Bose e Cake should continue to be elected from among persons who are not members of Parliament but the Vice President should be elected from among the members of the Bose e Cake.

339. The provisions concerning election and vacation of the offices of President and Vice-President of the Bose e Cake, and for a member of the Bose e Cake to be elected to preside at a sitting of that House in the absence of both the President and the Vice President of that House should correspond to those applying to the election, vacation of office and absence of the Speaker and Deputy Speaker.

340. No presiding officer in the Bose Lawa or the Bose e Cake should have a casting vote. All questions, other than those in respect of which the Constitution makes a different provision, should be decided by a majority of the votes of the members of the House present and voting.

341. Neither the Speaker nor the President of the Bose e Cake should have a deliberative vote, but the Deputy Speaker and the Vice President of the Bose e Cake, as well as a member of either House elected to preside at a sitting in the absence of any other presiding officer, should be entitled to exercise a deliberative vote.

342 The quorum for the Bose Lawa should continue to be 24 members and the quorum for the Bose e Cake should continue to be 12, including in each case a presiding officer other than the Speaker and the President of the Bose e Cake.

343. The Constitution should continue to empower each House to regulate its own procedure consistently with the Constitution, provided that a vacancy among its members or the participation of a person who is not a member should not invalidate its proceedings, and empower Parliament to make provision for the exercise of the powers of each House and its Committees and for the privileges and immunities of its members.

344. The Constitution should continue to give an independent body the task of reviewing parliamentary emoluments. That body should have the power to gather relevant information and consider submissions, and should be required to set out its recommendations in a report to the Speaker who should table it in Parliament.

345. The Constitution should provide that the salaries, allowances and benefits of those referred to in the provision should be as prescribed by Act.

346. The present Independent Parliamentary Emoluments and Benefits Committee should be replaced by a Parliamentary Emoluments Commission. That body should be a constitutional commission to which the general rules later recommended should apply. It should consist of a Chairperson and two other members, one of whom should be a qualified actuary with at least five years' practical experience. No person whose remuneration is reviewable by the Commission should be qualified to be a member.

347. The members of the Commission should be appointed by the President on the recommendation of a sector Standing Committee of the Bose Lawa responsible for overseeing Administrative Services. That Committee should make its recommendation after considering names placed before it by the Speaker.

348. There should continue to be a Secretary-General to Parliament, a Secretary to the Bose Lawa and a Secretary to the Bose e Cake.

349. The Secretary-General to Parliament should be appointed by the recommended Constitutional Offices Commission after consultation with the Speaker and the President of the Bose e Cake.

350. The Public Service Commission should be required to consult the Speaker and the President of the Bose e Cake as appropriate, before exercising any power in relation to any public officer appointed to the staff of the Secretary-General or of either House.

351. The Constitution should provide that the legislative power of the Republic of the Fiji Islands is vested in Parliament.

352. It should continue to provide that

(a) the legislative power must be exercised by Act;

(b) to become law, a Bill for an Act must be passed by both Houses of Parliament unless the Constitution provides otherwise, and must be assented to by the President; and

(c) no Act shall come into operation until it has been published.

353. The Constitution should provide that all Bills must originate in the Bose Lawa.

354. The Constitution, supplemented by the Standing Orders of each House, should continue to provide that Bills, other than Appropriation Bills and other money Bills, urgent Bills, and Bills altering the Constitution or other entrenched legislation, must be passed in accordance with the following procedures:

(a) Every Bill passed by the Bose Lawa is sent to the Bose e Cake.

(b) The Bose e Cake may pass the Bill with or without amendment or may reject the Bill.

(c) Where the Bose e Cake amends a Bill, the Bose Lawa considers the amendments. It may agree to them, reject them or agree to them in amended form.

(d) If the Bose Lawa does not agree to the amendments, the Bill is then returned to the Bose e Cake, in the form in which it was again passed by the Bose Lawa. The process of consideration by the Bose e Cake is then repeated.

(e) If,

(i) the Bose Lawa passes a Bill in two successive sessions, and

(ii) there is an interval of at least six months between the dates on which it is passed in each session, and

(iii) on each occasion the Bose e Cake rejects the Bill, or passes it with amendments to which the Bose Lawa does not agree,

the Bill shall nevertheless be presented to the President for assent, unless the Bose Lawa resolves otherwise.

355. The provision under which the Bose Lawa can help break a deadlock by suggesting to the Bose e Cake amendments which the Bose Lawa will be taken as having agreed to if they are approved by the Bose e Cake, should be retained. The Standing Orders of both Houses should make provision for the setting up of ad hoc Joint Committees to consider Bills which are not acceptable to the Bose e Cake in their original form. The Joint Committee should endeavour to recommend amendments which would make the Bill acceptable to both Houses.

356. The Bose e Cake should continue to have seven days in which to pass an urgent Bill in its original form or with amendments to which the Bose Lawa agrees. Otherwise, at the expiry of the seven days, the Bill must be presented to the President for assent unless the Bose Lawa resolves otherwise.

357. The role of the Bose e Cake in passing Appropriation Bills and other money Bills and Bills altering the Constitution or other entrenched legislation should be as recommended later.

358. The Standing Orders of the Bose Lawa should establish sector Standing Committees with responsibility for all areas of Government policy and administration.

359. Sector Standing Committees should have

(a) the duty to scrutinise areas of government activity on a systematic basis, and

(b) the legislative function of considering Bills referred to them by Parliament, hearing submissions on them from members of the public and reporting them back to Parliament with any amendments recommended by the Committee.

360. The parliamentary timetable should allow sufficient time for the work of the sector Standing Committees.

361. Their function of scrutinising should allow sector Standing Committees on their own initiative to take up matters within their subject areas. Their scrutiny could include all or any of the following activities:

- examining the estimates of expenditure prepared by departments and other government agencies;
- financial reviews of departments;
- reviews of regulations and other subordinate legislation made under the authority of Acts administered by departments;
- reviews of the performance and current operations of statutory bodies;
- follow-up and in-depth inquiries into particular matters;
- reviews of State-owned enterprises;
- reviews of audit reports and the responses made to them;
- in-depth policy inquiries.

362. The legislative function of sector Standing Committees should be carried out by providing in Standing Orders that every Bill, other than an Appropriation Bill, stands referred to a sector Standing Committee unless the House has accorded urgency to its passing. The Standing Orders should also require the House to determine the Committee to which a particular Bill should be sent.

363. Consideration should be given to adopting the practice of holding the Second Reading debate before the Bill is referred to a sector Standing Committee, so that members of the Committee will have "an understanding of the mind of the House", before they consider the Bill. Sector Standing Committees should be empowered to recommend amendments that are relevant to the subject-matter of the Bill and consistent with its purposes and objects.

364. Unless there are special reasons for hearing submissions in private, all submissions should be heard in public. Other proceedings of sector Standing Committees should not be open to the public, and should remain confidential until the Committee reports to the House.

365. The members of sector Standing Committees should be appointed at the beginning of a new Parliament. All members of the Bose Lawa who are not Ministers or Assistant Ministers should be members of at least one. The overall membership of sector Standing Committees should reflect the balance of the parties in the House. The Chairperson and the Deputy Chairperson of each Committee should come from opposite sides of the House.

366. The Minister in charge of a Bill, while his or her Bill is being considered, should be permitted to take part in the proceedings of a Committee but not to vote. Ministers should also be encouraged to cooperate with Committees in the exercise of their scrutiny functions.

367. Consideration should be given to the possibility of creating a standing Joint Finance and Expenditure Committee of the Bose Lawa and the Bose e Cake, with wider functions than the present Public Accounts Committee of the Bose Lawa, and perhaps replacing it.

368. The Secretary-General of Parliament should develop a permanent but flexible structure for servicing sector Standing Committees by providing them with their own staff, and access to researchers, policy analysts and experts.

Chapter 12: Executive Government

369. The Constitution should continue to vest the executive authority of the Republic of the Fiji Islands in the President, and provide for its exercise in accordance with the following rules:

(a) The President, the Cabinet, or a Minister authorised by the Cabinet, as well as a department or other government agency acting under the direction and control of a Minister, should be empowered to exercise the executive authority of the Republic.

(b) To the extent that the executive authority of the Republic is exercised by the President, he or she should be required to act only in accordance with the advice of the Cabinet or a Minister, except in those cases where the President is required by the Constitution to act on the advice of, or after consultation with some other person or body, or in the President's own deliberate judgment.

(c) The Cabinet should be collectively responsible to Parliament for any advice given to the President by the Cabinet or a Minister (except advice given by the Prime Minister about the appointment or responsibilities of Ministers or the dissolution of Parliament) and for all things done by or under the authority of any Minister in the execution of the Minister's office.

370. The Constitution should continue to require the Prime Minister to keep the President informed concerning the general conduct of the government of the Republic, and to supply such other information about any particular matter relating to the conduct of government as the President may request.

371. The Constitution should provide that there shall be a Cabinet, consisting of the Prime Minister and not more than 15 other Ministers appointed from among elected members of Parliament. It should also permit the appointment, from among elected members, of not more than 5 Assistant Ministers. There should be a convention that not more than a quarter of all Ministers and Assistant Ministers should be appointed from among the elected members of the Bose e Cake. The Constitution should no longer require the inclusion in the Cabinet of Ministers responsible for named portfolios.

372. The Constitution should provide that the office of Attorney-General must be filled by a member of the Cabinet qualified to practise as a barrister and solicitor in the Republic of the Fiji Islands. The Attorney-General should continue to be the chief legal adviser to the Government and have the right to take part in the proceedings of either House of Parliament, but to vote only in the House of which he or she is a member.

373. Section 83(4), providing that, if the person holding the office of Attorney-General is for any reason unable to perform the functions of that office, they may be performed by another qualified person, whether or not a member of Parliament, appointed by the President on the advice of the Prime Minister, should be repealed. The Constitution should provide that, in such a case, a Minister may be appointed to act as Attorney-General, whether or not legally qualified, and that the Solicitor-General may exercise any power specifically conferred on the Attorney-General by law, or by virtue of the Attorney-General's appointment to any office or body created by or under a law.

374. With particular reference to the Attorney-General, but with reference also to other members of the Cabinet, the substantive responsibilities of each Ministerial portfolio assigned to a member of the Cabinet, and those of the departments or offices coming under the general direction and control of the Minister holding that portfolio, should be clearly defined.

375. If after a general election, no one party or pre-election coalition is in a position to form a government, the President should, if necessary, facilitate negotiations among political parties about the formation of a coalition government. Unless the Prime Minister in office before the general election has tendered a resignation, the President should obtain the Prime Minister's consent before talking to the leaders of other parties.

376. The political parties should make public the outcome of their negotiations, to the extent that it provides a basis for the appointment of a Prime Minister.

377. Sections 84(2) and (3) should be rewritten to make it clear that, after a general election, a Prime Minister who has not been re-elected to the Bose Lawa, or who clearly no longer commands the support of a majority of the House, must tender a resignation, but remains in office in a caretaker capacity until a new Prime Minister is appointed. It should be

implicit that a Prime Minister who has not clearly lost the support of the majority is entitled to remain in office until Parliament meets. The President should have a residual power to dismiss the Prime Minister only if the Prime Minister is under a constitutional duty to resign but fails to do so.

378. Section 80(1)(b) of the Constitution, authorising the President, acting in his own deliberate judgment, to dissolve Parliament, if the President considers that there is no prospect of his being able within a reasonable time to appoint to that office a person who can command the support of a majority of the members of the House of Representatives, should be repealed.

379. All members of the Cabinet should continue to take the Oath of Allegiance and the Oath for the due execution of office which binds the members of the Cabinet not to disclose without authority anything that has transpired in or in relation to the proceedings of the Cabinet while in office, or at any time thereafter.

380. The doctrine of Cabinet secrecy should be looked at critically in the light of the principles it serves, so that it can be reconciled with the competing principle that there ought to be freedom of access to official information unless there is good reason to withhold it.

381. The Constitution should continue to provide that a Minister or Assistant Minister may be dismissed by the President on the advice of the Prime Minister.

382. It should provide for the vacation of office by a Minister or Assistant Minister if its holder tenders resignation, or ceases to be a member of Parliament otherwise than by reason of a dissolution, or is not re-elected to Parliament after a general election, or if the Prime Minister vacates office. The Constitution should recognise that the Prime Minister and other members of the Cabinet who tender their resignations in anticipation of a change of Government remain in office until the new Prime Minister is appointed.

383. The substance of section 86(1) providing that the President, acting on the advice of the Prime Minister, may assign to any Minister, including the Prime Minister, responsibility for the conduct of any business of the Government, including responsibility for any department, should be retained. There should be a further provision that the Prime Minister has responsibility for any matter in respect of which no such assignment has been made.

384. The substance of section 87 concerning the performance of the Prime Minister's functions during illness or absence should be retained, apart from the requirement that a Minister performing the functions of the Prime Minister shall be a Fijian. There should be a corresponding provision allowing the President, on the advice of the Prime Minister, to authorise another Minister to perform the functions of a Minister who is ill or absent. The fact that a Minister has been authorised to perform the functions of the Prime Minister or another Minister should be notified in the Gazette.

385. Section 80(1)(a) should be rewritten to provide that, if the Government is defeated on a confidence vote, the Prime Minister must resign or advise a dissolution within prescribed time limits. A Prime Minister who fails to take either step should be dismissed by the President. The President should have no power to dissolve Parliament without the advice of the Prime Minister.

386. The Constitution should make it clear that, if a Prime Minister advises a dissolution, the President must act in accordance with that advice, unless

(a) the Prime Minister was in office before a general election and his Government is defeated on a vote of no-confidence shortly after Parliament meets following a general election; or

(b) the Prime Minister is the leader of a new Government formed after a general election and that Government is defeated shortly after meeting Parliament; or

(c) the Prime Minister is displaced from the leadership of the governing party or coalition.

387. The Constitution should recognise that the Minister responsible for a department exercises general direction and control over it and is accountable to Parliament for its work. The Constitution should also state that, subject to the Minister's general direction and control, the Permanent Secretary or other officer in charge of the department is responsible to the Minister for the efficient, effective and economical management of the department.

388. The term "department" should include all government offices other than a disciplined service.

389. The Constitution should continue to constitute the office of Commissioner of Police, and provide that the Police Force is under the Commissioner's command.

390. The Commissioner of Police should be appointed by the Constitutional Offices Commission, after the Commission has consulted the Minister responsible for the Police Force.

391. The Constitution should provide that the Commissioner is responsible for the organisation, maintenance and administration of the Police Force, as well as for determining its use and controlling its operations.

392. In matters pertaining to the organisation, maintenance and administration of the Force, the Commissioner of Police should be under the general direction and control of the Minister responsible for the Police Force. The Commissioner should also be required to act in accordance with such general directions of policy with respect to the maintenance of public safety and public order as may be given by that Minister. In exercising the powers and authorities of the office for the purpose of determining the use and operational control of the Force, the Commissioner of Police should not be subject to the direction or control of any other person or authority.

393. The Constitution should provide that a military force may be raised or maintained in the Fiji Islands only under the authority of an Act. Section 94(1) of the 1990 Constitution, requiring the maintenance of the Republic of Fiji Military Forces, should be repealed.

394. The Constitution should give effect to the following principles:

(a) The Republic of Fiji Military Forces should be under the control of the Government of the Republic of the Fiji Islands, exercised through the Cabinet and a Minister responsible for those forces;

(b) The Republic of Fiji Military Forces should be under the command of a Commander appointed by the President acting in accordance with the advice of the Prime Minister.

395. The purposes for which the armed forces may be raised or maintained should be specified in an Act, rather than the Constitution. Section 94(3) of the Constitution, specifying the present responsibility of the Republic of Fiji Military Forces, should be repealed.

396. Such an Act should set out the circumstances in which, and the machinery through which, decisions may be taken by the Government to use the armed forces or any part of them to perform a public service or to provide assistance to the police.

397. The Act should give members of the armed forces assisting the police, the powers that may be exercised by a member of the police and the protections of a member of the police against criminal and civil liability, but without prejudice to the legal protection they may otherwise acquire by having acted in obedience to a lawful order.

398. The Act should prescribe a procedure for obtaining the authority of a Minister before the armed forces are used to provide a public service or assist the police on a particular occasion.

399. The Constitution should make provision for the office of Solicitor-General.

400. It should provide that no legal proceeding in a civil case in which the state is the plaintiff may be initiated or discontinued and no legal proceeding in a civil case in which the state is the defendant may be defended or settled without the concurrence of the Solicitor-General. In giving or withholding that concurrence, the Solicitor-General should not be subject to the direction or control of any other person or authority.

401. The Constitution should provide that the Solicitor-General must be a person qualified to be appointed as a judge of the High Court.

402. The Solicitor-General should be appointed by the Constitutional Offices Commission. Before making the appointment, that Commission should consult the Attorney-General.

403. The responsibilities of the office of Solicitor-General should be kept distinct from other responsibilities which that office-holder has as, in effect, Permanent Secretary of a Department of Justice or any other department.

404. The Constitution should maintain the substance of the arrangements in section 96 of the 1990 Constitution under which the discretion in respect of prosecutions is vested exclusively in a Director of Public Prosecutions. It should continue to provide that, in the exercise of the powers conferred by the Constitution, the Director of Public Prosecutions shall not be subject to the direction or control of any other person or body.

405. The Director of Public Prosecutions should continue to be a person qualified to be appointed as a judge of the High Court. Appointments to that office should be made by the Constitutional Offices Commission, after consulting the Attorney-General.

406. The substance of section 98 of the 1990 Constitution, which empowers the President to constitute offices for Fiji, make appointments to them and terminate the appointments, subject to the provisions of the Constitution and of any other law, should be retained.

Chapter 13: Administration of Justice

407. The Constitution should vest the judicial power of the Republic of the Fiji Islands in a Supreme Court, a Court of Appeal and a High Court, and such other courts as may be established by law.

408. The court at present called the "Fiji Court of Appeal" should be renamed the "Court of Appeal".

409. The Supreme Court should be retained for the time being. The need for its retention should be considered again when it has heard a sufficient number of cases over a period to allow a study of the number of appeals considered, the grounds for appeal, the outcome on appeal, the time lag involved in hearing a second appeal, and the jurisprudence created by its decisions, as well as the cost involved.

410. The Constitution should constitute the Supreme Court, the Court of Appeal and the High Court. It would be premature to give constitutional recognition to the Magistrates' Courts before they are ready to be given the title and status of District Courts, as contemplated in the *Beattie Commission* report.

411. It should empower Parliament to create other courts by Act.

412. The Constitution should provide that the judicial power of the Republic of the Fiji Islands is independent of the legislative power and the executive authority of the Republic.

413. Judges should be required to take the judicial oath or affirmation in the following slightly revised form:

> I, , do swear [or solemnly affirm] that I will well and truly serve the Republic of the Fiji Islands, in the office of . I will in all things uphold the Constitution; and I will do right to all manner of people in accordance with the laws and usages of the Republic, without fear or favour, affection or ill will. So help me God. [To be omitted in affirmation.]

414. The substance of the provisions which prohibit the remuneration and other terms and conditions of a judge from being altered after appointment to the judge's disadvantage, and require judicial salaries to be prescribed by law and charged on the Consolidated Fund, should be retained.

415. In drafting any provision of the Constitution applying to all persons in the service of the state, care should be taken to avoid referring to members of the judiciary in a way that appears to equate them with persons serving in the executive branch of government.

416. The Constitution should continue to provide that a court has only such jurisdiction as is given to it by the Constitution or by law.

417. The High Court should continue to have unlimited original jurisdiction to hear and determine any civil or criminal proceeding and such other jurisdiction and powers as are conferred on it by the Constitution or by law.

418. The jurisdiction conferred on the High Court by the transitional provision contained in section 112 should be conferred directly on the High Court by a new High Court Act. As recommended by the *Beattie Commission*, that Act should not describe the jurisdiction by reference to English law and practice, but should use modern terms. If that cannot be done by the time that it is desired to put new constitutional arrangements in place, the substance of section 112 should be moved to a separate chapter of the Constitution containing transitional provisions.

419. The Constitution should retain the substance of section 113 which gives persons who claim that any provision of the Constitution other than a provision of the Bill of Rights has been contravened, and that his interests are being or are likely to be affected, the right to apply to the High Court for a declaration and relief. In exercising this right, there should be no power to raise issues which are to be determined exclusively under an election petition or a proceeding alleging that a seat of a member of Parliament has become vacant.

420. The substance of section 114(2) and (3) requiring a subordinate court to refer to the High Court any substantial question of law as to the interpretation of any provision of the Constitution other than the Bill of Rights should be retained.

421. The Constitution should confer appellate jurisdiction on the High Court to hear and determine appeals from courts subordinate to it in those cases where a right of appeal is conferred by law.

422. The substance of section 114(1) giving the High Court jurisdiction to supervise any civil or criminal proceedings before any subordinate court should be retained.

423. The Constitution should expressly confer on the Court of Appeal jurisdiction in respect of appeals from decisions of the High Court and such other jurisdiction and powers as are conferred by law. A transitional provision should provide that the renamed court is the same court as the Fiji Court of Appeal.

424. The Constitution should continue to confer on the Supreme Court exclusive jurisdiction to determine finally any appeal from a final decision or order of the Court of Appeal.

425. The question whether the Constitution should continue to articulate the doctrine of precedent as it applies to the Supreme Court should be examined in consultation with the Solicitor-General and the judiciary, as should the power of the Supreme Court to review its own decisions. The Constitution should continue to empower the President of the Supreme Court to make rules of court.

426. The Constitution should continue to empower the President, acting on the advice of the Cabinet or a Minister, to refer questions as to the effect of any provision of the Constitution to the Supreme Court for its opinion. The power should not be over-used.

427. The Constitution should continue to provide that the superior courts have power to punish persons for contempt of court in accordance with the law.

428. The Constitution should provide that appeals lie to the Court of Appeal as of right from final decisions of the High Court

(a) in the exercise of its original or appellate jurisdiction, on questions as to the interpretation of the Constitution;

(b) in the exercise of its original jurisdiction to determine claims that the Bill of Rights or other provisions of the Constitution have been contravened; and

(c) in the exercise of its jurisdiction to determine whether a taking of property is constitutional, and if so, the amount of compensation (if any) that is payable.

It should also provide that appeals shall lie, as of right or with leave, in such other cases as may be provided by law, consistently with the Constitution.

429. As recommended by the *Beattie Commission*, the Constitution should provide that appeals from the Court of Appeal to the Supreme Court should not lie as of right. Such appeals should lie only

(a) by leave of the Court of Appeal on a question certified by that court to be of great general or public importance; and

(b) by special leave of the Supreme Court in any criminal or civil matter.

430. The Constitution should provide that the High Court consists of the Chief Justice and not fewer than nine puisne judges or such greater number of puisne judges as Parliament may prescribe.

431. It should provide that there may be not more than two Masters of the High Court, or such greater number as Parliament may prescribe. They should have the jurisdiction and powers conferred by Act.

432. The requirement for a judge who has participated at an earlier stage of a case to disqualify himself or herself from sitting on an appeal should be reinserted in the Constitution as a general principle.

433. As now, the Chief Justice should not be a member of the Court of Appeal. The Constitution should provide that the Court of Appeal consists of:

(a) a Justice of Appeal who is appointed to be the President of the Court of Appeal;

(b) such other Justices of Appeal as are appointed to be members of that Court; and

(c) the puisne judges of the High Court.

434. The Constitution should provide that the Supreme Court consists of:

(a) the Chief Justice, who shall be the President of the Supreme Court;

(b) such Justices of the Supreme Court as are appointed to be members of that Court; and

(c) the Justices of Appeal, other than the President of the Court of Appeal.

435. The Constitution should provide that a person is not qualified to be appointed as a judge of the High Court unless that person:

(a) holds, or has held, high judicial office in Fiji or in any other country that may be prescribed by law; or

(b) has had not less than seven years' practice as a barrister or solicitor in Fiji or in another country prescribed by law. The term "practice" should be interpreted as discussed in paragraphs 13.66 and 13.67.

436. The Constitution should make provision for a service commission dealing exclusively with the judiciary. It should be called the Judicial Service Commission.

437. The Chief Justice and the Chairperson of the Public Service Commission should be ex officio members of the Judicial Service Commission. The third member should be a person qualified to be a judge of a superior court but not in active practice in the Fiji Islands. That person should be appointed to the Commission by the President on the

advice of the Minister responsible for Justice, after the Minister has obtained the approval of the Select Committee of the Bose Lawa responsible for matters affecting the administration of justice. The term of office should be three years.

438. The third member of the Judicial Service Commission should be subject to the rules applying to members of other service commissions, about

(a) disqualification for appointment, and

(b) appointment to other office in the service of the state, including judicial office, after ceasing to be a member.

The third member should be free to accept nomination as a candidate for election to Parliament.

439. To permit the appointment of a Chief Justice to be initiated by the Judicial Service Commission, the Constitution should provide that a Justice of Appeal or a Justice of the Supreme Court who does not wish to be considered for the office of Chief Justice should be appointed to preside over that Commission for any period during which the office of Chief Justice is vacant. The appointment should be made by the President on the advice of the Minister responsible for Justice.

440. The Constitution should provide that the President shall appoint the Chief Justice, Justices of the Supreme Court, the President of the Court of Appeal and other Justices of Appeal, and puisne Judges and Masters of the High Court, on the recommendation of the Judicial Service Commission, and with the concurrence of the Minister responsible for Justice and the approval of the Select Committee of the Bose Lawa responsible for matters affecting the administration of justice.

441. When the office of Chief Justice is vacant or the Chief Justice is absent or unable to fulfil the functions of the office, an Acting Chief Justice should be appointed by the President on the recommendation of the Judicial Service Commission, and with the concurrence of the Minister responsible for Justice. Corresponding provision should be made for the appointment of acting judges of the High Court.

442. The Constitution should give to the Judicial Service Commission the responsibility of appointing all magistrates and the Central Agricultural Tribunal appointed under the Agricultural Landlord and Tenant Act. Before making the last-mentioned appointment, the Commission should be required to consult the Prime Minister and the Leader of the Opposition.

443. The Constitution should require the Judicial Service Commission to appoint the holders of all other judicial offices for which provision is made by Parliament.

444. The Judicial Service Commission should be given power, by regulation made with the concurrence of the Prime Minister, to assume responsibility for appointing persons who are not strictly judicial officers in those cases where the Public Service Commission has excluded that responsibility under a corresponding mechanism.

445. The Constitution should not require the Judicial Service Commission to obtain the consent of the Prime Minister before recommending a non-citizen for appointment as a judge of a superior court. However, it should be required to obtain that consent before appointing a non-citizen to any other judicial office.

446. The Constitution should provide that, in appointing persons to judicial office, the over-riding principle should be the maintainance of the quality of judicial appointments, while seeking in the longer term to ensure that the composition of the judiciary reflects the ethnic and gender balance among citizens as a whole. Section 124(3)(b), (4) and (5) should be repealed.

447. The Constitution should provide as follows:

(a) The Chief Justice should hold office until the age of 70. It should not be possible to appoint a Chief Justice for a term of years.

(b) A Justice of the Supreme Court or a Justice of Appeal, including the President of the Court of Appeal, who is not appointed for one or more sessions of the Court or for a term of years, should hold office until the age of 70.

(c) A judge of the High Court, other than the Chief Justice, should hold office until the age of 65.

(d) A Chief Justice, Justice of the Supreme Court, Justice of Appeal, including the President of the Court of Appeal, or judge of the High Court, who has held office until reaching the retirement age, like expatriate judges or former judges, should be eligible for appointment as a Justice of the Supreme Court or a Justice of Appeal for one or more sessions of the Court or for a term not exceeding three years, if under the age of 75 years at the date of the appointment.

(e) A person should be eligible for appointment as an acting judge of the High Court if under the age of 70 years at the date of the appointment.

(f) A person appointed as Acting Chief Justice or as an acting judge of the High Court should vacate office when the holder of the office resumes the duties of the office, or, if the office was vacant, when the person appointed to fill the vacancy takes up office.

448. The Constitution should continue to allow a Judge of the High Court other than the Chief Justice to be appointed for a term of years. The term should be not less than four years and not more than seven years.

449. The retiring age or term of office of magistrates and other judicial officers should be as prescribed by the Constitution or other law.

450. The power to exercise disciplinary control over judges of subordinate courts and other judicial officers appointed by the Judicial Service Commission should be vested exclusively in that Commission.

451. Complaints about the conduct of individual judges of the superior courts should be channeled through the Secretary of the Judicial Service Commission and from that officer to the Chief Justice. There is no need to provide for this in the Constitution.

452. The Constitution should continue to provide that the only grounds for removing a judge of a superior court from office are inability to perform the functions of the office (whether due to infirmity or some other cause) or misbehaviour. If the President, acting on the advice of the Cabinet or a Minister, considers that the question of removing a judge from office on such a ground ought to be investigated, he should be required to constitute a tribunal consisting of not less than three persons who hold or have held high judicial office in Fiji or some other country. The tribunal should be required to inquire into the

matter and report its findings to the President. If it recommends removal, its report should be submitted to Parliament. The President should remove the judge only if each House adopts a resolution to that effect supported by three fourths of its members present and voting.

453. The Constitution should expressly give the Judicial Service Commission the responsibility for arranging study and refresher programmes for members of the judiciary.

454. The administration of the courts should be the responsibility of a separate Courts Department headed by a Courts Administrator. Such a department should remain part of the executive branch of government. The Public Service Commission should have the power to appoint its officers, including court registrars and other staff, but should consider delegating major aspects of that power to the Courts Administrator. The holder of that office could appropriately be appointed as Secretary of the Judicial Service Commission.

455. To the extent that the Public Service Commission itself exercises the responsibility of appointing or promoting members of the Courts Department, court staff or the secretarial staff of judges and magistrates, those responsibilities should be exercised only after consultation with the Courts Administrator and the Chief Justice, President of the Court of Appeal or Chief Magistrate, as appropriate.

456. A Minister should be assigned responsibility for the Courts Department.

457. There is no need to make provision in the Constitution for any of these matters.

458. The substance of section 99(1) of the Constitution codifying the content of the prerogative of mercy should be retained.

459. The Constitution should continue to make provision for a commission to advise the President on the exercise of the prerogative of mercy. The chairperson of the Prerogative of Mercy Commission should be the Minister responsible for Justice, ex officio. The other two members should be persons appointed by the President, acting in his own deliberate judgment. The President should be required to act in accordance with the Commission's advice.

Chapter 14: State Services

460. The Constitution should contain a provision along the following lines:

> In recruiting and promoting members of all state services belonging to the executive branch of government, including the public service, the Fiji Police Force and the Republic Fiji Military Forces, and in the management of those services, the factors to be taken into account shall include:
>
> (a) the need to ensure that government policies can be carried out effectively;
>
> (b) the need to achieve efficiency and economy in all the state's services;
>
> (c) the need to make appointments and promotions on the basis of merit;

(d) the need to provide men and women and the members of all ethnic groups with adequate opportunities for training and advancement;

(e) the need for the composition of each service, at all levels, broadly to reflect the ethnic composition of the population, taking account, however, of occupational preferences.

461. It should no longer contain provisions such as those contained in subsections 124(3), (4) and (5) and 127(10), (11) and (12) of the 1990 Constitution.

462. The Constitution should provide that no person or authority exercising a power to appoint any person to any office may appoint a person who is not a Fiji citizen and not already in the service of the State, unless the Prime Minister has agreed that person may be appointed.

463. The Constitution should continue to provide for independent service commissions with responsibility for the appointment, disciplinary control over, and removal of, state servants. It should provide that, subject to the Constitution, in the exercise of its powers, the commissions should not be subject to the direction or control of any other person or authority.

464. The Constitution should provide for:

- a new Constitutional Offices Commission, (the functions, powers and composition of which should be as recommended in the next Chapter);
- a new Disciplined Services Commission to replace the existing Police Service Commission;
- a Public Service Commission.

465. Responsibility for the appointment, discipline and removal of members of the Republic of Fiji Military Forces should continue to rest with the Commander, subject to ministerial responsibility for the armed forces.

466. The Constitution should make it clear that Government remains responsible for the structure of state services and, subject to any Act, the general policies involving their management.

467. Apart from the special case of the Judicial Service Commission, the Constitution should provide for the same procedure to be followed for selecting and appointing the chairpersons and members of all of the independent service commissions.

468. The Constitution should continue to provide that the chairperson and members of independent service commissions be appointed by the President. The Minister responsible for the particular commission should nominate a candidate to the appropriate sector standing committee of the Bose Lawa. The committee should have authority only to confirm or reject the Minister's nominations. If a nomination is confirmed, the Minister should advise the President accordingly, but if it is rejected, the Minister would have to nominate another suitable candidate.

469. The tenure of the chairperson and members of independent service commissions should remain three years. Persons who are appointed to fill casual vacancies should be appointed for a full term of three years. Commissioners should be eligible for re-appointment.

470. The Constitution should provide that if the office of chairperson of any service commission is vacant or if the holder is unable to perform the functions of the office, the members may elect one of their number to perform the functions of the chairperson.

471. The Constitution should provide that an acting member may be appointed when a member cannot for any reason perform the functions of his or her office. An acting member should be appointed by the President, acting on the advice of the Prime Minister, tendered after the Prime Minister has consulted the Leader of the Opposition.

472. The Constitution should no longer allow the appointment of a person to act as a member of a service commission in the case of a vacancy. Subject to the presence of a quorum, service commissions should continue to be empowered to act despite a vacancy in their membership.

473. The Constitution should no longer reserve any position on a service commission for members of any particular ethnic group and it should no longer contain provisions like those in subsections 128(2) and (6).

474. The Constitution should provide that a person is not qualified to be appointed to be a member of the Constitutional Offices Commission, the Disciplined Services Commission, or the Public Service Commission if he or she is, or, in the immediately preceding three years, has been:

- a member of either House of Parliament or an elected member of any municipal council or other similar body prescribed by Parliament;
- nominated with his or her consent as a candidate for election as a member of either House of Parliament or any municipal council or other similar body prescribed by Parliament;
- a national office bearer in any political organisation that sponsors or supports or in the previous 3 years has sponsored or supported a candidate for election to either House of Parliament;
- a public officer or a local government officer.

475. The Constitution should also disqualify a person who is a member of a service commission, other than the chairperson of the Public Service Commission, from being a member of another service commission at the same time. It should, however, allow the person who is the chairperson of the Public Service Commission also to be the chairperson or a member of the Constitutional Offices Commission or the Disciplined Services Commission.

476. A person who is appointed to any service commission should be disqualified from appointment to any office in any state service for a period of three years after he or she was last the chairperson or a member of a service commission.

477. The Constitution should continue to provide that the Public Service Commission comprise a chairperson and not less than three nor more than five other members appointed in accordance with the procedure outlined in recommendation 468.

478. The Public Service Commission should have constitutional responsibility for appointing, removing and exercise of disciplinary control over, all offices and officers in the state services that are not specifically made the responsibility of some other commission, or other authority by or under the Constitution. The Constitution should provide that the

Public Service Commission should not have the power to appoint, remove or exercise disciplinary control over the offices and officers that are the responsibility of another service commission, or any in the Fiji Police Force, Republic of Fiji Military Forces, or any naval or air force, or for which other provision is made by or under the Constitution.

479. The Constitution should continue to permit the Public Service Commission to make regulations with the concurrence of the Prime Minister by which any office or class of office is exempted from its constitutional responsibility.

480. Apart from the offices of the Director of Public Prosecutions and the Solicitor-General, the Public Service Commission should have responsibility for all non-judicial offices which are at present the responsibility of the Judicial and Legal Services Commission. These would include the State's legal officers, the heads of departments within the portfolio of the Ministry for Justice and senior officers in the administration of the courts.

481. The Constitution should require the Commission to consult both the Prime Minister and the Leader of the Opposition before appointing an agricultural tribunal.

482. The Constitution should continue to require the Public Service Commission to obtain the concurrence of the Prime Minister before making any appointment to the office of Secretary to the Cabinet, or any office of Permanent Secretary, or head of any government department or ministry.

483. The Constitution should require that the Public Service Commission should obtain the concurrence of the Ombudsman and the Auditor-General before exercising any of its constitutional powers over any office on their staff.

484. The Constitution should continue to require the Public Service Commission to obtain concurrence of the President before exercising any of its constitutional powers over any of the President's personal staff.

485. The Constitution should provide that the Commission should consult the Speaker before exercising any of its constitutional powers over the Secretary to the Bose Lawa and any member of the staff of the Bose Lawa. Similarly, it should be required to consult the President of the Bose e Cake in respect of the offices of Clerk to the Bose e Cake or any other member of the staff of the Bose e Cake.

486. The Constitution should require that all Permanent Secretaries and heads of departments should be consulted prior to any appointment or removal of a member of their staff.

487. The Constitution should continue to vest in the President, acting on the advice of the Prime Minister, power to appoint and remove ambassadors and principal representatives of Fiji to other countries and to international organisations. It should provide that before recommending the appointment of a person who is a state servant to be an ambassador or principal representative, the Prime Minister shall first consult the Public Service Commission.

488. The Constitution should also provide that the power to remove an ambassador or principal representative from office does not include the power to remove a person from the state services, if that person was already a state servant when appointed to be an ambassador or principal representative.

489. The Constitution should no longer empower the Public Service Commission to grant such officers early pensions. To the extent that it may be desirable to provide for pensions, provision should be made in an Act.

490. The Constitution should continue to allow the Prime Minister to prescribe specific state offices requiring residence overseas. Once prescribed, the power to make appointments on transfer between these offices should vest in the Prime Minister. The Constitution should allow this power to be delegated to a minister public officer. The power should be limited to transferring between offices carrying the same salary.

491. The Constitution should continue to allow the Public Service Commission to delegate any of its functions to an individual commissioner or a public officer. It should continue to prohibit any delegation of the powers over agricultural tribunals, the Secretary to Cabinet or any Permanent Secretary, head of department or other comparable officer. It should continue to allow Acts of Parliament to impose limitations on the power to delegate. It should allow the Commission to impose conditions on its delegations.

492. The Public Service Commission should expedite the consideration of the delegation of its powers.

493. The Government should re-examine the statutory functions of the Public Service Commission to see if all or any of these might be more efficiently, effectively or economically exercised either centrally by a Government ministry or by the individual departments and ministries.

494. The Constitution should authorise Parliament to provide by Act for a system of appeals against decisions of the Public Service Commission or any person exercising any of the Commission's powers by delegation. The provision should allow Parliament a discretion to prescribe the body to hear appeals and the types of decisions that may be appealed against.

495. In drafting new statutory provisions for appeals, care must be taken to avoid the difficulties experienced under the system established by the 1974 Public Service Act. State servants should be excluded from membership of the appeals body. Appeals against decisions involving transfers to rural areas should be provided for in a way which does not affect rural services unduly.

496. The Disciplined Services Commission should comprise a chairperson and two other members appointed in accordance with the procedure outlined in recommendation 468.

497. The Disciplined Services Commission should have constitutional responsibility for appointing, removing and exercising disciplinary control over all offices of the prisons service and all police officers above the rank of senior inspector. It should not be responsible for the office of Commissioner of Police.

498. The Constitution should continue to give the Commissioner of Police the responsibility for appointing, removing and disciplining police officers of, or below the rank of, senior inspector. It should provide that the Commissioner cannot remove or reduce the rank of any officer without the concurrence of the Disciplined Services Commission.

499. The Constitution should provide that in the event of any alteration in the ranks of the police force, the Disciplined Services Commission may by order specify the equivalent rank to senior inspector for the purpose of defining the extent of the respective responsibilities of the Commission and the Commissioner of Police.

500. The Disciplined Services Commission should have the power to delegate any of its powers to any member of the Commission. It may also, to the extent that the Prime Minister directs in writing, delegate any of its powers over gazetted officers to the Commissioner of Police.

501. The Constitution should also provide that, as with the Public Service Commission, the power to delegate should be subject to any Act of Parliament.

502. The Disciplined Services Commission should have a similar power to delegate any of its functions over prison officers to an individual commissioner or to the Commissioner of Prisons. This power should be subject to the same limitations as its power to delegate in regard to the police.

Chapter 15: Accountability

503. The Constitution should contain an Integrity Code containing general, broad standards of conduct for important office-holders.

504. In substance, the Constitution should provide that the President, the Vice-President, all Ministers, all members of Parliament, all constitutional office-holders and such other persons as may be prescribed by Act shall conduct themselves in such a way as not:

(a) to place themselves in positions in which they have or could have a conflict of interest;

(b) to compromise the fair exercise of their public or official functions and duties;

(c) to use their office for private gain;

(d) to allow their integrity to be called into question; or

(e) to endanger or diminish respect for, or confidence in, the integrity of the Government.

505. The Constitution should place a duty on Parliament to provide a more detailed integrity code under an Act .

506. The mechanisms for monitoring, investigating breaches of, and otherwise enforcing, the code must be designed very carefully after a full study of the experience in other countries and should be provided for in the Act.

507. The Constitution should contain a general provision which confers freedom from direction and control on the person or body charged under the Act with investigating or monitoring compliance with the Code. It should also apply other measures which assure independence to other constitutional officeholders.

508. The Act must allow for the Director of Public Prosecutions and the Police to fulfil their respective roles in respect of offences.

509. The provisions of the Act should ensure that important officeholders remain liable to monitoring, investigation and prosecution for offences even after they have left office.

510. The Ombudsman Decree, 1987 should be repealed.

511. The office of Ombudsman should continue to be established by the Constitution.

512. It should continue to provide that the Ombudsman shall not, in the exercise of his or her constitutional functions, be subject to the direction and control of any other person or authority.

513. The Constitution should continue to provide that no proceedings of the Ombudsman in exercise of constitutional functions shall be called in to question in any court of law.

514. The Constitution should state the Ombudsman's functions in clear terms. It should provide that it is a function of the Ombudsman to investigate any decision or recommendation made, or any act done or omitted by any officer or authority (to whom the power to investigate applies), in the exercise of the administrative functions of that officer or authority and affecting any person or body of persons, whether incorporated or not, in his or her or its personal capacity. In substance, it should not allow complaints to be initiated by government bodies which are presently disqualified.

515. The existing requirement that private persons must have suffered injustice as a consequence of an administrative act before their complaint can be investigated should not be retained. The Constitution should allow personal complaints to be investigated if the person or persons are "affected" by an administrative action.

516. It should continue to require that private complaints must be lodged by a person or persons affected, but should allow the Ombudsman a discretion to investigate on the complaint of another if the person or persons affected cannot for any reason act for themselves. Parliament should continue to be authorised by the Constitution to make provision allowing individuals' complaints to be made on their behalf by a member of Parliament.

517. The provisions contained in subsection 135(5), under which the Ombudsman cannot investigate a complaint unless the aggrieved person is (or was at the time of death), resident in Fiji or the complaint relates to action taken in relation to the complainant while he or she was in Fiji or in relation to rights or obligations that accrued or arose in Fiji should be done away with.

518. The Constitution should continue to provide that the Ombudsman may investigate any action taken by an officer or authority in the exercise of administrative functions, if invited to do so by a member of either House of Parliament or on the Ombudsman's own motion. The Constitution should specifically allow investigations to take place on the invitation of a sector standing committee or any other committee of Parliament. It should allow the Ombudsman to report to the person or body at whose invitation an investigation was commenced.

519. The Constitution should continue to require the Ombudsman to find that the action, omission, decision, recommendation or practice investigated was either:

- contrary to law;
- based wholly or partly on a mistake of law or fact;
- unreasonably delayed; or
- otherwise unjust or manifestly unreasonable,
- before being able to state an opinion and make recommendations.

520. When the Ombudsman makes a finding referred to in the previous recommendation, the Constitution should, in respect of any matter investigated, continue to empower him or her to give the relevant principal officer an opinion:

- that the matter should be given further consideration;
- that the omission should be rectified;
- that the decision should be cancelled, reversed or varied;
- that any practice on which the act, omission, decision or recommendation was based should be altered;
- that any law on which the act, omission, decision or recommendation was based should be altered;
- that any law on which the act, omission, decision or recommendation was based should be reconsidered;
- that reasons should have been given for the decision; or that any other steps should be taken.

521. The Ombudsman should continue to be empowered to request the principal officer of the relevant department or authority to notify the Ombudsman within a specific time of the steps proposed to be taken or which have been taken. The Constitution should also empower the Ombudsman to make a report to both Houses of Parliament, if after a reasonable time, no adequate and appropriate remedial action appears to have been taken. Before so doing, the Ombudsman should be required to consider the comments of the relevant department or authority.

522. The requirement that the Ombudsman must send a copy of his or her opinion and recommendations to the Prime Minister and to any other Minister concerned should be retained in the Constitution.

523. Subject to the next recommendation, in substance, the existing offices and authorities which are made expressly subject to the investigating jurisdiction of the Ombudsman should be retained.

524. The Constitution should make statutory bodies subject to the Ombudsman, but should allow Parliament by Act to exclude a statutory body.

525. The Constitution should continue to allow Parliament to prescribe additional bodies and offices which are to be subject to investigation by the Ombudsman. The wording of the provision should be broad enough to provide for companies which exercise government functions but which may not strictly fall within the existing term "authority or officer".

526. The following persons and authorities should be exempt from investigation by the Ombudsman:

- The Bose Levu Vakaturaga;
- The President and his personal staff;
- The President's Council;
- All constitutional commissions, (including the Native Lands Commission) in the exercise of their constitutional functions and such of their statutory functions as Parliament by Act may prescribe;

- All other persons and authorities in the exercise of appointing, disciplinary, removal or pension powers over state offices;
- The Native Fisheries Commission;
- The Director of Public Prosecutions.

527. The Native Land Trust Board, Council of Rotuma and Council of Leaders on Rabi Island should no longer be exempt in respect of the exercise of their administrative functions.

528. The Constitution should continue to give the Ombudsman the absolute discretion to determine whether to initiate, continue or discontinue any investigation. It should also confer the Ombudsman with the discretion to decide whether a complaint has been duly made in accordance with the constitutional requirements.

529. The Constitution should provide that if the person or persons aggrieved has or had a right of appeal, reference or review to a tribunal under statute or a right to take legal proceedings in a court of law, the Ombudsman shall not proceed to investigate their complaint unless satisfied that the person or persons cannot or could not avail themselves of the right or remedy or that a breach of any individual right protected by Chapter 2 of the Constitution may be involved.

530. The Ombudsman's existing discretion to decline to investigate any complaint which he or she considers frivolous or vexatious or trivial, or where he considers that the person aggrieved has insufficient interest in the matter complained of, or where the complaint has been delayed without reasonable cause for more than twelve months should be provided for in an Act.

531. The Constitution should continue to provide that the Ombudsman may not investigate any action which the Prime Minister certifies in writing was taken by a minister acting in his or her own deliberate judgement.

532. The Constitution should continue to give the Ombudsman wide power to require any minister, member or officer of any department or authority or any other person who in the Ombudsman's opinion, is able to do so, to disclose any information or produce any document relevant to any investigation.

533. It should continue to give the Ombudsman the powers of the High Court in relation to the attendance and examination of witnesses and the production of documents.

534. The Constitution should also continue to provide that any law which otherwise prohibits a state servant from disclosing official information does not affect their duty to supply the Ombudsman with any information or document.

535. The Constitution should continue to disallow the state from making, in relation to any document or information required by the Ombudsman, any claim of state privilege which might normally apply in a court of law.

536. The Constitution should authorise Parliament to provide in an Act for the ability of individuals to claim before the Ombudsman any other type of privilege available in a court of law.

537. The Constitution should continue to provide that information and documents relating to the proceedings of the Cabinet or any sub-committee of the Cabinet may be withheld from the Ombudsman following certification by the Secretary to the Cabinet, acting on the advice of the Prime Minister.

538. It should continue to authorise the Attorney-General to give notice to the Ombudsman that it would be contrary to the public interest in relation to defence, external relations or internal security if a specified document or information, or information or documents belonging to a specified class were disclosed. It should provide that in these circumstances those matters cannot be disclosed by the Ombudsman or his or her officers.

539. The Constitution should provide that the Ombudsman has a discretion as to how information is to be obtained and how an investigation is to proceed.

540. It should also provide for persons implicated in a complaint to have a general right to make comments to the Ombudsman on the complaint.

541. The Constitution should no longer provide for the other procedural matters contained in section 136. These should be provided for by Act.

542. The Constitution should continue to require the Ombudsman to make an annual report to the President concerning the discharge of his or her functions, and to require that the report shall be laid before the Bose Lawa and the Bose e Cake.

543. In order to provide necessary flexibility, the Constitution should provide for the existence of at least one office of Ombudsman but expressly allow Parliament to establish other offices of Ombudsman by Act. The Constitution should also provide that, in the event that other offices of Ombudsman are established, Parliament should provide for the designation of one of them to be Chief Ombudsman responsible for the administration of the office and the co-ordination and allocation of the work between the Ombudsmen. The Constitution should also provide that subject to this provision for the Chief Ombudsman, all powers and privileges conferred on the Ombudsman by the Constitution apply equally to each Ombudsman.

544. The President should continue to appoint the Ombudsman. He or she should do so on the recommendation of the Constitutional Offices Commission, with the concurrence of the Prime Minister and the approval of the sector standing committee of the Bose Lawa responsible for matters relating to administrative services.

545. If the office of Ombudsman is vacant or the holder of the office is for any reason unable to perform his or her functions, the Constitution should authorise the President to make an acting appointment on the recommendation of Constitutional Offices Commission and with the concurrence of the Prime Minister, tendered after the Prime Minister has consulted the Leader of the Opposition.

546. The Constitution should provide that only a judge of a superior court may be appointed to act as Ombudsman when the office is vacant.

547. The existing disqualifications for appointment should also be retained.

548. The existing provisions that the Ombudsman shall not perform the functions of any other public office and that the Ombudsman may not, without the approval of the Prime Minister, hold any other office of emolument or engage in any occupation for reward outside the duties of the office of Ombudsman should be retained.

549. The Constitution should provide that the Auditor-General, at least once every financial year, shall inspect and audit, and report to Parliament on:

(a) the public accounts of Fiji;

(b) the control of public money and property of Fiji;

(c) all transactions with or concerning public money or property of Fiji.

It should also require the Auditor-General to ascertain whether all transactions concerning public money or property have been authorised by or under the Constitution and any applicable law, and that all expenditure has been applied to the purpose for which it was authorised.

550. The provision should be drafted in a way which covers branches, all departments, agencies and instrumentalities of the Government. It should continue to allow statutory bodies to be exempted by Act.

551. The Constitution should allow the Auditor-General to have such additional functions and powers as may be prescribed by an Act of Parliament.

552. The Constitution should continue to provide that the Auditor-General shall not be subject to the direction or control of any other person or authority.

553. It should confer on the Auditor-General and on any other person he or she authorises, access to all records, books, vouchers, documents, cash, stamps, securities, stores or other government property.

554. The Constitution should continue to provide that the Auditor-General shall submit every report made by him or her in pursuance of the constitutional functions to the Minister responsible for finance.

555. It should, in addition, require the minister to lay the reports before Parliament within thirty days or, if Parliament is then not in session, at its next meeting.

556. The Constitution should also require the Minister, if so required in any other special report of the Auditor-General, to lay that report before Parliament within the same period.

557. The Auditor-General should be appointed by the President acting on the recommendation of the Constitutional Offices Commission, and with the concurrence of the Minister responsible for finance and the approval of the sector standing committee of the Bose Lawa responsible for public accounts.

558 In the event of a vacancy in the office of Auditor-General or the officeholder not being able to perform the office's functions, acting appointments should be made in the same way as a substantive appointment.

559 The Constitutional Offices Commission should comprise a chairperson and two other members. Membership should be subject to the general disqualifications we recommend for all service commissions in Chapter 14. The chairperson and members should be appointed in accordance with procedures outlined in that Chapter.

560. In addition to responsibility for recommending candidates for appointment as Ombudsman and Auditor-General, and for appointing:

- The Solicitor-General;
- The Director of Public Prosecutions;
- The Secretary-General to Parliament;
- The Supervisor of Elections; and

- The Commissioner of Police,

the Commission should also appoint :

- The Governor of the Reserve Bank of Fiji.

Before appointing the Governor of the Reserve Bank, the Commission should be required to consult the Minister responsible for finance and the Board of the Reserve Bank.

561. The Constitution should contain a provision establishing the position of Governor of the Reserve Bank. The provision should not provide that this office be a public office. The existing qualifications for and tenure of this office should continue to be provided for under the Reserve Bank Act (Cap. 210).

562. The Reserve Bank of Fiji Act should provide that the Deputy Governor should perform the Governor's functions when the position is vacant or if when the Governor is temporarily unable to perform the functions of that office. If an acting appointment is necessary, the Constitutional Offices Commission should be empowered to appoint a member of the Board with the concurrence of the Minister responsible for finance.

563. The Constitutional Offices Commission should not have disciplinary control over the independent constitutional offices.

564. In substance, the Constitution should provide that an officer appointed by or on the recommendation of the Constitutional Offices Commission can only be removed for inability to perform the functions of his or her office (whether arising from infirmity of body or mind or any other cause) or misbehaviour.

565. The existing tribunal procedure for removing independent officeholders should be retained. However, in expressing the ground of misbehaviour, the Constitution should make a link with the integrity code proposed above.

566. The Constitution should provide that for all constitutional officers, the Constitutional Offices Commission should exercise the powers at present vested in the various service commissions and in the President.

567. Before exercising any power in regard to the removal of the holders of any office other than the office of Secretary-General to Parliament or Governor of the Reserve Bank, the Commission should be required by the Constitution to consult the Prime Minister. For the Director of Public Prosecutions and the Solicitor-General, it should also be required to consult the Attorney-General. Before exercising the power to remove the Ombudsman and the Auditor-General, it should consult the Leader of the Opposition.

568. Before exercising any power to remove the Secretary-General to Parliament from office, the Constitutional Offices Commission should first consult the Speaker and the President of the Bose e Cake.

569. Prior to exercising its powers to remove the Governor of the Reserve Bank, the Commission should be required by the Constitution to consult the Minister responsible for finance and the Board of the Reserve Bank.

570. The Constitutional Offices Commission should not be permitted to delegate any of its powers.

571. The Constitution should provide that the Ombudsman, the Director of Public Prosecutions, the Solicitor-General, the Auditor-General, the Secretary-General to Parliament, the Supervisor of Elections and the Commissioner of Police shall be paid such salaries and allowances as may be prescribed by Parliament.

572. It should provide that the salary and allowances and the terms of office of all constitutional officers within the area of responsibility of the Constitutional Offices Commission may not be altered to their disadvantage after appointment.

573. All constitutional officeholders within the area of responsibility of the Constitutional Offices Commission should be appointed for a fixed term of five years with eligibility for re-appointment.

574. The Constitution should allow the Constitutional Offices Commission, acting after consultation with the Prime Minister and the Minister responsible for finance, to permit the Auditor-General to continue in office for a period not exceeding six months after the expiry of his or her contract.

575. The Constitution should no longer stipulate any retiring age for constitutional officers.

580. The Constitution should continue to give all constitutional commissions and special constitutional tribunals freedom from the direction and control of any other person or authority except as otherwise provided by the Constitution.

581. The Constitution should provide that the salaries and allowances of all commissioners should be prescribed by Act of Parliament. It should also provide that these cannot be altered to a commissioner's disadvantage after appointment.

582. The Constitution should continue to provide that a member of a constitutional commission can only be removed for "inability to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause) or misbehaviour".

583. The tribunal procedure presently required for the removal of members of commissions should be retained, subject to changes we propose in the following recommendations.

584. The Constitution should require that the chairperson and at least one other member of a tribunal appointed to advise on the removal of a commissioner should hold or have held high judicial office.

585. The Constitution should provide that in any case involving the removal of any member of a constitutional commission, the President should act in accordance with the advice of the Prime Minister, tendered after the Prime Minister has consulted the Leader of the Opposition.

586. The Official Secrets Act should be replaced with an Official Information Act. The proposed Act should provide that official information should be made available to the public unless there is a good reason to withhold it.

587. The Act should set out clear grounds upon which information may be withheld. These grounds may include:

- national security;
- public order;
- economic stability;

- commercial transactions;
- legal privilege;
- individual privacy;
- effective conduct of government business.

588. It should allow for progressive application of the principle to different categories of information held by the Government.

589. With necessary exceptions, the Act should give individuals a legal right to be told and if necessary, have corrected, any personal data held by the Government or its agencies.

590. The Act should vest some person or authority with the function of hearing and resolving complaints from the public about the withholding of official information. On the passage of the Act, a unit or department of the government should be charged with reviewing the practices of Government departments and agencies to ensure that official information becomes available to the public in accordance with the requirements of the proposed Act.

591. Necessary changes must also be made to the other existing statutes and rules. The Public Records Act (Cap. 108) should be immediately reviewed and amended to bring it into line with the new principle of official information. The Act should provide that all official records should be made available to the public after 15 years unless there is a compelling reason to withhold them. It should also provide a system for the timely de-classification of closed records, once the reason for withholding them no longer exists.

Chapter 16: Revenue and Expenditure

592. The public finance chapter of the Constitution should be re-written to provide for public finance in a simple, non-technical way. The Constitution should state the fundamental principles which should govern public finance in Fiji. It should also provide only those basic procedural and accounting rules which are necessary to allocate clearly among the relevant state institutions, the responsibility for estimating and accounting for revenue and expenditure, and to ensure the disciplined and accountable use of public funds

593. The drafting of new constitutional provisions governing public finance should take place in close consultation with officials of the Ministry of Finance and other officials involved in public sector management.

594. The Constitution should provide that the raising of revenue by the Government, including the imposition of taxation and the raising of loans, and the spending of money by the Government, shall be under the authority and control of Parliament and shall be regulated by an Act.

595. The Constitution should provide that the issue by the Government of any guarantee of the financial liability of any person shall be under the authority and control of Parliament and shall be regulated by an Act.

596. The Constitution should contain a provision requiring the Government to present a national budget to the Bose Lawa and the Bose e Cake before the beginning of each financial year.

597. The Constitution should require the budget to contain estimates of all government revenues and expenses for the year. It should require it to contain any other information that may be required by or under an Act of Parliament. The language of the provision should be flexible enough to permit the introduction of the proposed accrual accounting reforms as well as any other subsequent reforms, in accordance with recognised accounting practices in the public sector.

598. The Constitution should also require annual appropriation bills to be introduced in the Bose Lawa.

599. The Constitution should require appropriation bills, as a minimum, to contain the Government's estimated expenditure for the following year.

600. The Constitution should allow Acts of Parliament to prescribe the level of detail at which estimates are to be specified and to prescribe other matters, including estimates of the year's accrued expenses, which should be contained in appropriation bills.

601. The Constitution should continue to provide for supplementary appropriations in a general way which allows Parliament to approve both unanticipated and unauthorised spending.

602. The Constitution should state that no money of or under the control of the Government shall be spent except as provided by the Constitution or by or under an Act.

603. The Constitution should also state in general terms that all money of, or under the control of, Government shall be dealt with and accounted for in accordance with the law and generally accepted accounting principles in the public sector.

604. The Constitution should continue to provide for a Consolidated Fund into which, subject to any Act of Parliament, all public money shall be paid. It should also provide that no money forming part of the Fund may be spent except

- to meet expenses which are charged on the Fund by the Constitution or by or under an Act of Parliament
- where spending has been authorised by an Appropriation Act or Supplementary Appropriation Act, or
- in advance of appropriation as authorised by the Constitution.

605. The Constitution should provide that Acts of Parliament may make provision for all other public funds not forming part of the Consolidated Fund. It should require these to be administered and dealt with in accordance with Acts of Parliament.

606. The Constitution should continue to charge the Consolidated Fund with the salaries of the Judiciary and all independent constitutional office holders and commissioners.

607. All debt charges for which Fiji is liable, as well as all civil service and judicial pension payments due from the Government, should also remain charged on the Fund.

608. The Constitution should provide that any proposals to raise or spend public money may be introduced only in the Bose Lawa.

609. The Constitution should continue to provide that any proposal

- imposing or increasing taxes
- increasing or imposing charges on public revenue

- authorising or increasing any spending, or
- adversely affecting any debt due to the Government cannot be proceeded upon in the Bose Lawa without the recommendation of a Minister acting on behalf of the Cabinet.

610. The Constitution should allow Members of the Bose Lawa to propose reductions in taxation, charges and appropriations.

611. The provisions should be drafted in such a way that the work of the proposed sector standing committees of the Bose Lawa will not be hampered.

612. The Constitution should continue to provide that the Bose e Cake should have no power to amend appropriation bills and other money bills.

613. The period for which the Bose e Cake should have the right to consider or delay any appropriation bill should be seven days beginning on the day the bill was sent to that House.

614. For other money bills, the existing period of twenty-one days should be retained.

615. After the relevant period has elapsed, the Government should have the right to present an appropriation or other money bill for the President's assent, unless the Bose Lawa has, in the meantime, resolved to reconsider the bill.

616. The Constitution should no longer provide for any supplementary appropriation to be authorised by a resolution of the Bose Lawa alone. Supplementary spending should be authorised by Supplementary Appropriation Acts to be introduced into both Bose Lawa and the Bose e Cake.

617. The Bose e Cake should have the right to consider or delay a supplementary appropriation bill for seven days.

618. Subject to an Act, the Minister responsible for finance should continue to have power, to authorise spending, if the Appropriation Act for any financial year has not come into force by the beginning of the year. However, the provision should limit the total amount which he or she can spend to one-third of the total authorised expenditure of the Government for the previous financial year. Under this section the authority to spend should lapse when the Appropriation Act comes into force.

619. The Constitution should no longer make express provision for a Contingencies Fund.

Chapter 17: Group Rights

620. Instead of being constituted by the Native Lands Act, the Native Lands Commission should be constituted by the Constitution, with all the protections conferred on other constitutional commissions.

621. The Commission should consist of three members, any two of whom should be permitted to hear and determine a particular matter. They should be appointed by the President on the recommendation of the Bose Levu Vakaturaga. The current system of using assessors should be retained. There should be no provision for ex officio members, and the Minister responsible for Fijian Affairs should no longer have the power to designate a single Commissioner or some other person to hear a dispute.

622. The Constitution should provide that, in the exercise of its powers, the Commission shall not be subject to the direction or control of any other person or authority, except by way of appeal or judicial review.

623. The rules about disqualification for membership of the Commission, or for appointment to public office, or eligibility to be a candidate for election to Parliament within three years of ceasing to hold office as a member, should be those applying to other constitutional commissions.

624. The Secretary of the Commission should be a public officer.

625. The Commission's functions should be those of determining the ownership of native land and the boundaries of parcels, as well as questions of headship. It should not have the power to give opinions or decisions on matters relating to custom, except so far as is necessary to determine those matters.

626. The Constitution should provide that provision for appeals against decisions of the Native Lands Commission on matters concerning either the title to land and its boundaries or on questions of headship may be made by Act. The Native Lands Act should be amended to constitute an Appeals Tribunal for this purpose along the lines of that provided for in section 7. The Appeals Tribunal should continue to consist of three members, but the opportunity should be taken to review the method of appointing them.

627. There should be no right of appeal to the courts on the *merits* of decisions of the Appeals Tribunal. However, the courts should have the power of judicial review in respect of the decisions both of the Native Lands Commission and of the Appeals Tribunal.

628. The Native Lands Act should be consequentially amended so far as is necessary to take account of the constitution of the Native Lands Commission by the Constitution and its status as a constitutional commission.

629. All aspects of the operation in practice of the Native Land Trust Act, "for the benefit of the Fijian owners", as well as the country as a whole, should be kept under constant review within the framework proposed below in relation to all matters affecting agricultural land.

630. The section of the Bill of Rights affirming the right to equality under the law and freedom from discrimination on prohibited grounds, including those of race and ethnic origin, should permit the limitation of that right, by or under a law, for the purpose of imposing restrictions on the alienation of land held in accordance with Fijian custom, or permitting the temporary alienation of such land without the consent of the owners.

631. There should be no comprehensive review of what land is native land or of existing titles or boundaries.

632. The Rotuma Lands Act and the Banaban Lands Act should be protected against the consequences of inconsistency with the Bill of Rights in the same way as the Native Land Trust Act.

633. The following Acts should continue to be protected against amendment by ordinary Act of Parliament, by means of constitutional entrenchment:

the Fijian Affairs Act;

the Fijian Development Fund Act;

the Native Lands Act;

the Native Land Trust Act;

the Rotuma Act;

the Rotuma Lands Act;

the Banaban Lands Act;

the Banaban Settlement Act; and

the Agricultural Landlord and Tenant Act.

634. The Bose Levu Vakaturaga should have a power to veto any amendment of the entrenched legislation protecting Fijian rights and interests, or the rights and interests of Rotumans or the Banaban community.

635. There should be a steady flow of clear, accurate, well-coordinated, up-to-date and reasonably detailed public information about what Government and the bodies working under its direction are doing, and planning to do, in the sensitive areas concerning the renewal, termination or grant of new ALTA leases of native and State land.

636. Steps should be taken to reach an accord among all political parties and communities in the Fiji Islands on policies relating to the use of land and the renewal or grant of leases for agricultural purposes.

637. The provisions of the Fisheries Act which recognise and protect Fijian customary fishing rights should continue to be protected against amendment by ordinary Act of Parliament under constitutional provisions which give a veto power to the Bose Levu Vakaturaga in respect of Bills affecting Fijian land or customary rights.

638. The Constitution should not permit the state to grant any right to extract minerals from the subsoil unless, as a condition of that right,

(a) approved measures are taken to prevent environmental damage, and

(b) consideration has been given to establishing a fund for the purpose of meeting the cost of further measures necessary to prevent, repair or compensate for any environmental damage that may nevertheless occur.

639. The owners of land or of a registered customary fishing right should be entitled to an equitable share, fixed by law, of royalties received by the state in respect of minerals extracted from the subsoil of their land or the seabed in the area covered by their customary fishing rights. In determining what is an equitable share, account should be taken of

(a) other benefits which the owners are likely to receive as a result of the exploitation;

(b) the risks of environmental damage to the land or fishing rights of the owners;

(c) the risks of environmental damage to the land or fishing rights of persons other than the owners;

(d) any legal obligation of the state to contribute to a fund to meet the cost of preventing, repairing or compensating for any environmental damage;

(e) the cost of administering the exploitation right; and

(f) the need for the benefits of the exploitation to contribute to general revenue.

640. The Fijian Affairs Act should be consequentially amended to reflect the recommendation for the constitution of the Bose Levu Vakaturaga in the Constitution instead of in the Act.

641. The Constitution should provide that the right to equality under the law and freedom from discrimination on a prohibited ground may be limited by laws providing for the governance of Fijians, the Rotuman community or the Banaban community, and of other persons living as members of a Fijian community, the Rotuman community or the Banaban community, if those laws

(a) do not discriminate against any person on any prohibited ground other than race or ethnic origin, and

(b) do not deny to any person any other human right or fundamental freedom recognised by the Constitution or by law.

Section 16(6) of the 1990 Constitution, validating all regulations made under the Fijian Affairs Act, should be repealed.

642. Consideration should be given to the question whether the governance of Fijian villages, Rotuma and Rabi Island should, in the longer term, continue to be based on a body of law applying to persons identified by their race or ethnic origin, or should instead be based on the concept of local government legislation applying to all persons living within a particular area. That possibility should be borne in mind in making decisions in the meantime about the exercise of the existing powers to make laws applying to Fijians, Rotumans and the Banaban community.

643. The substance of section 100(1) and (2) of the 1990 Constitution, allowing for the application of custom by Act, should be retained, but section 100(3), providing that, until such time as an Act of Parliament otherwise provides, Fijian customary law shall have effect as part of the laws of Fiji, should be repealed.

644. The customary law relating to

(a) the holding, use or transmission of land or fishing rights, or

(b) the distribution of the produce or proceeds of land, fishing rights or minerals, or

(c) the entitlement of any person to a chiefly rank or title

should not be open to challenge, even if it is discriminatory on a prohibited ground. The customary law applying to other matters should be protected against challenge by reason of discrimination on the ground of race or ethnic origin, as long as it does not deny to any person to whom it applies any other fundamental right or freedom, including the right to freedom from discrimination on any other prohibited ground.

645. Section 16(3)(d), protecting all customary law against possible invalidity on the ground that it is inconsistent with the right to freedom from discrimination, should be repealed.

646. Strenuous efforts should be made to improve the way in which the Magistrate's Courts deliver justice in the outer islands and other remote parts of Fiji. Courts should be held more frequently and in a wider range of places.

647. Section 51 of the Magistrates' Courts Act should be amended to provide that hearings may be held in languages other than English, but, to facilitate appeals, the record should continue to be kept in English. Magistrates serving predominantly Fijian areas should be required to be fluent speakers of the Fijian language.

648. Section 122 of the 1990 Constitution, establishing Fijian courts, should be replaced by a provision that the settlement of disputes in accordance with traditional Fijian processes of dispute settlement should be recognised, under conditions prescribed by Act. Such an Act should provide for the following matters:

(a) Settlements should be a bar only to prosecution for reconcilable offences coming within section 163 of the Criminal Procedure Code, with the exception of domestic violence, as recommended by the *Beattie Commission*.

(b) There should be provision for setting aside settlements on the grounds of public policy.

(c) Fijian conciliators should be appointed in all the larger villages, to facilitate agreements to use the traditional processes and the settlement itself. They should be persons of standing in the community, should receive training in their duties, should be required to make a record both of the facts and the terms of the settlement, and should be paid a suitable honorarium

(d) Initially, the system should apply only to disputes involving Fijians, but, if it is successful, persons who are not Fijians should be permitted to use it. The scheme should be set up by Act of Parliament, not by regulations under the Fijian Affairs Act.

(e) The settlement reached should not be directly enforceable in the courts, but a party who claims that it has not been honoured should be able to pursue in the courts, or by complaint to the police, the remedy that would have been available if there had been no traditional settlement. It should be a defence that the terms of the settlement were fulfilled, and that the court action is therefore barred. Even if the action is not barred, reparation already made should be taken into account in the sentence or award of the court.

649. If the parties do not agree to use the traditional method of dispute settlement, the matter should, if necessary, be the subject of criminal or civil proceedings in the ordinary courts.

650. As suggested by the *Beattie Commission*, the people of Rotuma should have the same access to the regular court system as other people in Fiji, specially in more serious cases including the trial of indictable offences. They should be consulted about such a change.

651. In addition, ways should be explored of enabling a court to be held in Rotuma at any time, to deal with minor matters, without waiting for a Magistrate to come from Fiji. The people of Rotuma should also be invited to consider whether there is a traditional system of dispute settlement which could be given recognition, along the lines of the recommended system for recognising traditional Fijian processes for settling disputes.

652. The existing arrangements for a Rabi Island Court and a Banaban Land Court should not be changed.

653. There should be no change in Rotuma's status as an integral part of the Republic of the Fiji Islands as long as that coincides with the freely expressed wish of a majority of the Rotuman people.

654. Rotuma should be given greater autonomy in matters of local concern. The law-making power under the Rotuma Act should be enlarged, so that it is not necessary for all Rotuma Regulations to be confirmed by resolution of Parliament before they become law.

655. In settling the level of funding for Rotuma, the recommended constitutional principle that the interests of all communities must be taken into account and any differences settled by negotiations in good faith should be applied.

656. Consideration should be given to some grant funding on a basis which gives the Rotuma Council the freedom to use the funds in accordance with its own priorities.

Chapter 18: Local Government

657. The Republic of the Fiji Islands should continue to be a unitary state.

658. The Constitution should not expressly recognise local government or guarantee local government autonomy.

659. No seats on municipal councils should be reserved for any community or group.

660. The Constitution should not provide for advisory councils.

661. The Government should commission a broad and comprehensive review of all local government arrangements in Fiji to be carried out by an independent and broadly representative body. The review should, in light of modern needs, re-examine the organisation, functions and powers of all the existing local government bodies provided by law. The Terms of Reference should include a review of the Local Government Act (Cap. 125). Ministerial supervisory powers over local government and electoral arrangements should also be re-examined. It should also include a review of the operation of those bodies which exist without a statutory basis. The reviewing body, among other things, should be required to inquire into appropriate democratic systems of local government for rural areas.

Chapter 19: Emergency Powers

662. The Constitution should provide clear guidance about the circumstances in which emergency powers can derogate from the Bill of Rights, and the extent to which derogations are permissible. It should strengthen the present provisions for supervision of the exercise of emergency powers by the Bose Lawa if they involve such derogations.

663. Section 162 of the 1990 Constitution, giving Parliament the power to pass certain Acts, even if they are inconsistent with the Bill of Rights, should be repealed.

664. Although the Constitution should not expressly exclude the possible sources of emergency powers under the common law, the powers needed in the Fiji Islands to deal with emergencies should, in principle, be conferred either by Parliament or by the Constitution.

665. Section 163, giving the President the power to issue a Proclamation of Emergency, if "satisfied that a grave emergency exists whereby the security or economic life of Fiji is threatened", and conferring unlimited powers on the executive and Parliament, should be repealed.

666. The constitutional provisions dealing with emergency powers should be based on the expectation that Parliament, in the exercise of its ordinary legislative power, will, in anticipation of foreseeable emergencies, confer on the President the power to proclaim a state of emergency in the Fiji Islands or any part of them, in such circumstances as the Act prescribes.

667. Parliament should be encouraged to enact "sector" emergency legislation, enabling the emergency powers granted to the executive to be specially tailored to the particular type of emergency and incorporating some provision for monitoring by the Bose Lawa, but there should be no constitutional requirement to this effect.

668. A power conferred by Act to make emergency regulations should remain in abeyance until triggered by the declaration of an emergency.

669. The Constitution should not confer any power to derogate in time of emergency from rights under the Bill of Rights which can be limited on broad grounds.

670. In permitting derogations from other constitutionally protected rights in time of emergency, the Constitution should comply with the international standards.

671. The Constitution should not permit any derogations from the Bill of Rights unless all the following conditions are satisfied:

(a) The Cabinet has reasonable grounds for believing that, by reason of the actual or imminent situation within the Fiji Islands described in a proclamation of a state of emergency, the life of the Republic of the Fiji Islands is threatened, and that the situation is of such proportions or danger that it cannot be dealt with effectively by the exercise of powers conferred by law, in conformity with the Bill of Rights.

(b) Parliament has, by Act, conferred on the President, acting on the advice of the Cabinet, the power to proclaim a state of emergency in the circumstances referred to in paragraph (a).

(c) The President has issued such a proclamation.

(d) Any emergency powers derogating from the Bill of Rights have been conferred by Act, or by the executive in the exercise of a power to make emergency regulations conferred by Act.

(e) Provision has been made for the exercise of the supervision of the Bose Lawa in the following manner:

- The proclamation of the state of emergency remains in force only for an initial period of three months or such shorter time as it may specify.
- Immediate notice of the proclamation of the state of emergency must be given to the public and to the Bose Lawa, or, if the House is not then sitting, it must be summoned to sit as soon as practicable and be given notice of the proclamation as soon as it sits.
- The state of emergency terminates if not confirmed by resolution of the Bose Lawa within five sitting days from the date on which notice of it is given to the House.
- The state of emergency may be continued in force by proclamation for further periods of not longer than six months if the continuation is confirmed by the Bose Lawa. (The number of renewals is not limited.)
- The Bose Lawa may revoke the state of emergency at any time. A motion that a state of emergency be revoked takes effect without a

vote if parliamentary time is not made available for its consideration within three days of the date on which notices of motion are given by at least 18 members of the Bose Lawa.

- Emergency regulations cease to be in force as soon as the state of emergency terminates.
- All emergency regulations must be laid before the Bose Lawa within two days of being made, if the Bose Lawa is then sitting, or, if it is not, on the first day on which it next sits. The House may amend or revoke them at any time.
- A motion that emergency regulations be amended or revoked takes effect without a vote if parliamentary time is not made available for its consideration within three sitting days of the date on which notices of motion are given by at least 18 members of the Bose Lawa.

672. The Constitution should include procedures for bringing forward a session or a meeting of Parliament or a sitting of the Bose Lawa, if the President has proclaimed a state of emergency and it is desired to exercise powers derogating from the Bill of Rights. The substance of section 80(5) providing for the summoning, in such circumstances, of the members of the former House, after a dissolution and before the next following general election, should be retained.

673. The Constitution should permit the following derogations from the Bill of Rights during a state of emergency proclaimed in compliance with the constitutional requirements (a "state of national emergency"):

(a) It should confer an express power to derogate from the right to personal liberty and the right to freedom from forced labour for the purpose of taking, during a state of national emergency, such measures as are authorised by law and are reasonably justifiable for the purpose of dealing with the situation described in the proclamation.

(b) It should provide that a person detained under a derogation from the right to personal liberty should continue to have the substantive rights provided by section 17(1) and (2), requiring the review of the justification for the detention by a tribunal with recommendatory powers, unless an Act provides that the recommendations are binding. In addition, the detained person should have the procedural rights referred to in Recommendation 95 (d), (e), (g) and (j), from which no derogations should be permitted. (Those recommendations deal with the right of every detained person to legal aid, to have a family member or friend notified about the fact of detention, to habeas corpus, and to be treated with humanity and respect for their inherent dignity.)

(c) It should give an express power to derogate from the right to freedom of movement for the purpose of imposing , during a state of national emergency, such restrictions on any person's freedom of movement or residence within the Fiji Islands, or on any person's right to leave the Fiji Islands, as are authorised by law and are reasonably justifiable for the purpose of dealing with the situation described in the proclamation. A person whose movements are restricted under a derogation from the right to freedom of movement should have the same substantive and procedural rights as a person who has been detained during a state of national emergency.

674. The Constitution should provide that no other derogations from the Bill of Rights are permitted in any circumstances.

675. Section 9(2), which establishes a special regime to protect the interests of the owner or other affected person if the state compulsorily takes possession of property during a period of public emergency, or other emergency or calamity, should not be regarded as a "derogation" from the Bill of Rights. Its substance should be retained as a permissible limitation of the right not to be deprived of property, in situations including, but not limited to, a state of national emergency.

676. Section 16(3)(g), providing that the right to freedom from discrimination may be limited by a law authorising the taking, during a period of public emergency, of measures that are reasonably justifiable for the purpose of dealing with the situation that exists in Fiji during that period, should be repealed. If, during a state of national emergency, there is a need for measures directed against persons or groups of a particular race, ethnic origin or place of origin, those measures should be shown to be reasonably justifiable in a democratic society, having regard to their nature and to special circumstances pertaining to the persons or groups concerned.

677. The Constitution should provide that no law may authorise the exercise of an emergency power involving a derogation from the Bill of Rights if that exercise would be inconsistent with the obligations of the Republic of the Fiji Islands under international law.

Chapter 20: Constitutional Amendments

678. The Constitution should continue to provide that it is the supreme law of Fiji and that if any other law is inconsistent with it, to the extent of the inconsistency, that law shall be void.

679. In principle, Parliament should be empowered to alter the Constitution in accordance with special procedures which should be contained in the Constitution.

680. The substance of section 77(8) which defines an alteration to the Constitution should be retained.

681. The Constitution should require that any bill to alter the Constitution should state that it is a bill for that purpose.

682. Any bill to alter the Constitution should be required to be passed by both the Bose Lawa and the Bose e Cake.

683. The Constitution should require that no bill to alter the Constitution shall be passed by the Bose Lawa unless it has been read and voted on at least three times in that House. It should provide that such a bill must be supported by the votes of not less than two-thirds of all of the members of the Bose Lawa on the final vote as well as on the vote immediately prior to the final vote. It should require both these votes to be preceded by a full opportunity for debate in the Bose Lawa.

684. The Constitution should provide that the final vote and the vote immediately preceding it must take place during different meetings of the Bose Lawa and must be separated in time by at least two months.

685. It should also require the bill to be referred to the relevant sector standing committee of the Bose Lawa at some time before the mandatory debate preceding the final vote. It should require that the third and final vote should not take place until the committee has reported back to the House.

686. In order to allow for expedited passage of a widely-supported urgent amendment to the Constitution, the Constitution should allow the Bose Lawa to waive the requirements that the last two votes be held in different meetings and be separated by at least sixty days and that the bill be referred to a sector standing committee. It should provide that these requirements may be waived if the Prime Minister certifies that the amendment is "so urgent and important" that the requirements should not be complied with and if the waiver is supported by a resolution passed by the votes of at least three-quarters of the all members of the Bose Lawa. It should also provide that a bill to alter the Constitution for which the requirements were waived, shall not be passed by the Bose Lawa unless it is again supported at the final vote by the votes of at least three-quarters of all of the members of the Bose Lawa.

687. The Constitution should require that a bill to alter the Constitution shall not be passed by the Bose e Cake unless it is supported at the final voting thereon by the votes of two-thirds of all of the members of that House. No additional constitutional requirements should apply in the Bose e Cake.

688. The Constitution should give the Bose Levu Vakaturaga a veto power over any bill to alter:

- the section which provides for the special entrenched legislation;
- the sections establishing the Bose Levu Vakaturaga and setting out its composition and constitutional functions;
- the section giving landowners and owners of customary fishing rights a right to a portion of the royalties from mineral extraction;
- the provisions which gives it a veto power over alterations to the foregoing sections.

689. If any bill to alter any of these provisions of the Constitution is passed with the required majority in the Bose Lawa and the Bose e Cake, the Constitution should require that before the bill is produced to the President for assent, it should first be referred to the Bose Levu Vakaturaga. The Constitution should require that the President shall not assent to any such bill unless it is approved by consensus of the Bose Levu Vakaturaga or failing that by the support at a vote of two-thirds of all the members of that body. It should require the Chairperson of the Bose Levu Vakaturaga to certify to the President that the Bose Levu Vakaturaga has approved the bill in accordance with the constitutional requirements and provide that the President may not assent in the absence of that certificate.

690. If the provisions of the 1990 Constitution are replaced by other provisions which are broadly acceptable to all the people of Fiji, the existing mandatory requirement for full reviews of the Constitution at least once in each ten years, should not be retained. Instead the Constitution should place the duty on Parliament to consider, every ten years, whether a review of the Constitution or any part of the Constitution is necessary or desirable.

691. The Constitution should continue to require that any bill to alter any provision of:

- the Fijian Affairs Act (Cap. 120);
- the Fijian Development Fund Act (Cap. 121);
- the Native Lands Act (Cap. 133);
- the Native Land Trust Act (Cap. 134);
- the Rotuma Act (Cap. 122);
- the Rotuma Lands Act (Cap. 138);
- the Banaban Land Act (Cap. 124); and
- the Banaban Settlement Act (Cap. 123),

may be passed by a majority of the votes of all of the members of each House.

692 The substance of the existing definition of an alteration should be retained.

693. The Constitution should contain a requirement that a bill to alter any of the entrenched Acts must contain a statement that it is a bill to alter that Act.

694. If any bill to alter one of the specified Acts is passed by both Houses, the Constitution should require that before it is presented to the President for assent, it should first be referred to the Bose Levu Vakaturaga for its approval. That approval should be expressed either through consensus or through a majority of two-thirds of the votes of all of the members of the Bose Levu Vakaturaga. The Constitution should provide that the President shall not assent to any such bill unless the Chairperson of the Bose Levu Vakaturaga has certified that the Bose Levu Vakaturaga has approved the amendment.

695. We propose that the general part of section 78(1) which requires any bill otherwise affecting Fijian land, customs and customary practices should be replaced. The new provisions should empower the Attorney-General to certify that a bill is one affecting Fijian land, custom and customary rights otherwise than by alteration of one of the entrenched Acts. The Constitution should provide that if the Attorney-General so certifies, that bill shall, after it is passed by the Bose Lawa and the Bose e Cake be referred to the Bose Levu Vakaturaga for its consideration. The procedures and rules which we propose for alterations to the entrenched Acts will then apply in the Bose Levu Vakaturaga.

696. The Constitution should make the Attorney-General's certificate conclusive. It should require that bills which affect Fijian land, customs or customary rights but which are not alterations to one of the entrenched Acts, be referred to the Bose Levu Vakaturaga only in cases where the Attorney-General has so certified. The Constitution should also not allow any Act, which is not an alteration to an entrenched Act, to be challenged on the basis that it should have been referred to the Bose Levu Vakaturaga.

697. We recommend that any alteration to the Agricultural Landlord and Tenant Act should continue to require the support of at least two-thirds of all of the members of the Bose Lawa and the Bose e Cake. The Constitution should also require a bill altering this Act, to be referred to the Bose Levu Vakaturaga in the same way as a bill to amend any of the other entrenched Acts. It should also require certificates to be provided by the Speaker, the President of the Senate and by the Chairperson of the Bose Levu Vakaturaga that the constitutional requirements have been complied with, before the President may assent to such a bill.

APPENDIX B

COMMISSION TO REVIEW THE CONSTITUTION

COMMISSION

BY His Excellency Ratu Sir Kamisese Kapaiwai Tuimacilai Mara, Knight Grand Cross of the Most Distinguished Order of Saint Michael and Saint George, Knight Commander of the Most Excellent Order of the British Empire, Knight of the Most Venerable Order of Saint John of Jerusalem, Privy Councillor, President and Commander-in-Chief of the Sovereign Democratic Republic of Fiji.

Whereas pursuant to sections 77 and 161 of the Constitution of the Sovereign Democratic Republic of Fiji 1990 a review of the said Constitution is required to be carried out within seven years from the promulgation of the said Constitution.

And whereas the House of Representatives by a Resolution unanimously adopted on 22 September 1993 called for the establishment of a Commission to review the said Constitution.

And whereas a similar Resolution was also unanimously adopted by the Senate on 7 October 1993.

And whereas I am of the opinion that such a review of the said Constitution is essential for the good Government and welfare of the people of Fiji.

Now therefore in the exercise of the powers conferred upon me by sections 77 and 98 of the Constitution of the Sovereign Democratic Republic of Fiji and acting in accordance with section 161 of the same.

I do issue this Commission of Review under my hand and the Public Seal of Fiji and I appoint:

The Right Reverend SIR PAUL REEVES, GCMG, GCVO, QSO, KSU

to be the Chairman and I further appoint:

Tomasi Rayalu Vakatora	Esquire
Brij Vilash Lal (f/n Somai Dass)	Doctor of Philosophy

to be members of the said Commission.

Terms of Reference:

The Commission shall review the Constitution promoting racial harmony and national unity and the economic and social advancement of all communities and bearing in mind internationally recognised principles and standards of individual and group rights. Towards these ends, the Commission shall:

(1) Take into account that the Constitution shall guarantee full protection and promotion of the rights, interests and concerns of the indigenous Fijian and Rotuman people.

(2) Scrutinise and consider the extent to which the Constitution of Fiji meets the present and future constitutional needs of the people of Fiji, having full regard for the rights, interests and concerns of all ethnic groups of people in Fiji.

(3) Facilitate the widest possible debate throughout Fiji on the terms of the Constitution of Fiji and to inquire into and ascertain the variety of views and opinions that may exist in Fiji as to how the provisions of the Fiji Constitution can be improved upon in the context of Fiji's needs as a multi-ethnic and multi-cultural society.

(4) Report fully on all the above matters and, in particular, to recommend constitutional arrangements likely to achieve the objectives of the Constitutional Review as set out above.

And in order to better enable the Commission to carry these presents into effect the Commission is hereby authorised and empowered to make and conduct any enquiry or investigations under these presents in such manner and at such time and place as it thinks expedient with power to adjourn from time to time and place to place as it thinks fit and so that these presents shall continue in force and any such inquiry may at any time and place be resumed although not regularly adjourned from time to time or from place to place.

And the Commission is hereby strictly charged and directed that it shall not at any time publicly or otherwise disclose save to His Excellency the President in pursuance of these presents or by His Excellency's directions the contents of any report so made or to be made by the Commission or any evidence or information obtained by the Commission in the exercise of the powers hereby conferred upon the Commission except such evidence or information as is received in the course of a sitting open to the public.

And it is hereby declared that the powers conferred shall be exercisable notwithstanding the absence at any time of any one of the three persons hereby appointed so long as the Chairman and at least one other member are present and agree in the exercise of the powers.

And I do further ordain that you have the liberty to report any proceedings and findings under this Commission from time to time if the Commission judges it expedient to do so.

And using all diligence you are required to report to His Excellency the President in writing under your hands not later than 30th day of June 1996 your findings and opinions on the matters aforesaid together with such recommendations as you may think fit to make in respect thereof.

And I direct that the report of the Commission be referred by Cabinet to Parliament to be tabled in accordance with section 77(6) of the Constitution.

I hereby further direct that the provisions of the Commission of Inquiry Act Chapter 47 including the powers to summon and subpoena witnesses shall apply to the proceedings of the Commission where appropriate.

In witness whereof I have caused this Commission to be issued and the Seal of the Sovereign Democratic Republic of Fiji to be affixed at Suva this 15th day of March 1995.

K. K. T. MARA
President and Commander-in-Chief

APPENDIX B - *(continued)*

COMMISSION TO REVIEW THE CONSTITUTION

COMMISSION

BY His Excellency Ratu Sir Kamisese Kapaiwai Tuimacilai Mara, Knight Grand Cross of the Most Distinguished Order of Saint Michael and Saint George, Knight Commander of the Most Excellent Order of the British Empire, Knight of the Most Venerable Order of Saint John of Jerusalem, Privy Councillor, President and Commander-in-Chief of the Sovereign Democratic Republic of Fiji.

Whereas pursuant to sections 77 and 161 of the Constitution of the Sovereign Democratic Republic of Fiji 1990 a review of the said Constitution is required to be carried out within seven years from the promulgation of the said Constitution.

And whereas by warrant dated 15 March 1995 I had appointed a Commission of Review consisting of The Right Reverend Sir Paul Reeves as Chairman, and Tomasi Rayalu Vakatora and Brij Vilash Lal as members of the same.

And whereas in order to better enable the Commission to carry out its work in accordance with its Terms of Reference specified in the said Warrant, it is necessary to appoint Counsel and a Secretary to the said Commission.

Now therefore in the exercise of the powers conferred upon me under section 98 of the Constitution of the Sovereign Democratic Republic of Fiji and acting in accordance with the provisions of the Commissions of Inquiry Act, I appoint:

ALISON QUENTIN-BAXTER
and
JON LESLIE APTED

to be Counsel.

And I further appoint:

WALTER GIBSON RIGAMOTO

to be Secretary, to the Commission.

In witness whereof I have caused this Commission to be issued and the Seal of the Sovereign Democratic Republic of Fiji to be affixed at Suva this 19th day of May, 1995.

K.K.T. MARA
President and Commander-in-Chief

COMMISSION TO REVIEW THE CONSTITUTION

EXTENSION OF COMMISSION

By His Excellency Ratu Sir Kamisese Kapaiwai Tuimacilai Mara, Knight Grand Cross of the Most Distinguished Order of Saint Michael and Saint George, Knight Commander of the Most Excellent Order of the British Empire, Chancellor of the Order of Fiji, Knight of the Most Venerable Order of Saint John of Jerusalem, Privy Councillor, PRESIDENT AND COMMANDER-IN-CHIEF OF THE SOVEREIGN DEMOCRATIC REPUBLIC OF FIJI

To The Right Reverend Sir PAUL REEVES,
GCMG, GCVO, QSO, KStJ,
TOMASI RAYALU VAKATORA, CF, Esquire
BRIJ VILASH LAL f/n SOMAI DASS, Doctor of Philosophy

GREETINGS:

WHEREAS by my Warrant dated the 15th day of March, 1995 I issued a Commission to review the Constitution of the Sovereign Democratic Republic of Fiji 1990, and appointed you the said The Right Reverend SIR PAUL REEVES to be the Commission's Chairman and further appointed TOMASI RAYALU VAKATORA and BRIJ LAL f/n SOMAI DASS as members of such a Commission, which review to be in accordance with the Terms of Reference therein contained

AND WHEREAS by my said Warrant you were required to report to His Excellency the President, not later than the 30th day of June, 1996, your findings and opinions on the matters aforesaid, together with such recommendations as you think fit to make in respect thereof

AND WHEREAS it is expedient that the time for so reporting should be extended as hereinafter provided

NOW, THEREFORE I do hereby extend until the 30th day of September, 1996, the time within which you are so required to report, without prejudice to the liberty conferred on you by my said Warrant to report your proceedings and findings from time to time if you should judge it expedient so to do

AND I DO HEREBY confirm my said Warrant and the Commission thereby constituted save as modified by these presents

AND, LASTLY, it is hereby declared that these presents are issued under my authority and subject to the provisions of the Commissions of Inquiry Act, Cap. 47

IN WITNESS WHEREOF I have caused these presents to be issued and the Seal of the Sovereign Democratic Republic of Fiji to be hereunto affixed at Suva this 11th day of July 1996.

WITNESS the Right Honourable Ratu Sir Kamisese Kapaiwai Tuimacilai Mara, Knight Grand Cross of the Most Distinguished Order of Saint Michael and Saint George, Knight Commander of the Most Excellent Order of the British Empire, Chancellor of the Order of Fiji, Knight of the Most Venerable Order of Saint John of Jerusalem, Privy Councillor, President and Commander-in-Chief of the Sovereign Democratic Republic of Fiji.

K K T MARA
PRESIDENT AND COMMANDER-IN-CHIEF

APPENDIX C

PUBLIC HEARINGS

FIRST ROUND

Sigatoka	3 July 1995
Nadi	4 July 1995
Lautoka	5 July 1995
Tavua	6 July 1995
Vatukoula	6 July 1995
Suva	10–11, 14 July 1995
Nausori	12–13 July 1995
Rotuma	15 July 1995
Lami	19 July 1995
Ba	20 July 1995
Navua	25 July 1995
Vunidawa	26 July 1995
Korovou	26 July 1995
Nanukuloa	27 July 1995
Rakiraki	27 July 1995
Labasa	31 July 1995
Nabouwalu	1 August 1995
Savusavu	2 August 1995
Taveuni	3 August 1995
Levuka	9 August 1995

SECOND ROUND

Suva	22–24, 28 August 1995, 1, 11–13, 15, 18 September 1995, 10 October 1995
Seaqaqa	29–31 August 1995
Lautoka	4–6 September 1995
Kadavu	14 September 1995
Lomaloma	19 September 1995

APPENDIX D

SUBMISSIONS

INDIVIDUALS:

ACRAMAN Rodney, Lami
ALI John, P O Box 8505, Nakasi
ALI Khalid, Vutuni, Ba
AROPIO Alifereti, Saukama, Juju, Rotuma
BA Tevita, Ba Methodist High School, Ba
BABA Filipe, Nadonumai, Lami
BAGAGA Semi, Saqila Settlement, Sigatoka
BAKANI Peni, Levuka Town, Ovalau
BAL Govind Ashok, 1-3 Berry Road, Suva
BALE Joeli, Nanuku Street, Vatuwaqa, Suva
BALEILAKEBA Ratu Meli, Nausori
BALRAMAN Anand, Nakauvadra High School, Ra
BETANI Filimone, Sigatoka
BOSEIWAQA Solomoni K, Sandalwood Street, Lautoka
BULL Donald Henry, Dreketi, Macuata
BURE Iliesa, P O Box 15097, Suva
CAGIMAIVEI Hon Vilisoni, Ba Town Council, Ba
CANIOGO Cr Ratu Emosi, Labasa Town Council, Labasa
CAUTY Susan, P O Box 139, Pacific Harbour
CEREWALE Maciu, Nabua, Suva
CHAND Dr Ganesh, USP, Suva
CHAND Kalyan, P O Box 78, Wainikoro, Labasa
CHAND Cr Pradeep, Ba Town Council, Ba
CHAND Prem, P O Box 1276, Nausori
CHAND Subhas, P O Box 722, Ba
CHANDRA Ramesh, Labasa
CHATIER Vijay, P O Box 1739, Nadi
CHETTY Shri Venkanna, Namaka, Nadi
CIKA Akuila, Matanagata, Vatukoula
COQE Laite, Matanagata, Vatukoula
DAKUVULA Jone, Samabula, Suva
DAWAI Ratu Luke Mataiciwa, Nadogoloa, Nakorotubu, Ra
DEGEI Anasa, Naila, Bau, Tailevu
DELAI Savenaca, Vatukoula
DENARO Judith, Nasinu, Suva
DEO Jag, Kabisi, Nadroga

DEO Vas, P O Box 16537, Suva
DESAIYA Mr & Mrs Abhimanya, Labasa Sangam College, Labasa
DREUNIMISIMISI Ratu Viliame, Lautoka
DRUGALE Viliame, Nabouwalu, Vuya, Bua
DUKUMOI Timoci, Drauniivi, Rakiraki, Ra
DUVULOCO Iliesa, Tamavua, Suva
DWARKA Shiu Prasad, Coqeloa, Labasa
FAKRAUFON Margaret, Duvula Road, Nasinu, Suva
GALALA Sevanaia, Sabeto, Nadi
GAVIDI Joseva, Samabula, Suva
GONEDOMO Joana, Bau Island, Tailevu
GOUNDER A S, P O Box 900, Suva
GOUNDER Narain Sami, 3 Salesi Road, Namadi Heights, Suva
GOVIND B, P O Box 4611, Samabula, Suva
HILL John, Waivote Street, Lami
HOWIE Dr Dorothy } USP, Suva
PULEA Mere }
HURLEY Fr Dermot, Vatuwaqa, Suva
JOHNS Dan R, Suva
KAISAU Semiti, Waiyevo, Taveuni
KAITO Niumaia, Naruwai, Nabouwalu, Bua
KANAKANA Ratu Epeli, Suvavou
KEARSLEY Hon Mr Justice R A, Strathfield West, Sydney, Australia
KETEWAI Semi, Nadarivatu, Naitasiri
KHALIL Hon Mohammed A, P O Box 157, Sigatoka
KHALIL M S, Nausori
KHAN Ilisapeci, Lautoka
KHAN Mohammed H Ahmed, P O Box 13574, Suva
KHAN Sher Mohammed, 12 Maharaj Place, Tamavua, Suva
KHATRI Suresh, Suva
KILA Rupeni, Tavua
KISUN Hari, P O Box 249, Lautoka
KORODRAU Ratu Kelepi M, Nadali, Nausori
KOROI Tevita, Vunidawa, Naitasiri
KOROITAMUDU Samisoni, Serua
KOROITUINAKELO Imanueli, Suva
KOROVULAVULA Hon Manu, Naikorokoro, Kadavu
KUBUABOLA Hon Ratu Inoke, Somosomo, Taveuni
KULAVERE Kitione, Nasautoka, Wainibuka
KUMAR Merelesita, Jittu Estate, Suva
LAL Jag, Korotale Settlement, Rakiraki
LIGALEVU Bulou Amalaini, Namaka, Nadi
LIGAMOANI Iliesa Sivaro, Vuci, Tokatoka, Tailevu
LOTO Apimeleki, Rewasau, Naitasiri
LULUI Jone, Vunisucu, Labasa
LUTU Saimoni, Levuka Town, Ovalau
MAHARAJ Ishwari Prasad, Bulileka, Labasa
MAHARAJ Moti Chand, Ba
MAILAU Prosey K, 83 Amy Street, Suva

MAKUTU Ratu Isoa, Cuvu, Nadroga
MALANI Hon Ratu Wilisoni T, Ra
MAONE Josefa Duguivalu, Bavu, Malomalo, Nadroga
MARAN Ram Swamy, P O Box 410, Rakiraki
MATA Iokimi, P O Box 15345, Lami
MATA Saimoni, Tovatova, Yavuna, Namaka
MATANAVOU Timoci, Lololevu, Korowere, Vatukoula
MATANI Iliesa, Dama, Bua
MATAVESI Filipe, Kocoma, Qamea, Cakaudrove
McLAREN Albert E, Nabouwalu Hospital, Nabouwalu
MOCEVAKACA Isimeli M, Nabudrau, Noco, Rewa
MOIMOI Peniasi, Vaturova, Cakaudrove
MOTOTABUA Joeli, Vugalei, Tailevu
MOTOTABUA Mitieli, Nakalawaca, Tailevu
MUA Dr Tukaha, Gordon Street, Suva
MUDALIAR A R, P O Box 4724, Samabula
NABATI Akariva, Kadavu
NADALO Isikeli, P O Box 263, Sigatoka
NAIDU Mani Rajnam, Mataniwai, Tavua
NAIR Keshwan, Ba
NAIR M, Korovuto, Ba
NAKASALA Semesa, Sigatoka
NAKAVORO Ratu Sakiusa, Naqelewai, Tavua
NAMOLI Kavaia, Dama, Bua
NAND Sam Mangla, Toko, Tavua
NAND Satya, Toko, Tavua
NAND Hon Shardha, Laucala Bay Road, Suva
NANDHA Chhaganlal Kanji, P O Box 249, Nadi Town
NAQICA Samisoni, Nadala, Nadarivatu
NARABE Sailosi, Navala Catholic School, Ba
NARAYAN Bhupendra, P O Box 1082, Suva
NARAYAN Deo, Bua
NARAYAN Deo, Suva
NARAYAN Dip, c/o Post Office Ba
NASAKU Peniasi, Nagado, Vaturu
NAVUNICAGI Josaia, P O Box 267, Sigatoka
NAWALOWALO Ratu Samuela, Tavuki, Kadavu
NISHA Mehrul, Sigatoka
NOA Kautoga, P O Box 351, Ba
OLIVER Meliki, Pier Street, Suva
ORISI Cabenatabua, P O Box 3382, Lami
PATEL Dayal, Waiyevo, Taveuni
PATEL Mahendra, Nadi
PILLAY Samarasan, Rakiraki Town
PRASAD Bhupendra, Labasa
PRASAD Gaya, Vunivau Bhartiya School, Bua
PRASAD Jayti, Suva
PRASAD Narayan, P O Box 140, Nausori
PRASAD Ram, Suva

PRASAD Rameshwar, P O Box 49, Seaqaqa
PRASAD Ravin, Sigatoka
PRASAD Surendra } P O Box 5294, Raiwaqa, Suva
KUMAR Ajal }
PRATAP Rana, P O Box 489, Sigatoka
PROBERT Harvie, Matanikutu Road, Tamavua, Suva
QARIKAU Peceli Vakaloloma, Kinoya, Suva
RACEVA Tevita, 57 Kauvula Road, Delainavesi, Suva
RAE Mahesh Surendra, P O Box 1159, Lautoka
RAFOI Jamie J, P O Box 14442, Suva
RAHMAN S, P O Box 1162, Labasa
RAHMAN Joseph, P O Box 12797, Suva
RAKKA Dr Balwant Singh, Ba
RAKORO Taniela, Suva
RAM Anil Kumar, P O Box 485, Labasa
RAM Daya, P O Box 197, Savusavu
RAM Dhani, Bua
RAM Ganga, Lomawai, Nadroga
RAM Karan, Votualevu, Nadi
RAM Keshou, Coqeloa, Labasa
RAMATAI Ratu M B, Nabouwalu, Vuya, Bua
RAMESH Sanjay, 73 Mead Road, Tamavua
RATTAN Sadhana, Lami
RATU Jemesa, Navutukau, Savusavu
RAVULA Maikali, Namata, Tailevu
REDDY Bal Krishna, P O Box 5168, Raiwaqa
REDDY Mahendra, University of Hawaii, Honolulu, Hawaii
REDDY Narayan, P O Box 507, Nadi
REDDY Shameer Sanju, P O Box 1930, Labasa
REDDY Subha, Korotogo, Sigatoka
RICKETTS Jane, USP, Suva
RITCHIE A G, P O Box 4, Pacific Harbour
ROKO A, Government Buildings, Suva
ROKODURU Rusiate, Levuka, Ovalau
ROKOSAUTURAGA Ratu Anasa, Nasautoka, Wainibuka
RUSAQOLI Josefa, Vatia Place, Labasa
RUVENI Posiano, Nukubalavu, Savusavu
SAGAITU Desmond B, P O Box 3156, Lautoka
SAITORO Viliame, Batiniwai, Levuka
SALAUCA Adi Avisake, Ucunivanua, Verata
SAMI Nagur, P O Box 446, Ba
SARASOTIA V K, Nabouwalu, Bua
SAUTURAGA Sowane, P O Box 329, Deuba
SAVEA Iane, Rotuma
SCOTT Hon Mr Justice Michael D, Suva
SHAMEEM Dr Shaista, University of Waikato, Hamilton
SHARMA Kamlesh Chand, P O Box 1699, Ba
SHARMA Suruj, P O Box 817, Lautoka
SILIBAU Anasa, Taveuni

SIMPSON Maria Elena Hope, Queensland, Australia
SINGH Arun Chattur, Ba Town
SINGH Harnam, Vuna, Taveuni
SINGH Jagat, P O Box 248, Sigatoka
SINGH Parmanand, P O Box 365, Nausori
SINGH Hon Raman Pratap, Nabouwalu
SINGH Vijay, P O Box 113, New Town, Seaqaqa
SIVO Maikeli, Tomuka Settlement, Lautoka
TABAIWALU Semi, Serua
TABAKAUCORO Hon Adi Finau, Suva
TADULALA Malakai, Nabua, Suva
TAGANESIA Sailasa, P O Box 784, Suva
TAGIVAKATINI Serupepeli, Navave, Vuya, Bua
TAITO Aisea, Tuatua, Labasa
TAUKENA Solomone, Matanagata, Vatukoula
TEMO Salesi, Nichol Place, Muanikau, Suva
TIKARAM H, P O Box 3210, Lami
TOGANIVALU Ratu Josua B, Tamavua, Suva
TOMBE Frederick David, Belfast, Northern Ireland, United Kingdom
TUICAKAU Taniela, Nausori
TUIVUNA Andrew P, P O Box 190, Nausori
TUKANA Marika, Lautoka
TULEGA Ratu Qoroniasi Bale, Tamavua Hospital, Tamavua
UNDERWOOD Lydia, Batiniwai, Levuka
URAIA Vosa, P O Box 599, Sigatoka
USHER Sir Leonard, Des Voeux Road, Suva
VAKABULI Tomasi, Kennedy Avenue, Nadi
VAKALALA Josaia, Makosoi Estate, Deuba
VAKAREWAKOBAU Litia, P O Box 13132, Suva
VEISAMASAMA Gilbert S, P O Box 1468, Suva
VEREBALAVU Meli, Namena, Tailevu
VOLAU Viliame S, P O Box 14483, Suva
VUDA Esira, P O Box 1141, Namau, Ba
VUKIVUKI Luke, Navunievo, Bua
WAHAB Abdul, P O Box 1680, Ba
WALOKI Iona, Tokou Village, Ovalau
WAQAINABETE Melisitima Digitaki, P O Box 3383, Lami
WHITESIDE Cherrie Alofa , P O Box 1191, Suva
WISE Ben, Navua
YABAKI Akuila, Suva

GROUPS AND ORGANISATIONS:

ALI Shamser and 558 others	Nasinu and other areas
ALI Shamima and 2 others	Fiji Women's Crisis Centre
ALIKISIO Josua and 109 others	Nadrala Church, Vatukarasa
ALIKISIO Josua and 40 others	Narata Church, Vatukarasa
ALIPOSO Q and 96 others	Vunidakua No 2 Church, Vunidakua, Naitasiri
AME Iliesa and 32 others	Namalata Church, Kubulau
AME Iliesa and 20 others	Nautoloulou Church, Kubulau
AME Iliesa and 32 others	Navatu Church, Kubulau
AME Iliesa and 32 others	Raviravi Church, Kubulau
ANJANI R	Bina Ramayan Mandli, Sigatoka
ARJUN Hon N Singh	NFP Nasinu North/Nausori Indian Constituency
ARMS Fr Dave G	Colomban Fathers
ARYA Kamlesh and another	Nasinu Arya Samaj
ATALIFO Aisea and 6 others	Chiefs and Council of Rotuma
BA Tevita	Ai Soqosoqo Vakavanua, Laucala Branch
BABA Olipani and 431 others	Nasese/Nasova Church, Muanikau
BABLA Hon Anand	National Farmers Union, Tavua
BAINIVALU Sirilo and 28 others	Maumi Church, Mokani.
BAINIVALU Kaseni	Tikina Nalaba
BALAWAKULA Joape and 32 others	Dagai Church, Nabukelevu
BALE Manoa	Yavusa Navutua, Bua and Shlomo Trading
BALE Meli and 32 others	Nawaikama Church, Gau
BALE Qoriniasi and 5 others	Electoral Commission
BALE Patiliai and 121 others	Waitabu Church, Lakeba
BALEIKASAVU Laisenia and 58 others	Naisogowaluvu Church, Suvavou
BALI Raj	Tavua District Youth League
BANUVE Lekima	Tikina Navolau
BATIGAI Sala and 311 others	Sawani Church, Vuna
BEDDOES Mick and another	General Electors Association
BERANALOVO Timoci and 58 others	Daku-i-Lomaloma Church, Lomaloma
BETEDRA Niko and 61 others	Marou Church, Naviti
BHAGWAN Lois	Retrogade Productions Ltd
BIAUSAVU Sisa and 328 others	Deuba Church, Deuba
BIAUSAVU Sisa and 46 others	Vagalala Church, Deuba
BIAUSAVU Sisa and 106 others	Vunibau Church, Deuba
BISA Jimilai and 34 others	Qalikarua Church, Matuku
BLEWMAN Br John and 3 others	Fiji Forum for Justice, Peace and Integrity of Creation
BOBONO Samuela and 47 others	Nacodraudrau Church, Wailevu
BOGISA Aporosa and 204 others	Gunu Church, Naviti, Yasawa
BOLA Kelepi and 32 others	Naivaka Church, Navakasiga
BOSE Hon Isimeli S TAVAI Hon Ratu Etuate KUBUABOLA Hon Ratu Inoke MATATOLU Hon Koresi L SERU Hon Apaitia	Soqosoqo ni Vakavulewa ni Taukei

BRYCE Right Rev J R	Anglican Church
BUASERAU Ratu Ifereimi	Yavusa Nabukebuke, Nailili, Namosi
BUISENA Anasa and 66 others	Tovata Church, Korotubu
BUISENA Pita and 60 others	Nakawaqa Church, Mali
BUKANIYAVA Tevita V and 32 others	Navukailagi Church, Gau
BUKSH Dr Abdul Qader	Fiji Muslim Organisation for the Advancement of Science and Education Inc
BULA Tomasi and 32 others	Naviqiri Church, Navakasiga
BULI Josefa and 32 others	Waisei Church, Namena
BULIVAKARUA Kolinio and 332 others	Mabula Church, Mabula
BULU Kevueli	Tikina of Lakeba, Lau
BUTADROKA Sakeasi and 3 others	Fijian Nationalist Party
CAINE Fred } KAMALI Paul }	Wallis and Futuna Association, Fiji and Rotuma
CAKOBAU Hon Adi Samanunu	Cakobau Family
CAKOBAU Hon Adi Litia	SVT Womens Caucus
CAMA Epeli	Tikina of Lomaloma, Lau
CATI Jope and 17 others	Vatunisici Church, Vuna
CATI Semesa and 182 others	Ketei Church, Totoya
CAUCAU Litia	Christian Women's Power of Prayer
CAVUBATI Hon Viliame	Yavusa Nauluvatu, Vanuavatu, Lau
CELUA Saimoni	Veisari Community
CHAND John and 2 others	Lautoka Group
CHAND Hon Parmod	NFP Macuata East Indian Constituency
CHAND Satish	Daku Vuliaki Arya Samaj
CHAND Pratap and 2 others	Fiji Trades Union Congress
CHAND Vijay	NFP Lami/Naitasiri South/Kadavu Indian Constituency
CHAPEL Harry	Malmahau Clan
CHARAN Sheila	Nadi Women's Council
CHARAN Guru	Advisory Council, Seaqaqa
CHAUDHRY Hon Mahendra P	Fiji Public Service Association
CHAUDHRY Hon Mahendra P and 2 others	National Farmers Union
CHINNKANNU Hon Munsami	NFP Labasa Indian Constituency
CIQO Isoa and 32 others	Nadrano Church, Namena
CIWA Rev Apenisa and 374 others	John Wesley Church, Vuda
CIWA Rev Apenisa and 32 others	Navutu Church, Vuda
COKANASIGA Filomena and 57 others	Wainiyabia Church, Lakeba
COLA Sairusi and 11 others	Ararata Church, Vuna
DANFORD William	Danford Family, Namosi
DATT Shiu	Shree Sanatan Dharam Ramayan Mandali, Vunivau, Bua
DAUNIWAQALEVU Silive and 93 others	Savudrodro Church, Nasavusavu
DAWAI Asiveli	Lovonivonu Village, Cakaudrove
DEGEI Anasa and 332 others	Nakodu Church, Koro
DELAI Josua A and 90 others	Nawamagi Church, Vatukarasa
DELAI Mosese and 24 others	Korovesi-Babalase Church, Nasavusavu
DELANA Sakiasi and 115 others	Navunievu Church, Bua

DENARO Judith and 102 others	Fiji-I-Care
DEO Indar	Fiji Youth and Students League, Muanidevo Branch, Dreketi
DEO Mar	Vishnu Ramayan Mandali, Kawaci, Dreketi, Macuata
DEVI Pramila	Mahila Manch
DEVI Rina	Women's Wing, Fiji Youth & Students League
DHANI Ram	Shiri Sanatan Dharm Pratinidhi Sabha, Lautoka
DHANI Ram K	Fiji Kisan Sangh
DHESI Tara Singh	The Sikh Association of Fiji
DIANI Josaia and 2 others	Taukei Movement and the Fijian Dockworkers
DIANI Sakaraia and 33 others	ATG Church, Nasinu
DIKEDIKE Ratu Tevita and another	Tui Davutakia
DIVAGA Manasa and 32 others	Dakuinuku Church, Waimaro
DONU Isikeli and 3 others	Raviravi District Council, Narewa Village, Rakiraki
DRAUNIDALO Ratu Isireli	Tikina of Moala, Lau
DRAYA Ratunaisa and 32 others	Nadromai Church, Cuvu
DUARARA Orisi	Tikina Soloira
DURI Semiti and 40 others	Hanahana Church, Cuvu
DUTT Deo	Arya Samaj, Wainikoro
DUTT Ramesh C and another	Office of the Auditor General
DUVULOCO Iliesa	Fijian Nationalist Party
DUVULOCO Iliesa	Tokatoka Vunivutu, Verata
FAAL Sada	Rakiraki Arya Samaj
FAGA Semesi	Fiji Nurses Association
FERESI Ro Vereto K	Deuba Church, Deuba
FINAU Malakai and 120 others	Uruone Church, Lomaloma
FOTOFILI Epeli and 32 others	Sawana Church, Sawana
GANDA Rambhai	The New Zealand Indian Central Association Inc
GAUNA Virivalu and 33 others	Makadru Church, Matuku
GOULDING Christopher and 30 others	Vatudamu Church, Nasavusavu
GOUNDAR Arna Jalal	Ra District Advisory Council
GOUNDAR Dr Gunasagaran	Sri Siva Subrahmanya Swami Devasthanam, Nadi
GOUNDAR Manikam	Fiji Teachers Union, Ra Branch
GOUNDAR Muneshparan	Penang Sangam School Management
GOVENDAR Cr Dr C S	Fiji Local Government Association
GREHAN Sister Loyola and 9 others	Society of Mary
GUDRUNAVANUA Ganilau and 63 others	Qalira, Nabukelevu
GUSUVAKALIA Milio and 25 others	Korovou Church, Lomaivuna
HUSAIN Hon Ali Aiyub	NFP Lautoka City Indian Constituency
ILISONI R and 20 others	Wainivudivula Church, Vuna
JALAL Imrana	Fiji Women's Rights Movement
JITOKO Eroni and 32 others	Natokalau Church, Matuku
KADRALEVU Inoke	Provincial Council of Nadroga
KAKILI Joni and 105 others	Nuku Church, Moala

KALAKAI Jone	Melanesian Community, Savusavu Branch
KALOU Hon Joeli	Lomaiviti Provincial Council
KALOUNIWAQA Adoni and 32 others	Namuana Church, Tavuki
KALOUWARAI Manasa and 386 others	Makoi Church, Nasinu
KAMA Mosese G and 171 others	Muainase Church, Davuilevu
KAMIKAMICA Josevata N	Fijian Association Party
KAMIKAMICA Viliame and 52 others	Lomaloma Church, Lomaloma
KAPADIA Virendra	Gujerat Education Society of Fiji
KAPAIWAI Meli and 582 others	Tubou and Levuka Church, Lakeba
KARAN Dev and 3 others	Vanualevu Arya Pratinidhi Sabha
KATISAWANI Domoniko and 25 others	Josaia Church, Lomanikoro, Rewa
KATONIVERE Semisi and 70 others	Malomalo Church, Cuvu, Nadroga
KAUKIMOCE Hon Jonetani	SVT Suva City Fijian Urban Constituency
KAUSAKMUA Gagaj	Molmahao Clan Elders, Rotuma
KAUSIRAF Gagaj	Oinafa District, Rotuma
KELIKAUTA Mitieli and 239 others	Nabalebale Church, Buca
KESOIQESA Isoa and 37 others	Nanuku Church, Vuda
KETEDROMO Semi and 112 others	Lauwaki Church, Vuda
KHAIYUM Hon Sayed	NFP Nasinu South/Colo-i-Suva/Suva Constituency
KHAIYUM Hon Sayed and 11 others	Muslim Members of the House of Representatives and other Prominent Muslims
KHALIL Mohammed and another	NFP Nasinu East/Rewa East Branch
KHAN Hafiz Dean	Fiji Muslim League
KHAN Hassan	Fiji Council of Social Services
KHAN Dr M S Sahu	Ahmadiya Anjuman Ishaat-I- Islam (Lahore) Fiji
KHAN M Y	Fiji Girmit Council of Women
KHAN Mohammed Ashraf and 117 others	Muslim Political Rights Movement
KHAN Ismail	Fiji Muslim Youth Movement
KHATRI Dilip	Nadi Town Council
KIDOVUKA Pita and 160 others	Naruwai Church, Naruwai
KISSUN Cr Mahendra Pratap	Tavua Town Council
KISUN Hari	Western Disabled People's Association
KOLIKATA Viliame and 864 others	Raiwai Church, Muanikau
KOMAI Pauliasi and 290 others	Namacu Church, Koro
KOROBASAGA Ilaitia and 117 others	Nasaqalau Church, Lakeba
KOROCAWIRI Tikiko and 172 others	Lami Church, Suvavou
KOROI Sulivenusi and 97 others	Tarukua Church, Cicia
KOROI Silivinusi	Tikina of Cicia, Lau
KOROI Laisenia and 34 others	Peceliema (Lomati) Church, Matuku
KOROIBULILEKA Kiniviliame and 2 others	Koroibulileka Family, Naketei, Dogotuki, Macuata
KOROICIQO Sakiasi and 200 others	Sinuvaca Church,Koro
KOROITUKU Jone and 65 others	Matacawalevu Church, Yaqeta
KOROLEVU Beratabua and 32 others	Naila Church, Dravo
KOROSAYA Vereniki and 52 others	Naqaraivi Church, Vuna
KOROVULAVULA Isireli	Fiji Journalists Association
KOTOILAKEBA Viliame and 83 others	Tuvuca Church, Lomaloma

KOTOIWASAWASA Poasa and 32 others	Tovulailai Church, Nairai
KOTOIWASAWASA Poasa and 44 others	Vutuna Church, Nairai
KRISHNA Ram and 3 others	Fiji Law Society
KRISHNAN Ram	Then India Sanmarga Ikya Sangam, Lautoka Branch
KUBUNAVANUA Sautaki and 496 others	Maloku Church, Moala
KULI Hon Ilai	Naitasiri Constituency
KUMAR Dalip	Advisory Council Naquvu No.1
KUMAR Deo and another	Nadroga Arya Samaj
KUMAR Hon Dhirendra	NFP Rakiraki Branch
KUMAR Lakhan	Shree Sanatan Dharm Pratinidhi Sabha, Seaqaqa Branch
KUMAR Dr Mahend and another	Arya Pratinidhi Sabha of Fiji
KUMAR Norma	Ra Women's Advisory Council
KUMAR Raj	Nasarowaqa Ram Mandali
KUMAR Sanjay	NFP Lami/Naitasiri South/Kadavu Indian Constituency
KUMAR Sanjeet and 8 others	Ganesh Ramayan Mandali, Nacula, Dreketi, Macuata
KUMAR Sunil	Fiji Youth and Students League
KURUCAKE Navoliyani and 50 others	Nalauwaki Church, Waya
KURUISAQILA Dr Apenisa	Office of the Speaker of the House of Representatives
KURUSOQO Lemeki	Nadroga/Navosa Provincial Council
LABALABA Iliesa and 68 others	Namatakula Church, Vatukarasa
LACABUKA Hon Atunaisa	Serua Provincial Council
LACABUKA Atunaisa	Fiji National Democratic Party
LAL Babu	Boroboro/Selesele Settlement, Lekutu, Bua
LAL Rattan	Shree Sanatan Dharam Prathinidhi, Suva Branch
LAL Sambu	Vunivau Gyan Mandir No.2
LAL Shambhu	District Advisory Councillor, Nasarowaqa No.1
LAL Shanti	Malmahau Rotuma Organisation
LALA Fiu and 32 others	Yaroi Church, Matuku
LALAKAI Apete	Yacata Island, Cakaudrove
LALAQILA Manasa	Nabulagi Farm
LASARO Rev Manasa	Methodist Church in Fiji and Rotuma
LATA Kirti Arishma and 13 others	Group of Young People, Suva
LATA Rev Naibuka and 32 others	Nabouono Church, Udu
LATA Rev Naibuka and 32 others	Nukudamu Church, Udu
LATA Rev Naibuka and 60 others	Vunikodi Church, Udu
LAVETA Apaitia and 59 others	Muaninuku Church, Nabukelevu
LAWELEVU Emosi	Ovalau/Moturiki/Lomaiviti Ex-Servicemen
LEDUA Temo and 128 others	Bagata Church, Bagata
LEDUA Viliame and 59 others	Keteira Church, Moala
LESIKILAKEBA Filikesa and 132 others	Yadrana Church, Lakeba
LESIKIMUALEVU Tavo and 31 others	Burenivalu Church, Namena
LEU Isikeli and 92 others	Lagilagi Church, Nasinu
LIGAMAMADA Epeli	Yavusa Dewala, Nagigi, Bua
LIVANI Maikeli and 12 others	Bala Church, Natewa

LIVANI Maikeli and 5 others	Nadavaci Church, Natewa
LIVANI Maikeli and 5 others	Naqaravutu Church, Natewa
LOGA Hon Tevita	Lau Urban Community
LOLOMA Filipe and 71 others	Ligau Church, Kia, Macuata
LOTA Ilaitia and 52 others	Kipioni [Koroinasolo] Church, Bua
LOVODUA Ema	Women's Church Group, Vitogo, Lautoka
LOW Ken M	Chinese Business Association of Fiji
LUCAS Rev Richard	National Spiritual Assembly of the Baha'is of the Fiji Islands
LUI Eparama and 32 others	Raviravi Church, Matuku
LUTU Asaeli and 58 others	Nagigi Church, Nasavusavu
LUTU Rupeni and 211 others	Navosai Church, Nasinu
LUTU Sepesa and 205 others	Vadra Church, Moala
MADRAIWIWI Ratu Joni and 10 others	Citizens' Constitution Forum
MADRAIWIWI Ratu Joni and 12 others	Moral Re-Armament
MAHARAJ Suman Lata	Shree Sanatan Dharam Nari Sabha, Savusavu
MAHARAJ Swami Kumar	Shree Sanatan Dharam Sabha of Fiji
MAIKALI Anare and 52 others	Tabia Church, Korotubu
MAILEKAI Sekonaia T	Department of Inland Revenue
MAISALI Penina and 67 others	Yaro Church, Kia, Macuata
MALANI Inoke and 128 others	Valenicina Church, Suvavou
MALANICAGI Emosi and 32 others	Talaulia Church, Nabukelevu
MANA Semi and 88 others	Muaira Church, Naviti
MANYAM Jean	Bethel Full Gospel Church of Fiji
MARAMA Filimoni	Tokatoka District, Tailevu
MATACA Archbishop Petero	Roman Catholic Church of Fiji and Rotuma
MATAHAU Anare	Foundation of the Indigenous People of Fiji Ltd
MATAI Apete and 96 others	Vunivesi Church, Bagata
MATAI Salimoni K and 32 others	Dravuni, Ono, Kadavu
MATAIKA Easi Qalo	Tovata Methodist Youth Fellowship
MATAINADROGA Mitieli	Soqosoqo ni Turaga, Sigatoka
MATAITINI Ro Epeli	Rewa Provincial Council
MATANABULA Kemueli and 67 others	Vivili Church, Nasavusavu
MATANISIGA Mere and 211 others	Lomolomo Church, Vuda
MATAWALU Isimeli	Tikina Tokaimalo, Ra
MATEINANIU Sivoki	Taukei Movement Suva/West Branch
MATI Savenaca and 53 others	Levuka Church, Nabukelevu
MATIA Peceli and 32 others	Daviqele Church, Nabukelevu
METIA Viliami and 34 others	Naividamu, Vulaga
MOCEITAI Qionilau and 32 others	Namalata Church, Lomaloma
MOHAN Brij	Savusomo Indian Settlement, Nasarawaqa, Bua
MOORE Peni and others	Women's Action for Change
MORO Napolioni and 32 others	Tilivalevu Church, Cuvu
MUAIMATAGI Aminio and 34 others	Narocivo Church, Nayau
MUDALIAR Keshwan	Then India Sanmarga Ikya Sangam, Labasa Branch
MURTI Sant Kumar	NFP Labasa-Women's Wing
NABA Samisoni and 33 others	Yadua Church, Bua
NABI Niyamut	Muslim Viewpoint

NABOU Jone	Viti Chamber of Commerce Fiji/Rotuma, Nadi
NABUNOBUNO Samuela and 270 others	Nairukuruku Church, Matailobau
NACANAITABA Savenaca and 3 others	Fijian Constitution Review Collective
NACOLA Hon Ratu Jo	Ra Provincial Council
NAGINDAS Shiu	Labasa Chamber of Commerce and Industry
NAGUSUCA Pita T	Nasau District, Nalawa, Ra
NAICKER Velaindar	Then India Sanmarga Ikya Sangam, Ba Branch
NAIDU Dorswamy	Then India Sanmarga Ikya Sangam, Sigatoka Branch
NAIDU Hon Dorswamy S	NFP Nadi Branch
NAIKAWALU Saula and 284 others	Mau Church, Deuba
NAIKAWALU Saula and 43 others	Nabukavesi Church, Deuba
NAIKAWALU Saula and 16 others	Taunovo Church, Deuba
NAIKAWALU Saula and 2 others	Veivatuloa Church, Deuba
NAIKAWALU Saula and 88 others	Vunimasi Church, Deuba
NAIKAWALU Saula and 32 others	Wainadoi Church, Deuba
NAILA Tevita	Men's Church Group, Drasa/Vitogo
NAINIMA Autiko and 55 others	Bua Church, Bua
NAINOCA Mesulame and another	Family Life Counselling Services
NAITINI Apete and 32 others	Kabariki Church, Nabukelevu
NAITOKO Apisai and 76 others	Nasau Church, Nabukelevu
NAITURA Isikeli	Tikina Makawa Rakiraki
NAIVALU Ratu Serupepeli and 2 others	Waya Tikina Council
NAIVALU Solomone	Naitasiri Provincial Council
NAIVALU Solomone	Tikina Makawa Lutu
NAIVALU Solopeni and 75 others	Narailagi Church, Tubalevu
NAIVALU Vaisoni and 116 others	Nabaitavo Church, Lomaivuna
NAIVITI Isimeli	Nasomo Village Council
NAKOROMOCIU Aparama	Yavusa Yavana (12 tribes) of Nawaka, Nadi
NALAGILEVU Raceva and 60 others	Nataqiri Church, Vuna
NAMATE Budamu and 34 others	Bucalevu Church, Koroalau
NAND Sharda	Arya Samaj, Nadi
NAQAYA Alipate and 42 others	Toge Church, Cuvu
NAQEU Lasarusa and 32 others	Malakati Church, Yaqeta
NARAYAN Anita	National Federation Party, Ba-Women's Branch
NARAYAN Clarence	Fiji Disabled People's Association
NARAYAN Jag	Shiu Prakash Ramayan Mandali, Vunivau, Bua
NARAYAN Rup	Korovuto Ramayan Mandali
NARAYAN Rup	Nasuva Ramayan Mandali, Vatubogi, Bua
NARESH Ram	Soti/Selesele Settlement, Nasarawaqa, Bua
NARUMA Tevita and 162 others	Cuvu Church, Cuvu
NASALI Simione and 32 others	Nalele Church, Cuvu
NASAROA Peni	Somosomo Village, Taveuni
NASILASILA Semi and 248 others	Navuevu Church, Cuvu
NASOBA Pita and 50 others	Lokuya Church, Waimaro
NATAUCEMA Ifereimi	Tikina Waima
NATH Ram	Navutua/Nasoso/Dranudradra Ramayan Mandali

NAVAKAROKO Sakiusa	Tikina Nabobuco
NAVASU Saula and 110 others	Emuri Church, Cuvu
NAVEATA Paula and 36 others	Balenabelo Church, Vatukarasa
NAVEATA Paula and 127 others	Namada Church, Vatukarasa
NAVEATA Paula and 36 others	Saru Church, Vatukarasa
NAVEATA Paula and 200 others	Vatukarasa Church, Vatukarasa
NAWADRA Apimeleki and 102 others	Naivuruvuru Church, Verata
NAWAI Joeli and 55 others	Vatudavila Church, Vuna
NAYAVU Isikeli	Fijian Nationalist Party
NEILIKO Joeli and 66 others	Malevu Senibua Church, Vatukarasa
NINA Sarote	Malmahau Clan
NIUKULA Rev Paula	Fiji Council of Churches
NIUMATAIWALU Lorima	Naseisei Family, Yaroi, Matuku, Lau
NIUMATAIWALU Sitiveni	Tui Wailevu's views
NIUSORIA Rupeni and 66 others	Yalava Church, Korotubu
NUINUI Simeli	Tikina Makawa Lawaki
PANDARAM Muniappa	Then India Sanmarga Ikya Sangam, Suva Branch
PATEL Hon Harilal	Fiji Gujerat Samaj, Suva
PATEL Hon Harilal	NFP Suva City Central Indian Constituency
PATEL Hon Vinod	Ba Gujerat Education Society
PATEL Hon Vinod	Hindu Heritage Foundation, Fiji
PILLAY Madhawan and another	Then India Sanmarga Ikya Sangam, Nadi Branch
PRASAD Amrit	Nasea Ramayan Mandali, Labasa
PRASAD Bindesari and 300 others	Advisory Council, Nasarowaqa
PRASAD Bimlawati G and 12 others	Laucala Bay Women's Club
PRASAD Bimla B	NFP Youth Wing
PRASAD Devendra and 25 others	Laxmi Ramayan Mandali, Nacula, Dreketi, Macuata
PRASAD Gaya	Shree Sanatan Dharam Pratinidhi Sabha, Bua Branch Ramayan Mandali
PRASAD Genda Wati	Arya Samaj, Samabula
PRASAD Hari	Laqere/Tabia Ramayan Mandali
PRASAD Kamla and 2 others	Ramayan Mandali of Naqovu No.1, Vunivau
PRASAD Krishna Mala	Macuata Womens Forum
PRASAD Madan	Nausori Arya Samaj
PRASAD Mahendra	Tavua Sanatan Dharm Mandir Samiti, Tavua
PRASAD Prabha Sneh	Shri Sanatan Dharma Nari Sabha Fiji
PRASAD Rajendra	Shree Sanatan Dharm Pratinidhi Sabha of Fiji, Navua Branch
PRASAD Ram	Advisory Council, Labasa
PRASAD Ram	NFP Nasinu/Colo-i-Suva Indian Constituency
PRASAD Ram and 58 others	Luvuluvu Tenants Association
PRASAD Santu and 2 others	Fiji Hindu Society
PRASAD Shiu	Advisory Council, Bulileka
PRASAD Surendra	Waituri Gram Sudhar Sabha
PRATAP Devendra	Sanatan Dharma Pratinidhi Sabha, Nadi Branch
PUAMAU Sowane and another	SVT Suva City Fijian Urban Constituency
PUFE Kusitino	Rotuma Royal Association, Vanuatu

PUNJA Yogesh	Fiji Manufacturers Association
QALO Kaulotu and 89 others	Ogea Church, Vulaga
QALULU Eroti and 17 others	Delainavasa Church, Naitasiri
QARANIVALU Moceituba and 32 others	Luvunavuaka Church, Namena
QARIKAU Maika and another	Cakaudrove Provincial Council
QATA Ledua and another	Lovoni Tribe, Ono-i-Lau
QEREIWARA Navitalai and 34 others	Muanaira, Vulaga
QESANAVATA Josaia and 33 others	Tabuya Church, Nabukelevu
QIO Amelia	Women's Church Group, Drasa/ Vitogo
QIO Joeli and 40 others	Beach-Comber Church, Vuda
RABOILA Eneri and 32 others	Peciseita Church, Namena
RABUKA Mineti and 62 others	Dreketi Church, Wailevu
RABULI Peniasi and 96 others	Naodamu Church, Nasea
RACEVA Keni and 129 others	Muana Church, Toga
RADRODRO Mikaili	Tokatoka Nonone, Vuna, Taveuni
RAFEOK Gagaj	Molmahao Rotuma Organisation Sydney, Australia
RAFEOK Gagaj	Rotuma Association for Independence and Democracy
RAIKIVI Viliame and 79 others	Wailevu Church, Wailevu
RAJ Dhirendra Prasad	District Advisory Council, Vuci/Vuci South-Nausori
RAJ Prithvi	District Advisory Council, Vunidawa
RAKADROKA Isikeli and 32 others	Natewa Church, Natewa
RALOA Joji and 294 others	Nakorovatu Church, Matailobau
RAM Dhani	Shiri Sanatan Dharm Pratinidhi Sabha, Lautoka
RAM Paras and 30 others	Prakash Ramayan Mandali, Malawai, Dreketi
RAMA Surend	Savusavu District Advisory Council
RAMAKA Kameli and 3 others	Naselai Church, Nuku
RAMAN Dharmesh and 10 others	MGM High School - Form 502 Students
AMATAI Meli B and 56 others	Raviravi Church, Nabouwalu
RAMESHWAR Prasad	National Farmers Union
RANIGA Vinod	Market Vendors Union, Labasa
RARAWA Paula and 34 others	Narocivo Church, Lomaloma
RASOKI and 32 others	Kiobo Church, Kubulau, Bua
RASOKI and 13 others	Kuaka Church, Kubulau
RASOKI and 32 others	Nadivakabua Church, Kubulau
RASOKI and 32 others	Nasavusavu Church, Kubulau
RASOKI and 7 others	Vatuloaloa Church, Kubulau
RASOKI and 32 others	Waisa Church, Kubulau
RASUWAKI Jiuta and 66 others	Valeni Church, Tubalevu
RATHOD Dalpat B and another	Lautoka Retailers Association
RATU Setareki and 148 others	Malevu Church, Naviti
RATULELE Lasaro	District of Nacula, Yasawa
RATULEVU Pastor Samuela	Suvavou Village
RATUMAIYALE Sukabula and 32 others	Nauria Church, Vanuakula
RATUVA Laitia and 76 others	Lakena Church, Nausori/Kuku

RATUVOU Pio	Fijian Catholic Community, Mt St Mary Church, Nadi Airport
RAUCA Maleli and 452 others	Nauluvatu Church, Nauluvatu
RAUCA Ratu Vuki and 186 others	Soso Church, Naviti
RAVAGA Petaia and 32 others	Baravi Church, Navakasiga
RAVASAKULA Samisoni K and 172 others	Kumi Church, Verata
RAVUKI Ilisaniasi and 173 others	Navatuvula Church, Vuna
REDDY Chandra W	NFP Lautoka-Women's Movement
REDDY Kamala	Then India Sanmarga Ikya Sangam Women's Wing, Lautoka
REDDY Narain Swamy	Then India Sanmarga Ikya Sangam, Tavua Branch
REDDY Hon Jai Ram } CHAUDHRY Hon Mahendra P } GHAI Prof Yash }	Joint National Federation Party and Labour Party Submission
RIKA Joeli and 134 others	Lomati Church, Cicia
RIKA Makereta	Lautoka Market Vendors Association
RINAKAMA Peceli	Wainimala Graduates Association
RINASAU Peni and 117 others	Navuniasi Church, Matailobau
ROKOBORABORA Eveli and 103 others	Nauluvatu Church, Waimaro
ROKOBULI Bula and 32 others	Kalekana Church, Suvavou
ROKOBULI Salusalu and 109 others	Qauia Church, Suvavou
ROKODUNA Apisai and 32 others	Vesi Church, Mali
ROKOTOVITOVI Eminoni and 266 others	Colo-i-Suva Church, Vuna
ROKOTUBU Joeli and 32 others	Nasau Church, Navakasiga
ROKOVAKATAWA Taniela and 45 others	Waitoga Church, Nairai
ROMALAMALA Joseva and 32 others	Namelimeli Church, Deuba
RONAITEQE Ratu Ilisoni and 64 others	Saumakia Church, Wainimala, Matailobau
ROQICA Tevita and 32 others	Matailabasa Church, Mali
ROTAN Tekoti and 2 others	Rabi Council of Elders
RYLAND Henry and 31 others	Nacula Church, Biaugunu
RYLAND Henry and 32 others	Nadogo Church, Biaugunu
RYLAND Henry and 16 others	Valovoni Church, Biaugunu
SADIQ Mohammed	Macuata Muslim League
SADOLE Asesela	Ba Provincial Council
SAHAYAM Mul Deo	Naleba Catholic Mission
SAKIA Meli and 29 others	Malaka Church, Biaugunu
SAKOKO Saiasi and 93 others	Batiri Church, Tubalevu
SALAKABAU Asesela and 94 others	Namalata Church, Tavuki
SAMI Jaganath	Fiji Cane Growers Association, Lautoka
SAMY Kanna	Labasa Taxi Union
SAUKITOGA Iliesa and 32 others	Abaca-Nagaga Church, Vuda
SAUNIVEIKAU Luisa	Naitasiri Youth Council
SAUSOQO Ratu Peni and 66 others	Vunisei Church, Toga
SAVOU Noa and 144 others	Muanivatu Church, Muanikau
SEDUADUA Apenisa	Waterbabies Enterprise
SEKINABOU Jone and 105 others	Tomuka Church, Namoli

SEMO Viliame and 60 others	Buavou Church, Naduri
SENIKABUTA and 108 others	Naqara Church, Waima, Matailobau
SERU Hon Apaitia M	Kadavu Provincial Council
SERU Isimeli and 32 others	Sawakasa Church, Waimaro
SERU Rev Jiuta and 31 others	Yaroi Church, Nasavusavu
SERUVATU Anasa and 32 others	Buliya Church, Ono, Kadavu
SESEVU Jo and another	Fijian Melanesian Community Development Association
SEVA Netani and 75 others	Sanasana Church, Cuvu
SHAMEEM Nazhat	Office of the Director of Public Prosecutions
SHARMA Dr Arun	Fiji Alternative Medicine Practitioner Association
SHARMA D I C	Lautoka Arya Samaj
SHARMA Ganendra	Shri Sanatan Youth Association, Nadi
SHARMA Hon Harish C	National Body of Shri Sanatan Dharma Pratinidhi Sabha of Fiji
SHARMA Jagdish and 2 others	Aadi Brahamin Maha Parishad, Fiji
SHARMA Pundit Jagdish Prasad	Shree Sanatan Dharam Pratinidhi Sabha, Tavua Branch
SHARMA Keshna	Shree Sanatan Dharam Pratinidhi Sabha, Ba Branch
SHARMA Pundit Keshna Ram	Ba Central Arya Samaj
SHARMA Krishna Chand	National Farmers Union, Ra
SHARMA Ram P	Bulileka Arya Samaj
SHARMA Shiu Dayal	NFP Savusavu-Youth Branch
SIGA Tevita and 30 others	Waibasaga Church, Vuna
SIKELE Rev Epeli	Members of Mataqali Naututu
SIKOA Apimeleki and 30 others	Vabea Church, Ono, Kadavu
SILAVATA Ledua and 202 others	Cakova Church, Moala
SINGH Hon Aptar	NFP Tailevu/Ra East/Lomaiviti/Lau/Rotuma Indian Constituency
SINGH Hon Charan	NFP Labasa Branch
SINGH Dhijendra and 2 others	Arya Samaj, Ba
SINGH Dhijendra	Fiji Girmit Council
SINGH Hari Narayan	Shri Sanatan Dharm Pratinidhi Sabha, Sigatoka Branch
SINGH Jagdish	Fiji Teachers Union
SINGH Jeel Chand and 14 others	Baal Ramayan Mandali , Nacula, Dreketi, Macuata
SINGH Joe and 2 others	Suva Chamber of Commerce and Industry
SINGH Dr Pradeep	NFP Labasa-Youth Wing
SINGH Hardayal	Sikh Gurudwara Prabhandak Committee
SINGH Hon Maan	NFP Navosa/Serua/Namosi/Naitasiri West/Rewa West Constituency
SINGH Pratap	Namau Indian Community, Bua
SINGH Hardayal and 5 others	Interfaith Search, Fiji
SINGH Jagendra	NFP Navua Branch
SINGH Jiten	Labasa Sikh Temple Committee
SINGH Uttam	Arya Mahila Mandal
SINGH Kamal and another	Shri Sanatan Dharam Prithnidhi Sabha, Savusavu Branch
SINGH Kashmir	Advisory Council Korovou
SINGH Kuldip	Barotu, Tova Settlement, Rakiraki, Ra
SINGH Mirla	Labasa Women's Forum

SINGH Natwar	Sigatoka Chamber of Commerce and
SINGH Ramesh	Singhs Employment Agency
SINGH Shankar	Shree Sanatan Dharm Pratinidhi Sabha, Rewa Branch
SINGH Uttam	Central Suva Arya Samaj
SINGH Pundit Vijay	Savusavu Samaj Arya
SINGHVinod	NFP Suva City Suburban Indian Constituency
SINHA Mahendra	Naselai Ramayan Bhajan Mandali, Naselai, Nausori
SIRI Vilive and 32 others	Tadevo Church, Deuba
SMITH Robyn and 2 others	Children's Co-ordinating Committee
SMITH Hon Leo	General Voters Party
SOKO Viliame and 32 others	Susui Church, Lomaloma
SOKO Jone and 115 others	Keteira Church, Moala
SOKONIBOGI Francis Waqa	Kudru Na Vanua, Taveuni
SOKONIBOGI Francis Waqa	Fijian Assembly of Constitution Review
SOLANKI Saraj	Savusavu Chamber of Commerce
SORBY Bill	General Voters Party
SOTIA Viliame and 118 others	Dravuwalu Church, Totoya
SOVUI Tomasi and 57 others	Waivunia Church, Nasavusavu
SOWANE Alipate	Lau Provincial Council
SUBRAMANI Professor and 11 others	Fiji Writers' Association
SUGUTURAGA Nemani and 32 others	Nukunuku Church, Lakeba
SUKA Waisea and 42 others	Dravo Church, Dravo, Bau
SUKANADULAKI Sevanaia and 55 others	Lomai Church, Waimaro
SUKAWAI Sakeasi and 59 others	Vuniduba Church, Nairukuruku, Matailobau
TABASI Solomoni and 237 others	Kenani Church, Qoma, Verata
TABU Taniela	Viti Civil Servants Association
TABUA Esava and 34 others	Nabena Church, Matailobau
TABUA Esava and 73 others	Delaitoga Church, Matailobau
TABUA Dr Sefanaia B	Yavusa Nayaumunu, Viwa, Bau, Tailevu
TABUATOA Leone	The Vincentian Native Community, Korovou, Tailevu
TAGI Netava	Taivugalei Tikina Council
TAGI Viliame and 32 others	Waisere Church, Suvavou
TAGILOA Aisake and 36 others	Vunato Church, Namoli
TALEMAIVAVALAGI Ratu Inoke	SVT Tailevu/Naitasiri Fijian Urban Constituency
TAMAILAI Viliame and 62 others	Korotubu Church, Korotubu
TAMANI Kaveni and 59 others	Saineai Church, Nasinu
TAMANIVELI Aporosa and 69 others	Police Mobile Church, Nasinu
TAUKEINIKORO Hon Kiniviliame	Namosi Provincial Council
TAUYAVU Peni and 46 others	Waibau Church, Vuna
TAUYAVUVOU Filipe and 118 others	Muaicake Church, Vulaga
TAVUTAVUVANUA Ratu Dovi	Yavusa Drola, Yasawa
TAWAKE Manasa and 63 others	Nakasi Church, Nasinu
TAWAKE Tevita and 106 others	Lomanikoro Church, Lakeba
TAWAKE Pacolo and 150 others	Komo Church, Kabara, Lau
TAWAKE Iliesa	Ai Soqosoqo Vakavanua, Vatuwaqa Branch

TEIKABUA Teaoti and 43 others	Tabwewa Church, Tabwewa, Rabi
TEKOTI Rotan	Rabi Council of Leaders
TEKURU Saliceni and 32 others	Delai Kuku Church, Namena
TEMO Josaia and 66 others	Vakano Church, Lakeba
TERUBEA Rev Rongorongo	Banaban Community and Landowners
THAGGARD L and 69 others	Citizen Constitution Forum
TIKARAM Hon Justice Sir Moti	Fiji Court of Appeal
TOALEKA Iosefo and 2 others	Bua Youth Committee
TOBUWAIQIRI Sowane and another	Serua/Rewa West Urban Constituency
TOGA Jokatama	Fiji National Council for Disabled Persons
TOGA Samuela and 182 others	Kalokolevu Church, Natauvakarua, Suvavou
TOKAIQALI Aisea	SVT Nasea Sub-Branch
TOKALAULEVU Ratu Lote and 32 others	Lawaki Church, Namena
TOKALAUVERE Filikesa and 32 others	Levuka-i-Daku Church, Matuku
TORAU Josua and 159 others	Navatuyaba Church, Toga
TOROCA Levani and 37 others	Qalela Church, Saunaka, Nadi
TOYOLA Sainivalati and32 others	Joritani Church, Navatu, Ra
TRIVENI Anil Das	Tavua Arya Samaj
TU'AKITAU Hon Ratu Cokanauto and 4 others	The Senate
TU'AKITAU Hon Ratu Cokanauto and 4 others	Tailevu Provincial Council
TUIBENA Pita and 59 others	Nacula Church, Nasea
TUICAKAU Solomoni and 53 others	Galoa Church, Tavuki
TUIKOROCAU Aliki and 124 others	Yasawa Church, Naviti
TUINAVANUA Taitusi and 32 others	Nananu Church, Namena
TUINAVITILEVU Mereoni and 201 others	Naulu Church, Toga
TUIQILA Varanisese and 154 others	Nabukaluka Church, Waimaro
TUIREBAWAQA Josaia and 312 others	Vunuku Church, Moala
TUISAWAU Ratu Filipe Q	Rewa Provincial Youth Council
TUISAWAU Susana	Fijian Teachers Association
TUITUBA Motame and 2 others	Raiwaqa Church, Deuba
TUITUBOU Tevita Tuitubou and 201others	Vunidilo Church, Muanikau
TUIVAGA Hon Justice Sir Timoci and fellow Judges	The Judiciary
TUKANA Loata and another	Handicraft Centre, Nadi
TUKITUKINABUKA Samuela and 234 others	Nabukelevu Church, Nabukelevu
TULELE Ilaisa and 205 others	Naqaidamu Church, Koro
TUNALAU Ropoama and 50 others	Ligaulevu Church, Mali
TUNAOSARA Ratu Josaia	Bua Provincial Council
TUNIDAU Toko and 206 others	Caqiri/Nasole Church, Nasinu
TURAGACA Adi Marica	Soqosoqo Vakamarama, Ra
TURAGAIVIU Osea Benidito and another	SVT Delainabua Sub-Branch
TURUVA Ilisavani and 33 others	Naqiroso Church, Vuda
TUSAQA Eliki and 124 others	Nabukadogo Church, Naduri
TUSAQA Eliki and 32 others	Korolevu Church, Naduri
TUTUKU Ratu Meli and 109 others	Vunarewa Church, Raiwaqa, Navosa

TUWAI Jone Duicagi	Yavusa Nuburavi, Lomati, Kabara, Lau
UFIAMORAT Aliti and another	The Jotama Muaheahea Panapasa Families, Noatau District and Kikorio Ufiamorat Fatafes and Kauatas Ruse Families, Malhaha District, Rotuma
UFIAMORAT Vilisoni Aisake	Suva Malhaha District Community
ULUICICIA Mosese	Yavusa Nadave and Naulunivuaka
ULUICICIA Mosese	Ai Soqosoqo Vakavanua, Fiji
ULUICICIYA Mosese	SVT Tailevu/Naitasiri Constituency
ULUIVITI Ilisoni and 75 others	Natauloa Church, Nairai
ULUIVUTIA Apisalome	Nakamakama Front
ULUTOGA Meli and 32 others	Navurevure Church, Waimaro
VADEI Tiko and 32 others	Sawaieke Church, Gau
VAGH Nathwar Lal	Lautoka Chamber of Commerce and Industry
VAKAIKAIVATA Adriu and 366 others	Naisaumua Church, Verata
VAKASEVA Sivaniolo and 32 others	Udu Church, Totoya
VAKAWALE Kelera and 154 others	Navua Church, Deuba
VATU Saimoni	Yavusa Tiliva, Ono, Kadavu
VAYESHNOI Hon Lekh Ram	Labour Party Nadroga Indian East Constituency
VELIA Pita and 391 others	Nawailevu Church, Bua
VELIA Mosese and another	Yavusa Vunigiagia, Udu, Kabara, Lau
VERE Lewai and 30 others	Soqosoqo ni Marama, Tovata Church, Kalabu
VEREIVALU Veniana and 71 others	Nakasa Church, Wailevu
VESIKULA Seci and 64 others	Gaunavou Church, Vatukarasa
VESIKULA Seci and 39 others	Korotogo Church, Vatukarasa
VESIKULA Seci and 23 others	Reef Church, Vatukarasa
VESIKULA Seci and 63 others	Jeriko Church, Vatukarasa
VESILEVU Waisea and 245 others	Nepani Church, Nasinu
VESITAWALE Vilikesa and 125 others	Mokani Church, Mokani
VOCEA Anasa and 57 others	Drekeniwai Church, Navatu, Natewa
VOLI Joji	Fijian Melanesian Community
VOLITI Semi	Nadera SVT Sub-Branch
VONOVESI Rev Tevita	Vatukoula Methodist Church, Vatukoula
VOSA Etonia and 196 others	Tamavua-i-Cake Church, Tamavua
VUATAKI Kitione and another	Macuata Provincial Council
VUATAKI Kitione	Muaira Prison Fellowship
VUIBAU Isireli	Conservative Party of Fiji
VUIBAU Isireli	Yatumabua Tribe
VUIBEQA Sakiusa and 60 others	Namaqumaqua Church, Serua
VUIBEQA Sakiusa and 12 others	Mataikadawa Church, Serua
VUNILAGI Saimoni and 34 others	Nailuva Church, Vanuakula, Ra
VUNISA Nimilote and 161 others	Mudu Church, Koro
WAILUTI Koresi	Viti Cauravou
WAIRATA Kepu and 16 others	Navetau Church, Biaugunu
WAISALE Jone and 442 others	Nawanawa Church, Nasinu
WANAWANA Viliame and 650 others	Raiwaqa, Suva
WAQA Bale	Tovata Church, Kalabu
WAQA Taito and 235 others	Naloto Church, Verata

WAQA Tuimasi and 32 others	Lomati, Nabukelevu
WAQANACEVA Wame and 153 others	Dakuni Church, Sawau
WAQANACEVA Wame and 147 others	Dakuibeqa Church, Sawau
WATI Kamla	Vunivau Gyan Prakash Mahila Mandal No.2
WATI Urmila and 12 others	Dagau, Seaqaqa
WAVU Suliasi and 92 others	Namuka Church, Bau
WHIPPY Salome	Tavua Women's Advisory Forum
WHITESIDE Cherie and 2 others	Women's Aglow Fellowship Inc
WIRI Sinaikesi and 234 others	Tovu Church, Totoya
YALE Anare and 11 others	Nukunuku Settlement Church, Navatu, Natewa
YA TENG Rev Ming	Chinese Christian Fellowship of Fiji
YEE H W and 2 others	Chinese Association of Fiji

APPENDIX E

RESEARCH PAPERS

NAME OF AUTHOR	TITLE OF PAPER
Professor Asesela D Ravuvu	Fijian Leadership and Administration
Dr Isimeli J Cokanasiga	Foundation for the Future: Education Issues, Problems and Prospects
Dr Vijay Naidu	Ethnic Aspects of Education in Fiji
Dr Paul Geraghty	The Fijian Understanding of the Deed of Cession
	The Ethnic Basis of Society in Fiji
Professor Subramani	Civil Society: People's Participation and Building a Political Consensus in Fiji
Rev Paula Niukula }	
Ratu Joni Madraiwiwi }	Religion and the State
Rev David Arms }	
Rev Dr Bruce J Deverell }	
Rev Dr Joseph E Bush, Jr	Church and State in Fiji
Rev Dr Ilaitia Sevati Tuwere	Church – State Relation in Fiji
Professor David J C Forsyth	The Fiji Economy
Ms Patricia I Jalal	The Status of Fiji Women and the Constitution
Professor Alan Howard }	
Dr Janet Rensel }	Report on Rotuma
Ms Teresia K Teaiwa	Rabi and Kioa: Peripheral Minority Communities in Fiji
Ms Annelise Riles	Fijians and Mixed Race Peoples: A Regulated Relationship
Mr Josevata N Kamikamica	Fiji Native Land Systems Issues and Challenges
Professor R. Gerard Ward	Land in Fiji
Professor John D Overton	Land Tenure in Fiji
Dr Robin South }	
Mr Joeli Veitayaki }	Fisheries
Mr Konisi Tabu Yabaki	Forests
Mr Abdul Rahiman	Ownership and Exploitation of Minerals in Fiji
Mr Savenaca Narube	Participation of Fijians in Commerce
Rev John Garret	The State and Religions in Fiji
Professor Cheryl Saunders	The Constitutional Preamble
Dr Cyrus V Das	The Monarchial System under the Federal Constitution of Malaya
Professor M P Jain	Formation of Government in Malaysia
Professor Patrick Macklem	Basic Features of the Constitution of Canada
Professor W Michael Reisman	International Human Rights Law Bearing on Individual and Group Rights

Dr Shaheen Mozaffar	To Sustain Democracy in Culturally Plural Societies: Some Lessons from Mauritius
	Constitutional Designs, Electoral Systems, and Democracy in Multi-ethnic Societies: Comparative Lessons from Africa, Western Europe, and the Caribbean
Dr John Darby	Comparative Approaches to Power Sharing
Dr Timothy D Sisk	Power Sharing in Multi-ethnic Societies: Principal Approaches and Practices
Dr Michael Pinto-Duschinsky	Power Sharing: Electoral Arrangements and the Formation of Governments of National Unity
Dr Mahendra P Singh	Directive Principles of State Policy in the Constitution of India
Dr Guy Powles	The Place of Chiefly Systems in Constitutions
Mr Alex Frame	'Sovereignty' and 'Self-Determination' for Indigenous People in Multi-ethnic States: With Particular Regard to New Zealand and Fiji
Professor Rohan Edrisinhe	The Freedom of Conscience of MPs and Anti-Defection Provisions
Professor Daniel J Elazar	The Role of an Upper House in the Circumstances of Fiji
Professor Anthony J Regan	Accountability of Government as a Constitutional Imperative - Protection of the Independence of Constitutional Office Holders, The Ombudsman Commission and the Leadership Code in the Papua New Guinea Constitution

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APPENDIX F

OVERSEAS CONSULTATIONS

CANBERRA

Mr Bill Gray, Electoral Commissioner, Australian Electoral Commission (AEC)
Dr Robin Bell, Deputy Electoral Commissioner, AEC
Mr Brian Nugent, Australian Electoral Commissioner for NSW
Mr Michael Maley, Director (International) AEC
Mr Rodney Medew, Director (Applications Development) AEC
Mr Paul Edstein, Acting Director (Internal Audit) AEC
Mr Philip Green, Chief Electoral Officer, ACT
Mr Bruce Taylor, Manager, Tasmania Electoral Office
Professor Ted Wolfers, University of Wollongong
Professor Cheryl Saunders, University of Melbourne
Professor H P Lee, Monash University

KUALA LUMPUR

Tan Sri Ghazali Shafie
Dato Abang abu Bakar bin Datu Bandar Abang Mustapha, Hon Minister in the Prime Minister's Department
Chairman of the Malaysian BAR Council, Ms Henda Mohamed and members of the Council
Mr Gurmit Singh, General Secretary, HAKAM
Mr Karpal Singh, Deputy Leader of the Opposition
Tan Sri Dato Haji Anuar bin Dato Haji Zainal Abidin, Chief Judge of the High Court of Malaya and his fellow Judges
Dr Gan Khuan Poh, Economic Planning Unit, Prime Minister's Department
Dato' Dr A H Zainul, Secretary General, Ministry of National Unity and Social Development
Dr Shad Saleem Furuqui
YB Dato' Mokhtar Abdullah, Attorney General of Malaysia
YB Dato' Haliliah Hj Yusof, The Solicitor General and her senior officers
Dr Jomo K Sundaram
Datuk Harun Din, Chairman of the Electoral Commission and members of the Commission
Dr Cyrus V Das, Advocate and Solicitor
Professor M P Jain, University of Malaya

MAURITIUS

HE Mr Cassam Uteem, GCSK President of the Republic of Mauritius
HE Sir Rabindrah Churburrun, Kt. GOSK, QC Vice President of the Republic of Mauritius Beau Bassin
Dr the Honourable P Nababsing, MP Ag. Prime Minister, Minister of Economic Planning and Development and Minister of Internal and External Communications and Information
Hon Sir Maurice Rault Kt., Attorney General and Minister of Justice
Honourable A Jugnauth, Minister in Charge of Ministry of External Affairs
The Bishop of Mauritius

Sir Veerasamy Ringadoo, G.C.M.G., Kt. G.O.S.K., Q.C.
Mr Awatar, Senior Electoral Officer
Mr M Veerasamy, Senior Electoral Officer
Mr A Robert, Chairman Electoral Commission
Mr R Mathur, Associate Professor, University of Mauritius
Mrs V Nababsing, Senior Lecturer, University of Mauritius
Mr A Pompon, Clerk, National Assembly
Mr D. Dabee

SOUTH AFRICA

Mr Hernus Kriel, Premier of the Western Cape
Professor David Welsh, University of Cape Town
Professor Gerhardt Erasmus
Advocate Johnny De Lange, MP
Hon Justice Albie Sachs, Judge of the Constitutional Court
Professor Hugh Corder, University of Cape Town
Dr Frene Ginwala, Speaker of the National Assembly
Sharif Pandor and Hon Naledi Pandor, MP
Archbishop Desmond Tutu
Hon Justice Kate O'Reagan, Judge of the Constitutional Court
Hon Justice J C Kriegler, Judge of the Constitutional Court
Ms B Mabandla, Deputy Minister of Arts, Culture, Science and Technology
Mr Fanie Van Der Merwe, Constitutional Adviser
Dr Zola Skweyiya, Minister for Public Service and Administration
Mr Cyril Ramaphosa, Secretary General and Chairperson of the Constitutional Assembly
Mr Roelf Meyer and Valli Moosa, Minister of Const. Dev & Prov Affairs
Dr Bhadro Ranchod, Deputy Speaker
Hon Colin Eglin, MP
Hon Willie Hofmeyer, MP

LONDON

Dr John Darby, University of Ulster
Dr Timothy Sisk, Norwegian Nobel Institute
Dr Michael Pinto-Duschinsky, University of Brunei
Mr Niall Cullens, Far Eastern Department, Foreign & Commonwealth Office
Sir James Spicer MP, Chairman of the Westminster Foundation of Democracy
Professor Dr Carl Heinz, Nassmacher, University of Oldenburg
Mr Vernon Bogdanor, Brasenose College, Oxford
Dr David Butler, Nuffield College, Oxford
Professor James Crawford, Jesus College, Cambridge

NEW YORK

Professor W Michael Reisman, Yale Law School
Mr Francesc Vendrell, Director, East Asia and the Pacific Division, Department of Political Affairs, U.N.
Professor Shaheen Mozaffar, Bridgewater State College, Massachusetts

Professor Patrick Macklem, University of Toronto
Mr Marrack Goulding, Under-Secretary-General, Department of Political Affairs, U.N.

LOS ANGELES

Professor Arend Lijphart, University of California, San Diego
Professor Mathew Shugart, University of California, San Diego

WELLINGTON

Sir David Beattie, Sole Commissioner, Commission of Inquiry on the Courts in Fiji (1994) and
Mr Timothy Castle, Counsel Assisting
Sir Geoffrey Palmer, Victoria University, Wellington
Professor Donald Horowitz, Duke University, North Carolina
Chairman and Members of the NZ Electoral Commission

APPENDIX G

LOCAL PRIVATE CONSULTATIONS

NAME	OFFICE/ORGANISATION
Ratu Viliame Tagivetaua	Acting Chairman, Native Lands Commission
Mr Albert Queet	Director of Lands and Surveyor General
Mr Luke Ratuvuki	Permanent Secretary for Regional and Multi-ethnic Affairs
Ro Jone Mataitini	Ombudsman
Mr Emori Tudia	Secretary/Chief Investigating Officer, Ombudsman's Office
Mr Laisenia Qarase	Chief Executive, Fiji Development Bank
Dr Paul Geraghty	Director, Fiji Institute of Culture
Mr Qoriniasi Bale	Chairman of the Electoral Commission
Ms Nazhat Shameem	Director of Public Prosecutions
Mr Amaraiya Naidu	Permanent Secretary for Education, Women and Culture and senior members of his staff
Mr Isikeli Mataitoga	Solicitor-General and Secretary for Justice
Ratu Jone Radrodro	Permanent Secretary for Fijian Affairs
Dr Ahmed Ali	Director, Policy Analysis Unit, Prime Minister's Office
Mr Charles Walker	Chairman, Public Service Commission and fellow Commissioners
Hon Sir Timoci Tuivaga	Chief Justice of Fiji
Hon Sir Moti Tikaram	President, Fiji Court of Appeal
Mr Justice Daniel Fatiaki	Judge of the High Court of Fiji
Mr Rodney Acraman	Former Secretary and Chief Investigating Officer, Ombudsman's Office
Mr Mosese Volavola	General Manager, Native Land Trust Board and senior members of his staff
Mr Liesa V Tiko	Acting Commissioner of Prisons
Mr Grish Maharaj	Chief Executive, Fiji Sugar Cane Growers Council
Mr Jayant Prakash	Secretary/Legal Counsel, Fiji Sugar Cane Growers Council
Mr Isikia Savua	Commissioner of Police and senior members of his staff
Brigadier General Ratu Epeli Ganilau	Commander, Republic of Fiji Military Forces and senior members of his staff
Mr Nand Kishore Chetty	Acting Government Statistician

APPENDIX H

WRITTEN RESPONSES

UNIONS AND ASSOCIATIONS

NAME	TITLE
Abid Hamid Khan	Secretary, Federated Airlines Staff Assn
Ajendra Singh	President, Nausori Market Farmers Vendors Assn
Akariva Waqa	For Secretary, Fiji Air Engineering Assn
Alisi Ratulevu	President, Fiji Tourist Guides Assn
Anare K Silimaibau	General Secretary, FPTEA
Apenisa Seduadua	General Secretary, FEA Hourly Paid Employees Union
Asivorosi Waqatakirewa	Secretary, USP PHPSU Assn
Dr Arun Sharma	President, Fiji Alternative Medicine Practitioners Assn
Babu Ram	General Secretary, Terminal Taxi Proprietors Assn
Bhagwan Singh	Secretary, Sigatoka Taxi Operators Assn
Bir Varma	General Secretary, Civil Aviation Authority of Fiji Employees Union
C J Jayachandran	Chief Executive (Fiji Operations) Bank of Baroda
Capt Harley Steven	President, Fiji Airline Pilots Assn
Catherine Wong	President, Fiji Physiotherapy Assn, CWMH
D R Rao	Secretary, AUSPS
D A Christopher	Executive Director, Rabi Council of Leaders
Faga Semesi	General Secretary, Fiji Nursing Assn
Filimone Banuve	General Secretary, Public Employees Union
Gopal Pillay	Secretary, Nausori Carrier Operators Assn
Grant L Walden	Manager Personnel, ANZ Bank
Inoke Ulutegu	General Secretary, Fiji Sugar Tradesmens Union
Iva Tupua	Marketing Officer, Pacific Quality Foundation
J A Paul	General Secretary, Fiji Electricity and Allied Workers Union
Jale Toki	Secretary, Suva City Council Staff Assn
Jaganath Sami	General Secretary, Fiji Cane Growers Assn
James R Raman	General Secretary, National Union of Factory and Commercial Workers
Jean Ragg	Secretary, Fiji Motor Traders Association
Jitendra Lal	General Secretary, Handicraft Market Vendors &
Manufacturers Joshia Devi	Secretary, The Society of Hospital Pharmacists of Fiji
K Dhani Ram	General Secretary, Fiji Kisan Sangh
Kamatia Pene	Secretary, SPD Employees Union
Mahendra P Chaudhry	General Secretary, Fiji Public Service Assn
Mahendra P Chaudhry	General Secretary, National Farmers Union
Mamatuki Itautoka	Secretary, Blue Lagoon Cruises Staff Assn

Mateyawa Waqabaca	Industrial Officer, Fiji Sugar and General Workers Union
Michael Harness	President, Pig Producers Assn of Fiji
Mohammed Mushtaq Ali	Secretary, Sugar Milling Staff Officers Assn
Mohammed Jalil	General Secretary, National Taxi Proprietors Assn
Mosese Dakunivosa	Manager Human Resources, NBF
Naibuka Rabuku	Actg General Secretary, National Union of Hotel and Catering Employees
Nesbit Hazelman	National General Secretary, Telecommunication Employees Assn
P Raj	Secretary, Fiji Local Govt Officers Assn
Paul Wilkinson	Manager Human Resources, Westpac
Paul S Dunk	Chairman, Licenced Insurance Brokers Assn of Fiji
Phil Rogers	Chairman, The Insurance Underwriters Assn
Pita Emosi	Secretary, Vatukoula Mineworkers Council
Pradeep C Lal	Secretary, FNTC Staff Assn
Praneel Kumar	Secretary, Vaileka Market Vendors Assn
Pratap Chand	National Secretary, Fiji Trade Union Congress
Raana Asgar	Secretary, Fiji Veterinary Assn
Ralph W Sharp	Secretary, The Society of Fiji Travel Agencies
Ram Charitar Mohan	Secretary, Nausori Taxi Union
Ramend Kumar	Secretary, Tavua Market Vendors Assn
S Chandra	For General Secretary, Building Workers Union of Fiji
Seru Momo	President, Nadi Carrier Assn
Sharmila Naidu	For General Secretary, FEA Staff Assn
Shiu Sahai Sardar	Secretary, Navua Market Vendors Assn
Shyam Sharma	Secretary, Navakai Farmers Assn
Sireli Matanimeke	Executive Secretary, Tropik Wood Industries Salaried Staff Union
Sivinia Vakarewa	Secretary, National Cocoa Producers & Growers Assn
Snehlata Chand	Secretary, Dietitians Assn of Fiji
Surend Prasad	General Secretary, Fiji Post and Telecommunications
Viliame Waqabilibili	Secretary, PAFCO/PPL Staff Assn
Volau Rabuka	Secretary, Fiji Para-Dental Assn
W T Nata	Secretary, Fiji Air Traffic Control Officers Assn
W B Sorby	Secretary, Association of Banks in Fiji

CITY AND TOWN COUNCILS

Aniel Kuar Singh	Town Clerk, Lami
Anita Murgan	Acting Town Clerk, Levuka
Jamir Khan	Town Clerk, Lautoka
Joveci Tuinamuana	Town Clerk, Suva
Mukesh Kumar	Town Clerk, Sigatoka
Premendra Pande	Town Clerk, Ba
R K Ali	Town Clerk, Nadi
Raj Deo	Town Clerk, Tavua

Ratu Peni Rokotuibau	Town Clerk, Nausori
Sharma Nand	Town Clerk, Labasa
Vimal Prasad	Town Clerk, Savusavu

OFFICIALS OF INTERNATIONAL ORGANISATIONS AND FOREIGN GOVERNMENT

Andie Fong Toy	Legal & Political Officer, Forum Secretariat
Cameron Dick	Acting Attorney-General, Tuvalu
Camillo Noket	Attorney-General, Federated States of Micronesia
David Blackstock	Director, Legal & Political Division, Forum Secretariat
Father McEvoy	Columban Brothers
Ganesh Chand	Lecturer, University of the South Pacific
Gordon Davis	Solicitor-General, Cook Island
Jack I Kilu	Attorney-General Chambers, Vanuatu
Jamie Antolok	Law Clerk, Attorney-General Chambers, Marshall Is
Laisenia Qarase	The Chief Executive, Fiji Development Bank
Michael Takabwebwewe	Attorney-General, Kiribati
P M Afeau	Solicitor-General, Solomon Islands
Paul J Tovua OBE	Chairman, Electoral Commission, Solomon Is
Peter W Graham	Crown Counsel, Cook Is
Henry Hatton	Director, International Labour Organisation
Sao Gabi	Secretary, Attorney-General Chambers, Papua New Guinea
Siaosi T 'Aho	Supervisor of Elections, Tonga
Somsey Norindr	Resident Representative, United Nations Development Programme
T L Sioneholo	Assistant Govt Solicitor, Niue
Tuala Kerslake	Secretary for Justice, Western Samoa
Wilfred Golman	Legal Officer, Attorney-General Dept, Papua New Guinea
William Halm	Secretary for Justice, Republic of Nauru

OFFICIALS OF THE FIJI GOVERNMENT

J Serulagilagi	Registrar of Trade Unions
Ratu Jone Radrodro	Permanent Secretary for Fijian Affairs
Jioji Kotobalavu	Permanent Secretary for Information, Broadcasting & Telecommunications
Charles Walker	Chairman, Public Service Commission
T Bainimarama	Government Statistician
Gurmej Rup	Director of Economic Planning
John Tevita	Director of Immigration
L V Tiko	Deputy Commissioner of Prisons
Dr Paul Geraghty	Director, Fijian Institute of Culture
Nand Kishore Chetty	Deputy Government Statistician
Ratu Viliame Tagivetaua	Deputy Chairman of Native Land Commission
Albert Queet	Director of Lands

Luke Ratuvuki	Permanent Secretary for Regional Development and Multi-ethnic Affairs
Nazhat Shameem	Director of Public Prosecutions
Amaraiya Naidu	Permanent Secretary for Education
Eroni Sauvakacolo	Resident Magistrate, Domestic Court
Mr Justice Daniel Fatiaki	Judge of the High Court of Fiji
Ian R Perks	Ministry of Foreign Affairs
Ian Blakeley	Senior Legal Officer, Inland Revenue Dept
Isikia Savua	Commissioner of Police
Mary Chapman	Secretary to the House of Representatives
Paras Ram	Assistant Commissioner of Police
R H Hickling	Adjunct Professor of Law
S Chand	Senior Education Officer, Statistics
Salote Kaimacuata	Public Legal Adviser
Semesa Sikivou	Director of Social Welfare
Hon Sir Moti Tikaram	President of the Fiji Court of Appeal
Tevita K. Banuve	Permanent Secretary for Finance and Economic Development
Tui Mailekai	Commissioner of Inland Revenue

TABLE A

COMPARISON OF TOTAL POPULATION DISTRIBUTION BY ETHNICITY AS AT 1986 CENSUS AND 31 DECEMBER 1995*

	1995		1986	
	POPULATION	PERCENTAGE	POPULATION	PERCENTAGE
Fijians	403,288	50.7%	329,305	46.0%
Indo-Fijians	346,523	43.5%	348,704	48.7%
All Others	46,267	5.8%	37,366	5.3%
TOTAL	796,078	100.0	715,375	100.0

Source: Bureau of Statistics' Statistical News No. 19, 1996

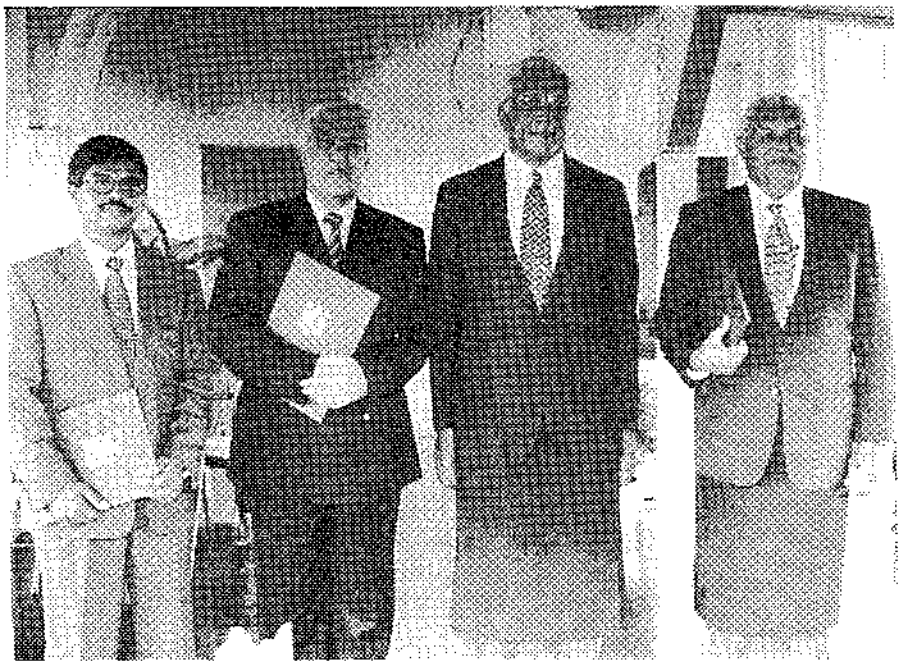
NOTE: The 1995 figures are provisional estimates based on births and deaths registered since the 1986 Census and the net population outflow estimated from official immigration records.

TABLE B

COMPARISON OF ESTIMATED POPULATION OF PERSONS 18 YEARS AND OLDER AS AT 31 JUNE 1996 AND 31 JUNE 1999

	FIJIANS		INDO-FIJIANS		ROTUMANS		OTHER PACIFIC ISLANDERS		ALL OTHER ETHNIC GROUPS		TOTAL
	Population	Percentage	Population	Percentage	Population	Percentage	Population	Percentage	Population	Percentage	
1996	224,174	48.9%	204,360	44.6%	6,781	1.4%	6,829	1.4%	16,049	3.5%	458,193
1999	250,818	49.2%	226,736	44.4%	7,441	1.5%	7,365	1.4%	17,368	3.4%	509,728

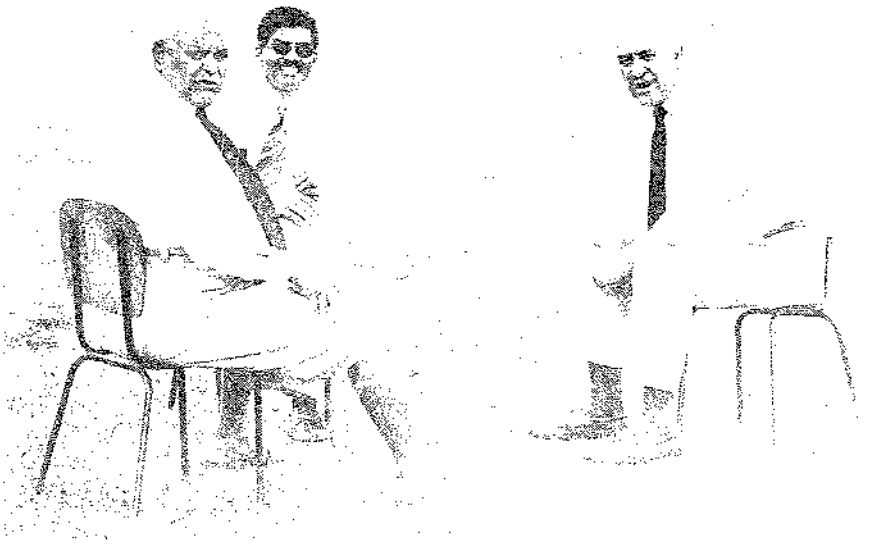
NOTE: These estimates were prepared at the request of the Commission from official Bureau of Statistics data.



Receiving their warrants
Photograph by courtesy of Fiji Times



By the International Date Line, Wairiki, Taveuni.
Photograph by courtesy of Fiji Times



A relaxing moment to recap - Seaqaqa Junior Secondary School

Photograph by courtesy of Fiji Times





Its submission time. Lautoka City Council Chambers



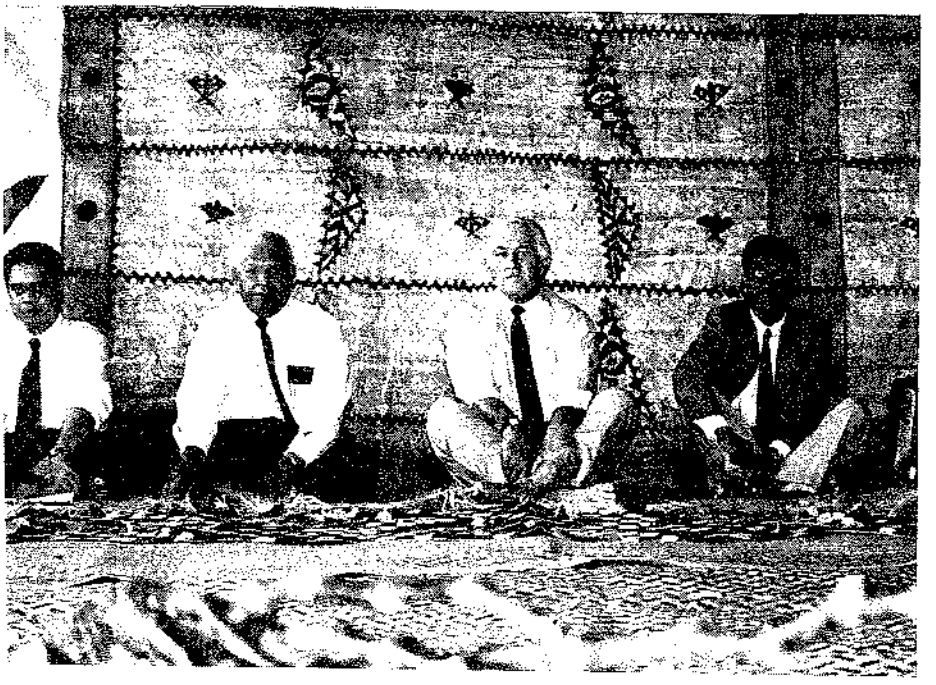
Visiting a cane farm homestead. Lautoka



Enroute to Kese, Naviti, Yasawa by speedboat



The centre of Viti Levu enroute to Suva



Traditional Welcome at Tavuki, Kadavu



At Namalata Airstrip, Vunisea, Kadavu



We also listened! Tavuki, Kadavu



Commissioner Vakatora makes a point. Parliamentary Complex, Veiuto, Suva.
Photograph by courtesy of Fiji Times



The Commission in Meeting



After a meeting with Senior Malaysian Government Officials



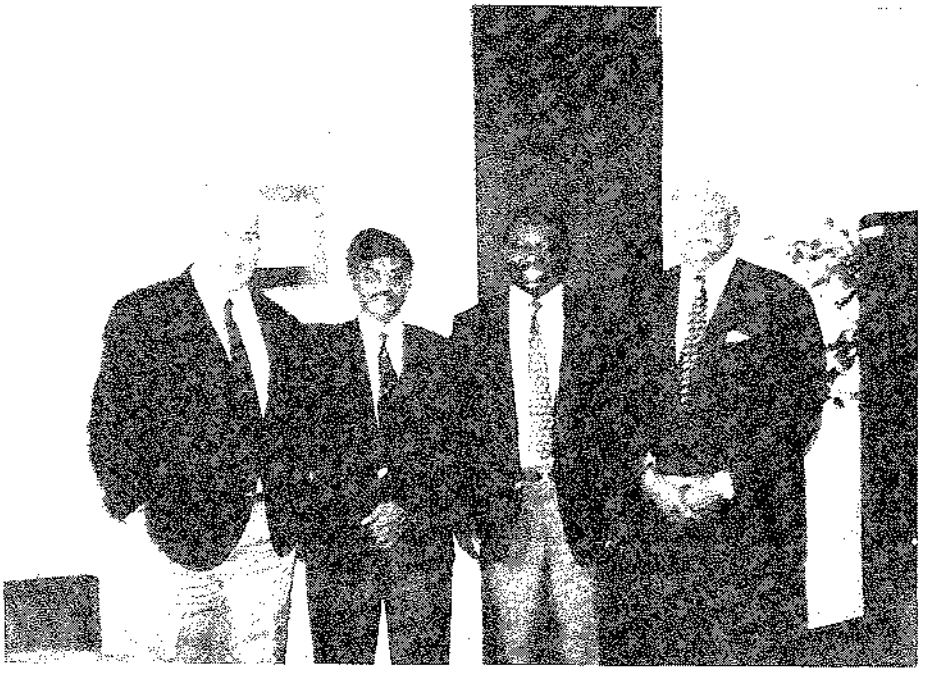
The Commission at Port Louis Mauritius



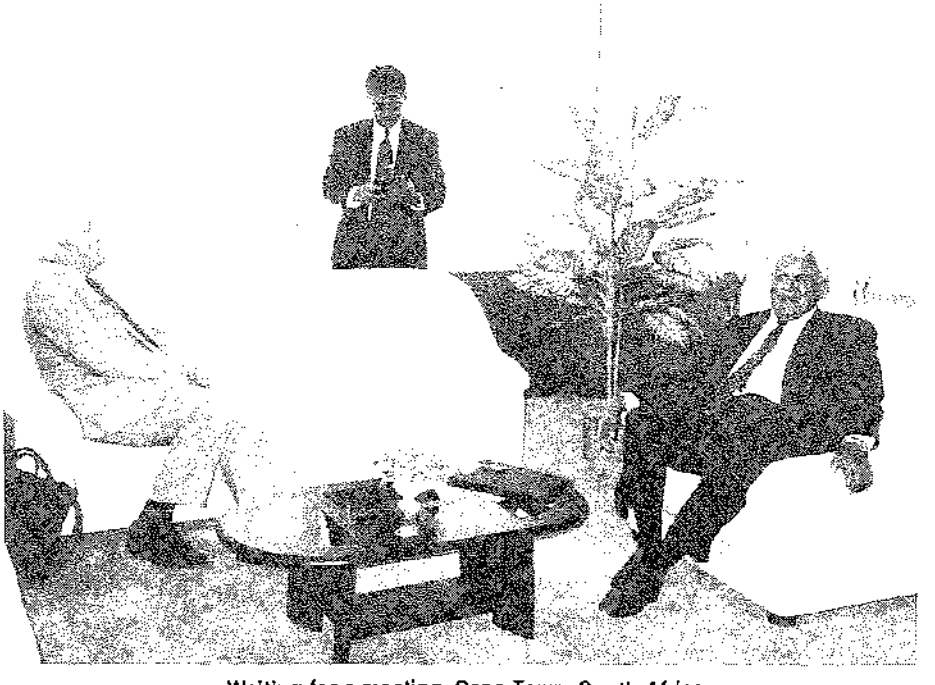
The Commission in Cape Town, South Africa



At UN Headquarters, New York before their meeting



After meeting with Cyril Ramaphosa the Secretary General and Chairperson of the Constitutional Assembly, South Africa



Waiting for a meeting, Cape Town, South Africa



The Commissioners adopt and sign their report



Vinaka Vakalevu — We have completed our task



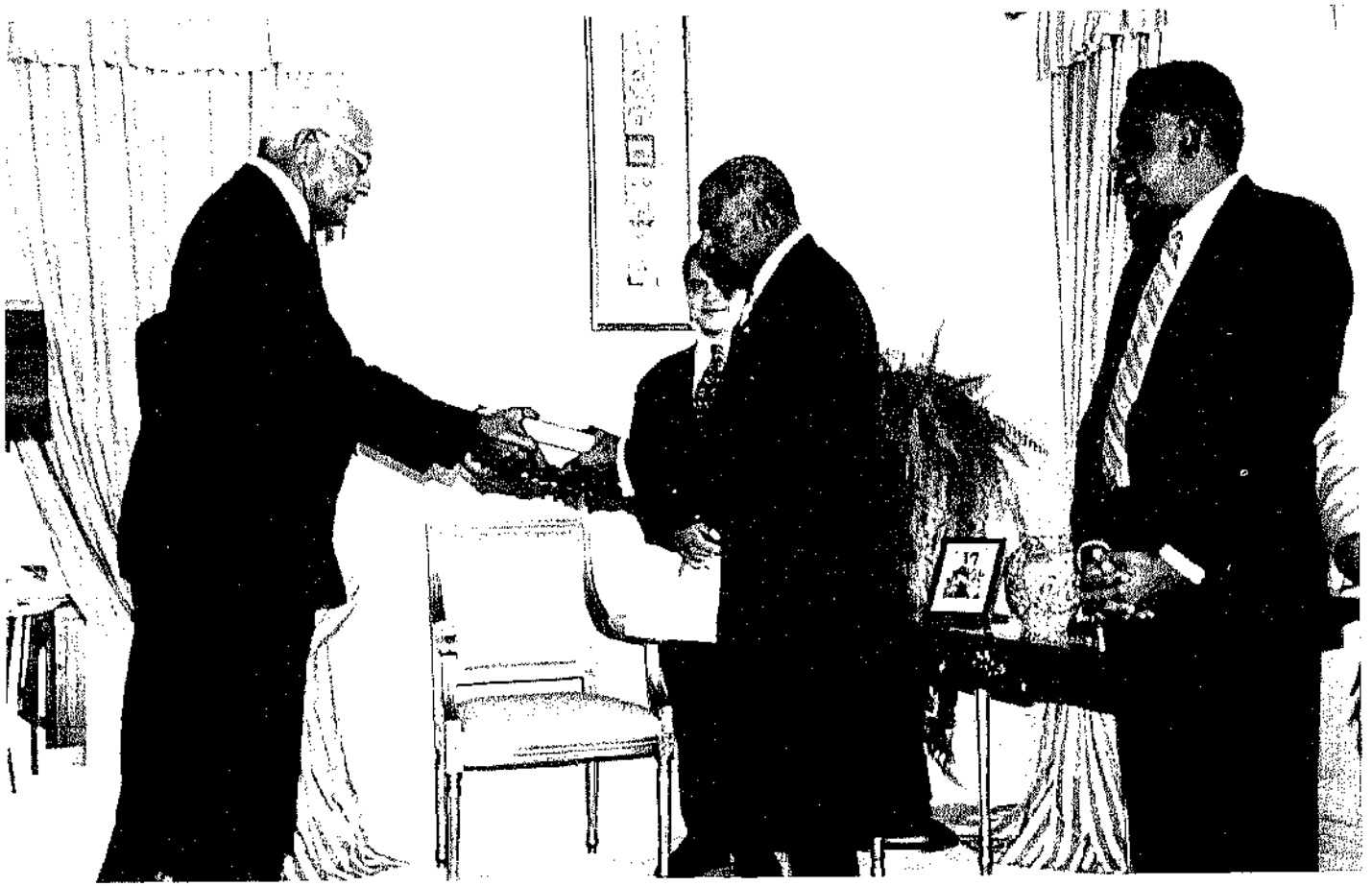
The Chairman makes his pre-presentation address



The Chairman addresses His Excellency the President prior to presentation of the Report



The President receives the Commission's Report



The Prime Minister receives a copy of the report — 6/9/96