

DRAFT CONSTITUTION: THE EXPLANATORY REPORT

THE CONSTITUTION COMMISSION

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The Commission

The Constitution Commission was appointed in July 2012 to prepare a Draft Constitution for Fiji. The members of the Commission are:

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PREFACE

The Explanatory Report is a record of the work of the Constitution Commission in preparing the Draft Constitution of Fiji in accordance with Decree 57 of 12012.

During its work, the Commissioners had the good fortune to meet thousands of Fijians and to listen to their views and recommendations for the new constitution. We are grateful to them and to many organisations that made submissions to us. The submissions were invaluable to us in understanding the conditions in which Fijians in different parts of the country live and their hopes and aspirations for the future. We thank them for their efforts in preparing the submissions and presenting them to us.

We were assisted by a number of Fijian and international experts, and many more Fijians who we consulted and who participated in our workshops and seminars. With their guidance and wisdom we were able to make a number of decisions, now reflected in the Draft Constitution, responding to the hopes of Fijians. We thank them all for their advice. Their names appear in Appendix 2.

We acknowledge the financial contributions from Australia, European Union, New Zealand, USA and United Kingdom and thank them for their generosity.

We were assisted throughout by the members of our secretariat who worked long and sometimes tedious hours, and always retained their cheerfulness. We cannot thank them enough for their labours. Our Executive Secretary, Keshwa Reddy who worked efficiently and tirelessly, sometimes under great stress. His assignment involved a variety of tasks and contacts with a host of people and institutions. It is amazing that he never lost his sense of humour. At the start of our work we received valuable help from Conciliation Resources in setting up our office and handling our finances.

We would like to mention specially the imagination, efficiency and hard work of our Chief Draftsperson Phil Knight. He worked endless hours regardless of his ill health; without his dedication, the Draft would not have been ready in time.

Finally, and a personal note, I would like to thank my fellow Commissioners for their hard work and their commitment to their responsibilities. We worked very well together, learnt a great deal from each other, and developed a close and warm comradeship. All our decisions, reflected in the Draft Constitution, were reached unanimously, not without long discussions and lively arguments.

We hope that all Fijians will have an opportunity to study the Draft Constitution and read this Report, and make a full contribution to the deliberations of the Constituent Assembly. We hope that our efforts—and the efforts of thousands of Fijians—will not be in vain.

Yash Ghai

Chair, Constitution Commission

21 December 2012

PART I

THE COMMISSION AND ITS APPROACH

ABOUT THIS REPORT

The purpose of this report is mainly to explain the Draft Constitution that has been prepared by the Constitution Commission in a way that people will readily understand. A constitution is not an easy document to read; perhaps few will want to try. The Commission imagines that far more people would be interested in something that does not use legal language but tries to make the ideas understandable. And this is one of the tasks Section 7(2) of the Decree on the Constitution Commission (57/2012) requires the Commission to do:

Shortage of time has meant that the report is less thoroughly prepared than the

(a) to summarise, as concisely as possible and in a way that the people of Fiji will understand –

- (i) the recommendations embodied in the draft Constitution,*
- (ii) the reasons for those recommendations,*
- (iii) how those recommendations relate to section 3 of this Decree, and*
- (iv) the views received from the people, and*

(b) describe how the Commission has carried out its work.

Commission would ideally have wished. But we believe it does serve its purpose.

This Explanatory Report contains an account of the process for the preparation of the Draft Constitution of Fiji, the views of the people, and an explanation of the scheme and contents of the Draft Constitution.

Section 3 of the Decree says its purpose is a Constitution that:

- (a) results from full, inclusive and fair participation of Fijians;*
- (b) meets the needs of Fiji and the aspirations of its people;*
- (c) unites the people of Fiji;*
- (d) includes provisions appropriately designed to achieve, among others, –*
 - (i) true democracy, and*
 - (ii) respect for, and protection and promotion of human rights;*

- (e) *includes provisions that achieve the following non-negotiable principles and values —*
- (i) *a common and equal citizenry;*
 - (ii) *a secular state;*
 - (iii) *the removal of systemic corruption;*
 - (iv) *an independent judiciary;*
 - (v) *elimination of discrimination;*
 - (vi) *good and transparent governance;*
 - (vii) *social justice;*
 - (viii) *one person, one vote, one value;*
 - (ix) *the elimination of ethnic voting;*
 - (x) *proportional representation; and*
 - (xi) *voting age of 18.*

Originally the Decree also required the Commission under section 7 (i) (j) to prepare consequential changes to legislation that was inconsistent with the draft constitution. For this purpose The Commission did a detailed examination of the Decrees published by the Government. Unfortunately at a late stage this provision was deleted by the Government without consulting us or advance notice, after we had already spent considerable time and resources on a detailed analysis of the post-2009 Decrees. As the Commission believes that this work will be useful when these Decrees are cleansed of violations of rights and due process, we have published it on our website as “Analysis of Decrees.”

Part I of the Report focusses first on the Commission and its work, including a summary of major issues raised by the people in their many submissions. It then reflects on the problems faced by the country, as perceived by the Commission, including in the light of those public views.

The Commission developed what it believes to be a coherent view of the way a new Constitution should approach the situation of Fiji, and that approach is explained in some detail. The Part ends with some observations on the principles listed here, and a brief overview of how the Draft Constitution has carried out its mandate to apply those principles.

Part II focusses on the actual document. There is an overview of the whole scheme of the Draft Constitution. Then follow a number of short summaries of the topics in the Draft, some of them cutting across chapters – such as “Democracy and Participation” or how the Draft Constitution deals with issues related to women. These short, often partially bullet-pointed summaries are themselves grouped into themes: The People and their Concerns; Land, Environment and Resources; the People in Society and Politics; Government; Integrity, Accountability and Justice; Security of the Nation and Person; and finally the Future. There are overlaps between these various segments but the Commission believes this approach will enable people to find what really interests them. There is some repetition between the overview that begins this part and the individual thematic segments.

The Appendices contain material on the consultation process and the administration of the Commission as well as a chart of the relationship between the People’s Charter for Peace and Progress and the Draft Constitution.

The Commission hopes the reader will find this arrangement understandable and the contents of this Report useful, even interesting.

SECTION 1: THE COMMISSION AND ITS PROCESS

The details of the process and of the funding are set out in Appendix 2 of this Report.

The work of the Commission can be divided into three phases. First it studied what it was required to do, building an understanding of constitutional concepts, institutions and procedures, and objectives of the new constitution. It made a careful study of its mandate. A number of in-house seminars were conducted to increase the awareness and knowledge of constitutional issues, through comparative and Fijian experiences, particularly in areas covered by the principles identified in the Decree 57/2012 as “non-negotiable” (see preceding page). It consulted a number of Fijian and foreign experts on constitutional provisions relevant to its terms of reference. It conducted a close examination of the contents and experiences of past constitutions in Fiji to understand their role in its political, economic and social history—and to explore lessons they hold for us as Fijians embark on another attempt to find a suitable constitution. During this period the Commission recruited its secretariat and secured the equipment necessary for its tasks.

The second phase was the engagement with the people, principally to seek their views and recommendations on the constitution. The Commission published a general introduction to the process and constitutional issues to increase public awareness and to enable the people to participate in the process, by debates among themselves and then to give the Commission their views (*Building the People’s Constitution: Your Responsibility: A Guide to Constitution Making for the People of Fiji*). The Commission set up a website which provided much information about constitutions, and the activities of the Commission (<http://www.constitution.org.fj>). It travelled widely throughout the country to receive views. It also received a large number of submissions from the public electronically and by post or direct delivery: over 7000 submissions, from the whole cross section of society. Many of these (oral and written) were made by organisations (including villages, political parties, faith groups, professional and business associations, trade unions, women’s and youth groups, academics, and the diaspora) so that the number of Fijians who engaged in the process runs to thousands. All are now available on the Commission’s website, except a small number whose authors preferred that they were not.

The details of this phase are set out in Appendix 2. The Commission also held a number of public seminars to involve the people in the process and to increase their knowledge of constitutional options.

The third phase was the preparation of the Draft Constitution. A careful study and analysis was made of the views and recommendations from the public (details are available in Appendix 3). The Commission conducted considerable amount of research, through scholarly books and articles, commissioned papers and briefs, wide consultations with local and foreign scholars, and engagement with public servants, academics and civil society representatives. It obtained several expert briefs on critical aspects of its work. It studied political, social and economic problems facing Fiji and considered how they might be resolved through the constitution. It paid particular attention to the approaches adopted in different countries to promote political integration and national unity. It sought, through a series of workshops, advice on the various options in relation to difficult areas. The Commission developed its own recommendations in a series of meetings over nearly 10 weeks and worked with its legal draftspersons, turning its ideas into legal text.

The funding for the process came mainly from the Australian, New Zealand and British High Commissions, the US Embassy and the European Union. The Commission is very grateful for their generous assistance. It is also grateful to the Fiji Government for providing the excellent facilities of the Parliamentary Complex, and two vehicles. Regular accounting of expenditure was made to the donors. A financial audit will be conducted in January 2013 and made available to the donors and the public as soon as it is completed. Meanwhile Appendix 2 provides a record of the money received by the Commission and the purposes for and the manner of its expenditure.

WHAT HAPPENS NEXT?

The Decrees governing the constitution making process provide for the Constitution Commission to prepare a draft constitution for consideration by the Constituent Assembly (CA) whose chairperson, members and staff of the CA are to be appointed by the Prime Minister. No rules for the procedure of the CA have been published.

After the CA has adopted the constitution, it is to be scrutinised by a judicial tribunal appointed and presided over by the Chief Justice (and which must include two overseas judges) for compatibility with the constitutional principles as well as the mandatory immunity in respect of all the past coups as well as the acts of the coup makers. It is only if the tribunal decides that the CA's constitution is compatible with these principles and immunity that the President would bring it into effect. If it decides otherwise, the constitution will be sent to the CA for appropriate amendments.

Section 4 (c) of Decree 57/2012 requires the Constitution Commission to make decisions on the constitution by reference to four factors, as follow:

- *the purposes and guiding constitutional principles for the Constitution;*
- *the wishes of the people of Fiji;*
- *the lessons of the past; and*
- *best relevant practice.*

But it is only in relation to the first of these points and the grant of immunity spelled out in detail in the Decree that the judicial tribunal would assess the compatibility of the constitution with the Decree.

The Decrees had provided for the Commission to consult the people on the Draft Constitution and to pass on the views of the people to the CA. At a late stage (November 2012), the Decrees were unfortunately amended to remove that provision, without any consultation with or advance notice to the Commission. The Commission regrets that the people seem to have been denied an important opportunity to engage in discussions on the Draft Constitution before the CA deliberates on it, which would have helped its deliberations.

WHAT THE PEOPLE TOLD US

Some of the recurring themes are connected to livelihood issues, demonstrating the poverty in which many Fijians live. Much concern was expressed about diminishing pensions and welfare provisions. Issues around land kept cropping up: great anxiety among the iTaukei [indigenous Fijians] as to what would happen to their land, as well as claims to freehold and state land, and of the natural resources on or under their land; and equally great anxiety among their tenants (predominantly but not exclusively Indo-Fijians) as to the availability and security of leases—their main source of land. There was much discussion of the productive uses of land—including some fundamental reforms of principles and institutions governing land. The Commission got some understanding of the many dimensions of land, including the role it plays in the identity of many iTaukei. The discussion about the distribution of incomes from the exploitation of natural resources demonstrated the multiplicity of legitimate claims, and how to balance them—and raised profound questions of fairness and social justice. The obligations of the present generation to future generations in respect of these resources, and, even more important, the preservation and custodianship of Fiji’s fragile environment also featured prominently

Economic issues were another constant theme: unemployment (with the rise of violence and petty crime), massive movement from rural to urban areas (and the emergence of informal settlements), declining standards of living for increasing numbers of people, access to education, the crisis of the sugar industry, the difficulties of marketing agricultural crops, and poor communications.

Moral issues, connected to traditions, religions, human rights, identity, modernity, globalisation, occupied an extraordinary amount of time. There were numerous demands for corporal punishment at school and home, the disciplining of women, and tighter control of life in villages. Some of those who made these claims were also supporters of the declaration of Fiji as a Christian state (against the wishes of the majority of the Christian community). On the other hand, there were many who looked forward to a new life style, an open society, friendships across ethnic divides, new technologies, the

challenges and opportunities of globalisation—especially, it must be said, the younger generation.

There was considerable ambivalence on human rights—some seeing them as a threat to traditional culture, and others as liberation, the freedom to decide on the kind of life they want to explore. A formal understanding of human rights was not much in evidence, but debates centred round the principles and approaches implicit in a scheme of human rights. Some saw the close connection between rights and democracy. Some saw rights as a set of values and procedures to combat the consequences of poverty and marginalisation. Others saw them as the foundation of the rights of workers and trade unions. The media, covering the consultations well but afraid to make its own case, would certainly see human rights as the basis for the freedom of expression and freedom of information. Many who asked for free education, health services, housing and even transport could well have grounded their claims on socio-economic rights. Not many saw human rights as defining the relationship between the state and citizens, much less as between citizens (although the claims of indigenous rights came close to both). Not infrequently, references were made by women, youth, children, iTaukei, the disabled and the elderly to the rights they were entitled under international conventions. In some submissions there was recognition of how the contemporary framework for human rights can be the foundation of social and economic policies—and social justice.

Many, but perhaps not as many as we had expected, spoke or wrote on the purposes and organisation of the state. At the macro level, most seemed satisfied with the parliamentary cabinet system that successive constitutions (though with significant differences) have provided. The people were divided on the retention of the Senate; some expressed the hope that the purpose for which it was set up could be achieved in other ways. Some wanted slightly increased powers for the president, though the overwhelming majority wanted a largely ceremonial president. Opinion was also divided on how the president should be elected; a few advocated direct elections by the people, rest were content with some kind of an electoral college.

Most people were critical of the role that politicians and senior civil servants have played since independence. The people see them as selfish, focussing on their narrow material interests, exploiting ethnic differences and jeopardising communal peace to serve their own interests. The Commission was repeatedly asked to stop the corruption round the state: its contracts, disposal of property, business preferences, and various forms of patronage. They wanted a leadership with a fundamental commitment to serve the people (and be accessible to them) and promote the economic progress of all. They longed for integrity in public life and greater accountability of government to the people (some even asked for the recall of MPs who had failed their constituents). Many submissions were received for the reform of the legal framework for political parties to increase their internal democracy and accountability to the public. Many were concerned with what they perceived to be corruption within the judiciary (and lack of independence) and the lack of access to courts.

There was considerable criticism of public servants, as insensitive and not easily accessible. We were told of improper appointments of staff by permanent secretaries and ministers, which among other consequences, undermines discipline within the ministry—and the authority of the Public Service Commission. Serious allegations were made of routine and systemic corruption within the public service. Many deplored the harshness of the police. There was consistent criticism of the ILTB for the neglect of the interests of the landowners, delays in collecting and distributing rents. There was also criticism of aspects of leases (perhaps rooted in the legislation rather than bureaucratic practices).

At the local (and particularly rural) levels out of Suva, people complained of the lack of access to state services and officials. The centralisation of government in Suva entailed for many long and expensive journeys to secure documents, seek specialised medical care (and even for the birth of their children). They wanted those responsible for delivery of services closer to themselves. Others wanted even policy making closer to them. Here was a clear indication of their preference for more political and administrative responsibility at local levels, with elected councillors to decide on policy and oversee officials. Many advocated re-organisation not only for these purposes, but additionally for the integration of local authorities, moving away from their ethnic foundations to non-racial councils serving all the people in a location, bringing with it rationality of purpose, inclusiveness and efficiency.

The theme of ethnic integration was by no means universally—or even widely—endorsed. With a few exceptions (mostly the smaller parties), political parties wanted to retain communal voting (few understood what proportional representation meant, much less how it worked). Few advocated power sharing governments. However, there were several submissions, many from the youth and some from academics, which argued for a non-racial political system, starting with the abolition of communal seats. They wanted “integration” extended beyond the electoral system, to include structures of the government and even the merger of official iTaukei institutions with mainline ministries. They also suggested how the use of symbols (like the flag or representations on the currency) could be used to promote national pride and unity. And language and educational policies can both be used to promote inter-ethnic contacts.

People expressed some scepticism about the value or longevity of constitutions. They wondered whether all the effort, time and money which were invested in this process was worth it. Some gave the constitution six months! They were also concerned about the legitimacy of our process, especially what appeared to be a tightly controlled CA. Naturally, scepticism arises from the frequency with which lawful governments have been overthrown by the military. This led to lengthy discussions on the causes and consequences of coups. Elsewhere in this report we discuss the consequences of coups—harm to and suffering of so many people, heightened tensions and conflict among ethnic groups, damage to the economy, breakdown of institutional trust, and a crushing blow to the rule of law.

Closely related to coups, the question of immunity was raised repeatedly. The government was heavily criticised for the way in which it had granted immunity to itself

as well as the scope of the immunity. In addition, the renewal of previous immunities was seen as favours to friends of the government. Many expressed their dismay that the government had not attempted to secure immunity through a process of discussion and reconciliation. As it is, many people interpreted immunity as a cynical act—and felt that it had adversely affected the capacity of this process to achieve commitment to constitutionalism.

The Commission was frequently asked whether or how a constitution can prevent coups, and made suggestions, though all were aware that there are no easy solutions (see “No More Coups?”)

CONCLUSION

The submissions—and our journeys to all parts of Fiji—provided the Commission with an excellent picture of how Fijians live in different parts of the country; of its diversity; economic activities; and often of social life—and the sheer beauty of its landscapes. The Commission found the country a deeply fragmented and polarised society, principally along race lines, but also within races; and increasingly spatially (urban and rural).

To an outsider there are many common features and practices that define citizens and groups within Fiji. However, among Fijians themselves is a sense of a crisis of identity, reinforced by the feeling that they are coerced against their will to abandon their traditional values and practice for a common identity.

This is a period of great transformation for Fiji, and with it of uncertainty and anxiety. The transformation is reflected in the differences of aspirations between the older and younger generations; and to a lesser extent between girls and women on one side and the men on the other. The youth (and some others) feel the constraints and pressures of a small well-knit society where they cannot express their views or live a different life style.

The massive movement out of villages to urban centres has had a fundamental impact on demography and the relations between members of the various communities. Emigration of recent years has changed perceptions of many people (emigrants and their families and friends left behind alike) of the centrality of Fiji to their future—a disorienting sense of impermanence.

For many the economy has not worked so well—workers, dwellers in settlements, people displaced by the coups, pensioners. In the last few years many people have fallen into the trap of poverty.

SECTION 2: PROBLEMS FACING FIJI

Fiji faces a number of problems which need to be resolved to provide a clear path to the future. The National Council for Building a Better Fiji described the problems in the following way:

[T]he people of Fiji are disappointed and disenchanted with the country in which they now live. The high hopes they had at Independence have been dashed. The reality they face is a country scarred by the consequences of political instability and repeated coups, a stagnant economy, a general lack of trust and confidence, growing unemployment and poverty, increasing religious and racial intolerance and divisiveness, the emigration of many talented citizens and a rising tide of crime and violence”.

ECONOMIC PROBLEMS

Fiji’s economic growth has been weak and unsteady over the past few years, averaging 0.1%, though the current rate is said to be over 2%. It is generally accepted that growth prospects remain “weak and uncertain” (as the IMF says). Fiji depends considerably on remittances (more than twice the income from the sugar industry) which have been declining, as have exports and investments. Economic growth suffered a major setback following the political instability of 2006-07 and during the global financial crisis of 2008-9.

Many social indicators have worsened in Fiji over the past three decades. These include the Human Development Index (HDI), which measures the average achievements in a country in three basic dimensions of human development. It is a widely accepted measure of a country’s progress in attaining satisfactory levels of education, health and income. Fiji’s ranking was 42nd in 1975 but dropped to 61st in 1997, and to 92nd in 2008. Based on the 2011 UNDP Human Development Index, Fiji currently is placed 100th out of 177.

Available data on employment indicates that while the total numbers of economically active persons have increased between 2006 and 2011 by around 20%, the number of wage earners has changed little or may have even declined due to low levels of private sector investment.

Inflation has been around 36%. Given that food prices have risen in the same period by 48% and the poor generally spend more of their income on food, their cost of living between 2006 and 2012 would have risen by probably above 40%.

It is evident that rates of poverty have increased since 2008-09 when the last Household Income and Expenditure Survey was conducted. Overall poverty in 2008-09 was 31% (18% in urban areas and 43% in rural areas). In both areas, poverty is likely to have increased due to low economic growth/stagnation.

Sugar production continues to decline due to a variety of reasons, including poor technology, lease problems, and shortage of labour. Similarly, the outlook for the pine and mahogany industries is uncertain, because of the state of the world economy, while it is not easy to find markets for mahogany.

ETHNICITY AND CULTURE

Perceived conflicts between Fiji's two major communities, which remain unresolved, are a major cause of uncertainty. Fiji remains a fragmented country, with both institutional and inter-personal racism. In the last 25 years, racism together with political, social and economic insecurity have resulted in more than a third of the Indo-Fijian citizens migrating for good, and they have been followed by citizens of other ethnicities including iTaukei.

There is a crisis of culture. Fiji is caught up in a culture which is based on the organisation of an out dated economy. The demands of people embedded in this culture (for free and better education, health, housing and transport) cannot be met without a radical change in that culture and the values and institutions that sustain it. "Culture" as applied to iTaukei has become very encompassing, and deeply attached to religion, politics and economy, which cause particular problems in organising the state and planning the economy. Privileging one culture or religion above others in a multi-racial society is no recipe for peace, unity or development. This problem is compounded by generational change, which makes culture a source of conflict not as between different cultural traditions but also within each culture.

There are some problems in coping with change, compounded by major contradictions. While traditional culture is valued the benefits of economic development are also sought. People are simultaneously looking backwards and longing for a different future).

LACK OF PUBLIC TRUST

Another major problem is the lack of trust in public institutions, a result of ethnic conflict and increasing levels of corruption. The rule of law (for long a positive and important feature of state and society in Fiji) has been undermined. People have little trust in political leadership, which compounds the sense of crisis which is widespread. The frequency of coups has produced a feeling of hopelessness all too evident to the Constitution Commission in public hearings.

DEMOCRATIC WEAKNESS

Fiji's democracy is without deep roots, without real understanding of its importance or procedures. Racial politics have dominated at the expense of the values of democracy; operating within previous frameworks well past their usefulness. The succession of coups and military or military-influenced governments have also undermined democratic values and prevented the accumulation of democratic experience.

SECTION 3: WHY A NEW CONSTITUTION?

Even recognising these problems, why does Fiji need a new constitution now?

The immediate cause is that there is currently no constitution. In 2006 there was a coup, after which a military-led government took over the running of the country. At first the government, led by Commodore Voreqe Bainimarama, operated under the 1997 constitution (without the legislature and government provided in that constitution). But in 2009, after a Court of Appeal judgment that the government was unconstitutional because it was inconsistent with the 1997 constitution, the government formally abrogated the constitution. Since then Fiji has been ruled without a constitution. The government has operated under previous laws as modified and supplemented by Decrees passed by it. There are no fundamental values and principles which govern the contents or procedures for making decrees. The government is free to do what it likes. Several Decrees violate rights of the people. Some restrict access to courts.

A crucial function of the new constitution will be to restore democracy and the rights and freedoms of all Fijians. Laws and practices which contravene these rights and freedoms will be repealed. Free and fair elections will be held for a new legislature by 30 September 2014, which will take over responsibility for law making and supervising the conduct of the government. Access to independent courts to challenge laws and decisions of the government and to protect rights will be fully restored.

Apart from restoring democracy and rights, the constitution will provide the framework within which the fundamental social, economic and political problems that face Fiji can be addressed. The Decree sets out some values for the constitution, emphasising democracy and human rights, with equal citizenship and common identity of the people of Fiji as dominant principles (these are discussed later as “constitutional principles”). The policies and institutions of the constitution must respond to the anxieties and expectations of the people about which they told the Constitution Commission in numerous meetings all over Fiji.

Over the last several years, as mentioned earlier, the economy has declined, increasing numbers of Fijians live in poverty, many highly skilled people have left the country, and many individuals, families and communities worry about what the future holds for them. These issues have not been directly addressed in Fiji’s previous constitutions. In some important ways, the Draft Constitution is different from them, particularly in emphasising the purposes for which only state power can be exercised, and the underlying principle of integrity. In the Commission’s view, the constitution must address some fundamental issues relating to the people of Fiji as a single nation (divided as it on some key matters on a communal basis) and the restructuring of the state to reflect the commitment to a common identity and equal citizenship. Fiji needs to deepen the now shallow roots of democracy. Equally damaging is the erosion of the rule of law which the constitution must restore. Increasing disparities of wealth and opportunities have to be addressed for justice, social harmony and political stability. Many of the demands that the people

submitted to the Commission depend on the revival of a competitive and vibrant economy, on foundations of equitable employment relations. So here is another challenge of the constitution.

WHAT CAN A CONSTITUTION DO: ITS IMPORTANCE IN DIVIDED SOCIETIES

Many people, quite rightly, asked us if this constitution would suffer the same fate as its predecessors. Will it solve any problems? A constitution cannot arrange or predict its own fate. Its fortunes depend on the traditions of the rule of law and the broad satisfaction of the people with its values and institutions. Some countries may indeed be able to manage without a constitution as we were reminded. But the category of such states is nearly extinct as the role of the state changes with increasing complexity of society and its relations with the external world. Ironically, it is those states that most need constitutions, which include some former colonies, that frequently dispense with them.

Why is their need for a constitution so strong? In established societies with long common histories, there is substantial agreement on national values, the relationship of the state to society, and the proper limits of state power. This kind of social consensus does not exist in new multi-ethnic states, as is obvious from Fiji's own history. An option for such countries is to use the constitution as the source of consensus—on values and institutions. But for a constitution to serve this purpose it has to be the product of a national discourse and negotiations, an agreement on the vision and values of the country and its people. And then there has to be agreement on the institutions of government. In no past instance in Fiji have there been sufficiently wide consultations to have produced that result. But even that is not enough: the tradition of commitment to the constitution as a compact or to the rule of law is also needed.

We believe that Fiji and its communities cannot progress unless all communities are convinced that their concerns and anxieties have been dealt with sympathetically. The process so far has been highly consultative. But an important element has been missing. The conversations have been between the people and the Commission; the more important conversations, between the people, their various communities and regions, have not taken place. In the circumstances we have tried to balance fairly competing interests within the broad framework of constitutional principles and our own understanding of the dynamics of Fiji society.

We do not expect all the groups to like all of the constitution—this was scarcely possible with such different interests, expectations, and lack of nationwide dialogue. But we assure all Fijians and their communities and groups that we have tried to be fair to all, and hope that the vision of the future of Fiji that we are proposing will find favour with them. If the draft constitution is accepted by the Constituent Assembly, the responsibility for the safekeeping of the constitution and living by its values and procedures will pass to the people.

SECTION 4: THE WAY FORWARD: THE COMMISSION'S APPROACH

The Constitution Commission believes that the fundamental need is to shift the identity, politics and institutions of the people of Fiji from their bases in community to those based on equal citizenship. This approach is explicit in the constitutional principles in the Decrees on the constitution making process. Fiji has been a state for long now but it is not yet a nation. We believe that the challenge is to create out of its diverse communities an identity as a nation founded on common values and aspirations, without dispensing with its rich cultural diversity. Once the foundations of that national identity have been agreed upon (“nation building”), the values, institutions and procedures of the state must be reformed to reflect the Fiji nation and its aspirations (“state building”). The challenge of the constitution is to achieve both together.

The Commission believes that it is in the interests of the development of culture that it should be separated from the state; being tied to the state not only threatens the autonomy of cultural communities and with their social structures; but also encumbers the state with responsibilities that interfere with its duty to be fair to all communities and equally accountable to them (compromising the principles of inclusion, equal opportunity, and above all integration).

There is wide acceptance among scholars and the public that the most fundamental causes of Fiji’s contemporary problems lie in history and in its various constitutions shaped by that history (a point noted by both the Reeves’ Commission and the NCBBF). At the root of the problems is the organisation of politics, state and economy on the basis of ethnic communalism—the colonial legacy. This much is evident from the narratives of Fiji’s two major communities: both victims of forces beyond them; deprived of free choice and will; both communities suffered greatly in the colonial system. Instead of dealing with the forces that subordinated and in many respects exploited them, they regarded the other community as the obstacle to the advancement of its members—and made little effort to understand the suffering of the other. So the colonial policy of pitting one community against another was successful.

In this way some fundamental factors governing their destiny were obscured—and continue to be to this day. Uncovering the factors that have prevented the realisation of the full potential of Fiji and its various communities is essential to constitutional and economic reforms. The segregation of races that was the major organising principle of colonialism meant that there were few contacts and little social mixing between them, leaving each ignorant of the values, culture, and aspirations of the other. The experience of numerous multi-ethnic states is that unless there is a strong sense of nationhood and a feeling of a shared destiny, politics inevitably lead to ethnic tensions and conflict.

The fragmentation of society was evident to the Commission in a large number of submissions, which concentrated on the concerns of specific communities, and relatively

few spoke on the needs of the people as a whole. Underlying tensions were driven by communal differences, based on colonial classifications of people as in few other countries, a remnant of the colonial rule. Colonial policies labelled people and then segregated them (in line with colonial policies in other places). The separate native administration is not unique to Fiji; it has been the means of control of the people throughout the Empire. In Fiji it proved possible to keep communities segregated because of “conservation” policies regarding the iTaukei: assigning different economic and occupational roles of communities; different places of residence; a certain degree of racial incitement; these persisted into independence unlike in Africa, for a number of reasons, particularly the perceived notion that iTaukei needed special protective mechanisms; and protection from other communities, particularly Indo-Fijians. The labels given to people cut across the stereotypes that they represent and neither depict reality (the neat and often derogatory labels) nor provide a guide to policy and justice. It is impossible to separate off “races” in terms of residence, occupation, economy, education, links to the outside world—or anxieties and aspirations. Policies or institutions geared towards one community make little sense—often unnecessary and impacting in unexpected ways on others.

It is important more than ever before that the people understand that the interests of their communities are not divergent, much less antagonistic. The specific interests they have in common—such as livelihood, housing, employment, care of children and the elderly—greatly exceed the specific interests within the community. The question of poverty can, for example, no longer be understood or remedied in terms of ethnicity—it is a national problem and should be dealt with as such. Students from all groups attend same schools—and learn each other’s languages. Social contacts, especially among the younger generation, are increasing as are inter-ethnic marriages. The traditional organisation of society and state on communal lines makes little sense—and costs the country a great deal in social harmony, emigration of highly skilled people, productive use of resources, cultural and artistic developments, and co-operation in many fields.

A major cause of political instability in Fiji has been the tendency of race-based political parties, when in power, to focus primarily on their own ethnic group as in need of "affirmative action". The two major parties have been reluctant to accept the objective assessment of poverty in Fiji which clearly shows that the two major ethnic groups are equally poor, and that assisting the poor on the basis of need alone would distribute poverty alleviation resources roughly in proportion to their population numbers. Economic growth is fundamental to the solution of Fiji’s problems and the aspirations of its people. In formulating its recommendations, the Commission has sought to be fair to all communities and individuals. We have looked for approaches and solutions under which every community would be better off than otherwise.

SEPARATING STATE AND SOCIETY

Perhaps the most important issue facing Fiji is the relationship between state and society. Due to Fiji’s colonial history and contemporary politics, state and society became deeply

entangled, society (or more precisely, ethnicity) becoming the basis for the policies and structures of the state. The principal task of the state became the management of ethnic claims, entitlements and relations. The principles and values in the Decree would seem to require a considerable degree of separation of state and society. This would make society less dependent on the state--and ultimately both more responsive to social and economic change, and the vitality of culture. This would have particular significance for iTaukei who are more extensively and deeply connected to state institutions. Some distancing of the state and cultural communities is necessary—both for the vitality of the communities and the role that civil society should play in a democratic state. We have acknowledged this role in the Draft Constitution.

The above approach will have a major impact on another major issue—a non-ethnic approach to the values and structures of the state. The shift to non-racial state values and structures would be easier if the values, culture and practices of ethnic communities became their own responsibility. In this way institutions like chieftaincy or religious practices would not be threatened or undermined but become matters for the community (as in our proposal for the new Bose Levu Vakaturaga). The separation of state and society will both protect culture and make it possible for members of ethnic communities to co-operate and work constructively in the public sphere, in the affairs of the state as well as the economy. More than in most countries, the challenge of balancing nation building (common identity and values) and the restructuring of the state seems extraordinarily difficult. The approach of the Decree seems to be to build the framework for nation building and then structure the state accordingly.

**NATIONAL UNITY AND SEPARATION OF STATE AND SOCIETY ARE
NO THREAT TO ANY COMMUNITY**

The Commission wants to make clear that its approach is not based on any disrespect for the cultures and religions of Fiji's communities. It acknowledges their importance to the life and cohesion of Fiji's communities and greatly values Fiji's diversity. Nor does the Commission believe that its proposals are in any way a threat to them. In re-defining the relationship between the state on the one hand and religion and culture on the other, we are liberating the communities as well as the state, so both will develop and prosper, to the mutual advantage of both.

The Commission realizes that the separation of the state from communities may give the impression that iTaukei interests may be jeopardized. All previous constitutions tried to protect iTaukei interests through the apparatus of the state, particularly by creating “native institutions”, like the Great Council of Chiefs, Fijian Affairs Board, Ministry of Fijian Affairs, provincial councils, and vetoes given to the Senate iTaukei members. Ironically by these “protective” mechanisms, the British government and its successors prevented the ability of iTaukei to look after their own affairs, to enter into the modern economy, and to develop skills to cope with a rapidly changing world. iTaukei did need protection once, for not only were they unaccustomed to the ways of modern economy and the tricks of foreign investors and entrepreneurs, they were a minority, although a

large minority. But the situation today is very different. Many iTaukei are now engaged in the economy, manage important companies, and have achieved distinction in many fields. Standards of education have gone up, and most of the senior civil servants are now iTaukei. The iTaukei are a majority today and proportionately their number will continue to increase. Under the proposed new electoral system, the iTaukei members will have a very significant majority in Parliament and the Cabinet—sufficient to protect the interests of the iTaukei community. The draft constitution entrenches important interests of iTaukei, including their ownership of customary land. However, we wish to clarify that the aim of the draft constitution is to discourage ethnic politics and ensure that the protection of the legitimate interests of all communities and groups will become part of the national ethic and practice.

INDIGENOUS RIGHTS

This may be a suitable place to discuss the relationship between individual rights and group rights. A number of iTaukei claimed that their community was entitled to the rights of the indigenous people under international instruments, particular the UN Declaration on the Rights of Indigenous Peoples. Some set out in considerable detail the implications of the provisions of the Declaration (including self-determination under which the iTaukei would decide on the system of governance).

The main thrust of human rights is equality and non-discrimination, so that it is up to those who argue for special rights and measures to justify the resulting discrimination against other groups. The origins of indigenous peoples' rights lie in their status as a minority, subjected to discrimination, politically vulnerable, with their culture under threat. It is not obvious that indigenous people would be entitled to special rights if they were a majority, in control of the state, and owners of 90% of the land. Any protection they need would be secured by their majority status. It is the minorities who might need special protection. Under the circumstances, there is a strong case for the application of the usual regime of human rights, particularly as most iTaukei have left their villages and taken to modern life and market economy. Their land rights are well protected.

It may of course be the case that within the iTaukei there are communities who wish to preserve their traditional values and life style—as still practised in numerous villages. Since a major reason for indigenous peoples' rights is the preservation of their culture and identity, it could be argued the claims of these communities should be considered sympathetically, for example, by giving them some authority for regulating life in villages. There may be need to protect the rights of those who wish for change, but often their option is to retire from the village. Over 40% of iTaukei live in urban areas where their claims for fair treatment and justice are based on a different perspective. In these circumstances, signalled by the social transformation which this Report has referred to, it is sensible to have some flexibility—and not apply notions of rights in a dogmatic way. Both the UN Declaration and the ILO Convention 169 on indigenous peoples recognise that their situation may vary from country to country or place to place, and the extent of the application of the norms of indigenous people's must accordingly differ. The

Commission understands the wishes of many iTaukei to preserve their traditions, but considers that for this purpose the claim for significant powers over a range of matters, including monopolisation of political power, is not justified. As it has stated before, this is in any case a matter of choice for the communities concerned, and should not need the intervention of the state.

NATION, STATE AND SOCIETY

We have found it useful in developing our approach to think in terms of three categories: nation, state, and civil society. They are no doubt interlinked, but their differences need to be acknowledged and accommodated. Through a set of values and principles and institutions, the Draft Constitution locates the space and role of each of them.

There are two types of values: those which define and bind the people (relating to nation and civil society), and those which bind the state and its officials. Not surprisingly they are similar in major respects. The state is after all set up by the people to achieve objectives of the people. But the two sets of values perform different functions.

The first is a joint commitment of the people to live in unity and harmony, to work together as a modern, progressive, multi-cultural nation based on faith, tolerance, inclusiveness, compassion and the dignity and equality of each individual. They share the commitment to human dignity, freedom, democracy and social justice and to national unity and common identity, while respectful of diversity. As citizens, their identity is defined by these principles and commitment: that is what makes them the people of Fiji. Consequently they have agreed *“to build a just and sustainable government on the foundation of human rights, the rule of law, and respect and stewardship of nature’s gifts”* (Preamble).

But as citizens they have also undertaken another role: that of civil society, individually and collectively to safeguard the constitution, particularly the values and practice of democracy, and the right of the people to participate in the affairs of the state and other public affairs.

The second group of values and principles define the objectives of the state that the people have created. These include respect for human rights and freedoms and the rule of law; an independent and impartial system of justice to which all will have access; and the participation of the people, and the inclusion of all the communities and groups in public bodies. The government must be based on number of institutions that can check and balance each other. State institutions and officials must have integrity, serve the people, in transparent ways; they must also be accountable to the people. Thus the second principles must not only determine the structure of government but the purposes and procedures by which alone state power must be exercised. Historically, particularly since colonialism, the state has dominated the people; now the state is of the people, not an entity different from them.

Both sets of values provide a vision of Fiji which the Commission believes is shared by many people.

NATIONHOOD

How can Fiji develop a sense of common nationhood? There is no easy solution. The constitution can establish values and principles that the people can embrace, it can de-emphasise the communal factor in the policies and structures of state institutions, it can make citizenship equal for all and the primary link between the people and the state, and it can promote policies (educational, economic and social) that bring members of different communities together. It can create incentives for political parties to broaden the ethnic base of their support and delegitimize hate speech. It can emphasise the equality of all citizens. But none of these will achieve much if national, communal, political and professional leaders are not committed to national integration and prepared to take steps to bring it about. This commitment and qualities, as the Commission was repeatedly told, has been missing in Fiji's leadership.

The many experts and the documents we consulted (particularly the Reeves' Commission and the People's Charter) have emphasised the necessity for national unity and political integration. Some have provided concrete steps towards this goal. That is the approach that the Commission has adopted in the Draft Constitution, as is illustrated throughout this report. We adopt this approach not only for moral or psychological reasons, but for the economic and social development of the people. In this world of global competition, it is already evident from many cases that a state which is occupied by ethnic differences is unlikely to deliver peace or prosperity to its people. It is already clear that coups have taken place in Fiji because it has been easy for those with a vested interest in the overthrow of lawful government to argue that Indo-Fijians are out to harm the rights of iTaukei—with usually disastrous consequences for the economy and relations among the two major communities.

CIVIL SOCIETY

It is not easy to distinguish civil society from the people or the nation; or from business groups, trade unions, or family. There is no accepted definition of civil society, except perhaps to distinguish it from the state or government (even that may not be entirely accurate unless we disregard political parties). There is some understanding that it refers to voluntary associations, pursuing a variety of objectives and methods. In many third world countries where people are not well organized along interests or value goals, formal organizations have developed, to pressure the government and sometimes the private sector. This often leads the governments to attack these organizations, and try to regulate or suppress them—vulnerable to these attacks because they seem to depend entirely on foreign funds for their activities.

For the purposes of the draft constitution, we have adopted a broad definition: *civil society means the collectivity of persons and associations or other organised groups of persons, other than public officers and State organs, actively engaged in the development of society* (Article 185).

The three important elements of the definition are (a) the self-organisation of these groups (which will be greatly facilitated by the new Bill of Rights), (b) “active engagement” for (c) a prescribed though broad goal, the “development of society”. There is an element of self-identification, so it would be for groups and not the government to designate organizations which participate under the constitution in various activities (such as nominating candidates for the National People’s Assembly, discussed below). There is similar open-endedness about “development of society”. But given the emphasis on values in the constitution, the “development” must be consistent with constitutional values outlined in this Report (which is clear from Art. 53).

During public hearings, the Commission became conscious of how relatively unorganised the people were, except for the guidance and structure provided by faith organizations or through traditions and culture (principally with regard to the iTaukei). Their lack of knowledge of the purpose and nature of the state, of their own rights as individuals and organizations, or how to access state officials or lodge complaints, much less to participate in public affairs or influence state policies became evident to us as we travelled through the country. In most countries this sort of knowledge is the result of the work of social organizations (including trade unions). The deficit of it in Fiji is a major obstacle to the development of democracy which has to become a major factor in the responsiveness and accountability of government—and shield against coups.

At the same time the Commission received numerous complaints about the lack of responsible and honest leadership in political parties, their failure to maintain contact with their constituents, or address their problems. Often civil society filled the gap. So civil society, even with its weaknesses, must be encouraged, including because, as the Reeves Report put it “Civil society has a vital role to play in providing opportunities for members of different communities to come together”.

The Draft Constitution recognises the role of individuals and social groups throughout the document. The Bill of Rights guarantees the right to form associations, and to assemble and march—and to petition state authorities. Various political and social rights are granted to all, which enable the involvement of people in public life, including the freedom of expression and the freedom to information. It recognises the rights of “cultural, religious and linguistic communities”, particularly to associate together. Throughout the document, the draft constitution provides for the right to participate—that is, people’s rights, organised or individual, to contribute to decision making by state organs, and to expect accountability from these organs.

The Draft Constitution devotes a whole chapter to civic society (chapter 4 entitled “Civic and Political Life”). The main rationale for recognising civil society is that “democratic constitutionalism depends upon (a) *“civil society being active in raising awareness of the human rights and other values recognised by this Constitution, and in discussion, debate, decision making, and governance”* and (b) *“wide participation of the people, including organised civil society, in public affairs”*. The state has to *“recognise, facilitate and not impede the role of the people and civil society in the promotion and protection of*

constitutional democracy” (Article 53(3)) (including through onerous rules about their registration).

The chapter promotes the role of civil society in four ways. It sets the principles and details of the right to participation in public decisions. Secondly, it recognises the Bose Levu Vakaturaga as “non-partisan organs of civil society”, a “custodian of iTaukei culture and traditions”, to promote “wider understanding of iTaukei culture, and its traditional values and practices” compatible with national values. Thirdly, it protects and promotes the freedom of the public media on the grounds that: *Free and open discussion and dissemination of ideas is essential in a democratic society.*

Fourthly, it provides the principles for the conduct of political parties, to uphold national values, and promote national unity, to ensure responsible and peaceful politics. In return it gives them access to state media and resources.

The clearest role of civil society is expressed in a recommendation for an innovative institution—the National People’s Assembly (“NPA” in chapter 6). More details of the NPA are provided in Part II, but briefly, every year it will bring together various groups—representatives of the government, parliament, and local government, independent state commissions, and the nominees of civil society—with the latter in a majority. The main purpose of the NPA is to receive reports from government officials of their record of service and to discuss and adopt resolutions on national policies. It has a specific role in constitutional amendments and is the electoral college (meaning a group of people that elects someone on behalf of the wider society) for the election of the President.

An effect of these provisions would be to create a common public sphere or space where a number of different groups meet, talk and resolve on policies and settle differences—consistent with the vision of participatory and consensual democracy under the constitution. Over the next few years Fiji will have to make difficult decisions to implement the directives of the constitution, and civil society could play a constructive role in the framework in the constitution for resolving the differences through consensual processes. The expectation of the Commission is that civil society will draw attention to the circumstances of the poor and the marginalized and help build the infrastructure for the many provisions on affirmative action and social justice—and the accountability of those who hold and exercise state power. Beneficiaries of human rights, they can be expected to lobby for rights and freedoms, and protection of the environment, and to establish links with regional and international organizations for the promotion of these ideals. All of this would enrich debates in Fiji and help to achieve constitutional values.

But we end with a note of caution. Civil society must be sustained with local support and participation, including most importantly, its funding. Heavy, almost entire, reliance on foreign, largely government, funds would make civil society dependent on external interests, and the target of attack by the government or others who dislike its agenda. Fijian people and commercial organizations who believe in democratic and reform processes and have the means, must ensure financial and material support to civil society.

STATE

As compared to the nation and civil society, the state is the most deliberately structured. Unlike the other two, it is a creature of the constitution. It results from conscious decisions on a whole series of values, institutions, and procedures. The decisions however are limited by history, the past experience of governance and preference often for systems that leaders know of. (It is interesting that very few of the over 7000 submissions recommended an alternative to the parliamentary system practised in Fiji). And if new structures are adopted, there is no guarantee that they would not work largely the same way as the previous ones. Politicians and bureaucrats are often immune to change, comfortable with practices of the past. It is also interesting that in many former colonies which acquired democratic systems of government the colonial use and practices of the state has continued. The challenge in Fiji as elsewhere is to end the purposes and methods of the colonial state, which existed to exploit the people and often used excessive force for this purpose.

Traditionally constitutions have set up institutions and given them powers but without specifying how the powers must be exercised (though occasionally specifying how the powers must *not* be exercised). The exercise of powers is then determined by political and other factors, by processes in society. This means that those who are powerful in society also tend to dominate government. With democracy, the influence of powerful social groups has declined a little, but remains significant.

There is a contradiction about the state: it is the result of deliberate decision by committees or assemblies, yet it is so hard to control its tendencies. In developing countries perhaps the most powerful institution is the state because of its colonial origins. But in recent years many countries have tried to reform the state, to define its purposes, expand the scope of democracy, make it more accountable to the people. States in multi-racial societies experience serious problems of democratisation, instability, conflict and oppression. They have adopted different approaches to the organisation of the state, some based on communal arrangements and some on citizenship.

Recent reforms in other countries have led to significant changes in constitutional arrangements about the state. The old approach where power but not its purposes were defined has been replaced by a strong set of values and principles. The state has been reformed from within, by new institutions with specific responsibilities, no longer only the three fold distinction between legislature, executive and judiciary. The scope of democracy has been expanded to encourage people's participation in public affairs.

By deciding to move away from communal organisation of the state and to give a greater role to civil society, and to adopt the values and principles to govern the exercise of state power, Fiji now has a chance to think creatively about the structure of the state.

SECTION 5: THE DECREE AND THE DRAFT CONSTITUTION

The Decree under which the Commission has been operating sets out certain principles that the Draft Constitution must respect, as mentioned at the beginning of this Report. In the short Guide: *Building the People's Constitution: Your Responsibility*, produced in August the Commission wrote the paragraphs that follow about those constitutional principles.

COMMON AND EQUAL CITIZENRY

- There will be only one kind of citizenship, so that all citizens will have the same rights—men and women, members of all communities, regardless of religion, race, or region.
- Citizenship rights should be more important than rights or privileges within communities.

This principle is central to the fundamental objective of the constitutional review: a nation united, living and working together in equality, focussed on what unites and not on what divides it.

SECULAR STATE

- There will be no official religion; no religion will be given preference by the state
- Members of all religions will have equal rights to practise their belief and faith individually or in association with fellow members
- The freedom of religion will be guaranteed in the Bill of Rights
- A secular state is not hostile to religion.

This principle is closely connected to the previous objective, for if one religion is privileged over others, it treats people unequally depending on their religion.

REMOVAL OF SYSTEMIC CORRUPTION

In Fiji as in many other countries, recent years have seen a considerable increase in corruption, connected to the abuse of state power. Corruption undermines several constitutional objectives, like integrity, the rule of law, equal access to the state, confidence in public institutions, and the government's ability to provide services. Constitutions in democratic countries try to provide mechanisms to hold the government to account to curtail corruption and some recent constitutions provide a legal framework to combat corruption.

AN INDEPENDENT JUDICIARY

- The constitution will have to provide rules for the appointment and dismissal of judges, to give them independence from other parts of the state and its agencies, so that their decisions are always made in accordance with the law, and not due to pressure or bribes from any sources whether private or public.

- An independent judiciary is critical to the protection of human rights and democracy as well as upholding the conditions necessary for the proper functioning of the economy.

ELIMINATION OF DISCRIMINATION

- The constitution will have to establish and enforce principles of non-discrimination, that is, the equality of all citizens (and, for the most part, of other residents).
- It should make illegal any discriminatory law or practices which exist now.

This principle is closely connected to the protection of the rights of minorities and disadvantaged communities.

GOOD AND TRANSPARENT GOVERNANCE

- Good governance refers to the law, conduct and practices of state institutions which meet standards of fairness, transparency, effectiveness, participation and legality.
- A transparent government gives people access to the information about decisions that affect their lives.
- Good governance covers the rule of law and checks and balances among different state institutions.
- And it refers to a government that is accountable to the people.
- It covers also the protection and promotion of human rights.
- It is often used to refer to good democratic practices.

SOCIAL JUSTICE

- Social justice is a broad concept built on the assumption of the human dignity of all people. Its aim is to secure for all the basic needs for a life in dignity.
- It addresses the situation of the poor and the marginalised; promises redress to victims of past injustices; and ensures equal opportunities for all to compete for places in state and often also in the private sector.

ONE PERSON ONE VOTE ONE VALUE; ELIMINATION OF ETHNIC VOTING; PROPORTIONAL REPRESENTATION; AND VOTING AGE OF 18

- All these points are concerned with the electoral system. Under them:
 - Everyone who is 18 years or more has the right to vote
 - Every vote will count the same
 - There will be no seats reserved for a particular community or group
 - The number of seats a party wins will be in accordance with the number of votes it has won.
- The election system based on these principles will be significantly different from the system under the 1997 constitution under which the voting age was 21, voters

had at least two votes: one for a person from their community and the other without restriction of race; and the voting system effectively favoured the largest community in each open constituency, leaving minorities unrepresented.

In the box on the following page there is a summary of how the Draft Constitution actually responds to the challenges in these principles.

THE DRAFT CONSTITUTION AND THE PEOPLE'S CHARTER

There are many linkages between the principles in the Decree and the People's Charter for Change, Peace and Progress. For those with a particular interest in whether the Draft Constitution would advance the realisation of the Charter, there is an Appendix (1) to this Report that outlines some of the connections.

HOW DOES THE DRAFT CONSTITUTION COMPLY WITH THE DECREE SETTING UP THE COMMISSION?

Decree No. 57 laid down various general requirements for the new Constitution, and some very specific ones. The Commission believes it has done all that was asked of it. The Decree required **full, inclusive and fair participation**; participation of the people was remarkably full, especially in view of the time available and the lack of advance civic education. The Commission happily recognises that many people contributed to this. It has drawn heavily on that public input, as well as on information obtained from experts, and its own reading and experience, to try to produce a document that meets **the needs of the country and aspirations of the people**. Whether it **unites the people** depends very much upon the future will and efforts of both governments and the people themselves. But unity was in the forefront of the minds of the Commission – as you can see from “National Unity” in Part II of this Report. The design is for a democratic system (the Decree requires “**full democracy**”), on all levels, and one that involves active participation of the people, not just voting every few years (see “Democracy and Public Participation”) And there is a very full set of **human rights** provisions, and strong institutions to protect their rights and for the people to go to court to do so.

As for the other requirements:

- **a common and equal citizenry** is met by the absence of communal voting, a clear statement of the equality of all citizens, the general provision against discrimination and by a move towards inclusive local government;
- **a secular state** may mean many things, but the draft provides no special status for any religion, all religions are to be treated fairly, everyone has freedom of religion, but there is no hostility to religion in the document which recognises its importance to the people;
- **elimination of systemic corruption** is very hard, but the draft does insist on transparency, includes access to information (even a law on the subject), provides clear statements about integrity as a qualification for office and a standard of behaviour, requires a Commission (successor to FICAC), provides a Code of Practice for major office holders;
- **an independent judiciary**: the provisions on this are clear, meeting international standards, dealing with the independence of the courts and of individual judges, and the responsibility of lawyers;
- **elimination of discrimination**: discrimination is prohibited, and there is a wide-ranging list of specific grounds to make it clearer; the responsibility is upon private citizens, not just on the state;
- **good and transparent governance**: corruption issues are an important part of this, and the very full provisions on participation and openness are keys to good governance;
- **social justice** is a key issue, with provision for enforceable economic, social and cultural rights;
- **one person, one vote, one value; no ethnic voting; proportional representation; and voting age of 18 years** are all to be found in the proposed system of proportional representation based on lists produced by parties.
- The Decree also required **immunity**: for which see section on “The future” in Part II

A FEW WORDS ABOUT THE DOCUMENT

The draft constitution is, one must confess, an ambitious document. Unlike previous constitutions (with partial exception of the one of 1997), it aims to change society in fundamental ways, as will be obvious from the following pages. Constitutions like this can only be successful if concerted efforts are made to implement them. That would include engaging with the people, and explaining the values and objectives of the constitution, and ways in which it would benefit them. They have to take responsibility for its success. Not an easy task, which we return to at the end of the Report.

The draft constitution is written in somewhat different style from previous constitutions. It avoids their formalism; sometimes the style is almost colloquial, to make it accessible to the ordinary reader. As far as possible, technical legal expressions are avoided. We have made considerable use of Schedules to set out the details of principles that are contained in the chapters in the main text, to avoid over lengthy text. So for a full understanding of an issue or institution, it would be necessary to refer to the relevant Schedule.

Unlike previous constitutions, the draft constitution constantly announces and reaffirms principles and value that must inform the relations among the people, and between them and the state. One might say that it is suffused with values—of integrity, inclusion, transparency, rights and freedoms, participation, equality, justice. Values and principles are particularly important in states which were formerly colonies. The colonial state was always rooted in exploitation and coercion. It dominated people and communities, weakening society. Few post-colonial states have abandoned the exploitation of the people or the use of coercion. The focus on institutions without examining their underlying tendencies does little to change the role of the state. Hence values are important to redefine the mission and responsibilities of the state—the purposes for which alone its power or authority can be exercised. Values, as a source of identity, are important also for creating unity among the people. Values and principles, which are legally binding, appear throughout the draft constitution. Most chapters begin with a reiteration or elaboration of national principles most relevant to the chapter, reminding the people and state officials of their responsibilities.

Despite its informal style, the structure of the draft constitution has a clear logic. The preamble firmly signals the change of values, emphasising multiculturalism, national unity, trust among the various communities, and a just and fair government. The first 5 chapters define the values of Fiji, the nature and characteristic of the people as a single nation, the rights and responsibilities of citizens, the fundamentals of the political system, and the qualities of leadership of the officers of the state. The next 7 chapters deal with the institutions of the national government (particularly the legislature, executive and judicial organs) and the relationship between them, while chapter 14 deals with state's finances and 15 with the public administration and public servants. Retracing to chapter 12 on a new system of local government, based on geographical entities, not race, and with powers to make and implement laws and with enough resources to fulfil their

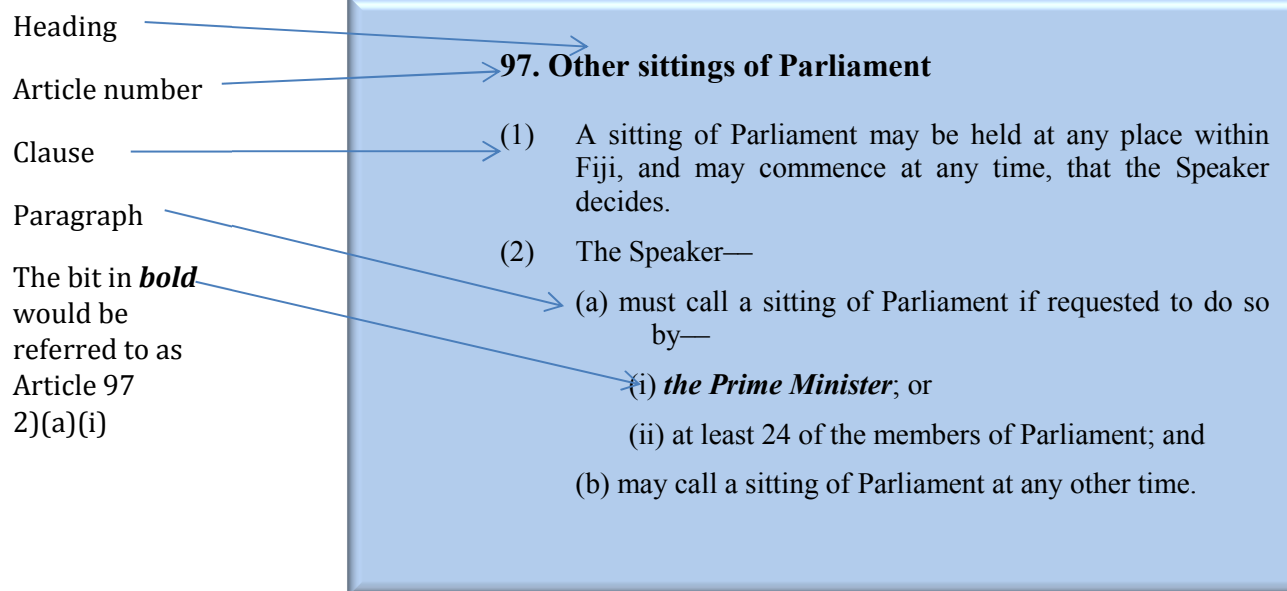
responsibilities. The important chapter on the security forces (including the military) appears as 16. Chapter 13 concerns independent commissions and independent offices, whose responsibilities are to perform sensitive tasks like elections and audit, and to receive and deal with complaints against state officers (the anti-corruption authority is one of them). The last chapter tells us the constitution may be amended, except for a few which cannot be amended at all. Of the schedules, perhaps the most important is the 6th which deals with transitional arrangements, that what happens from the time of the adoption of the constitution and the elections which must take place no later than 30 September 2014.

PART II: EXPLAINING THE DRAFT CONSTITUTION

SECTION 6: HOW TO READ THE CONSTITUTION

Many people reading this Report/Guide will have no interest in reading the entire Draft Constitution. However, some people may wish to do so, and for them we have included references to the relevant part of the Draft: so you might see (Article 44 (2)) or even Article 42 (2)(h)(ii)! Or even (Schedule 6 section 17(3)). What do these mean?

The Draft Constitution is quite long: 198 pages in its current form. It begins with a Preamble (see the next page) and ends with the Schedules (also see next page). It is divided into 17 chapters, as you will see from the Chart following this short section. Some are very short and some quite long. Within each chapter are Articles. The numbering of Articles runs right the way through (the last is number 188). Here is a specimen Article (from Chapter 9 on Parliament):



TAKING THE OVERALL VIEW

If you want to understand a complicated document like the Draft Constitution, you do need to have a sense of its overall structure. Often you cannot understand one bit without reading others. And sometimes one bit may be affected by what another bit says. An important example is the human rights provisions; you should never read one of the rights

(e.g. the right to privacy (Article 25), or freedom of movement (Article 27)) without being aware of Article 48, which explains that rights may be limited for good reason and if there is no other way of achieving the good purpose.

Two other very important things to be aware of are Article 185 with definitions of words, and Schedule 6 on “Transitions” (see “The future”). Sometimes part of the Constitution is simply not operating at first, and a provision in Schedule 6 may operate instead of it.

THE PREAMBLE

Usually courts are not interested in what preambles say, though occasionally a preamble may be useful to understand something later in the Constitution. The Preamble to the Draft Constitution is an expression of some regret for the past “*our failure to create a single nation*” and determination for the future “*we resolve to create a modern, progressive, multicultural nation*”.

SCHEDULES

The schedules cover some details to avoid making the main text even longer, while Schedule 6 on transition is temporary, and eventually people will not need to read it. Ordinary readers would perhaps find Schedule 4 interesting (Code of Conduct for Officers of the State).

THE STYLE

An attempt has been made to write simply, in a way that most people could understand. But you should remember that it is a legal document and the words are carefully chosen for their meaning. For example, sometimes the document says a person “must” do something: that mean they have no choice. Sometimes it says a person “may” do something, which means they do have a choice. If it says that one thing “includes” others, the list of things mentioned is not everything that is included; for example “Everyone has the right to liberty, which includes the right not to be detained without trial” – it includes other things as well.

UNDERSTANDING HOW A CONSTITUTION WORKS

A Constitution is a law: the country’s basic law. Lawyers argue about it, the public relies on it to protect their freedoms, by going to court, and the courts apply it, and if necessary decide what it means.

It is used in other ways as well. It is a basis for politics. And it is both a guide – and, more than that, a framework – for the way government operates. The Commission hopes it reflects the way the people of Fiji want their country to be, and that governments will take it seriously, passing the laws that are needed, behaving in the ways that the Constitution requires, and adopting policies that will achieve its promise.

In the end the Constitution is for the people. If they want it to succeed they need to learn about it, pressure government and politicians to follow it, and, of course, to follow it themselves.

OVERALL STRUCTURE OF THE DRAFT CONSTITUTION

Values of the Constitution	<p>Preamble The people acknowledge the difficulties of the past, and express their commitment to forging a united future.</p>	<p>Ch 1: Founding Provisions Values; overview of institutions; language; religion; the people, national unity; citizenship</p>	<p>Ch 2: Our Natural Heritage Environment; protection of land rights, principles of land use, and development; resources; future</p>
	<p>Ch 3: Our Human Rights Civil and political, economic, social and cultural; special groups; enforcement and application</p>	<p>Ch 4: Civil and Political Life: People and civil society, participation principles; Bose Levu Vakaturanga, media, party role, regulation</p>	<p>Ch 5: Good Governance and Leadership Principles; qualifications; appointment; conduct, removal, whistle blowers; Integrity Commission</p>
	<p>Ch 6: National People's Assembly What it does; and how it is appointed</p>	<p>Ch 7: President etc Appointment of the President, roles etc;</p>	<p>Ch 8 Representation of the People: Voters, elections, electoral system and how it works, Electoral Commission</p>
Institutions and processes	<p>Ch 9: Parliament Composition, role of body and MP; floor crossing; procedure; fixed term; early dissolution; public involvement : law making</p>	<p>Ch 10: National Executive Principles, Prime Minister, Ministers, appointing/ electing, removal, vote of no confidence</p>	<p>Ch 11: Justice & Rule of Law Structure of Courts; independence, appointment; role; removal, lawyers; JSC; Solicitor-General; DPP</p>
	<p>Ch 12: Local Government The system in principle: democratic, universal, integrated</p>	<p>Ch 13: Independent Commissions and Offices Appointment, role, independence; removal; Constitutional Offices Commission</p>	<p>Ch 14 Public Finance Control of public money, audit, Auditor-General; Salaries and Benefits Commission; Reserve Bank</p>
	<p>Ch 15: Public Administration Values; appointment; Public Service Commission; Ombudsman</p>	<p>Ch 16: National Security Principles; role of forces, state of emergency; Disciplined Services Commission; police; corrections</p>	<p>Ch 17: Amendment How to amend; what can't be changed - permanently, temporarily</p>
	<p>Ch 18: Interpretation and Commencement Principles of interpretation; transition; consequential amendment</p>	<p style="text-align: center;">Schedules Citizenship; Protected laws on land; oaths of office; Codes of Conduct for public officers; removal procedures for public officers; Transitional Arrangements; Consequential amendments and repeals</p>	

SECTION 7: DESIGNING THE STATE: OVERVIEW

This section deals with the structure of the state in order to explain the system of governance. The Commission made its decisions on this only after it had discussed its general approach, particularly values and principles, and the need to promote national unity and integration as well as to ensure good leadership as asked for by many people. The fundamental principle of the formation and operation of the state is no longer the authority of the state over the people, but its subordination to the people. The characteristics of the state that are emphasized are inclusiveness, service, integrity, participation, transparency and accountability—and the distribution of power to achieve good governance.

The purpose of this section is to show briefly how state institutions have been designed to promote these characteristics. Later in this Report there are more detailed notes on the structures and functions of the different institutions.

SYSTEM OF LOCAL GOVERNMENT

The first point is that there will be two levels of government: national and local governments. At the moment there are several forms of local authorities, based principally on race. Now they will be non-racial based on residence. The new system will strengthen democracy as local government will be elected and accountable to the residents. It will be more responsive to the needs of the people. It will cover both urban and rural areas. And it will be efficient as it will be administered by authorities with local knowledge of the area.

However the Draft Constitution does not contain the details of the proposed new system. What it does is provide the general principles for the system and its relationship with the national authorities. A committee will be set up to make detailed proposals for submission to the next Parliament which will have to enact a special law for the elected local governments.

NATIONAL GOVERNMENT

Article 4 of the Draft Constitution establishes the major institutions of governance. The first is the National People's Assembly composed of state officials and civil society, and which will meet every year for one week. It will consider progress towards the realisation of national values and emerging challenges. It will also elect the President and consider proposal for constitutional amendment.

The next institution is the President, who as the head of the State symbolises the unity of the people and whose functions are largely ceremonial.

Parliament comes next: representing the diversity and unity of the nation, making laws and overseeing the government.

The Prime Minister and the Cabinet make up the executive, to manage the government and administer the laws.

Much of the administration of the government and the delivery will be carried out by the public service, which is bound by high standards of integrity and professionalism.

Then there is the judiciary and other independent tribunals to administer justice independently, and with major responsibility for the enforcement and protection of the constitution.

The security of the State (so that people can live in peace and harmony among themselves and to be free from fear) is the responsibility of the police, correctional services and the military. They are ultimately accountable to Parliament.

The final institution is a collection of independent commissions and office to protect constitutional democracy, ensure the observance of national values, and insulate essential democratic functions from improper influence, manipulation and interference.

Put it like this, it is obvious that the system of governance is not significantly different from that under the 1997 constitution, apart from the new system of local government and the National People's Assembly. But there are qualitative changes, some of which are highlighted below. At the end is a brief summing up of the new governance system.

PARLIAMENT

Parliament will have one house only. We considered carefully the case for the retention of the Senate but decided that it was unnecessary as all the key interests could be represented in one house. Historically in Fiji the role of the Senate was to protect the rights of minorities, especially the iTaukei, through entrenched legislation. As explained earlier, iTaukei, now a majority, no longer need special representation. Their legitimate interests, like those of minorities (especially Rotumans and Banabans), will be protected through procedures for the amendment of the constitution.

The abolition of the Senate allows for a larger single house. Despite what many people told the Commission, the Draft Constitution provides for 71 members. This number takes account of the diversity of the country, wide dispersal of the population, and the need to ensure an effective opposition and effective parliamentary committees. There will be a leader of the opposition. The Speaker would be elected from outside parliament. The Draft Constitution defines their responsibilities to ensure that MPs play an active role in parliamentary affairs and look after and are accountable to the people.

Members of parliament will be elected under a new system of proportional representation under which the country will be divided into four multimember electoral districts. The new system (discussed in the "People in Society and Politics" section) will be more democratic as proper weight will be given to every vote. It will also bring more women (and hopefully minorities) into parliament and the executive. It will help to build bridges between different

communities. There will also be new principles for political parties which will hopefully be reflected in the character and work of parliament.

Other reforms include a more efficient, participatory and accountable system of public finance, dealing with the raising and expenditure of state revenue.

THE EXECUTIVE

The executive will be a parliamentary cabinet system of government. An important advantage is that Fijians are familiar with this system. A parliamentary system is more suitable for a multi-ethnic state because, unlike a presidential system where executive power is concentrated in one person, executive power is exercised collectively by the cabinet with the possibility of its members being drawn from different communities and regions. The executive is also more responsible to the legislature than in the presidential system as ministers sit in the legislature and are answerable to its members, and the government can be removed if it loses the support of the legislature.

However a number of changes are introduced to improve upon the parliamentary system practised in Fiji. First, in line with many recommendations the Commission received, the life of parliament, and therefore of the government, will be a fixed four years, so the government does not become stale or MPs lose contact with their constituents. It will no longer be possible for the government to dissolve parliament earlier, in order to capitalise on temporary popularity (but it would be possible exceptionally to earlier dissolution if no party or coalition has enough support to run the government). Under a new procedure it will not be possible to move a vote of no confidence to remove the government within the first 18 or the last 9 months of its life. When a motion is introduced, it must nominate the successor to the prime minister if the motion is successful. In this way there will no period without a government. Moreover, it will bring about stability because experience shows that it is easier for parliamentarians to agree to remove a government than to agree on the successor.

The Draft Constitution restricts to eight years any individual's service as prime minister, in order to strengthen democracy and the collective responsibility of the cabinet. The size of the cabinet is fixed at a maximum of 15 members so that the government cannot dominate parliament. And the prime minister will be able to appoint up to four ministers from outside parliament (with its approval) to allow for the recruitment of outstanding Fijians to strengthen the executive.

It should be pointed out that the Draft Constitution does not require a multi-party government, unlike the 1997 constitution. Experience shows that compulsory power sharing governments tend not to function well in a parliamentary system, especially of the 1997 constitution kind. A compulsory power sharing government would be inconsistent with the constitutional principles which emphasise citizenship over community (many saw the 1997 formula as providing multi-ethnic government). The proposed system of elections based on proportional representation is most likely to lead to an increase in the number of parties with parliamentary representation and therefore probably require coalition governments. And in due course the Commission expects that most parties will become multi-ethnic themselves.

JUDICIAL AND LEGAL SYSTEMS

An important objective of the Draft Constitution is strengthening the rule of law and promoting access to justice (chapter 10). It explains what the rule of law is and why it is important to freedoms, human security, equality, fair relationship between citizens and the state, and human endeavours, including economic growth. An underlying principle is that “state authority is never exercised arbitrarily or capriciously”. Justice is a matter not only between citizen and the state but also between citizens. It is hard to think of a fair society without these fundamental principles of justice.

The Draft Constitution reiterates the supremacy of the constitution and gives the judiciary a key role in its enforcement. Anyone who considers that the constitution has been violated would have access to the courts (whether the violation affects them personally or not) to seek a ruling on unconstitutionality and remedies. Those who cannot afford the costs of going to court and hiring lawyers will be assisted.

The judges cannot perform this duty without independence: from the state as well as powerful interests; nor without proper knowledge and experience of law. So the Draft Constitution sets out the qualifications to be a judge and gives the power to appoint judges (and to deal with their removal for wrongful conduct) to an independent body (Judicial Service Commission). There will be different courts, starting with magistrates courts and ending with the Supreme Court. The aim is that everyone will have physical access to a court, and to an appeal to a higher level of court. For the first time the constitution will regulate military courts. Military courts will deal only with offences of a “strictly military nature”, and not even then if the charge involves a serious human rights violation. Other safeguards include that the accused will be that the military courts meet the standard of “a competent, independent and impartial tribunal”, the hearings of the military court will be public, and appeals can be taken to the Court of Appeal.

Justice and the rule of law do not depend only on independent judges, but also on other categories of lawyers who are involved in the legal system. The Draft Constitution singles out private practitioners, the Director of Public Prosecutions (DPP), and the Solicitor General (for more detail see Justice below).

NATIONAL SECURITY

There is now a separate chapter on national security, covering the three institutions responsible for it. For the first time in Fiji the constitution will provide a detailed framework for the purposes and organisation of security services or forces. Its tone is clear from the change of terminology: police and correction are now described as “services” rather than “forces”. The purposes of national security are defined and these must be pursued “in compliance with the Constitution and with international law regulating the use of force”. The security organs are made fully accountable to the government and the legislature. No member of any security service must obey a manifestly illegal order (a further discouragement of coup attempts). Both the commissioners of police and correction services are independent

officers, responsible alone for the management of their services (in the case of police, the minister can issue only general policy directions). There have to be periodic reviews of the national security by the National Security Council (consisting primarily of parliamentarians), “with the objective of reducing the Republic of Fiji Military Forces over time” (Art. 175(5)). These reviews are to be considered by Parliament.

The integration of the security forces/services in the constitution should strengthen the rule of law and their accountability, and help their members to understand better their role in society. Hopefully it will help to inculcate a spirit to service to the community and to secure their rights.

Nothing more needs to be said here about other state institutions as they discussed later in the Report.

SUMMING UP

The Commission has given careful thought to the designing of the state so that it would fulfil the constitutional values, which include the concept of service to the people and of honest, responsible and competent leadership. It has distributed and structured powers in a way that responds to the different tasks of the state (thus differing organizational principles are set out for example policy making, administration, justice, security reflected in their accountability and transparency, independence and so on). In each case there are directions on the purposes of those powers. This enables not only the state official to know her responsibility but alerts the citizen to the obligations of the official and the manner of enforcing them. In the organization and functioning of state institutions the principles of inclusion and participation apply, as well as integrity, broadening the scope of responsibility and democracy. Thus despite some institutional similarities, the orientation of the state is significantly different.

The new institution of the National People’s Assembly illustrates well the philosophy of the organization of the state. It shows that the governance of society is not a matter just for officials; it is the concern of many groups, private or not. It also shows that the “government” itself is complex, made up of many institutions with differing mandates and methods of work, working ultimately for common objectives. It is based on the separation of powers but also productive co-operation. The Assembly itself is a manifestation of the authority of the people, but also the virtues of consultation and negotiations. Above all, the Assembly is as testimony to the unity and diversity of Fiji, people drawn from all parts of the country, in grand gathering of the nation.

In the next several sections, this Report summarises briefly most of the major aspects of the Constitution under thematic headings that do not necessarily correspond to chapters of the document.

SECTION 8: PEOPLE, VALUES, RIGHTS AND VISION

In this section we group various topics focussing on the people, and the values that they share and the hope for the future that the Constitution tries to reflect.

The Constitution talks about the people a lot. It emphasises the sovereignty of the people. What this means is that the country and the constitution belong to the people, and the Constitution should reflect their views and their hopes. The Commission is conscious that many people would consider that in a sense sovereignty belongs to God. But the sovereignty that the Constitution speaks of is earthly sovereignty.

One chapter is called “Our Natural Heritage” and another “Our Human Rights”. And the Constitution says on many occasions “we” or “our”.

THE PEOPLE

We are Fijian: iTaukei and all others who have come to make their home in these islands.

Preamble

The people of any country are its strength. Most of them will have citizenship (nationality) of the country. The Draft Constitution follows earlier constitutions in providing who is a citizen or can become a citizen, but most of the detail is in Schedule 1. The provisions from the Citizenship Decree are included, and the main points are:

- most children born in Fiji are citizens
- those born overseas are entitled to be registered as Fiji citizens if either parent was a citizen
- it is possible for a person to be a citizen of Fiji and of another country
- a person who is married to a Fiji citizen can become a citizen
- a person who has lived in the country lawfully for 5 out of the last 10 years can apply to be a citizen – but has no right to insist
- a child who is abandoned, without any information about their nationality or parents is assumed to be a Fiji citizen, provided they seem to be under 14 (the 1997 Constitution seems to have allowed this until the child was 21 but this was unusual).

HUMAN RIGHTS

...sharing the values of...the human rights of each individual, within a just and fair society

Article 1

What does it mean to be a human being? Being able to understand, to learn, to worship, to love, to make choices, to have opinions, to marry and have children, to cooperate with others, to express yourself in words and movement. Most people would think that these are very

important aspects of being human. If you are religious you will probably believe that these are part of a divine design.

What do they have to do with a constitution? People formed societies, including the modern state, because they are human. They are not human because they live in a state. So the state and its institutions, like the government, should not act in a way that prevents people fulfilling themselves as human beings.

So when a constitution recognises human rights and says they are protected, it is not giving the people something, it is recognising their full humanity. It is saying that the government has no power to act in a way that attacks or undermines human rights. Laws and actions that do not respect human rights are not valid.

WHAT PEOPLE TOLD THE COMMISSION

Most people who made submissions about human rights focussed on the rights of the particular group to which they belonged: especially on women's rights, or the rights of iTaukei, as indigenous people, or the rights of persons with disability, and the rights of prisoners. The Commission did receive a few submissions from children and some adults spoke on behalf of children. And there were submissions on the rights of workers.

People who spoke about the limitations on rights in the last few years were specifically focussing on what are often called civil and political rights: especially rights to associate with others, form organisations, and express opinions. Other rights that were mentioned as particularly important included freedom of information.

By far the largest group of submissions were about rights of a particular sort: what are often called livelihood issues. Issues of work or lack of work, inability to get produce to market, high prices, lack of water, poor health services, dissatisfaction with education, were very prominent. These issues are discussed in a separate section on social justice (below). The Commission does consider that these concerns are about rights: rights to health, education, water and food, work and livelihood and social security.

The right to environment is also discussed in another place. Here we explore the more "traditional rights".

The Commission was surprised by some hostility to rights. It believes that this reflects some misunderstanding. People seemed to believe that rights are hostile to community, and they fear that rights mean radical and worrying changes in society. They point to the young, and educators, as "problems", not respecting traditions and social obligations.

THE COMMISSION'S APPROACH

The Commission believes that being a human being means living in society and the rights make it possible for us to live together in society respecting each other. Insisting on pursuing our "rights" when this does harm to others is usually against the whole human rights idea,

which is as much about respecting others as about focussing on our own rights. It therefore believes that the Constitution should recognise the full range of rights, because this is to the benefit of society as a whole.

WHAT THE COMMISSION PROPOSES

The rights that the Constitution recognises can be grouped together in various ways, for example:

- The draft Constitution recognises the right of every person to dignity* (Article 20), and to equality and freedom from discrimination (Article 21) as well as the right to life (Article 19). Special measures to advance disadvantaged individuals and groups are permitted – see “Social Justice”.
- Some rights are important to enable people to play a full part in society including in organising and expressing views, which are also important to ensure that democracy functions well, because democracy requires an active citizenry; these include rights to freedom of speech (Article 27), association (Article 29), assembly, petitioning authorities (Article 30), and access to information* (Article 32); freedom of movement within the country is also relevant (Article 28).
- Some rights are more directly political, such as the right to vote, and to form and join political parties (Article 31).
- Some are protective rights: that is protecting people mostly from oppression by the state, or just from misguided action by state bodies: these include personal liberty (Article 24), from forced labour (Article 23), from being detained without trial, and rights to a fair trial (Article 42), to access to courts (Article 40), rights to fair treatment if for any reason they do have to be detained (Article 41), and the rights to privacy (Article 25) and to executive and administrative justice* – fair treatment by those who make decisions affecting their lives; the right not to have property seized without good reason, in an oppressive way and without compensation comes into this category (Article 37).
- Freedom of speech and expression is also relevant to the fulfilment of everyone’s personal potential, and the Draft Constitution recognises the freedom of artistic creativity and of research specifically*. And the rights to enjoy one’s own culture” and use one’s own language (Article 48)* are relevant here, as well as to full participation in the community, especially one’s own local community.

The mutual respect that the Commission considers must be at the root of the national life means that it is not only the state that must respect rights, but everyone must respect the rights of others. The draft Constitution recognises this, and provides for what is sometimes called “horizontal application” of human rights* – between people (Article 50(2)). Some rights are specially relevant to relations between people, including the right to be free from violence from any source (Article 24(4)), and rights of equality, including in connection with marriage (Article 45(4)). Previous constitutions of Fiji have recognised the horizontal application of equality rights in some situations, especially access to facilities like hotels, but the draft makes rights, including equality rights, generally applicable.

Parliament will be able to make laws on these rights, for example saying when it would be permissible to insist on a woman for a certain job, or doing something else that would be normally viewed as discriminatory. The courts also have an important role to play, and they will take the rights into consideration when they apply the law, and as they develop the law, which they do in some areas where the law consists mainly of rules coming from court decisions over many years.

LIMITING RIGHTS

Every constitution has to recognise that right cannot be unlimited. How can one person have rights if others have unlimited rights? Part constitutions of Fiji tended to have a long list of situations in which rights could be limited, with the result that each right seemed to be overwhelmed with exceptions.

The Draft Constitution takes a different approach: each right may be limited by law – including law made by parliament, by the courts, and customary law where it applies*. But the limitations must:

- be for a good reason, one that is justified in a democratic society
- be no more than is necessary to achieve the purpose (Article 48).

(The 1997 Constitution also included the requirement that certain limitations must be justifiable in a democratic society.) The courts will be important in deciding this question, but Parliament, and those who make laws and policies must also approach their task with rights in mind, and always consider “Does our objective justify this interference?” The draft Constitution specifically requires Parliament to consider this when making laws – because any Bill must come to Parliament with a memorandum that points out the possible implications of the Bill for human rights (Article 95(2)).

ENFORCING RIGHTS

An independent judiciary is essential to protecting rights – see under Justice later. The draft Constitution also recognises the Human Rights Commission and the Ombudsman, both very important protectors of rights.

THE RESPONSIBLE CITIZEN

Many people ask about the duties of citizens. These are recognised in two main ways: first because rights, are “horizontally applicable”: everyone must respect the rights of others. And the draft Constitution includes a set of “expectations”: not in the rights chapter but in the “Founding Provisions” *which say that everyone is expected to play their full part in society, care for others, be tolerant and live in harmony**.

WHAT IS NEW?

An asterisk in this section, indicates something new. In fact the rights discussed here are not very different from previous constitutions – or from other countries’ constitutions. Sometimes there is a difference in wording or emphasis, to make things clearer.

The right to access to information is largely new: the 1997 Constitution said that Parliament must make a law on this. The draft Constitution includes it as an enforceable right and has even included a law to make to work fully. And the approach to limitations is also new, as indicated earlier. The effect of this approach should be to require a detailed discussion when any limitation to a right is challenged in court, raising issues of the justice of the limitation in a way that tends, unfortunately, not to take place in Parliaments.

Including socio-economic and cultural rights is also new – only education was in the 1997 Constitution. These are discussed in the “Social Justice” section.

SOCIAL JUSTICE

A society in which people are very unequal, where some are grindingly poor where others are very rich, a society in which some do not know where their next meal will come from, where some are excluded from participation in society because of poverty, lack of education and other opportunities, is not a just society.

Issues of poverty are outlined elsewhere in this report. Fiji is not as poor as some societies. It is not as unequal as some societies, but it does have serious problems.

Not all constitutions even mention these sorts of things, but there are three types of social justice provisions that may appear in constitutions.

- Directive Principles are guiding principles for government, but are not usually enforceable by the courts, but have mainly political importance.
- Economic and social rights bring the international rights to health, housing, water, food, education and perhaps to work, into the constitution as rights not just as hopes. They do not make the state legally liable to feed and house everyone, but provide a remedy for serious abuses and failures.
- Affirmative action involves special steps to overcome the impact of past discrimination, bad policies and neglect. Constitutions often say that these are constitutional even if they seem to favour one group or certain people – because these are the very groups that in the past have been disadvantaged.

WHAT PEOPLE TOLD THE COMMISSION

The majority of individual submissions to the Commission really concerned social justice issues. People said:

- Life was becoming harder and more expensive
- The elderly were suffering because though their children could not afford to support them, they had no other means of livelihood
- People in remote islands and villages could not make a living properly because transport of what they produced to market was so difficult
- Medical services were often unsatisfactory

- Water was a problem in some places

THE COMMISSION'S APPROACH

The Commission believes that the Constitution must be meaningful to everyone, which means that it must address issues of social justice. And it believes that this must be as rights, not just as aspirations, and not in a way that feels like charity. But it also believes that the Constitution must not be just a series of calls on government funds. A society in which people depend on government to do everything is not a just society, but a dependent society. Justice requires that people have the opportunity to fulfil their needs as far as they are able. Government is needed to protect their rights to do this, and to provide some services that are not easily provided by people themselves, and a safety net for those in need.

WHAT IS THE COMMISSION PROPOSING?

The State must take reasonable legislative and other measures within its available resources to achieve the progressive realisation of [rights to housing, health, food water etc]

– Article 35(5)

The Draft Constitution recognises the following as rights:

- to education (Article 33)
- to participate in the economy including through access to markets of all sorts (Article 34)
- to an adequate standard of living (Article 35)– specifically
 - to housing and sanitation
 - to food, and to be free from hunger
 - to water
 - to health
 - to social security.

Some of these are explained or spelled out in some detail. There is a full provision on education, including the right to free primary education and progressively to free secondary education. Social security is briefly explained as schemes to protect people in times of need, not necessarily state schemes. Health does not mean everyone has a right to be healthy all the time – unfortunately that is not possible.

The state must *respect* these rights, which means it must not undermine them, leaving the people themselves to actively fulfil the right; it must *protect* them from interference by others, including by law, and if necessary it must *fulfil* the rights, for example, this would be in times of drought or disaster. Like other rights, these are horizontally applicable: everyone must respect them. It does not mean that everyone has the legal duty to feed their neighbour, but they must not prevent their neighbours doing what is necessary to feed themselves.

The state does not have unlimited resources, but it is required to work to improve the general access to these rights, improving education and health services, improving access to markets, and so on. If there is a failure to do this, and it argues that it could not afford to do what is necessary, and the matter comes to court, the state could have to show that it genuinely could not afford to do it.

Certain rights are not to be achieved only progressively. No-one should be refused emergency medical treatment. And no-one should be evicted from their homes without a court order.

Courts in other countries have held that government must focus on the most needy. So we come to the equality aspect of social justice. The draft Constitution also makes it clear that special programmes to benefit those in need or left behind are permitted, even required. We can also link this to the provisions on public finance which say that government spending must “promote the fair and balanced development” of the country (Article 152(b)(ii)).

A constitution, and the courts enforcing the constitution, cannot tell governments how to achieve these objectives. But failure to do anything if there are resources would violate the Constitution. And so would a programme to use public resources to benefit the already comfortably off if others were in dire need.

WOMEN

About half the people of Fiji are female, so they are not a minority. Women have been prominent, including Ministers and chiefs and businesswomen, and in civil society. But as in many countries women have had a struggle to play a full role in society, and are vulnerable in many ways. Some basic facts are:

- In 1999 and 2006 8 women were elected to in the House of Representatives (out of a total of 71 members), twice as many as in 2001, but still well below a “critical mass”
- Unemployment among women is about twice as high as among men (among those actively looking for work)
- Although slightly more women than men are engaged in subsistence agriculture, more than twice as many men as women are engaged in paid employment
- Although women are about 58% of clerks, they are only 26% of senior officials and management

I was told by the Village Head that I had no right to speak in any of the village meetings, and I was just brought in, just to be the mother of the four, and when my husband dies that is it, I have no right to speak – A woman of Bua

- When you include household work, women work 31% more hours a week than men

- There is some evidence of trafficking in women for prostitution,

sometimes with violence.

Not all figures are unfavourable to women: the school drop-out rate is higher among boys, and Fiji' achievements in improving the position of women giving birth are considerable. The Commission also notes that a number of changes in law in recent years have been favourable to women, including the Domestic Violence Decree and the Crimes Decree.

WHAT WOMEN TOLD THE COMMISSION

- there should be special measures, which would be temporary, to ensure that women hold at least 30%, or even half, of the seats in Parliament, and in other elected bodies
- there should also be special measures to ensure that women participate in appointed bodies
- the Convention on the Elimination of Discrimination Against Women should be implemented in Fiji
- it is not right that women are not listened to especially in village meetings
- there was concern about the position of single mothers
- Violence against women is still a problem.
- Women have a valuable role to play in peace-building and that the contribution of women in society is not limited to “women’s concerns”

The Commission recognises the important role of women as mothers, and fully respects the right of women to decide, exercising their own free choice, that their own role in society is to be obedient to men, as some women told the Commission. The Commission also believes it is important for the Constitution to make it perfectly clear that women are fully the equal of men. Because it is aware that, though equality of women has been the theoretical position for many years (even the 1970 Constitution said this) it is often very hard to get people to take this seriously. So it has spelled out clearly the implications of the equality of women, in special Article in the Human Rights chapter. And it has also thought carefully about the other parts of the Constitution, and the impact they may have on women.

Here are the main ways the Constitution supports women, helping them to make their full contribution to society.

- It prohibits discrimination on grounds of sex, gender, pregnancy, and marital status (whether a person is married or not) (Article 21)
- It specifically underlines the equal rights of women and to have equal opportunities in the political, economic, social, cultural and sporting areas of life (Article 45)
- Women have the right to equal pay for work of equal value
- It recognises their rights to property, and to be free from customs and practices that undermine their dignity and status
- It recognises the importance of marriage to society, stressing that parties to marriage have a free choice of partners, and equality also within marriage, and at its end, if this happens; it also says that people in a stable union, but not married, have rights too (often it is the woman who suffers if such relationships are not treated as equal to marriage) (Article 48(8)); it places a burden upon both parents to care for children,

- but saying that children have the right to care from both parents (Article 22(1)(e)); and it says that women have a right to paid pregnancy and maternity leave (Article 45)
- It recognises that everyone has a right to be free from violence – from every source, including in the home, and from public bodies including the police (Article 24(4))
 - The rights of people include a right to health, including reproductive health, water, food and housing, and social security (Article 35)
 - It says that everyone who serves the public must both understand and address the needs of all sectors, including women (Article 165)
 - The suggested electoral system, respecting the principle of one person one vote one value, is a system that generally encourages a far higher representation of women (you can find a brief description of the system later in this Report), but basically, voters will vote not for individuals but for lists of candidates from the various parties. But, to ensure that women are really represented, the Draft Constitution requires that any party list has at least one-third women, and they must be distributed in the list so that if the party wins any significant number of seats at least one-third of them are likely to be held by women; after two elections the lists must alternate men and women (or might even put a woman first); the time lag was to allow parties to recruit women and to give women the chance to organise themselves to become more politically active [Note: this does not guarantee women will get one-third or one-half; a party that gets only one seat will probably have a man first on its list; a party that gets three seats will probably have 2 men and one woman.]
 - It is also clear that programmes that are really designed to advance women in areas where they have been disadvantaged in the past cannot be “unconstitutional” – they are not discriminating against men, but are designed to achieve equality for all (Article 21(6))
 - Political parties must “*respect and promote human rights and freedoms, including gender equality*”
 - Finally, its language is designed to be inclusive of women.

CHILDREN

“Every child has the right to ask questions and to learn” –Article 22

The situation of children in Fiji is better than in many countries, including in the region. Legislation like the Child Welfare Decree and the Family Law Act is designed to protect children. Immunisation rates are high, as are school enrolments. Some of the positive facts are:

- the under 5 mortality rate improved from 30 per 1000 live births in 1990 to 17 in 2010
- by law children aged 6-15 are supposed to go to school
- the rate of initial enrolment in primary school (2007-9) was 92%

But too many children still drop out or are unable to cope with the demands of secondary or university education – or perhaps the education may need to take more account of their needs. And:

- about 15% of children do not complete 8 years of education; the drop-out rate being highest among iTaukei students, especially boys;
- dropping out, and failure in school, are caused by many factors, some cultural, some a result of disparity of resources for schools, sometimes poverty or the attractions of quick money
- there are children who work on the streets, including shoe shining and barrow boys, when they should be in school
- child sex workers, mostly girls, sometimes start as young as 10
- in rural areas children may also be involved in strenuous farm work, including cane cutting, or in diving for sea-food without proper training.

WHAT PEOPLE TOLD THE COMMISSION

- There is a need for vocational training for those who drop out
- More resources are needed for early childhood education which is very important for child development

I should have the right to speak.

All children should go to school.

A student in Nasinu

- The Covenant on the Rights of the Child should be fully implemented

- Some areas, because of remoteness, are not well served by secondary schools

- Though people are grateful for the help for children's bus fares

for going to school it is not yet comprehensive enough

- "Building" and other fees mean that supposedly free education is not really free.

The Commission was surprised and rather distressed by how much time in submissions was spent saying children's rights should be removed, and corporal punishment reintroduced – even from some children. The Commission is sympathetic to older people who feel a sense of lack of control, and are aware of their responsibility to guide children. But they feel that some people believe that ending corporal punishment means children cannot be punished at all. But there are ways to guide, counsel and discipline children that do not require physical punishment or other forms of humiliation. Parents and schools need help in this.

THE COMMISSION'S APPROACH

The Commission thinks of the Constitution as something of a children's charter. As the nation's future, they are the main beneficiaries of the entire Constitution. But additionally, the Commission decided to set out clearly what children are entitled to, drawing on the international Covenant.

The Constitution does recognise that children must be guided - it is their right. But the purpose of education and guidance is to enable the child to grow to adulthood as a responsible citizen, able to take, and take responsibility for, decisions about their own future, and to vote. As the child grows, so the guidance changes, and becomes less firm and directive.

“You smack a child, beat them up day after day, this is where you get a lot of these yellow ribbon cases, because they could not think anything positive, they have not heard anything positive in their lives, that they have been bad, gone ca, we say in our language, what else do we expect? What do we do? The child has sort of lived with that, and almost immersed in that saying that, ‘I am no good; I am helpless, I am rubbish; there is nothing else I can do.’”

Submission by an expert on early childhood education.

In the Draft Constitution :

- the human rights provisions emphasise the rights of the child to be an active participant in their own growing up process, including children’s rights to ask questions and to learn, to rest, to play and to engage in sports, to express their own views on matters that affect them (Article 22)
- the human rights also include protection as necessary: to be registered soon after birth, to nutrition and shelter and to care
- everyone, including children, have the right to education (Article 33); the Draft Constitution recognises that it will only be gradually possible to ensure free secondary education, and the right to early childhood education;
- an abandoned child whose family is unknown is to be assumed to be a Fiji citizen unless there is evidence that it is not (Schedule 1 s. 2)
- both parents have the obligation to look after children (Article 22(1)(e))
- the environment must be protected for the benefit of future generations as well as the present – for the children of the future (Article 38)

Children have responsibilities, too. The draft Constitution also recognises that everyone should be a “good citizen”, which includes respect for all and taking care of the elderly (Article 7(2)).

There is some more about rights to education, and health, housing, food and water in the “Social Justice” topic.

PERSONS WITH DISABILITY

“A person with any disability has the right to be treated with dignity and respect” Article 44

Iliesa Delana won the gold medal in the Paralympic high jump for lower limb amputees, and became rightly a national hero. For many people with disabilities life involves hiding from the limelight and being unable to fulfil their potential.

Fiji has made considerable efforts in programmes and rights for persons with disability. But the Commission received a good number of submissions from organisations and individuals, and some of the things they said were:

- The International Convention on the Rights of Persons with Disabilities (signed but not ratified by Fiji) should be fully implemented
 - Fiji sign language should be recognised as a national language
 - Persons with disability should receive financial support from the state, and helped to get jobs
 - Women with disabilities suffer particular hardship, including sexual assault taking advantage of their disability
 - There should be special representation of person with disability in parliament
 - Persons with disability must be treated with respect.
- “People in the village accused my father as a Devil worshipper after what had happened to me...I mostly preferred to stay at home while my family attends community and religious activities, was ashamed of what people would say or how people would react if I did something wrong” – a woman in Caukodrove*

The Commission proposes a number of ways in which persons with disability are acknowledged as full members of society, drawing on the International Convention particularly including:

- there is special recognition of the right of person with disability to be treated with respect and dignity and not in a demeaning way (Article 44)
- there is recognition of the rights of persons with disability to enjoy all the other rights, and specially to be a part of the community, and to participate in sports, and to be educated as part of the community, which would mean that education should be integrated as much as possible and desirable
- the right to health – or everyone, including those with disability, is recognised (Article 35), and so is the right to social security which includes social assistance schemes and special grants
- rights to use sign language, Braille and other appropriate forms of communication is recognised (Article 35_
- rights to access to necessary equipment and facilities, and to adaptations and adjustments to make it possible to live and work in society are recognised
- the voting system recommended is one that naturally tends to increase the range of candidates, because it provides incentives to parties to appeal to all voters
- the draft does not recognise being of “unsound mind” as being a necessary disqualification for voting or being a candidate for elected office; if any law wished to do this the courts would be able to decide if it was justified in a democratic society
- there is a broad definition of “disability”.

THE ITAUKEI PERSPECTIVE

Earlier in this Report the Commission writes about the concerns of iTaukei, and about the frequent references to the United Nations Declaration on the Rights of Indigenous Peoples, the Commission's own views on that, and its vision of the way forward .

This section highlights the main provisions of the draft Constitution that are of special interest to iTaukei people. You will find more detail about some of them in other places in this Report.

- Special recognition is given to the iTaukei language, and the State is given a duty to support it (Article 5).
- The status of land under customary law – and the fact that it cannot be sold – is spelled out more clearly than in previous constitutions (Article 12).
- The importance of explaining to people about planned developments relating to land is stressed (Article 15).
- The Bose Levu Vakaturaga (the Great Council of Chiefs) is recognised as a civil society organisation but, as most people who made submissions about it requested, it is given no political role (Article 56).
- Religion is given special prominence because of the central role it plays in the lives of most people in Fiji (Article 6): all religions must be treated equally, and the freedom of religion of individuals is spelled out in the Bill of Rights (Article 26)
- Culture is given special recognition as both a uniting factor, stressing the importance of understanding each other's cultures, including languages (Articles 7 and 8), and as something important to specific communities – the Draft Constitution says that everyone has the right to enjoy their culture, along with the members of their community, and to join cultural organisations (Article 47).
- The Bill of Rights recognises that obligations may include participating in the care of the local community and, if this is reasonable, it is not “forced labour” (Article 23)
- The Draft Constitution recognises the need to protect places with historical or cultural importance (Article 8).

The present system of Provincial Councils will eventually change, and a new integrated system of local government of which all residents of an area are a part will be set up (see “Local Government” and Chapter 12). But this will allow for elected bodies right down to village level, if Parliament agrees.

OTHER COMMUNITIES

For most other communities in the country their main concern will be to be treated equally, and the Draft Constitution is very clear about everyone's right to equality and not to be discriminated against (Article 21).

For vulnerable minorities the Draft Constitution insists that they are catered for in various ways:

- When arrangements are made for public participation, care must be taken to ensure that all groups including minorities are able to participate (Article 55)
- Political parties must respect the rights of minorities and marginalised groups to be involved in the political process (Article 58)
- Local government, which is to be set up, must ensure that the needs of minorities are met (Article 142)
- State organs of all sorts must understand and meet the needs of minorities: so that people who, for example, go to a government office can find that people understand their problems (Article 162).

The electoral system that is proposed (proportional representation with closed party lists) usually operates to encourage parties to have a wide range of candidates so that they can appeal to all voters, so minority candidates have a greater chance of being chosen. It tends also to encourage small parties. And minorities that are widely scattered are more likely to have an impact on results because their votes are counted together.

"Our vision is that Fiji be our home, irrespective of culture, religion and identity."

"Full recognition of the indigenous people are the iTaukei; we cannot take that away, and we need to let our children know that that will never be taken away from them, but relevant to that is the fact that we must live in harmony with those that are here in Fiji: our Indian brothers and sisters, the Melanesians, the Micronesians and everyone else."

Two groups who have had some degree of special treatment are the Rotumans and the Banabans. Both communities have special laws especially on local government and land. These laws are protected under the Draft Constitution, rather as they have been in the past. When the new system of local government comes into effect, the Rotuma and Banaban laws will be able to be changed to fall into line with the new system.

The Banabans of Rabi expressed some concern about the security of their freehold title. The confirmation of the existing system of land including freehold should reassure them (Article 12).

NATION BUILDING AND NATIONAL UNITY

It is generally agreed that Fiji's most significant problem is dividing people into racial categories and using these categories as the basis of economic, social and political

institutions (a view acknowledged by both the Reeves' Commission and the NCBBF). These categories—iTaukei, Rotuman, Banaban, Indo- Fijian, European, part European, Pacific Islander, Chinese and part Chinese—make little sense today (if they ever did). Most problems of basic human needs, economy, environment, and poverty transcend these categories and call for a concerted national approach and policies. The fragmentation of society is a major cause of racial incitement and conflicts (and the occasional coup), prevents the best use of human potential and natural resources, hinders the development of constructive civil society, and damages prospects of democracy. It also hides the “*collective interests that are evolving from the many social, cultural and economic linkages between our different communities in their daily lives*” (NCBBF).

The most important non-negotiable principle is “a common and equal citizenry”, which is supported by principles of a secular state, elimination of discrimination, and the elimination of ethnic voting. The Commission’s approach is first to encourage unity and political integration among diverse communities (“nation building”) and then to restructure the state to achieve that and other principles and objectives (“state building”). This section is concerned with nation building.

COMMON IDENTITY

The starting point of a common identity is equal citizenship, which the Draft Constitution recognises as a manifestation of national unity (Art. 9(1)).

The Draft Constitution commits citizens to “*national unity and common identity, appreciation of diversity, tolerance, and the inclusion of all communities in the life of the nation*” (Art. 1). In a similar way the Reeves Commission said that national unity is based people’s self-respect and self-confidence as members of their own community, as well as a positive attitude by members of each community towards those of other communities based on mutual respect and trust. The Draft Constitution acknowledges the special status and contribution of iTaukei, but gives equal rights and status to all the people of Fiji. Equality, national unity and development of diverse cultures go hand in hand.

Identity as citizens and people of Fiji comes from values to which people commit themselves. These values include human rights and dignity, equality, harmony, social justice (especially the most poor), participation, integrity, a stable and productive economy, and prudent and sustainable relationship with nature. We believe these values are widely shared by the people of Fiji, and are compatible with the faith of all communities.

As the Commission listened to thousands of people, it realised that they were concerned about identity. This is understandable in a time of rapid change as well as the challenge of unity. This fear is based on a misunderstanding of identity, which is neither fixed for all time dependent on one or two factors, like language or religion. Identity is complex, consisting of various strands, and is always changing—the values that iTaukei cherish today are not those of the pre-Cession period, Indo-Fijians’ identity is rooted in Fiji, not India, and the values of the younger generation are generally—everywhere—somewhat different from those of the older generation. The Constitution fully recognises the importance of identity connected to a

sense of belonging to a place or community (7(4)); it aims to place this within a wider, overarching, “common identity”.

STATE, RELIGION AND CULTURE

An important principle is the separation of state from religion and culture: in a multi-racial state, such separation is essential to preserve the state’s neutrality and the equality of all the people (not only as between communities but also within communities); and to prevent ethnic conflicts..

The separation of state from religion and culture does not mean that the state is opposed to religion and culture. On the contrary, this separation is in the interests of religion and culture, freeing them from the regulation by the state. Culture is always evolving and it is only in this way that it will remain relevant to the people and enable them to cope with changing social and economic circumstances. In order words, culture and religion will be responsibilities predominantly of civil society (including for example, the role of chiefs within iTaukei communities and some other ways outlined in the chapter on civil and political life – see next section of this Report).

LANGUAGE

Fiji, like many other states, is marked by the diversity of languages. While recognising the special status of indigenous languages, Fijian and Rotuman, the Draft Constitution provides equality in language rights, with a similar status for Fijian, English and Hindustani as languages of the state. All other local would be “recognised and respected”. In view of the importance of language as a means of social and inter-cultural exchanges, the Draft Constitution speaks of learning of languages of the country “*foster national unity and mutual understanding by endeavouring to respect, learn and use our languages*” (Article 7).

HUMAN RIGHTS

Normally the effect of a Bill of Rights is to give an individual considerable autonomy and thus release them from morals and dependence on the community. The Bill of Rights creates considerable space both for individuals to pursue their own goals and shape their lives, and for communities to pursue collective cultural, political and social goals. The Commission considers that the balance between individuals and communities that this facilitates should promote national unity as would the principle of social justice.

SOCIAL JUSTICE

Social justice addresses the problem of economic and social inequalities. If these inequalities exist ethnic lines, national unity becomes difficult. The Draft Constitution allows special measures to help communities which are disadvantaged regardless of race, and this should help in national integration. Similarly social and economic rights are given to all in need, not on racial lines.

LOCAL GOVERNMENT

The Draft Constitution recommends a radically new system of local government, based on locality and residence and not race, as is the case at present with much of local administration. The details of this system will be worked out by a commission to be set up soon after the adoption of the constitution, in accordance with principles and objectives specified in the constitution, among which is the promotion of national unity and local democracy.

INCLUSIVE STATE

Racial unity is difficult if some groups dominate the state, and others are excluded or not given a fair share. A fundamental constitutional principle is the representation and participation of members of all communities in the institutions and processes of public bodies (Article 1(2)).

ELECTORAL SYSTEM

Two constitutional principles, proportional representation and without ethnic seats, should do much to take the heat out of ethnic politics. Proportional electoral system based on closed list in multi-member constituencies should encourage political parties to broaden their appeal to all communities. In course of time this should lead to several multi-ethnic political parties, reducing the element of ethnicity in elections and leading to political integration .

NATIONAL PEOPLE'S ASSEMBLY OF FIJI

Meeting every year for a week, the National People's Assembly will bring together representatives of people from all parts of Fiji to discuss national issues and policies, and try to build consensus. Apart from executive and parliamentary officials, a greater number of nominees of organisations and groups will be elected to the Assembly. Such a gathering would increase people's knowledge of fellow citizens from other parts of the country. They will engage in discussions on national affairs and question officials on their mandates. Their responsibilities will include the election of the national President, discussion of pressing social problems, and debate on proposals for change of the constitution. The Commission believes that the Assembly's proceedings will increase national unity.

TOLERANCE

The need for tolerance is stressed at a number of points, and is an important part of developing national unity (in the Preamble and Articles 1, 3 and 7). Intolerance, on the other hand, has no protection. Hate speech, meaning speech stirring up violence on the basis of race, religion factors is not protected by freedom of expression (Article 27), while political parties must not engage in advocacy of hatred (Article 58(2)).

SECTION 9: THE LAND, THE ENVIRONMENT AND THE RESOURCES

The people are probably more concerned about these matters than they are about governments and courts and so on and for this reason the Draft Constitution, and this Report, deal with them at an early stage.

The basic approach of the Commission, as with the constitution as a whole, is to think of these issues in terms of the national interest, while reassuring people that their rights are protected.

LAND

All ownership of land, and all rights and interests in land, whether freehold, customary or public, that existed immediately before the effective date of this Constitution, continue to exist under this Constitution

Article 11(1)

The issue of land and natural resources has been at the centre of debates about the past and future of Fiji. Land is a complex matter and affects Fiji in many ways: it is closely tied to iTaukei history, culture, and social organisation; it is critical to economic development; it defines to a large extent the relationship between the iTaukei and other communities (especially Indo-Fijians) and between the iTaukei and the state. The use of land will determine the future of Fiji's delicate environment. Over the years there has been considerable research on land and various attempts have been made to resolve fundamental issues about it. The Commission received numerous submissions on land and held several consultations with experts and social leaders where land featured as the major topic.

As nearly 90% of the land belongs to iTaukei communities which cannot be alienated to anyone but the government, the major dilemma is how the land can benefit them at the same time as it is used productively to benefit other communities as well as the country as whole. The device for the use of land by other communities is the lease of iTaukei land, based on ALTA (Agricultural Landlord and Tenant Act) and NLTA (Native – now iTaukei – Land Trust Act), and administered by iTaukei Land Trust Board. In recent years there have been significant changes in the use of land which have called these Acts into question. The sugar cane industry which depended heavily on ALTA has declined significantly, and the leases of many former cane farmers have either not been renewed or abandoned by the farmers. Meanwhile there is increasing recognition of the potential of agriculture, growing importance of industry (particularly tourism), greater willingness of iTaukei to develop and utilise land themselves, migration to urban areas (raising new kinds of issues relating to land use and ownership), the further ethnicisation of land policies and politics by the perpetrators of coups and the TLTB, the conversion of Schedules A and B land to native land, low levels of investment, and the imperative of economic development, in a globalising economy—as well as growing recognition of the fragility of Fiji's environment.

The basis of consensus regarding agricultural land underlying the ALTA has disintegrated (with increasing dissatisfaction among the landowners, with its approach and implementation, and the unwillingness of potential lessees to take on leases of what they regard such restricted length). There is much dissatisfaction among landowners with the inefficiency of the TLTB (though the new management of the Board has taken steps to improve efficiency and promote commercial uses of land). The approach has been paternalistic, which has marginalised iTaukei landowners from decision making—and thus isolated them from knowledge of the critical issues that lie at the heart of land policies and negotiations.

The Commission was aware that the system recognising iTaukei ownership of land has meant that they have not been dispossessed in the way that communities in some countries have been. And they were struck by how many people – not just iTaukei – said that customary rights in land should be confirmed. They also received advice that the system as it is forms a good basis for developmental use of land, though there have been some problems with the administration of land.

The process of accessing land via the iTaukei Land Trust Board is still too lengthy and may need to be reviewed.

The focus should be on finding solutions that help conserve the land through sustainable management, rather than focus the discussion on issues of ownership and lease

...the new mataqali liuliu kept his father's word and had the lease renewed. At this point I understood the bond between my grandfather and father and the village elders

—members of the public to the Commission

The conflict of interests around land is no longer racially based, with the migration of iTaukei to urban areas, and others who wish to make commercial use of land. There is considerable danger of land being withdrawn from the market. A new consensus has to be built with a greater variety of interests and policies, and actors than before. A number of changes are already being discussed, including the professionalization of the TLTB, the greater involvement of landowners both in land transactions and land development, a land bank run by a government agency, restructuring the basis as well as use of rental income.

The things that people told the Commission about land included:

- it is important that land is made available for development purposes
- iTaukei are afraid that people will take away their land
- Banabans are fearful that they will lose their freehold land
- foreigners should no longer be able to buy freehold land
- land should be used productively

- there should be land for the landless
- all land that iTaukei have lost, including freehold, should be returned to them.

The Commission considers that now is the time to resolve outstanding issues on land. In the limited time available to it, the Commission was not able to make detailed recommendations. It proposes that the rights and arrangements about land and natural resources as defined in the current law should continue until agreement is reached on future policy. Given the diversity of interests and stake holders in land, it proposes that a consultative forum bringing together all the stakeholders be established to negotiate and agree on policies, which would then be adopted by Parliament and become part of the constitution. The Commission has proposed some underlying principles that must guide the negotiations in the forum, which seek to harmonise the interests of different groups, ensuring social justice, economic development and the national interest. These principles include security of land rights, better administration of land, responsible use of land, and participation and consultation.

It proposes that a national dialogue take place on land, and the draft Constitution includes a mechanism for this: the National Consultative Forum on Land, involving state bodies, land owners and tenants or all sorts. But the Commission feels that people will feel reluctant to talk about changing anything in the land law if they do not feel secure. So it has provided that:

- all existing rights in land and system of land law are recognised
- it brings into the Constitution the provisions now in the iTaukei Land Trust Act that says customary land cannot be permanently transferred to anyone, except the state
- it encourages even the State not to take land permanently as freehold, but on lease
- it also recognises freehold land and rights to it.

The laws that in the past had been protected in successive constitutions are still protected: though there will not be any Senators (in the past the BLV nominated Senators had to approve changes in the land laws) it will still be hard to change the laws. At least half the House of Representatives members must approve any change, and if any of the groups in the National Consultative Forum does not approve the change the majority needed rises to 48 out of the 71 members (two-thirds). If the Forum is unanimous in rejecting a Bill to change the land laws, that Bill may not even be introduced in Parliament. This protection does not apply to the Land Use Decree, which will remain law but could be changed more easily.

The Commission hopes that it will finally be possible for Fiji to deal with this difficult and divisive issue. There are some other points that are important:

- there are clear requirements of consultation in connection with any projects affecting land.
- in the human rights chapter women and men are recognised as having equal rights in connection with land (but law could limit this if it is justified).

THE ENVIRONMENT

Fiji's natural beauty and its clean environment are not just important for the well-being of the people but for its economy as well, especially because of the importance of tourism to the country. Young people were particularly concerned about environmental issues, but they were raised by people in both urban and rural areas. Some issues were:

“Strict fines must be in place for public transport that have old engines and pollute the environment with large amounts of fumes, dust and noise”

–from a Facebook group that discussed the co

“There should be a right balance between the preservation of our coastal areas and the growth of tourism”

A submission in Tavua

“We need to green Fiji once more”

– the Green Party of Fiji

- Mangroves must be protected because they play an important part in keeping the equilibrium of marine life
- Environment should be a compulsory school subject
- There are concerns about plastic products, wrecked ships on reefs, climate change, water pollution
- Green technology generally should be promoted
- The Constitution should recognise a right to environment, and even the rights of nature.
- Fiji's biodiversity must be protected, including by creation of national parks and marine parks
- There is need for more consultation around projects that affect the environment, including with women, and about use of qoliqoli.
- There should be an independent body for complaints about environmental decisions.
- There many complaints about lack of environmental enforcement, including: mangroves being cut, logging without proper licensing or companies logging beyond license area, illegal fishing, and lack of enforcement by Land Transport Authority regarding vehicle emissions.

THE COMMISSION'S APPROACH IN THE DRAFT CONSTITUTION

Everyone has a right to a clean and healthy environment –Article 38

The Commission agrees that the environment is a crucial issue, for Fiji, as for the world, and protecting it should be the concern of communities, business and agriculture, government and society. There are quite a lot of provisions in the Draft Constitution that are relevant to this, explicitly or not.

Individuals will be able to claim redress, through political means, the Human Rights Commission or even through the courts if their right is violated. Like other rights, this one applies not just against the state, but against other people and against companies and businesses. The Constitution also makes it clear that the environment is an important responsibility of everyone, in various other ways, including:

- a sustainable relationship with nature is a national value (Article 1)
- maintaining the natural heritage is a responsibility of everyone exercising public authority (Article 3)
- every individual is expected to protect the environment for the benefit of future generations (this is not a legally binding obligation) (Article 7(2)(d))
- There is a whole Article (10) on the natural environment stressing the obligations of everyone

And there are provisions that are very specific about what must be done by the State:

- it must protect indigenous knowledge of biodiversity and natural resources (Article 12 (3))
- it must have environmental impact procedures that are effective, participatory and transparent (Article 12 (4) and (7))
- marine areas must be protected (Article 13).

There is also general provisions that will be important for environmental protection. For example, one about public participation in decision making processes (Article 55), which mentions the need to ensure that everyone can participate including women, and others specifically in connection with law making (Articles 101 (2)(b) and 110 (3)(b)).

The provision about not victimising anyone who reports on violations of the law by the state, often called a “whistle-blower” is also relevant. If they are public servants they must not be dismissed, demoted or punished . They cannot be taken to court for what they have said, if they were honest in their belief. And damage to the environment is specifically mentioned as one of the things that may be reported. The government is required to make it public that there is such a system for making protected reports of wrong-doing (Article 65).

The Draft does not give “nature” or animals right as such. It would be hard to see what it might mean in practical terms. But it does give wide rights to people and organisations to bring actions to protect rights and enforce the constitution even if they themselves are not affected (Article 120). Environmental protection organisations would be an example, where a case involves environmental issues.

RESOURCES

Natural resources raise two very different sorts of concerns which we can summarise as:

- who do they belong to?
- what threat does their exploitation pose?

Many iTaukei expressed some resentment at their feeling that they are robbed of what they feel is “theirs” when minerals are mined. Many also realised that minerals are resources that ought to be of benefit to the country as a whole, as well as those under whose land they happen to be found.

Exploitation of minerals is a messy process, with damaging impacts on the land, the rivers, the sea, the wildlife and plants and also on the people, leading to uprooting of communities, disruption of ways of life, physical changes to their surroundings and introduction of new people, cultures and practices. Resources are not limited to minerals of course.

The Commission was very aware of all these aspects of the issue, and the Draft Constitution reflects them in a number of ways.

On the issue of ownership and benefit:

- the Draft Constitution endorses the current laws under which minerals belong to the State as trustee of the people (Article 14(2))
- as in the current law minerals do not include sand, clay, gravel and stone
- but the Draft continues the provision from the 1997 Constitution about owners receiving an “equitable share” of royalties or other money paid to the State for minerals (Article 14(3))

There are important provisions about the procedures to be used when resources are to be exploited, including:

- full information to the public (Article 14)
- full assessment of the positive and negative impacts (Article 14)
- full consultation and efforts to reach agreement (Article 15).

The Draft does not go so far as to require “prior informed consent” (to use the expression from the UN Declaration on the Rights of Indigenous Peoples), but the focus is very much on full involvement of all those affected.

SECTION 10: THE PEOPLE IN SOCIETY AND IN POLITICS

Apart from their families most people are involved in society in other ways: as part of their village community, their religious organisation, a sports club, a trade union, a women's organisation, a political party etc. The Draft Constitution does not try to prevent any of this; indeed it strengthens it especially by:

- protecting freedom of religion
- protecting freedom to associate and assemble
- specifically the freedom to associate in cultural groups
- by protecting union rights
- by protecting freedom of speech.

This Report has explained earlier what is meant by “civil society” and why civil society is important (Part I). In this section you will find summaries of specific aspects of the Draft Constitution that are important for people's involvement in organised society, when it is relevant to government, politics and public policy making.

REGULATING CIVIL SOCIETY

Organised bodies are very important: they bring people together to share interests, and develop ideas, and it is much easier for people to put across their ideas if they do so with others. Civil society also has responsibilities. Often organised groups receive funding, perhaps from foreign sources. They should be open about their funding. On the other hand, it is not uncommon for governments to be suspicious of civil society bodies, especially if they express views critical of government. So civil society also needs protection.

The Draft Constitution brings together these concerns, recognising that it may be necessary to register organisations, it says that:

- registration must be required only if necessary (Article 54),
- though it does not prescribe conditions that make it necessary, the human rights chapter would mean that the purpose would have to justify registration, which is some reduction in the freedom of association
- the reasons for refusing registration must be stated
- registration must not be refused unless an organisation does not satisfy those reasonable requirements.

BOSE LEVU VAKATURAGA

For many iTaukei the Great Council of Chiefs is an important institution. Some, it is true, said it should be abolished. But very many said they wanted it restored, and many people

from other communities also mentioned it. But many submissions said that it should not have a political role.

The Commission has tried to respond to these wishes by recognising the BLV as a civil society organisation, not a political body. The Draft Constitution says:

“The Bose Levu Vakaturaga was the pinnacle indigenous people’s institution that symbolized the recognition of the indigenous people’s traditions, cultural heritage and values. It was the very embodiment of the respect for their value as a race”

- The BLV is “a custodian of iTaukei culture and traditions”
- Its role is promote wider understanding of iTaukei culture traditional values, promote those values, and advise the government
- But it must do so in a way that is “consistent with the multicultural character of Fiji”.

MEDIA

There is a detailed treatment of the freedom of expression in the Bill of Rights (Article 27) which includes “freedom of the press, including print, electronic and other media”. In Chapter 4 there is also a separate provision on the Media (Article 57) which says:

- Licensing (that is not allowing media to publish without government permission) is not allowed, except for the need to regulate the use of radio frequencies etc.
- Even for that limited purpose, licencing must not be controlled by government, political interests or commercial interests – to prevent suppression of opposition, other political views or rival commercial concerns.
- State media must not be controlled and must be impartial, and allow a wide range of views to be expressed.
- There must be an independent public body, created by law, to regulate media standards.

The Draft Constitution also says that all political parties and candidates must have equal chances to appear on private or state broadcasting media (Article 60). It would also repeal many of the provisions of the “Media Decree” (Schedule 7).

DEMOCRACY AND PARTICIPATION

Public participation expresses the right of the people to exercise their sovereignty in direct engagement with their representatives, and strengthens Fiji’s democratic culture by drawing on the experiences and knowledge of the people

Article 55

Nowadays in most countries people expect to elect the individuals who make the most important decisions. This has been part of the lives of people in Fiji for most of the last 4 years. The draft Constitution deals with this formal part of democracy, including by:

Provisions to cater for the participation of our people through consultations and seeking our consent on vital national issues must be provided for in the new constitution. All members of society are to be actively encouraged to participate in all phases of political governance especially in the area of development or nation building research activities –a church group

- A new voting system that is easy for the voter to understand, treats everyone equally and produces a Parliament that really reflects the choices of the voters (you can read about that later in this section)
- A new system of local government that requires Fiji to move forward to a system in which everyone votes for local government. This will allow voting at the level of small communities as well as at the level of larger local government authorities and will bring decision making within the reach of everyone. The local governments will have the powers and resources to deal with many issues that most concern people in their day to day lives (you can read about that under Government).
- A new body, not elected in the usual way but representing the people through a mixture of MPs, members of commissions and civil society groups will be the National People’s Assembly. It will elect the President, and play a part in making the government and the important public officers accountable to the people, and in amending the Constitution.

Traditionally constitutions and political systems assumed that voting once every four or five years was all democracy meant. Now, all over the world, citizens and governments have been devising ways for citizens to have more on-going engagement with the decisions that are taken on their behalf about spending their (public) money and generally affecting their lives.

The Commission believes that the people have a right to participate directly in government, and that this is likely to produce a system that is more geared to what the public need, is more accountable, and ultimately more effective. So, it provides many opportunities for people to participate in government decision-making. The provisions about participation include:

- a statement that public participation is a fundamental value of the state (Article 1 (2)(b))
- a statement of principles of public participation (Article 55)
- provisions on civil society and its role in in public affairs (Article 53)
- a requirement that public participation in law making is provided for, and indeed in the affairs of parliament generally (Article 101 (2)(b))
- a right to petition authorities (Article 101 (1) and Article 183 (2)(a))

- a requirement that the public must be able to participate in decision making about public financial affairs (Article (156) (a))
- requirements about public involvement in environmental decision making (Article 14(1)(b)), and a system of environmental impact assessment that gives people the opportunity to comment on major projects and their impact (Article 12(7))
- requirements of public participation if the Constitution is ever altered (amended) (Article 183).

The Commission has not provided for a referendum on any decisions. It is afraid that, apart from the very considerable expense, a referendum may be manipulated. It believes that public discussion and the many chances to make an input are a more useful means of public participation.

A form of public participation also takes place when non-specialists are appointed to important bodies, to introduce a different perspective: for example in the Judicial Service Commission (Article 135) and in the bodies that consider the removal of major state office holders (Schedule 5). The Constitutional Offices Commission has the task of encouraging citizens to be prepared to take on such public service responsibilities (Article 151(2)).

Overall the Commission hopes that the people of Fiji will feel encouraged to take an active role in helping their country to advance in a way that respects the Constitution and its values.

NATIONAL PEOPLE'S ASSEMBLY

“an annual forum of Officers of the State and representatives of civil society, which considers progress towards the realisation of the national values and goals” – Article 4(2)(a)

The NPA (See Chapter 6) will meet once a year and bring together the President, Prime Minister and other Ministers, parliamentarians, and the non-state organisations (sometimes called civil society) including trade unions, academics, professions, faith groups, and minorities. It will provide the forum for the accountability of state officers and commissions to the people and for discussions of national issues to build consensus. It will also elect the President.

More specifically its purposes are to:

- consider new or emerging challenges to the nation;
- consider progress towards the realisation of the national goals recognised in the Constitution;
- receive reports from the President, Prime Minister, Independent Commissions and Independent Officers
- make recommendations to the Cabinet, Parliament, or any Independent Commission or Independent Officer;

- consider any proposed amendments to the Constitution and pass a resolution that Parliament should take seriously but does not have to follow

Its members are to be:

- Any person elected as President under this Constitution
- The Speaker and Deputy Speaker of Parliament
- The Prime Minister, Cabinet and Leader of the Opposition
- Ten MPs: 4 chosen by the PM and 6 by the Leader of the Opposition
- Twenty local government representatives: 10 rural and 10 urban
- The Ombudsman, the Chair of the Human Rights Commission, and the Chair of the Ethics and Integrity Commission
- Twenty people (10 men and 10 women) appointed by the Constitutional Offices Commission, who must have “a record of active engagement or leadership in civil society” but not be public office holders
- Thirty six men and 36 women divided between the division (electoral districts) in proportion to population, who are nominated by civil society and chosen by lot by the Electoral Commission: these people satisfy similar criteria to those chosen by the Constitutional Offices Commission.

POLITICAL PARTIES

Modern political systems usually depend very much on political parties, and Fiji has had a well-established tradition of political parties. Yet constitutions usually say very little about parties – some nothing at all. Fiji’s 1997 Constitution referred to parties a few times: in connection with the role of the Leader of the Opposition, with “floor-crossing” (MPs lost their seat if they changed party), and with the rules about power sharing in government.

WHAT PEOPLE TOLD THE COMMISSION

Some of the points that were made about parties were:

- They should be more multi-racial
- They should be more democratic
- They should be more accountable
- There should be as few parties as possible, maybe only 2
- There should be no party representatives in the Senate
- Parties should not promote ethnic fear and distrust
- Parties should make full disclosure of their donors

THE COMMISSION'S APPROACH

The Commission recognises the importance of parties. It also recognises that there are many doubts about parties in Fiji, as in other countries. It believes that the Constitution ought to try to ensure that parties are internally democratic, financially accountable, effective and focused on policies rather than personalities and ethnicity.

The electoral system that is proposed, the closed list, party list proportional representation system, does strengthen parties. This is because voters vote just for a party, and not for individuals. The party chooses its list, though it must announce it in advance. However, the Commission is recommending that independent candidates should be able to stand as well. Another common effect of this system is to encourage small parties. But the Commission draft says that no party with less than 1% of the national vote would be able to get only of the 11 seats to be distributed on the basis of the national vote rather than in one of the 4 constituencies.

Other provisions that are relevant to parties are (Article 58):

- They must register in order to contest elections
- There must be codes of practice for parties
- They must be internally democratic
- They must respect gender equality, and must not engage in any advocacy of hatred, violence, intimidation or bribery.

There are brief provisions about party finance, especially that they should receive money only from individuals – not from companies and not from government – and those individuals must be either people resident in Fiji or Fiji citizens overseas. There must be law to limit how much a person may donate in any one year. Legislation must provide for audit of party accounts. (Article 59).

There are some provisions that are important for parties:

- State broadcasting media must be even-handed in their treatment of parties.
- MPs who voluntarily leave their party lose their seats: this is because in the system recommended people are likely to vote for parties rather than individuals. A person who wishes to leave their party ought to leave the seat for a person still in that party. This is more important than it was under the old system of elections (Article 89(2)).

THE PEOPLE CHOOSING THEIR REPRESENTATIVES

The principles that the Commission are bound to follow in drafting the Constitution include:

- Voting age of 18
- One person, one vote, one value
- Proportional Representation
- End to ethnic voting.

THE SYSTEM OF VOTING (ELECTORAL SYSTEM)

Under all its past constitutions Fiji has required communal voting: voters voting for candidates of their own ethnicity. The 1990 constitution had only this type of voting. Under the 1997 Constitution, each voter had two votes, one for a candidate from their own communal group, and one free vote not tied to community. Each person elected represented a specific geographical constituency (though these overlapped). And the

Parties getting voters to vote along ethnic lines should be stopped . . . Each party should have equal representation of all cultures

Even with the one-man, one-value, one-vote; I still strongly feel that people will still vote according to their ethnicity.” – a member of the public in the West

House of Representatives reflected the total number of members elected in each of the constituencies. It did not reflect the number of votes a party got across the country.

The Commission received a limited number of submissions on voting. Quite a lot said the old system of communal voting should be retained although many rejected the specific AV (alternative vote) system). But at least as many said that non-racial voting should be adopted, and many of these people spoke of proportional representation. There were occasionally unusual suggestions such as that only members of Provincial Councils should be able to stand for Parliament. One person suggested that the people should vote only for local councils, and that those councils should elect some of their members to be MPs.

The Commission approached its task, within the binding framework of the principles above, by identifying the main objectives the system should achieve:

- a representative Parliament
- accountability of the elected members
- stable governments
- simplicity for the voters – and ideally for the election administration
- parties that appeal across communities, and a system that encourages dialogue and compromise.

WHAT IS PROPORTIONAL REPRESENTATION?

A system of proportional representation (PR) is one that guarantees that the make-up of the body being elected reflects the size of the support for each party in the country. If one-third of the people vote for a particular party, it gets one-third of the seats in the body elected. If half the people vote for a party, it gets half the seats. Proportional representation is found in many countries in the world.

There are different types of PR. In some voters cast two votes, one for a party and one for an individual candidate in their constituency. In others the entire country votes on the same ballot sheet and casts just one vote. The system the Commission proposes is designed to balance the fair representation of parties and the need for accountable MPs, with real links to their voters.

The proposal in the Draft (Chapter 8) is:

- The country is divided into 4 electoral districts using the existing divisions (Central, Eastern, Western and Northern); 60 of the 71 seats in the House of Representatives are divided between the districts according to population. The remaining 11 seats are “compensatory” seats, used to ensure that each party gets a share of seats that is in proportion to the votes that it received nationally.

ALLOCATING THE 60 DISTRICT SEATS:

- According to population (with the exception of the Eastern Division), the seats are divided as follows:
 - 24 for Central
 - 22 for Western
 - 9 for Northern
 - 5 for Eastern.
- Eastern is given 5 seats, not the 3 that its population would suggest, because it is made up of smaller scattered islands. With 5 seats it will be easier for the people in Eastern to have proper contact with their MPs. This won't affect how the votes for parties are reflected in the number of seats in Parliament because the 11 compensatory seats will balance things out.
- Any party that wishes to put forward candidates in a constituency must produce a list of its candidates in order of preference.
- To ensure that a reasonable number of women are elected, the Draft requires that the party lists all include women. To begin with, the Draft requires women to be included in the lists in a way that will ensure that nearly one third of the seats are given to women. After the 2nd elections the provisions in the Draft mean that women will get very nearly half the seats in Parliament.
- An individual may stand as an independent, not linked to a party.
- Each voter has ONE vote in the District: for a party, or for an independent member
- When the votes are counted, the seats are allocated according to how many votes have been won in the constituency: a party that wins 20% (one-fifth) of the votes gets one-fifth of the seats etc. In this calculation, the Electoral Commission will take into account independents as well. It will work out how many votes an independent candidate needs to win a seat and will adjust the number of seats parties get accordingly.

ALLOCATING THE “COMPENSATORY SEATS”

- What about the remaining 11 seats? The Electoral Commission will also calculate the national support for each party, and the 11 compensatory seats will be distributed among the parties to ensure that the final make-up of Parliament reflects the national support of each parties. In particular this benefits small parties whose support is spread across constituencies.
- A system of proportional representation tends to produce a large number of small parties. This can destabilize government. So, to limit the number of parties in Parliament no party will get any of the extra 11 seats unless it has at least 1% of the total votes across the country.

WHAT DOES THIS SYSTEM MEAN FOR PARTIES?

- They should make sure that their lists include a diverse range of candidates, to ensure that they appeal to as many voters as possible.
- They must ensure that they have women on their lists.
- They should educate voters about who is on their lists.

WHAT DOES THIS SYSTEM MEAN FOR VOTERS?

- It is very easy on polling day – a voter simply votes for a party or an independent candidate.
- But voters should be prepared in advance; it will not be good enough to turn up and decide on the day which party has the better list.
- It is important for voters to understand the system: if there are 20 seats to be won in the constituency, and the party you vote for gets one-fifth of the votes, just the 4 people at the top of its list will get seats. So if you would like to vote for a person with disability, and a party has such a person near the bottom of its list, but the party is likely only to win a few seats, that person will not be elected. You need to assess parties according to the people they put high up on their lists.

ARE THERE ADVANTAGES AND DISADVANTAGES FOR THE COUNTRY IN THIS SYSTEM?

This system makes it easier for small parties to get seats in Parliament than the systems Fiji has used in the past. One consequence may be that no party gets more than half of the seats, and that parties will have to work together to form a government– a coalition government. This has advantages: government should reflect a wide range of citizens’ concerns. There may also be disadvantages, including:

- It is more difficult to make decisions if parties with different views must agree.
- A party may be able to form government only with the support of some small and extremist party, which may negotiate to have some of its own unpopular ideas adopted. But, the system may have the opposite effect. If the small party really wants to be part of the government it may have to give up its extremist views.

- The coalition of parties that forms the government may not be very stable and the government may not last long. Again this is not inevitable. The draft Constitution has some proposals to help deal with these risks (see discussion on Parliament), And the politicians will work out how to make coalitions work. The most important thing is for the parties to come to a clear agreement on their shared policies when they form a government.

WHY WAS THIS SYSTEM CHOSEN?

- It is easy for voters
- It ensures that parties are represented according to the votes that they receive
- Because each district elects a number of candidates, the system avoids racially divisive contests that can occur when voters may vote for only one candidate in a constituency and candidates from two or more different racial groups stand for election.
- Voting may be less racial
- MPs will be accountable to the voters in their electoral districts.
- Parties are encouraged to widen their range of candidates, so widen their range of policies to convince good people to join them.
- It is easier to have quotas for women than with other systems.

WHO CAN VOTE?

The Commission heard views on the voting age (mostly in favour of voting at 18); on whether people with dual nationality can vote (most people said “yes”; a few said “No”).

The draft Constitution recommends that:

- every adult (over 18) citizen should be able to vote,
- but they must satisfy an “ordinary residence” requirement”
- the Electoral Act can permit other citizens of Fiji to vote.

This allows people with dual citizenship to vote (that is people who are living in Fiji and who have another nationality as well as Fijian).

FAIR ELECTIONS

The draft Constitution says that elections must be, fair, held by secret ballot, and run by the Electoral Commission, which must be independent from government and parties.

There must be no use of government facilities to fight the election – to prevent giving an unfair advantage to the people already in power.

SECTION 11 GOVERNMENT

For many people this is the very heart of a constitution – what is the system of government and who has the power? The Draft Constitution, and this Report, put the people at the centre of consideration. But a constitution is indeed mostly about government; it does not – should not – seek to regulate every aspect of life.

Earlier this report has given an overview of the system and the parts of the government. Here we summarise the main features of each: President, Parliament, Government and Courts. We also look at the outline scheme for local government that is proposed.

The National People’s Assembly was discussed earlier: though it has an important role in government it is not part of government. In order to understand how government will work it is also important to be aware of other topics dealt with under “The people in society and politics”: civil society, people’s participation, political parties, and the voting system.

As explained earlier, the system adopted is what is described as a “parliamentary system”. Other than during a military regime the system of government has always been a parliamentary one: the head of Government, the Prime Minister, must be a member of Parliament, and the government could only survive as long as it had the support of a majority in Parliament. This is the system of government used in most countries in the region, including in Australia and New Zealand.

A very small number of people suggested that Fiji should give up the parliamentary system, and adopt more a US style presidential system, where the President is not a member of Congress (their Parliament) and does not necessarily have majority support there, but may have to negotiate constantly with Congress to get his programmes and budget adopted. A very few suggested a French system, where both President and Prime Minister have some independent powers, and one or two even proposed an elected King. Most people seemed to assume that the previous system would continue in Fiji, and some positively proposed this.

The Commission decided that the former system should continue, because it was what most people wanted and because it believed it was the best system for Fiji as explained earlier.

THE PRESIDENT

The President is the Head of State and symbolises the Republic, the unity of the nation, and the sovereignty of the people Article 73

Fiji did not have a President when it became independent. The head of state was the Queen, and she was represented by the Governor-General. Since Fiji has been a republic, the head of state has been the President. The head of state had hardly any personal powers, and was supposed all the time to do what the government said, but sometimes, especially at times of coups, they have made decisions on their own.

WHAT PEOPLE TOLD THE COMMISSION

- Some people wanted the Great Council of Chiefs to appoint the President as in the past, and wanted the Constitution to say that he or she must be iTaukei

*If possible the President of this country should be elected by the voters – a member of the public in Ba
As the highest office in the land they should not take part in any political affairs and they should be independent – a submission in Lautoka*

Abolish the post of President of the Fiji Islands – a member of the public in Navosa

- Quite a lot of people said the GCC should not appoint, and there was no reason to limit the choice to iTaukei

- Some said Parliament should elect the President

- A few wanted official like the Prime Minister, Commissioner of Police and Head of the Military to be involved

- Quite a lot said that the President should be elected by the people.

- A few people thought of

the President as having some personal powers, and not just doing what the Government asked.

THE COMMISSION'S APPROACH

The Commission feels that there have been some misleading features of the Presidency in the past: such as calling the President the Commander in Chief, when he or she has no actual powers in relation to the military. And it also feels that the system of appointment of the Prime Minister should be more democratic – not involving the President. The Draft Constitution includes:

- The President is appointed by the big, annual gathering of the people called the National People's Assembly (Chapter 6)
- The President holds office normally for five years, so will usually be in office during a general election (Article 74(2))
- A person may hold office as President only for one term
- The President would have nothing to do with the choosing of the Prime Minister – this would be done by a vote in Parliament
- The President signs new laws, and would have the power to ask Parliament to be reconsider whether a law it is has passed is constitutional; if Parliament sends it back the President must sign it, and if he or she does not do so it would automatically come into legal effect (Article 108)
- The President will have many formal roles such as signing letters of appointment for major offices of the State, signing documents formally committing the country to be

bound by treaties, receiving foreign ambassadors and awarding honours. None of these involves any freedom of choice by the President. (Article 73)

- Every year the President must make a report to the National People’s Assembly (Article 68)
- The President is the person who formally pardons or reduces the sentence of a person convicted of a crime, but must do so only on the advice of the Mercy Commission which is a mixed government/public body (Article 139).
- The Draft Constitution does not make the President above the law in any way: some constitutions have provisions that say a President may not be taken to court while in office; this comes from old constitutions where the head of state was the monarch and seems to make no sense in the modern world.

The President has hardly any powers but should have “the moral authority of the office”, and should use that authority to promote the values of the Constitution. Such a President can be a force for good in a nation, without being politically divisive. The President’s powers come only from the Constitution and cannot claim any extra powers: like everyone else the President must respect the principle that “*The authority of the Republic of Fiji may be exercised only in accordance with this Constitution and the laws under it*” (Article 3).

The President is in a sense the people’s President elected by the National People’s Assembly. He or she must be the President of all the people, and should not be a tool of the government. He or she cannot be removed – the same is true of other officers of the State – except by a careful process to examine any allegations of improper conduct (See Schedule 5).

PARLIAMENT AND MPS

Parliament manifests the diversity and unity of the nation, represents the will of the people, and exercises their sovereignty. Article 83

Parliament makes the laws of the country, but it has a lot of other important functions as well. As the Draft Constitution says: “*it provides a national forum for public deliberation and resolution of issues, scrutinises and oversees government action, and ensures that reports and recommendations from state organs are received, considered, and acted upon*”.

Under the 1997 Constitution there were two Houses of Parliament (House of Representatives and Senate). The Senate was made up of members chosen by the BLV, and others chosen by the Prime Minister and the Leader of the Opposition (and one by the Council of Rotuma).

WHAT PEOPLE TOLD THE COMMISSION

- Some said the Senate should continue, while others said it should be abolished
- Many said the House of Representatives should be smaller (suggestions ranged between 40 and 60)
- Many said it should have a term of only four, or even three, years
- There should be a Code of Conduct for MPs

- MPs should be required to be present in Parliament, and also to visit their constituencies
- MPs who leave their party should be dismissed
- Constituency allowances paid to MPs should be published in the newspapers

The Commission considers that Parliament is at the heart of any democratic system. So as well as the method of elections being both fair and representative, Parliament must be effective, adequately resourced and serviced, it must be protected from unnecessary harassment, but accountable – not just at election time. It must be connected to the people it serves, open and approachable.

THE COMMISSION IS PROPOSING

- Only one house of Parliament – there is no Senate in the Draft Constitution. If the BLV is not to have official functions (see), it is hard to see how an elected Senate would easily be different in political make-up from the House of Representatives. Many countries do not have second houses of Parliament precisely for this reason.
- 71 MPs: though many people recommended fewer, the Commission feels that it is hard to get a truly representative body with many fewer than this; 71 for a population of 850,000 is within a normal range for small countries. One reason for retaining this number is to ensure effective committees, something that is even more important if there is no other house of Parliament to check the House.
- Those members will be elected mostly from large electoral districts: there will be 4: Central, Eastern, Northern and Western, which will share 60 members between them, while 11 others are elected to ensure that overall Parliament reflects the voters preferences between parties nationally. The electoral system is explained earlier.
- For the first two elections, rules are designed to ensure that women come close to being one-third of the members; after that the rules are intended to achieve 50% women members (for an explanation of why these rules are unlikely quite to achieve their object see the section of women).
- A term of 4 years (reduced from 5), which cannot normally be dissolved and an election called.
- There could be an early election only if Parliament itself decides, and this must only happen if there has been an unsuccessful attempt to remove the Prime Minister by a vote of no confidence; then the Leader of the Opposition could move the motion for an election (Article 88). Members would only support it if they really felt the Prime Minister did not have their support, but they were unable to agree on any other person as Prime Minister. The idea is to avoid having a divided and dysfunctional Parliament being required to continue, but to prevent the government choosing a moment for election when it expects to win – a common cause of early, expensive dissolutions of Parliament.
- Parliament to make its own Rules, which is usual, but these must respect some important values including the full participation of all members, openness,

consideration of the needs of remote and vulnerable sections of the community (Article 95).

- The public must be able to participate in the work of Parliament, by being present to watch and listen, to have a chance to express views on new laws and other matters, and by presenting formal petitions; and there must be a procedure to ensure that petitions receive proper consideration (Article 101).
- Committees must also work in an open way.

MAKING LAWS

There are a few important points about making laws:

- The public participation provisions apply to law making
- People may suggest new laws by a petition
- Any MP, and any committee, may introduce a Bill for a new law into the House (Article 106)
- The procedure must not allow laws to be rushed unless there is real urgency; there must be time for careful consideration by Parliament itself and by the people.
- Draft laws (Bills) must be sent to Parliament with an explanatory document including pointing out financial, human rights and other constitutional implications of the proposed new law (Article 95(2)).
- The President may send a law back to Parliament if he thinks it is against the Constitution, and Parliament must reconsider; he would do this as a matter of his personal judgment (almost certainly with legal advice) (Article 108).

It is normal for Ministers to be able to make regulations to fill in the detail of laws and in many countries there are more pages every year of such regulations than there are full Acts of Parliament. This reduces the democratic control over law making (most regulations do not get properly looked at by the Parliament the supposed law makers). In the Draft Constitution, such regulations must be sent to Parliament which must consider them, so the people's representatives retain some control over them. And there are limits to what regulations may do: they may not change an Act of Parliament for example. (Article 110).

The provisions on finance are intended to strengthen the control of Parliament as well, and Parliament also now has a role in deciding whether the country should agree to be bound by major international agreements (Article 111).

THE MPS

There are various way in which the draft Constitution makes the MPs more responsible to the people they represent; this is even more important in the new system where every MP will be one of several representing the same electoral district.

- There is a very clear statement of what the role of MPs is, including their responsibility to keep in touch with their districts and the views of the people (Article 82).

- Anyone who has committed serious crimes may not become an MP (or hold any other important public office) (Article 80(5)(f))
- MP is elected for a party must remain in that party – anyone who voluntarily leaves the party or is dismissed for breach of discipline loses their seat in Parliament (Article 89(2))
- Once in office MPs must, like other public office holders, make regular declarations of their assets and their interests (Schedule 4 Part D)
- MPs should be free to express their views honestly, and they have “freedom of debate” in Parliament, unless Parliament’s own rules change this (Article 102).

THE EXECUTIVE: PRIME MINISTER AND CABINET

The Prime Minister and the Ministers form the Cabinet, what is often called “the government”. Each Minister is in charge of a particular part of government, called a Ministry, such as agriculture, trade, education or health. The Prime Minister is in charge of the whole government, and chairs the Cabinet. Together the Cabinet develops the policies of the government, and oversees the preparation of new laws, and the annual budget which includes the government plans for spending money and for raising the necessary money through taxes and other means.

The Commission has decided that the most suitable system of government for Fiji is a parliamentary one, and early in this Report the Commission explains why. In a parliamentary system the President is not (usually) the head of the government. That is the job of the Prime Minister, as just mentioned.

Usually in any Parliament, there will be some MPs who support the government and some who do not. You may remember that under the 1997 Constitution any party that won 10% of the seats in the House of Representatives, or more, was entitled to be in the government, having its members as Ministers. This sort of system is often called “power-sharing”. The only time it actually worked was for a few months before the 2006 coup.

WHAT PEOPLE TOLD THE COMMISSION

The important points made by the people in their submissions were:

- Cabinet posts should not exceed 20 and there should be no assistant ministers, or Cabinet should be no more than 25% of the Parliament (this would be 18 in a Parliament of 71)
- The Prime Minister should have a limit of two terms in office
- Ministers must be accountable for their acts
- The Prime Minister should be free to appoint Ministers from outside Parliament
- A small number of people said the Prime Minister must always be iTaukei

- A few people suggested that some sort of power sharing system should continue; in fact someone suggested that every MP should be a Minister – then they would not be tempted to support a coup. But quite a number of people said they were not in favour of power-sharing.

WHAT THE COMMISSION PROPOSES

The Commission was guided in its decisions by the desire to make the system as democratic as possible, as effective as possible, and as accountable as possible, drawing on its own knowledge and experience, as well as the views of the people of Fiji and the fact that “good governance” is one of the principles required by the Decree under which it is working.

The most important features of the Draft Constitution, affecting the government, which reflect these concerns are:

- The Prime Minister must be a member of Parliament, and has to be elected by Parliament; this voting would happen after a period of negotiation between parties; the President would have no role in deciding who was to be Prime Minister (Article 115)
- There is a limit on how long a person can be Prime Minister for: after serving for a total of 8 years the Prime Minister would have to step down (Article 115(4)).
- The Prime Minister chooses the Ministers who form the Cabinet, and may dismiss them (Article 117).
- There must be no more than 14 Ministers apart from the Prime Minister so the Prime Minister cannot try to keep the support of large numbers of MPs by making them Ministers (Article 113)
- Up to 4 Ministers could be appointed from outside Parliament, so that the Prime Minister can draw on the knowledge and experience of people outside Parliament (Article 117)
- The Ministers from outside must be approved by Parliament.

The Commission decided not to propose a formal power sharing arrangement – so this is quite different from the 1997 Constitution. The Commission does believe that a valuable purpose is served by having Parliament in which there is a genuine opposition: people who do not owe anything to the government and feel free to criticise it, constructively.

On the other hand, the electoral system proposed – proportional representation using party lists does tend to encourage the growth of more parties and therefore coalition governments, that is governments involving more than one party, are very common in countries that have this system.

Finally, the Draft Constitution also says that the Prime Minister must try to choose the Ministers so that the Cabinet as a whole must reflect the country’s ethnic, cultural and gender diversity (Article 117(1)).

The Draft Constitution follows its usual pattern and explain what the role of the Cabinet is including: to “*deliver good government, compatible with the principle of service to the people of Fiji, for their well-being and benefit, and to promote the values recognised in Chapter I*” (Article 111).

ACCOUNTABILITY

What is there to keep the government working for the people in the way they promised when they were elected?

- Ministers are accountable to Parliament – to the peoples’ representatives: they must be prepared to answer questions in the House (including those Ministers from outside Parliament) and appear before committees (Article 113(4)).
- One important check on the Prime Minister and government is that they should be able to remain in office only so long as they have the support of the people’s elected representatives. They can be removed by a vote of no confidence (with the support of at least 36 MPs) (Article 116).
- In order to avoid frequent votes of no confidence, which can produce changes of government, and a sense of instability in the country, any proposal for a vote of no confidence must include the name of another person to take over as Prime Minister (so that if the vote of no confidence passes Parliament has already proposed the name of someone to take over).
- And also to avoid frequent votes of no confidence, there must be no motion of no confidence within 18 months of a new Prime Minister coming into office (Article 88) and if a vote of no confidence fails, there must be no new motion of no confidence for 6 months (Article 116(5)): MPs must be careful when trying to remove the PM.
- There can also be no vote of no confidence in the last 9 months of a Parliament (Article 88(3)).
- The Prime Minister must report to the National People’s Assembly every year (Article 68).

Finally: the rules about leadership and integrity which you will find discussed later apply to the Prime Minister and Ministers, including on declarations of financial assets. And there is a procedure for removal of individual Ministers, including the Prime Minister, if they are found guilty of a serious crime or violation of the Constitution (Schedule 5).

The Courts are often considered to be an arm of government, and independent commissions are also a sort of part of government. But for both these their independence is so important that we are discussing them separately from government. You will find them in the next section (Integrity, Accountability and Justice).

“The public finance system must promote a just society”

Article 152

Sections on public finance in a constitution deal with how the government raises money (including through taxes), how it spends money and systems to ensure that the way public money is used is fair and efficient, with no corruption, that people are given proper explanations of what their money has been spent on and that there are opportunities to for citizens to participate in decision making on public spending.

A good system of public finance is an essential part of a strong democracy. If public money is fairly and efficiently spent, on the real needs of the public, wherever they are, not only will the people feel that this is just but the country’s economy should benefit and hopefully flourish.

WHAT PEOPLE TOLD THE COMMISSION

- There should be more transparency in the way government raises money and spends it and more consultation with all sectors of society.
- Tax should be based on the annual salary of people and not an across the board percentage.
- On the Auditor-General:
 - Auditor-General’s reports are not followed.
 - The independence of Office of the Auditor-General should be strengthened and its resources made more secure.

WHAT THE COMMISSION PROPOSES

The Chapter on public finance in the draft Constitution starts with a set of principles that must govern all decisions relating to public finance. These principles build on the values and principles of state in chapter 1, applying them to public finance by emphasizing: empowering citizens in matters concerning public finance (the system must promote public participation, accountability, transparency and accountability); fairness in raising taxes and spending; that attention must be paid to present and future needs; and that money must be used carefully and responsibly.

The Draft Constitution then sets out a number of rules on the management of public finance. Similar rules are found in many constitutions, including in the 1997 Constitution, but in the Draft these are extended to improve accountability, openness and public participation. The

“...a culture of incompetence, abuse, mismanagement ... has and continues to plague our public and private sectors”

Electronic Submission to Commission’s offices

“The stewardship of the public purse is an important measure of a government’s standing and its reputation in the eyes of the public for it focuses attention on how accountable and transparent it is in the raising and dispersal of funds.... Broad principles should be set out in the Constitution as a guide to governments about the raising of revenue and the expenditure of public monies ... to be a benchmark against which performance may be judged.”

Written submission

rules are mainly for the executive to follow, while Parliament plays a major role in overseeing them.

- All money raised by the government must be paid into the “Consolidated Fund” unless there are special reasons for exempting it (Article 158). This is an accounting rule: it means that what is happening to public money can be supervised because it is centralised. It is easier to keep track of money and ensure that Parliament has control over government spending. Money can be withdrawn from the Fund only if a law permits the withdrawal.
- Taxes cannot be imposed unless the law authorises them – again Parliament authorises them
- Tight control is exercised by government over Parliament: any Bill (proposal for a law) that involves taxing the people or spending money can be introduced in Parliament only by the Finance Minister or some other Minister whom Cabinet authorises: this is to prevent MPs being irresponsible (Article 106) .
- However, the government cannot compel Parliament to pass a law. On the other hand, if the law in question is the annual budget, the MPs will want to pass it so they can be paid.
- Parliament may control borrowing by the government and the government must report on loans whenever Parliament asks for such information (Article 157).
- The annual budget, which sets out how the government intends to tax people and what it plans to spend, must be presented to Parliament in time for members of Parliament to discuss it properly (Article 153).
- Government cannot get round the requirement of Parliamentary approval: if the budget is not approved by the beginning of the financial year some money can be spent, but only for four months and each of those months no more can be spent than in the corresponding month of the previous financial year (Article 155).
- Administrative systems for managing money in the public service must follow the law and must include mechanisms to ensure spending is properly controlled and transparent (Article 160).
- The government must have a “fair, transparent, competitive and cost-effective” tendering system so that tenders are not awarded in a corrupt way. This applies when government buys goods or services: public advertisements invite individuals and firms to offer to supply (tender) so that government gets the best price for the most appropriate goods and services. If these processes are not open and well-run they give many opportunities for corruption.

THE AUDITOR GENERAL

In addition to these measures, the chapter on Public Finance protects the office of an independent Auditor-General (Article 162). Traditionally the Auditor General in most countries has reported to Parliament, so is part of the machinery for Parliament’s oversight of government, and indeed the Draft Constitution says the office “provides independent assurances to Parliament that State organs are properly accounting for their operations and

management”. The Auditor General does this by auditing the financial statements of all government institutions annually. The law may require that financial statements of other bodies and corporations are also audited by the Auditor General (state owned companies would be a possible example). The reports of the Auditor General must be made public and may include an assessment of the general management of public finances. The most important difference from the 1997 provisions concerns the timing of audits. People complained that audits take a long time to come out and by the time they do, it is too late to do anything. The Commission’s draft requires government bodies to submit their financial statements to the Auditor General within three months of the end of the financial year (i.e. by the end of March) and for the Auditor General to finish the audits within two months (i.e. by the end of May).

THE PUBLIC SERVICE

The public service is the part of the government structure that most people are most likely to come in contact with: the person in the government office, a messenger, a receptionist, the person who deal with their problem, are all public servants. So are the police and the military and so, in Fiji are most teachers. At the same time they are the least visible; people will talk about government and politicians, parties and personalities. Public servants don’t hit the headlines; but they are important, and when people complain about service from government it is usually the public servants they are complaining about.

WHAT IS THE COMMISSION PROPOSING?

The People of Fiji require the public service to (a) be loyal to the people; (b) faithfully carry out the policies of the government and administer the law; (c) be free from corruption

Article 164

The Draft Constitution has some provisions that relate specifically to the public service, in fact a whole chapter on the topic (Chapter 15). The main features of the chapter are:

- Principles of public service (Article 164)
- The specific status of Permanent Secretaries (Article 167)
- The Public Service Commission (Article 168)
- The Ombudsman (Articles 17-172).

The Public Service Commission is one of the independent commissions (see next section), designed to be free from political interference: so it can exercise its professional judgment about appointments, management and discipline without individuals stepping in and saying “appoint my brother” or “don’t discipline my constituent”.

There is a very clear statement of what service means: professionalism, no corruption, prompt service, efficient use of resources and avoiding waste, including the people, being respectful, being open, and others (Article 164). One provision requires the public to

understand the needs of the more vulnerable sections of society, and respond to them, so that women, persons with disability, the poor, the elderly and minorities feel able to ask for help and for their rights (Article 165). It is also relevant to note that the Draft Constitution also say that people must be able to get service in any of the major languages of the country (Article 5(3)).

In the Bill of Rights there is a right to fair executive and administrative action: “*lawful, rational, proportionate, procedurally fair, and reasonably prompt*” (Article 39). They are entitled to reasons for decisions that affect them negatively.

There is also a right to access to public information (Article 32), and the Commission has drafted a law so this can become a reality very soon; one was promised in the 1997 Constitution but none has ever been passed.

There has been an Ombudsman in Fiji for many years. That independent office is continued by the Constitution. It is described as “an accessible forum for resolving complaints about failings in administration by Officers of the State or State organs” (Article 170). The Ombudsman will also hear complaints about the response of departments and bodies to Access to Information requests.

LOCAL GOVERNMENT

Government is not something that happens only in Suva. If government is to be truly democratic, it must also be closer to the people. And for most people government is about services: water, schools, hospitals, roads and transport. For these to be affective some decisions need to be made national, but many decisions need to be made locally. Some will be better made by bodies responsive to the local people, and responsiveness to local people will often be better achieved if the bodies are elected.

Like other state institutions in Fiji, up to now local government (provincial, district and urban councils) bodies have had a strong ethnic orientation. Provincial administration is for iTaukei people. Other residents of the same areas are served by Advisory Councils, which are not elected. Urban councils may provide services for villages within their boundaries but those villages are not full parts of the urban councils – their residents don’t pay rates and don’t vote.

The submissions that the Commission received, the Commission’s own view of the underlying problems of society in Fiji, particularly the need to build national unity, the principle of equal and common citizenry, and the requirement that the Commission must draw on best international practice all demand a restructured system of local government for Fiji that is non-racial and democratic.

WHAT DID THE PEOPLE TELL THE COMMISSION?

The Commission received many submissions on matters that relate to local government:

- The distance of communities from government
- The slowness of the response of the national government to local concerns
- The general inadequacy of services outside the main centres.
- People living away from Suva often find it hard to secure services, no one listens to their queries or complaints, and the government does not often understand their problems.
- Powers should be devolved to the local structures to carry out development work in order to deliver more efficient services.
- The current racially divided structures should be abolished and replaced with an integrated system, though some submissions asserted that current structures, which protect and promote indigenous culture, should be retained.

THE APPROACH OF THE COMMISSION

The Commission believes that an integrated system of local government in which people have a real voice will strengthen democracy in Fiji and contribute to national unity. It will allow people to participate in decision making and give them more say over the decisions that affect their daily lives. It will help government to provide services in a way that responds to the particular needs and interests of local communities and it will contribute to social and economic development. An integrated system will also end the situation in which there is much duplication with the same services being provided by many different institutions and will give people living in the same areas an opportunity to come together to decide how their community should be run.

The Draft Constitution does not set out new system of local government fully. Instead, it provides a framework of principles for local government and says that the new system must be established after the 2014 elections.

The key principles in the Draft Constitution for local government are:

- **A single, integrated system** of local government throughout the country in which all residents the area may participate without discrimination.
- **A democratic system** with regular elections administered by the Electoral Commission.
- **A participatory system** in which every citizen is able to participate actively in local decision making processes.
- An **inclusive system** in which the needs of the entire community including youth, women, minority groups and people with disabilities are considered.
- Local governments with **clearly defined and appropriate devolved responsibilities** and with a **reasonable degree of autonomy** to carry out their responsibilities.
- **Accountable and transparent** local governments with clear decision making processes, properly communicated to the people and with representatives and officials who adhere to the constitutional principles concerning leadership.

In addition, the Draft Constitution recognizes that one-size-fits-all local government is not wise. It allows Parliament to give different local government bodies different responsibilities depending on where they are, what the particular local needs are and what their capacity is. For example, urban councils may have different functions to those in rural areas. And in some places it may be useful to have more than one level of local government – in some areas, villages may form a second level of local government.

For a system of local government to work properly it is important that it is given support by the national government but the national government must not be allowed to intrude on local government functions in unnecessary ways. So, the Draft Constitution sets out a framework for the relationship between local governments and the national government. First, it requires the national government to support local government bodies and to help them build their capacity to fulfill their responsibilities properly. Second, it says that local government bodies must have adequate sources of revenue to fulfill their responsibilities. For instance, local government bodies may be given the power to raise taxes or levies and they may receive grants from the national government. Third, the national government may intervene in a local government if it is not managing to carry out its responsibilities adequately. But, there must be proper procedures for such an intervention so that the national government does not usurp the role of the local government body.

GETTING THE NEW SYSTEM OF LOCAL GOVERNMENT GOING

There are two main reasons why the Draft Constitution does not set out the whole system of local government:

- Getting local government institutions and responsibilities right is difficult. Local government in Fiji needs to be carefully designed so that it meets the needs of all people across the country. Local government areas need to be demarcated and the responsibilities for local governments in different places need to be carefully determined. To do this properly, people must be consulted. The Commission did not have the time to do this.
- A system of local government needs to be flexible so that it can change with time as needs change. Provisions in a constitution are hard to change. So the Draft Constitution expects the new system to be set out in Acts of Parliament that can change to respond to lessons learnt and new needs.

The Draft Constitution says that the new system must be established when the second elections under the Constitution are held. That may be in 2018. This gives the first government elected under the Constitution four years to plan. But the Draft Constitution also wants some planning done earlier, before the first elections. So it says that the Transitional Advisory Group which is responsible for managing parts of the transition to democracy (discussed in “The future”) must convene a working group to start developing proposals for the new system. This group of people with expertise in local government and administration and representatives of civil society must consider all aspects of a new system and deliver a report to the new government after the elections.

SECTION 12: INTEGRITY, ACCOUNTABILITY AND JUSTICE

Good governance and elimination of corruption, both required elements of a new Constitution in the Decrees, require that people who hold important offices in the country come in with records of competence, honesty and integrity, behave properly while in office, and are removed from office, and probably punished in other ways if they do not.

To achieve these objectives a constitution can provide rules, it can set up institutions, and it can set up standards and expectations. The Draft Constitution does all these things.

The Draft Constitution describes certain offices as “Offices of the State”, and those who occupy them must observe particularly high standards. They include the President, Ministers, MPs, Judges, holders of important offices, such as the Auditor General, and the Commissioner of Police, and members of independent commissions.

LEADERS, PUBLIC SERVICE AND THEIR ACCOUNTABILITY

Public office is a trust conferred by the people through the Constitution, which vests in the holder the responsibility to serve, rather than the power to rule – Article 3

We therefore request that future leaders be trained prior to their appointment, because most after their appointment most do not know what they are doing –

member of the public in Savusavu area

We need political leaders who think of the common good – a submission in Lautoka

The public in their submissions frequently discussed issues of good governance and accountability. For example:

- Many people expressed general concerns about corruption
- In rural areas, people are concerned that elected leaders make false promises.

People would like their elected leaders to visit them on a regular basis to hear their concerns; and some feel that such visits should be mandatory.

- Members of Parliament should have minimum qualifications, including: a minimum education level, sound financial situation (no history of bankruptcy), personal integrity and moral standards, no criminal record. Some also suggested that there be a minimum and maximum age for serving in Parliament
- Those standing for elections should make financial disclosures
- There is a need for a code of conduct for politicians and civil servants

- The role of FICAC should be expanded and it should be given greater investigative and prosecutorial powers.
- The Auditor General reports should be made public and the office of the Auditor General should be strengthened.
- Human Rights Commission and Ombudsman should be re-established as independent offices
- There should be public consultation on government decisions, particularly decisions concerning the environment.
- Composition of the civil service should be ethnically diverse

The Commission has prepared the Constitution to be not just a set of rules, but a guide to leaders about how they should behave, and a guide to the people as well: what should they be looking for in leaders, and must they just to accept what leaders do or they have a right to expect leaders to be committed, competent and honest? Also, leaders, of course, are people, and it is from the people that future leaders will come. Finally, the Draft Constitution emphasises that leadership does not bring privilege, but responsibility, that greatness as a leader is earned.

The most important strategy in promoting integrity is openness: people who hold public office, or who wish to hold public office, must be prepared to reveal a good deal about their personal affairs, including their financial affairs. This is important for judging their honesty, and for monitoring whether they allow their personal interests to influence their official duties.

WHAT THE COMMISSION PROPOSES

The Draft Constitution is specific about the qualities of those who wish to hold public office, and what they should, or should not, do in service of the people:

- The way to public office requires integrity, suitability and competence
- Leaders must be honest and diligent, disciplined and committed (Article 53)
- Leaders and public officers must not allow their personal interest to conflict with their public duty, appointing their relative on the basis of their relationship and not their suitability
- Other values of public service are fairness, openness and loyalty to the people (Article 164).

The Draft Constitution also sets out detailed rules and requirements, procedures and mechanisms to ensure that all these values and guidelines are fulfilled. These rules cover who may become a leader/holder of an important office, or what they must do before they may stand for election or take up an office:

- No-one can be elected as MP or hold any other office under the Constitution if they are undergoing a prison sentence of 12 months or more (Article 80),

- Someone who has been removed from office may be barred from public office for life, or 10 years or less depending on the seriousness of the conduct (Schedule 5, sections 5 and 6).

They cover what leaders and public bodies must do or not do while in public office:

- The holders of office must declare if they have any personal interest in a matter on which they are deciding; MPs may not vote if they have a personal financial interest (Article 99(3))
- Officers of the State are required to make regular declarations of their assets, and those of one's closest associates (Schedule 4)
- In the case of public/state officers with important decision making functions, they must make public their interests, both business and personal, so that the public may judge whether they are being influenced by those interests when they make decisions (Schedule 4)
- In many other ways the Constitution requires openness, which enables people to check on how leaders and institutions and individuals are performing, including in terms of their honesty; for example, Parliament must usually sit in public (Article 101(2))
- Officers of the State must deliver to the state any gift received for the State in their official capacity, and must declare any personal gift received above a certain limit (Schedule 4 section 6), and may have to give it up
- Full time public officers must not have other jobs or actively run businesses or professional practices (Schedule 4 section 5)

There are rules about discipline of public officers, and their removal from office in serious cases: even though it may be hard to sack many public office holders, because it is important they can make their decisions without being in constant fear of dismissal, they can all be dismissed in certain circumstances (especially Schedule 5)

And there various mechanisms and bodies that are intended to work to ensure the integrity of public officers, ensuring that these rules work:

- A Code of Conduct provided to guide public office holders (Schedule 4).
- The various independent commission discussed in the next section
- The constitutional processes for passing the annual budget, about spending public money and collecting taxes and other income for the state.
- Special provisions about MPs, some of which are concerned with ensuring their integrity, including that they do not fix their own salaries (see Salaries and Benefits Commission)
- The protection of what are sometimes called "whistle-blowers: this refers to people who report wrong doing to the authorities. Many people have been victimised or even dismissed because they have done this, so the Constitution provides that no-one who does this can be dismissed or penalised for it (Article 65)

- Finally, the independent courts, which cannot be pressurised into being gentle on public officers who offend (see “Justice”) and the independent prosecution system as well, which is also designed to be free from temptation to favour the well-connected and powerful (see DPP)

Finally, it is very important to note the role of the people: they are the main guardians of the Constitution: they must watch their leaders, be prepared to take them to task for bad behaviour, not vote for them if the elected ones if they do not live up to the ideals of the Constitution. It is to help them, especially, that the many provisions for openness are there.

INDEPENDENT COMMISSIONS AND OFFICERS

In recent years in a number of countries, a new trend has emerged in the structure of the state: independent commission and officers. Their primary role is to ensure that certain sensitive tasks (like the holding of elections, promoting high standards of integrity in public life, and ensuring fair and efficient conduct of state institutions) are performed by institutions which are neither beholden nor close to powerful state or political groups and that there is no abuse of state power. They often stand between the state and the citizen.

They are independent in the sense that their appointments, and if necessary, their removal, are made through a process which minimises political influence and ensures fairness so that only people with suitable qualifications and integrity are appointed. Another element of independence is that their financial resources are guaranteed by the constitution.

Furthermore neither the state nor other interests can interfere in their work, and the state has to respect their decisions. But in turn they must act impartially, without fear or favour or prejudice

To some extent the rationale and the model of their organisation are based on what used to be the only independent institution in the state, the judiciary: independence, security of tenure, high qualifications, integrity, expertise and professionalism, fair and transparent procedures, for the protection of people’s rights and dedicated to the rule of the constitution and the law, and seen as impartial and politically neutral—and enjoying considerable respect in the community.

THE DRAFT CONSTITUTION’S PROVISIONS

Independent commissions and officers are not new to Fiji, having existed at least since the 1970 constitution. The Draft Constitution seeks to establish a general and effective framework for their appointments, independence, and procedure, while recognising the specificity of each commission. It also gives considerably increased role to the commissions and puts some teeth into their authority. They are the embodiment of the values of the constitution around society and state. No understanding of the constitution and the new political order is complete without knowledge of their values, purposes and procedures.

THE PURPOSES

In the Draft Constitution, under the common principle of independence, independent commissions and officers serve a variety of functions, broadly defined as “to secure and protect constitutional democracy”; these are amplified in 144 (2):

- *protect the sovereignty of the people and the public interest*
- *uphold the rule of law, and promote the observance of democratic principles and values by all state organs; and*
- *maintain constitutionality and integrity by insulating essential democratic functions from improper influence, manipulation or interference.*

Chapter 13 identifies independent commissions (of which there are 9) and independent officers (of which there are 7) and establishes the framework for the performance of their functions, defining independence, conduct and duties of commissioners and officers, the actual functions (including receiving and investigating complaints from the public or on their own initiative), procedures to be used in the performance of their functions (including mediation and negotiations), and issuing remedial orders (often enforceable through court action). The commissioners and officers are appointed through a transparent procedure which includes advertising vacancies, relevant consultations (including with civil society) – and high and demanding qualifications. Most appointments are made by the Constitutional Offices Commission (consisting of chairs of some independent commission chairs and 2 men and women appointed by the Prime Minister and the Leader of the Opposition).

Organisational principles of the commissions and offices include:

- *accessibility and approachability*
- *simplicity and clarity of all procedures and documentation; and*
- *speed, efficiency and responsiveness.*

There are also rules for the accountability of the commissions and officers, which include reporting to Parliament and the public, through annual and periodic reports—as well as at the annual National People’s Assembly. In keeping with the general ethos of the Draft Constitution, civil society plays an important role in their organisation and functioning (through membership, access, complaints).

VARIETIES OF TASKS AND RESPONSIBILITIES

The commissions and officers serve to some extent to keep the government at distance: preventing abuse of power, especially where power can easily be abused, like police or military; keeping the public service competent and impartial/politically neutral. Some are appointing authorities themselves (Judicial Service Commission and more particularly the Public Service Commission); some are performing sensitive tasks where impartiality is necessary (holding elections, holding senior officers accountable, making decisions on matters where senior officials may have a personal interest; exercise of state power to ensure that its impartial exercise (prosecution); and others’ primary task is to protect legality).

Some commissions perform a variety of tasks. An example is the Fiji Human Rights Commission. It must protect human rights and develop a culture of human rights; educate the people about human rights; monitor, investigate, and report on observance of human rights in all spheres of life; advise the government on steps to protect human rights; investigate or research on its own initiative or on the basis of a complaint any matter in respect of human rights and make recommendations; receive and investigate allegations of violations of human rights and secure remedies; and monitor compliance by the State with obligations under treaties relating to human rights (Article 52).

Another commission with multiple tasks is the Ethics and Integrity Commission (which will replace FICAC) (Article 66). It has to educate state officials and society about ethical standards of good governance and integrity; establish Codes of Conduct for State organs; monitor compliance with Codes of Conduct; investigate corrupt practices in any sphere of life, and in some cases undertaking prosecutions itself (though the normal rule would be to refer the matter to the DPP); research into ethical governance and corrupt practices with a view to appropriate response; monitor compliance by the State with its obligations under treaties regarding corrupt practices; and advise the government on corruption and integrity issues.

The Electoral Commission has general oversight responsibility for the registration of voters and the conduct of free and fair elections in accordance with the law (Art. 82). This includes a number of activities including registration of voters, voter education, casting and counting of votes, settlement of electoral disputes, regulating the amount of money that can be spent on elections by parties or candidates, enforcing the code of conduct for candidates and parties, and facilitating the observation, monitoring and evaluation of elections.

There is to be an Ombudsman to provide an “*accessible forum for resolving complaints about failings in administration by state officers or state organs*” (Art. 170). To some extent its mandate is implicit in Article 39 (1) which says:

- *Everyone has the right to executive or administrative action that is lawful, rational, proportionate, procedurally fair, and reasonably prompt.*

It has to promote the protection and observance of the principle of respectful, effective, impartial, fair and equitable service (Art. 170(2), in part by

- *Consulting with and educating the public, including civil society, about the nature and content of the principles of public service and the right to executive and administrative justice*

and in part by:

- *Making recommendations to any State organ concerning the matters within its scope.; and*
- *Investigating or researching, on its own initiative or on the basis of a complaint, any matter within its scope, and making recommendations to improve the functioning of public entities.*

In the legal and judicial system, the Judicial Service Commission is responsible for the appointment of judges and magistrates, the Solicitor General and the DPP, and in appropriate cases initiating the process for their dismissal.

The finance chapter deals with three independent commissions and officers. The first is the Salaries Commission (Art. 161) which, every 4 years, reviews and determines the framework and upper limits of the salaries, allowances and benefits of the state officers.

The second is the Auditor General whose work has been described in the section of public finance.

The third is the Reserve Bank of Fiji. The Governor is an independent officer, appointed by the Constitutional Offices Commission (Article 16(4)).

Like most other central banks, the Reserve Bank issues the country's currency. It must also make policies that keep Fiji's currency stable. This is important because a stable currency helps keep prices for people in Fiji low, makes it easier to export Fijian products and stops the tourism trade becoming too expensive. A stable currency also encourages foreign investment because investors feel confident. The Bank will also be responsible for regulating other banks.

The Bank must carry out its functions in an independent manner, but in regular consultation with the Minister. Its independence ensures that the Bank is not swayed by the needs of any particular government but is concerned with the overall, long term interests of Fiji. Its regular consultation with government ensures that it does not Act in isolation but understands the government's policies, and that the government understands issues that the Bank is responsible for (Article 163 (2))

AND LASTLY

Altogether, independent commissions and offices create a new kind of balance within state authorities. They are a new form of checks and balances (adding to the traditional balance between legislature, executive and courts). They link the people in numerous ways with the government, not as subjects but as citizens with claims and responsibilities of their own.

JUSTICE AND THE COURTS

Laws must apply to all person equally, impartially and without regard to status or identity

Article 119(2)(b)

The “Rule of Law” means that everyone, including the state and all its officers and employees up to the President, respect and follow the law. And that law must be fair, consistent and justly administered. This is essential for a just country, and it is essential for the success of a constitution. Justice is a matter not only between citizen and the state but

also between citizens. It is hard to think of a fair society without the fundamental principles of justice.

In the past Fiji has had a generally good legal system and people who made submissions to the Commission did not want any fundamental changes but submissions did raise concerns about the independence of judges and magistrates, the difficulty of getting access to courts (people wanted courts to visit them rather than to have to go to the mainland for cases as is

now usually required), and high lawyers' fees. Some asked for the restoration of Fijian Courts to deal with village by-laws. A number of people thought that judges and magistrates should reapply for their jobs when the new constitution came into force.

Judicial independence is crucial and sacrosanct

- a group of lawyers

It takes two to four years to hear a case. I want that process to be quickened - a member of the public in Ba

THE COMMISSION'S APPROACH

The Commission shares the view of those who did speak or write about the importance of a strong system of justice. An important objective of the Draft Constitution is strengthening the rule of law and promoting access to justice. Chapter 10 explains what the rule of law is and why it is important to freedoms, human security, equality, fair relationship between citizens and the state, and human endeavours, including economic growth. An underlying principle of the rule of law is that “state authority is never exercised arbitrarily or capriciously”.

WHAT DOES THE DRAFT CONSTITUTION SAY?

The Draft Constitution's approach to justice reflects its approach to the entire Constitution: it calls for openness, fairness, competence, integrity, and for an active role for the people in furthering justice, not as judges, but in insisting on their own rights and those of others.

The Draft Constitution underlines that the constitution is supreme and gives the judiciary a key role in enforcing it. The aim is that everyone will have access to a court, and the right to appeal to a higher level of court if they are dissatisfied with the decision of the first court that they go to. The provisions intended to achieve effective access to justice include:

- statements of principle about the nature of law, of courts, their procedures, their accessibility, and the encouragement of restorative justice and other forms of alternative dispute resolution (Article 119)
- clear provisions about who can go to court to enforce the Constitution – including individuals and organisations acting or others who cannot go to court themselves (Article 120)
- that even remote parts of the country must be served by courts (Article 119(3)(d) and (e))

- in the Bill of Rights: the right to fair trial before an impartial and independent court or tribunal, and a duty of the state to provide assistance of a lawyer, if justice really requires (Article 40)
- clear statements about the powers of the courts to protect the Constitution: declaring a law invalid for example (Article 120 (4)).

JUDGES AND LAWYERS

Judges cannot perform their duties in upholding the Constitution and protecting people's rights without independence from the state as well as from other powerful interests. They also need proper knowledge and experience of law. So the Draft Constitution:

- gives the power to appoint judges (and to deal with their removal for wrongful conduct) to an independent body (the Judicial Service Commission) (Articles 129-131)
- prevents judges from being victimised by having their salaries etc. reduced arbitrarily (Article 128)
- sets out high qualifications to be a judge

The Commission realises that, because Fiji is a small country, in the past it has been necessary to bring in judges from overseas. It retains this possibility but there are a few differences in the provisions relating to judges, including:

- a foreign judge may have only one term as judge, but the length of that term is not fixed by the Constitution (Article 133)
- retiring ages are later: 75 for the Supreme Court and Court of Appeal, 70 for the High Court
- the Judicial Service Commission, which chooses judges, is to include 2 members of the public as well as two judges, another lawyer and a person chosen by the Minister of Justice (Article 135)
- The Chief Justice is a member of the Judicial Service Commission but does not necessarily chair it
- a person may become a judge if they have had considerable experience as a university level law teacher and researcher, not only as a practising lawyer (Article 130)

Justice and the rule of law do not depend only on independent judges, but also on other lawyers and court officials. The Draft Constitution expects the legal profession to “fearlessly protect the rule of law”, and recognises that their independence is necessary for this. It prohibits state organs from intimidating lawyers and their clients or interfering in their professional relationship (Article 136).

PROSECUTIONS

The power to prosecute those who break the law is an important power of the state. But it is also open to abuse. For instance, the Director of Public Prosecutions could come under

pressure from the government or powerful interests to prosecute particular people and to drop investigations against others. In order to guard against these dangers, like the 1997 Constitution, the Draft Constitution makes the Director of Public Prosecutions (DPP) an independent officer of the state with all the protections that such officers have and Article 138 says:

- appointment of the DPP is by the Constitutional Offices Commission (itself independent of the government)
- the DPP must have regard to the public interest, interests of the administration of justice, and the need to prevent and avoid abuse of the legal process.
- the DPP can be dismissed only for serious misbehaviour through a fair process established by the authority which appoints the DPP (Schedule 5).
- the DPP can take up or drop a private prosecution only with the consent of the private prosecutor or the court – to prevent abuse of the power to stop cases.

SOLICITOR GENERAL

Many provisions of the Draft Constitution are concerned with the exercise of the State's powers and making new laws. How the state gets legal advice and performs other functions in accordance with the law has a big impact on the rule of law. The main source of legal advice to the government is the Solicitor General (Article 137). The Solicitor General also prepares draft laws and represents the government in civil cases. So that the Solicitor General exercises these tasks strictly in accordance with the constitution and the law, the Draft Constitution makes the Solicitor General an independent officer appointed by the Judicial Service Commission. As a further protection, the Solicitor General may be removed from office only for good reason by a fair process.

COURTS

- The system of courts is the same as in the past: the Supreme Court, the Court of Appeal, the High Court and the magistrate's court. Parliament may also create other courts. Military courts are included in the Constitution for the first time, and certain basic principles spelled out (Article 126). Military courts will deal only with offences of a "strictly military nature" that do not involve a serious human rights violation. And military courts must meet the standard of "a competent, independent and impartial tribunal", the hearings of the military court must be public, and appeals can be taken to the Court of Appeal.
- The Supreme Court may allow a case to come directly to it in exceptional circumstances, for instance when a very serious matter relating to government and the Constitution needs to be settled urgently (usually the Supreme Court hears appeals only.) (Article 123(4)(c))

SECTION 13: SECURITY - OF THE NATION AND THE PERSON

Everyone has the right to security of the person, which includes the right to be free from any form of violence from any source... Article 24 (4)

People come together in communities, including in the community that makes up the whole country, for various reasons, but the most important perhaps is for safety – for security. The Draft Constitution recognises this in two main ways: in the human rights provisions, and by giving importance to – and controlling – state bodies charged with protecting security.

Violence might come from within the family, but also from within society, in “home invasions”, or assaults, which it is the responsibility of the police and the corrections service, as well as the courts, to protect people against. Citizens may be able to claim compensation from the state if it seriously fails to protect them.

Violence may also come from outside the country though it is many years since Fiji had to face a foreign armed enemy. Protecting the nation against external threats is the responsibility of the military forces.

NATIONAL SECURITY IN THE DRAFT CONSTITUTION

Article 24 (4) has two messages for the security forces: the military, the police and the corrections (prisons) service. It is their job to protect the people; and the people are absolutely entitled to expect the security forces themselves not to be a source of violence.

In one chapter the Draft Constitution puts together the military, the police and the Corrections Service – the last deals with prisons.

MILITARY

As is well known, the military is not solely responsible for coups—politicians, chiefs and business people allegedly have promoted or participated in coups. But inevitably the military plays the major role in their execution. And administration under the military for any length of time subverts the rule of law, generally undermines the independence of the courts, and weakens democracy and civil society. The question of the military is thus connected to a number of critical issues for Fiji’s future. A Report a few years ago (see box) raised a

Main points from a Report a few years ago

- Coups cause political crisis, worsen ethnic relations, and damage the economy
- The major problems confronting Fiji are internal: domestic and ethnic conflict resulting from insecurity of internal racial and ethnic conflict;
- Proposed reduction in size to avoid involvement in politics—and coups
- Military could reinforce the police to deal with domestic disorder
- The dominance of the military by iTaukei
- Creating a better ethnic balance (through active affirmative policies) especially if the military was to have a role in internal law and order tasks
- Military is divided on provincial basis
- There are long term security threats to Fiji from ex-soldiers returning from employment with international security firms.

number of important issues.

WHAT DID PEOPLE TELL THE COMMISSION?

The Commission received numerous submissions on the military, questioning the necessity of an army. Some said that the military should be reduced in numbers, and should focus on protecting the seas around Fiji and their resources. Some asked for greater accountability of military to civilian authorities and the strengthening of the police service to phase out the military's role in domestic affairs. People frequently challenged the Commission to produce a coup-free constitution (see "No more coups?").

THE APPROACH OF THE COMMISSION

The Commission is fully conscious of the importance that many people attach to the military, and the pride that is felt in its contribution to peace-keeping in many parts of the world. But it also feels that Fiji has paid a heavy price for this (see the box).

One of the most basic of all constitutional principles is that the military's functions is to serve the people, and thus to be under its civilian authorities. It must not be a law unto itself. Nor must it serve the cause of any particular section of the community or political ideology or group.

WHAT DOES THE DRAFT CONSTITUTION SAY?

Chapter 16 on National Security, contrasts with previous constitutions, which said little about the military, so did not have anything to say about critical aspects of its roles, procedures and accountability. It deals with:

- Principles of national security including the need to comply with the Constitution and international law, and the goals of the people –
 - to live together in peace and harmony
 - free from fear, and
 - peaceably with other nations (Article 173).
- The need for professionalism, training and discipline
- Compliance with human rights
- Political neutrality
- The need to reflect the diversity of Fiji, while basing promotion on merit and competence (Article 174)

The Chapter deals with the institutions and bodies: the National Security Council (Article 175), which brings together government people and the chair of the Parliamentary Committee on Defence matters, the Leader of the Opposition with commanding officers of the various security forces, and the Commander of the Military. The Commander is subject to the law and to written directives of the Minister responsible for defence. One point to note is

that the President is not called “Commander in Chief” any more: this was an old fashioned and misleading description.

This Chapter also deals with states of emergency (Article 181), which usually gives the executive extra powers and often an enhanced role for the military to help the civilian authorities. A state of emergency must be approved by Parliament within 10 days, and by two-thirds of the members of Parliament, or it lapses. It cannot last more than 3 months without being approved again.

The Commission was not able to address some important questions (in part due to inability to hold timely discussion with the Military). So we have recommended that (as in most countries) there should be regular periodic reviews of the role of the military, and possibly a gradual reduction in size. These reviews would be carried out by the National Security Council and reported to parliament (Article 175(5)).

The chapter on Justice and the Rule of Law now requires military courts to be set up under a law by parliament. They must conform to the standards of competence, independence and impartiality as other courts. Military courts can only try offences of a strictly military nature committed by military personnel. They would no longer be able to try cases of military members accused of serious violations of human rights, like disappearances and torture. Evidence can only be withheld in a military court when secrecy is strictly necessary to protect information concerning national defence. And now the Court of Appeal will be able to hear any appeal from a military court.

POLICE AND THE CORRECTIONS SERVICE

The provisions about competence, integrity, professionalism, respect for democracy and human rights, and for international law apply to the police and corrections as much as to the military. While the defence force must work closely with the government in accordance with its policies (and its senior staff are appointed by the government), the police and correctional services enjoy greater independence.

The Commissioner of Police:

- is an independent officer, and is appointed by the Constitutional Offices Commission, after consulting the relevant Minister (whereas the Commander of the Military is appointed by the Cabinet after consulting the National Security Council)
- The Commissioner can be given general directions by the Minister, but these would not affect decisions in individual cases; the police themselves did not want this to remain but it is important that the police should respect the policy priorities of the government, while exercising their independent judgment on specific cases, to avoid political interference.
- The Police and Corrections Service Commission appoints and removes senior officers in both services, but lower level appointments are internal matters.

SECTION 14: THE FUTURE

The whole Constitution is about the future. By the future we mean a Fiji that

- is at peace with itself and others
- is able to focus on developing its economy, and on the needs of the vulnerable in society
- keeps corruption under control
- respects the rule of law and human rights
- is democratic and inclusive.

Getting to that future means having a stable government, which means a stable constitutional system, and no coups. The Commission does not mean that the Constitution to be adopted in 2013 must last for ever. But constant change is not desirable either, whether by means of constitutional review or coup.

In this section we look at how the Draft Constitution, if adopted in the form it left the Commission, would come gradually into effect, with new bodies, new values and new ideas; how it is to be protected from hasty change even by Parliament; and what it has to say that is intended to try to prevent future coups.

We begin with the business of bringing in the new Constitution – rather a technical subject. But it contains some points of interest to everyone, including how the change takes place from the current government to a new elected one. Then we look at some of the changes that are likely to be longer term: especially in land and local government

BRINGING IN THE NEW

Shifting to a new Constitution is complicated. How are new bodies to be set up and new laws passed? What about the people already in office? What about the laws already there? What continues in the same way as in the past and what must be changed quickly?

The most important aspect is the shift from a non-democratic system to a democratic one. People have not voted for a long time; an unusually high proportion will never have voted before (anyone under 29 by the time of elections in 2014 will never have voted before, and this time everyone over 18 will be able to vote). It is vital that people are prepared, able to discuss and hear different views well in advance of the elections so that they can make up their own minds. It is made more complicated when the date of the first elections to be held under the Constitution is not clear.

Few people spoke to the Commission about transition. Some called for a caretaker government to lead the country to democracy; some spoke about the future of the judges; and a few spoke about the immunity provisions – the requirement that people who have been involved in coups and in illegal regimes in the past should be protected from legal liability for their actions.

THE COMMISSION'S APPROACH

The Decree on the Constituent Assembly says that the new Constitution becomes law when the President signs it but it also allows some parts of it to come into effect later. Most of the Constitution will come into effect immediately but some parts must be delayed. For example, the chapter on Parliament cannot apply until after the elections.

The Transition Schedule in the Draft deals with many technical legal matters including when different parts of it come into effect. But its most important provisions are about the transition to democracy and, particularly, getting ready for free and fair elections. It is vital that the first elections are held in an atmosphere that allows everyone to compete for Parliament on equal terms, and the voters to exercise their rights to choose their government freely. This is part of “true democracy”, which Decree No. 57 says the Constitution must be designed to achieve.

So, the Transition Schedule:

1. Requires a *caretaker government* (cabinet) for 6 months before the elections. This is in the interests of everyone: members of the current government can campaign for election if they so wish; voters cannot complain that the government, which has links to the military, is manipulating the elections; all candidates for election will be able to compete equally – none will have access to the special privileges that members of a government have. No one who serves in the caretaker government may stand for election to Parliament.
2. Requires an *independent Interim Electoral Commission* (IEC) to run the elections and some other temporary commissions.
3. *Repeals those laws that are inconsistent with the Bill of Rights* and that stand in the way of a free and fair election by restricting the ability of people to meet and discuss ideas.
4. Secures the *independence of the courts* so that they can uphold the Constitution without fear, favour or prejudice.

GETTING THE TRANSITIONAL BODIES IN PLACE: THE TRANSITIONAL ADVISORY COUNCIL

The caretaker government, the IEC and some other bodies responsible for a smooth transition need to be established. The Draft sets up a Transitional Advisory Council (TAC) to do this and to smooth the path to the new system and implementation of the Constitution.

The TAC is a body that bridges the present and the future. Its composition is intended to give it legitimacy. Its members are –

- 2 people chosen by the Prime Minister, one of them to represent the Military (so the current government has a say)
- one person chosen by the Fiji Law Society
- one person chosen by the 3 university Vice-Chancellors acting together

- 3 civil society people (chosen by the other members of the TAC)
- the heads of the three temporary commissions, once they are established

The caretaker government also appoints two members after it is established.

The main roles of the TAC are to select the members of the caretaker government and members of the interim commissions. It must also advise the government generally and promote public awareness of the Constitution. It will help prepare for the full implementation of the Constitution by doing research and developing strategies for the implementation of the Constitution by the new government.

THE CARETAKER GOVERNMENT

When? There must be a caretaker government for the 6 months leading up to the election. For example, if the election is on 30 September 2014, the caretaker government must take over on 1 April 2014. The way this works is that the date of the elections must be announced 6 months in advance. On that day the current government leaves office and the caretaker government takes over.

Who? The members of the caretaker government will be selected by the TAC and appointed by the President. The TAC can select up to 15 people who, in the past, served as Permanent Secretaries or in other similar positions, for the caretaker government. These people will have the administrative know how to run the administration before the elections. To ensure that the caretaker government is completely new, a person who is a Permanent Secretary when the Constitution comes into force may not be chosen.

What can the caretaker government do? The caretaker government has to ensure that elections can take place and is not supposed to do anything other than keeping government running and the situation stable. If necessary, it will prepare the estimates for the next year's budget.

THE INTERIM ELECTORAL COMMISSION AND OTHER TEMPORARY COMMISSIONS

It is not possible to wait until after elections for all the new bodies to be appointed. For example, there must be an independent Electoral Commission to run the elections. But it is also important for new independent commissions to be appointed under the new system of government after the elections. So, three temporary or interim commissions must be appointed for work that can't wait until after the elections. They will be replaced soon after the elections:

- The Interim Electoral Commission will be in charge of the first elections. It will be made up of people chosen by the TAC, the Law Society and the Vice Chancellors. Two members must be election experts from outside Fiji.
- The first Ethics and Integrity Commission will be appointed by the TAC, but will only last until the Constitutional Offices Commission appoints an Ethics and Integrity Commission.
- The Interim Judicial Service Commission will be composed of one local and one foreign judge, a person chosen by the Law Society and a member of civil society. It

will appoint any new judges and magistrates that are required until the permanent Judicial Service Commission is established after the elections and will also be needed if it is necessary to consider any judge for removal.

EXISTING LAWS AND DECREES

Most laws and Decrees (including promulgations) remain in effect. But some of the laws and Decrees that stand in the way of a free and fair election are repealed. These include:

- Most of the Public Order Act (but the Draft replaces it with a Public Order Law that is consistent with the Bill of Rights).
- Parts of the Media Industry Development Decree.
- The whole of the Essential National Industries Decree 2011 and certain provisions of the Employment Relations Decree.

Some other Decrees will not be in force because what they say will now be covered by the new Constitution. For instance most of the Executive Authority of Fiji Decree, 2009, is covered by the chapter on the Executive. Some laws might also not apply because they conflict with the Bill of Rights or some other part of the Constitution.

Finally, in the last few years it has not been possible to go to court to argue that a Decree is against human rights and therefore invalid. Once the new Constitution, including its human rights provisions, come into effect this cannot continue. Any provisions that say that people cannot go to court (in legal language that “ousts the jurisdiction of the courts”) are declared void.

Any Decree or part of a Decree that is covered by the new constitution or conflicts with the new constitution can be challenged in court as such. However, it will not be possible to argue in court that a law or Decree is unconstitutional because of the way it was made. This means a person cannot go to court and say “this law is not valid because it was made by an illegal government” for example.

INDEPENDENCE OF THE COURTS

As we describe above in the section on the judiciary, many people said that the courts were not independent. The transitional provisions of the draft respond to this, most serious, concern in two ways. First, all the provisions relating to an independent judiciary apply right from the beginning. This means that judges and magistrates will be able to finish their existing contracts and they will not be dismissed except for good reason, complaints must be handled properly by the Interim Judicial Service Commission and so on. This will protect judges and magistrates from interference by the executive. Secondly, any contract that is for a period other than 3 years is changed to be a three-year contract. This means that soon all members of the judiciary will have to be appointed under the new procedure set up in the Draft. If there are vacancies before the elections, the Interim Judicial Service Commission fills them, following the procedure in the Constitution.

OTHER TRANSITIONAL ISSUES

Oaths: Everyone who stays in office must take a new oath under which they swear or affirm to uphold the Constitution.

The President: The current President serves until the first election of a President by the National People’s Assembly (which must be no later than October 2015).

Members of the military serving in civilian office: Anyone who is a military officer and also holds a civilian office is treated as having resigned from the military office on the day the elections are announced.

WHAT ABOUT IMMUNITY?

The Decree requires that the Constitution gives the same protection to previous coup leaders and those involved in the governments as in the 1990 Constitution and the 2010 Decree that covered events since 2000. The Constitution does this. But it says that the protection only applies if the person wishing to rely on that protection swears an oath:

“that I accept the sovereignty of the people of Fiji as the only legitimate source of authority in the Republic. I renounce any actions in my past that may have promoted, assisted or protected attempts to establish a government otherwise than in accordance with law. I solemnly and sincerely submit myself to democracy and the rule of law, and promise that, from this day forward, I will be faithful and bear true allegiance to the Republic of Fiji, and will uphold and obey the Constitution of Fiji.”

WHEN DOES THE CONSTITUTION COME INTO EFFECT?

Most provisions come into effect as soon as the Draft is signed. Most importantly, these include the Bill of Rights – many human rights can apply even if the system is not democratic.

This Table provides a simplified guide:

Date	What comes into effect
The day after the President signs the Constitution	The Preamble; the founding provisions (on values); most provisions about land; the chapters on human rights, civil society, political parties and elections (Representing the People); Article 112 which is guidance on how governments should govern; Chapter 11 on the courts; most provisions about public finance; provisions about public service
Day election is announced	Provisions on caretaker government; requirement that anyone who wishes to stand for election resign any office of state.
When the results of the first election are declared	Chapter 9 – Parliament

The day of the first sitting of Parliament	The provisions on the National Consultative Forum on Land; the Cabinet and Prime Minister; independent commissions and offices; amending the Constitution; and the remaining public finance provisions.
October 2015	Latest date for the National People’s Assembly to hold its first meeting – but the provisions setting it up will be in effect earlier (however, some appointment provisions cannot come into effect for the first Assembly)
Third election for Parliament	Article 80(3) providing for party lists to be 50% women (until then they must be 30% women)

LONGER TERM IMPACT

Over a longer period the Constitution is designed to allow changes to occur, and to give a stimulus to certain sorts of change. Many changes will naturally occur as a result of any new system, and will occur if economic development picks up. The electoral system is bound to produce changes in politics and government. And many other parts of the Constitution are designed to change behaviour and attitudes on the part of leadership and even the people. It is designed to encourage change in two very specific areas, which have been discussed earlier.

The first of these is in land. The Commission has taken the view that the existing system is an adequate foundation for use of Fiji’s land in a way that is of benefit to all, whether they are owners, tenants or users or just people who do not have any interest in land other than having a home. For this reason it has put the foundations: the customary ownership, the freehold, limited as it is, and state land, into the Constitution, in the hope that the sense of security that this builds will enable the country to move forward. To move forward it needs to look closely at the details of the system and the way it is administered.

The Draft Constitution would establish a mechanism for a national conversation on land: the National Consultative Forum on Land. Existing laws cannot be amended if this Forum say a firm “No”. And if any section of it says “No” the laws remain hard to amend.

The other area for change is government at more local levels that in Suva. The previous, very divided, system involving Provincial Councils concerned with iTaukei affairs, Advisory Councils for everyone else, rural local authorities that were not local government, and city and town councils that were for everyone in urban areas (except for villages within towns) will go. But this will not take place overnight. There is to be a process of discussion and consultation to set up an inclusive system of local government that serves everyone in the country, and within any area serves everyone who lives there. You can read more about this in the “Local Government” section under Government in this Report

CHANGING THE CONSTITUTION

A constitution needs some room for change. Sometimes some aspect does not work, or circumstances change and a country’s needs change. But a constitution that can be changed very easily is not really a constitution at all. A constitution must guide other laws and bodies;

it should reflect the wishes of all the people and prevent short-term expediency, minority demands, or even the majority in a period of nationalist fervour, or moral panic, from departing from the principles the constitution has established.

A constitution requires hard work and commitment especially if it does something new. It must not be too easy for people to say “This is not what we are used to” or “This does not work” and rush to change it before it has been given a chance. And it is not a good thing for countries to rush into changing their constitutions whenever they have a crisis: it means they may focus on the constitution when the real cause of the problems lies in people and politics.

A balance is needed: making it possible to change if change is really needed, but protecting the document, and especially its most basic principles, from being unnecessarily changed.

The Commission has tried to achieve this by providing:

- the fundamental values, the provisions on religion and on citizenship or the human rights provisions must never be taken away
- the provisions about a new electoral system and the fixed term for Parliament cannot be changed until there have been at least two elections under the new system, so that it has been properly tested
- changes to the Constitution cannot be rushed: a period of 6 months must pass between the first vote in Parliament and the final vote, so that MPs have a good chance to understand and discuss it and the public can be fully aware of it, discuss it and make their inputs
- any proposal for change cannot be discussed in Parliament at all unless it has gone to the National People’s Assembly (see the discussion earlier) which will discuss it and can pass a resolution approving it or disapproving; this does not decide the matter but Parliament should take it seriously
- any change needs the support of at least 48 members of Parliament (two-thirds of the full Parliament).

NO MORE COUPS?

...any attempt to establish a government other than in compliance with this Constitution is unlawful

Article 2(3)9a

A coup is illegal and there is never any justification for a coup in a democratic society. A coup overthrows the constitution: even if some provisions are still said to be respected, this is just by wish of the coup makers. You might, however, think that saying in a Constitution that there must not be coups is about as useful as saying that no-one must break the law – which by itself would have no effect.

The Commission was frequently asked whether or how a constitution can prevent coups. Some made suggestions such as the constitution should prohibit coups, the abolition of the armed forces (since Fiji has no enemies), deploying the forces to protect Fiji’s maritime

resources, storing weapons in Australia to be picked up as Fijian soldiers go abroad as peace keepers, active recruitment of soldiers from all communities, public awareness of the harms of coups, social policies based on equity, harmonious relations between ethnic communities, and economic development. A few recommended that sanctions by the UN and the South Pacific should kick in as soon as a coup happens and that all Fijian peace keepers should be sent home immediately. Some suggested severe penalties for coup makers (including disqualification from public office and the death penalty). Some people cautioned that in all coups the military was used by other interests: politicians, business people, chiefs—which makes it harder to predict or prevent coups. So there are no simple solutions.

Those who were involved in coups should be given life sentences

There will always be coups in Fiji

- members of the public to the Commission

Why do coups happen? There must be a military willing, and able, to conduct the coup, and there is usually some situation within the country or the government that gives the willing military the opening or excuse, or that persuades the military to step in. As submissions to the Commission noted, in Fiji there has always been a third factor: behind the scenes actors who use, manipulate or persuade the military to take action. And other national and international factors may be relevant.

In most democracies, the military does not take over in times of crisis. This requires a military that takes pride in its role as defender of the country against outside attack, and accepts that role as one of being subordinate to the civilian government, however frustratingly incompetent, ineffective or even corrupt that government may appear to the military.

The Commission knows that a constitution on its own cannot prevent coups. But it believes that in a vigorous democracy in which citizens participate in decision making and value their democratic institutions coups are less likely. So the Commission has paid special attention to the institutions that foster the conditions that strengthen democracy. The emphasis on public participation is particularly important as it means that all citizens can contribute to decision making and provides opportunities for citizens to build and protect democracy. If they are respected and protected by the people, all the provisions in the Draft Constitution concerned with good governance, integrity, preventing corruption will not only deepen democracy but discourage coups.

The Draft Constitution is emphatic that coups are illegal and says:

- trying to establish a government except in the ways the Constitution provides for is unlawful (Article 2(3))
- no immunity can be granted for any future coups.

And it emphasises that the military does not have any role as a guardian of the Constitution or conscience of the nation. In Article 176 the Draft Constitution:

- makes it clear that the military is under civilian control
- sets out the role of the military: it is responsible for the defence and protection of the sovereignty and territorial integrity of the country from external threats at the request of the government (Article 176 (1)(a))
- states that Parliament (or the Cabinet if Parliament is not in session) must approve use of the forces outside the country, and that the Minister responsible for defence directs that use, in accordance with decisions of Parliament
- states that action by the military in Fiji in an emergency is at the direction of the National Security Council, and in other situations only after a written request from the Commissioner of Police, with the approval in advance of the Minister responsible for defence.

In addition, the Draft Constitution:

- does not give to the President any role in relation to the military because it is the democratically elected government that must direct the military
- states that members of the security services must not obey manifestly illegal orders (Article 173 (4)).

The prohibition on obeying manifestly illegal orders applies to all security forces: the police or prison officers must not obey orders to commit torture, for example. But it is of particular relevance to the military, especially in a country with a record of coups. Although soldiers and other disciplined forces are trained to obey orders, they must not use “superior orders” as an excuse for behaviour that they knew was clearly wrong (“manifestly” means “very clearly”). This includes carrying out a coup. This provision reinforces the signal to the military that coups in future are not to be tolerated.

SECTION 15: THE LAST (BUT NOT THE LEAST) WORD

The Constitution needs people: not just “the People”, but everyone, from the highest Officer of the State to the lowest paid (though not least important) public servant, the political leader and the political hopeful, the voter, the teacher and the pupil, the journalist and the reader, the priest and the worshipper, the foot soldier and the general, the Ratu and the villager.

The Draft Constitution has been written for them, and it will not work unless they take it seriously, recognising that it imposes duties on them as well as giving them rights, that it gives others rights as well as them, that no one is above the law, and no-one is beneath it.

Some new institutions will require hard work, commitment and some imagination: the National People’s Assembly, a new system of local government particularly. Taking seriously the rights of the people to be consulted, to receive information, to make their contribution to law making, to be treated with dignity and respect, to receive prompt service and reasons for decisions, will sometimes need a change of mindset on the part of leaders and public servants.

A new nation is even harder work, though in the end, like all the other effort, rewarding: moving away from what the Preamble calls “*our failure to create a single nation and to establish an inclusive democratic society*”.

The responsibility for making a success of a constitution does not rest only on the government, the politicians and parties and the public servants. The people must insist that those fulfil their duties: insist through the way they vote, through exercise of the freedom of expression, through watching how those in public office behave, and when necessary complaining formally to the Ombudsman, the Human Rights Commission, the Judicial Service Commission and so on. In serious cases they should be prepared to go to court: which they can do with others to bring issues of violating of the Constitution to justice.

This is not to urge people to be selfishly demanding: one person who complains about their own rights being violated is complaining on behalf of all those who suffer, because the best possible response to complaint is an improvement and a commitment not to do it again.

The constitution of a country should be understood by all the political, government, independent, religious, military, work and other leaders. Ideally it should be understood by the people. There is danger in believing what other people tell you about it: they may misunderstand, they may even wilfully mislead. Discussing, sharing, reading, thinking, seeking different perspectives will all help people to understand what the Draft Constitution says, and when it is adopted what the final Constitution says.

Before then there is an important hurdle: the Constituent Assembly (CA). That body can make changes in the Draft Constitution, but only if that change is supported by two-thirds of the CA. If at all they make changes it should not be because of some narrow sectional interest, but in the interests of the nation. If you like the ideas in the Draft Constitution, it will be important for the CA to know that.

APPENDICES

1: THE PEOPLE’S CHARTER FOR CHANGE, PEACE AND PROGRESS, AND THE DRAFT CONSTITUTION:

PILLAR of CHARTER	The DRAFT CONSTITUTION (DC) of FIJI 2013
<p>1. Ensuring Sustainable democracy and good and just governance.</p> <p>Through:</p>	<p>Chapter 1. Founding Provisions 1(2) <i>All sovereign authority of Fiji belongs to the People, who now affirm that the Republic of Fiji is a sovereign, democratic state.</i></p> <p>Chapter 1: outlines founding provisions of governance, values governing power and authority under the Constitution, the distribution of sovereign authority.</p> <p>Establishes a system of government including the President (Chapter 7) Parliament (Chapter 9) The Executive (Chapter 10) The National People’s Assembly (Chapter 6) and Local Government (Chapter 12)</p> <p>See also Art. 84 on Role of Parliament; Article 112: Principles of Executive Authority.</p> <p>DC provides for public participation through consultation, such as duty to consult with respect to land (Article 15) and Article 16: Natural consultative forum on land; Article 55 Participation in public decisions.</p> <p>Protects human rights: Chapter 3 – Our Human Rights Provides for the active participation of civil society (Chapter 4 on Civic and Political Life). [See under Pillar 3 for accountability]</p> <p>Chapter 12 – Local government.</p>
<p>Reforming Electoral system</p>	<p>Chapter 8 – Representation of the People Representative Government. Voter qualifications. Date of elections. Allocation of Parliament seats. Candidates for election to Parliament. Electoral commission.</p> <p>The system of proportional representation with closed party lists is adopted (Art. 79)</p>
<p>Transparency and accountability to combat corruption.</p>	<p>Chapter 13. Independent Commissions and Offices, Articles 144-151</p> <p>Chapter 15 Public Administration Articles 164-172</p> <p>Chapter 5: Good Governance and Leadership. Art. 62. Serving the public; Art. 63 Leadership principles; Art.64. Conduct of office holder;. Art. 65. Protection of Whistle blowers; Art. 66. Ethics and Integrity Commission; Art. 76 Standards and procedures for removal from office.</p> <p>The importance of transparency is frequently emphasised, and the right to access to information given (and a law drafted)</p> <p>See also Chapter 14 – Public Finance. 152 Principles of public finance -163 including Auditor General.</p>

End cycle of coups	Art. 2 states clearly the unlawfulness of coups. Art. 176 places military under civilian control and regulates declaration of states of emergency, as well as use of forces internally Art. 173(4): manifestly illegal orders should not be obeyed. Schedule 3 – Oaths or Affirmations – Part A –Allegiance. Part B. for taking Office. Part C. Oath of Reconciliation and allegiance.
To redress law and order situation	Article 138: Independent Director of Public Prosecutions Chapter 11 – Justice and the rule of law. Part A Principles of Justice Sets police on firm constitutional footing (Chapter 16 Arts. 178-9
2. Developing a common National Identity and building social Cohesion. Through;	
The name of the nation to be FIJI Common name	This is the name used in the document The Preamble states: <i>We are Fijian</i>
Shared National Values and moral vision	The Preamble set out a vision: <i>a modern, progressive, multicultural nation founded on trust, tolerance, inclusiveness, compassion, the dignity and equality of each individual, and respect and stewardship of nature’s gifts</i> and the Chapter 1 Founding Provisions. 1. The Republic of Fiji. (1) <i>We the People of Fiji are a single, united, multicultural nation, sharing the values</i>
Multi-cultural education	Learning the nation’s languages is specially mentioned (Art. 7(2))
Shared spirituality	Religion is recognised as an important force in society, but none must be given special treatment (Article 6)
Remove Racial divisions; Eliminate racial categorisation in records and registers.	Ethnic voting is removed: see above. Everyone is equal and discrimination barred on grounds of ethnicity, social origin, race, colour, primary language, religion, conscience, belief, culture, among others (Art. 21)
Ensure effective, enlightened and accountable leadership. Through:	Chapter 5 – Good Governance and Leadership, deals with criteria for appointment, conduct in office. Art. 62 deals with serving the public and Art. 63 with Leadership principles. Art. 64. Conduct of office holders. Art. 65. Protection of Whistle blowers. Art. 66. Ethics and Integrity Commission. Art. 76 Standards and procedures for removal from office – details in Schedule 5
Code of conduct for public	Codes of conduct are required for many offices, and a general

servants, Constitution office holders, municipal councils, MP and persons holding statutory appointments or executive positions.	Code of Conduct for State Officers (the major offices in the State) is provided in Schedule 4.
Develop a leadership model with emphasis on honesty, integrity, professionalism and service.	All these values are spelled out in: Chapter 5 on Good Governance and Leadership Chapter 15 on Public Administration
Enhance training of public leaders	Professionalism and training are emphasised for public service (Chapter 15) and security forces (Art. 174)
Increase civic education on key leadership principles.	Role of civil society in raising awareness in recognised in Art. 53
4. Enhancing public sector efficiency, performance effectiveness and service delivery. Through:	Requirement for establishment of an integrated local government sector to enhance service delivery and local democracy - Chapter 12
a vision for public sector which is performance and service oriented as well as accountable and ethical.	<i>Article 164: The values and principles of public service include high standards of professionalism, including professional ethics and integrity; prompt implementation of government policy and administration of laws; efficient, effective and economic use of public resources; involvement of the people in the process of policy making; prompt response to requests and questions from the public, and delivery of service to the public, in a manner that is respectful, effective, impartial, fair, and equitable; accountability for administrative conduct; transparency, ...</i>
Separate Constitutional and statutory powers of PSC and strengthen independence. Remove political interference in the public sector.	Art. 168 spells out the role of the PSC, and stresses its independence
Strengthen capacity, leadership and coordination of policy development and implementation.	A matter for implementation: the importance is stressed in Chapter 15
5. Achieving higher economic growth while ensuring sustainability. through; Govt provide an enabling environment to facilitating private sector led growth. Enhance cooperation and partnership between Govt/private sector/civil society. National strategy for development	Most of this is not a matter for the Constitution, but see Chapter 2 Our Natural Heritage Art. 10. The Natural environment. Art. 12 Principles of Land use and environmental protection. Art. 13. Fishing grounds and marine area. Art. 14 Natural Resources. Chapter 3 Our Human Rights especially Art. 34 Economic participation, Art. 35 Right to an adequate standard of living. Art. 36 Employment relations Schedule 2 code of public access to parliaments activities Art. 163 deals with the Reserve Bank of Fiji.

<p>of micro, small and medium enterprises and improve access to micro finance. Enhance export-orientation through diversification value-addition and appropriate policies. Upgrade and provide infrastructure. Increase food security through revitalisation of agriculture and marine sectors. Strengthen institutional capacity for environmental management. Promote sustainable management and utilization of natural resources</p>	
<p>6. Making more land available for productive and social purposes. Through; Create a market for leased land, through sustainable lease agreements Make land available for housing as well as infrastructure development in both rural and urban areas. Formalise vakavanua or informal settlement on all types of land. Establish a Land use board including a National Land register and land use development plan Empower indigenous landowners rights to access and lease native land.</p>	<p>Sets up mechanism for national dialogue on land, through the National Consultative Forum of Land (Art. 16) in the hope that this will be able to address the issues, within a framework of the existing structure of land relations – so that people feel secure enough to consider the issues.</p>
<p>Ensure security of tenure and equitable returns for both landowners and tenants.</p>	<p>Specifically deal with: confirmation of both customary and freehold rights: Art. 11 Schedule 1: protection of existing laws.</p>
<p>7. Establishing an integrated development structure at the provincial level. Through;</p>	
<p>Establish representative Provincial development boards for each province by integrating provincial and advisory councils</p>	<p>Requires development of an integrated local government structure – Chapter 12</p>

<p>Review roles and functions of Ministry of Indigenous and Dept of Multi ethnic, Ministry of Urban development and Ministry of Provincial development to eliminate duplication and ensure optimum use of resource, and increase efficiency.</p>	<p>Other factors are not really constitutional issues</p>
<p>Indigenous development interests to be mainstreamed into national development plans. Upgrade the professional capacity and skills at divisional levels. Integrated development boards at the national, divisional and district level.</p>	<p>Requirements for consultation in many areas including development projects and resource exploitation: especially Article 15, also Article 12.</p>
<p>8. Reducing poverty to a negligible level by 2015. Through: National Programme to Reduce Poverty Strengthen coordination, implementation and monitoring of poverty alleviation programs Introduce a national minimum wage and at the same time enhance national productivity. Encourage and protect the savings and investments of the poor.</p>	<p>Rights to education, health, housing, food and water are rights: not just aspirations (see Art. 35: right to adequate standard of living</p>
<p>Ensure affirmative action programmes are need based Enhance research and analysis. Align affirmative action programs to shared social justice preamble.</p>	<p>Most reliance is on the economic social and cultural rights – focus on poor is built in to these. Affirmative action programmes are possible: these must be for the disadvantaged :Art. 21 (6).</p>
<p>9. Making Fiji a knowledge based Society. Through: Ensuring access to quality education for all Increase access to tertiary and higher education. Implement a progressive and responsive curriculum and improve overall quality of teaching through better trained educators. Strengthen early childhood</p>	<p>Art. 33: (3) <i>The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right—</i> (a) <i>to free secondary education;</i> (b) <i>to early childhood education, and further education; and</i> (c) <i>to education for persons who were unable to complete their primary education.</i> Etc.</p>

<p>education especially in the rural and outer islands. Introduce a system of distribution of all education grants that specifically recognises and is based on the disadvantage of schools.</p>	
<p>10. Improving health service delivery. Through: Increase financing Strengthen institutional arrangements by centralising decision making and decentralising the delivery of health care. Consider other options for health financing such as Social health insurance in addition to tax financing. Establish a Health Policy commission.</p>	<p>Art. 33 (2) <i>Everyone has the right to health, and to the conditions and facilities necessary to good health, and to health care services, including reproductive health care.</i> Noe relevance of right to fair executive and administrative action: Art. 39 and the right to Access to Information Art. 32, as well as the various provisions above on public administration</p>
<p>11. Enhancing Global integration and international relations. Through: Strengthen local capacity to engage in global trading system. Enhance existing bilateral and multilateral relations .Improve investment, trade facilitation and negotiation. Advocate Fiji’s interest in regional and international institutions such as Pacific Island Forum, United Nations.</p>	<p>Most of this is not a matter the constitution can directly affect. But note the emphasis on <i>“living peaceably with all other nations”</i> (Art. 3 (3)(b)(vi). And the fact that Parliament has to approve most treaties: Art. 111.</p>

2: CONSTITUTION COMMISSION: PROGRAMME AND FUNDING

Introduction

The Constitution Commission of Fiji is an independent body tasked with developing Fiji’s Constitution. The Formulation of Fiji’s Constitution process was established under decree 57 of 2012. Commencing on 31st July 2012 the Commission was tasked to formulate Fiji’s new

Constitution which results from full, inclusive and fair participation of Fijians; meets the needs of Fiji and the aspirations of its people; unites the people of Fiji; ensures true democracy; and respect for, and protection and promotion of human rights.

During the initial stages secretariat support was provided by Conciliation Resources (CR) based in London. By 27th August a full fledged local secretariat was established with financial transaction operating from Fiji. Despite the localized operations CR continues to provide oversight and technical support, where necessary.

Public consultations commenced on 3rd August and concluded on 15th October 2012. Following public consultations several public seminars as well as group discussions were held. A local and international peer review was also held during November and December. The purpose of such forums was to build consensus as well as provide additional information for Commissioners, researchers and legal drafters.

The finance report in this section provides details of the Commission activities from 31st July to 31st December 2012. A detailed audited report will be made available by end of February 2013. This will also include an independent assessment of the process by CR.

Staffing

The Commissions work involved recruitment of secretariat staff to manage the general office administration, human resource and finance as well as recruitment of international experts for opinion and advice on various sections of the Constitution.

The Commissioners

A total of five Commissioners (3 locals and 2 international) were appointed from 1 July 2012 to 31 December 2012. They are:

1. Prof. Yash Pal Ghai (Chairman) - International
2. Prof. Christina Murray – International
3. Prof. Satendra Nandan – Local
4. Dr. Taufu Vakatale – Local
5. Ms. Penelope Moore - Local

The Secretariat

The secretariat was established by CR which initiated the operations and also the recruitment of key administrative positions of the secretariat. A total of 31 staffs were recruited during the term of the project. Attachment 1 shows details of staff employment, position and tenure at the Commission.

Expert input into the constitution development process

The Commission had the opportunity to consult various local and international experts. Experts consulted were either on volunteer basis or remunerated based on expertise/information required. Attachment 2 shows details of experts consulted by the Commission.

Financial and Non Financial Assistance

Our donors include: Government of Australia (AusAid), United States of America (American Bar Association), Government of New Zealand (NZAid); the United Kingdom (UK), European Union (EU) and UNDP. The Commission also acknowledges all other donor and international agencies and the Government of Fiji in particular for assistance provided either directly or indirectly.

Revenue and Expenditure

Revenue

The Commission received a total of \$1.77 million since inception and until 30th November 2012. A total of \$636,218 FJD from the EU will be expended during the months of December through February 2013. A summary of funds received by donors is shown in table 1 below:

Table 1: Sources of revenue

REVENUE (DONOR FUNDS)	F\$	F\$
Australian Agency for International Development (AUSAID)	781,637	
USAID /ABA	219,440	
British High Commission	145,330	
New Zealand High Commission (NZAID)	731,882	
TOTAL REVENUE UNTIL 30 NOVEMBER 2012		1,771,450
EU funds from November to February 2013	636,218	
TOTAL REVENUE UNTIL 28 FEBRUARY 2013		2,514,507

Expenditure

The Commission had expended approximately \$1.5 million as of 30th November 2012. The major expense category include: Commissioners fees, accommodation and transportation expenses, Public Consultation Costs and Technical Expertise along with Secretariat Staffing

Costs. Table 2 below shows broad categories of expenses incurred from July to November 2012.

Table 2: Sources of revenue

Expenditure	F\$	F\$
Commissioners: Fees, Hospitality, Accommodation and other Expenses	529,112	
Secretariat Staffing	177,825	
Office Equipment and Running Costs	103,905	
Media and Communications	166,778	
Public Consultations	340,098	
Consultancy and Technical Assistance	191,558	
TOTAL EXPENDITURE UNTIL 30 NOVEMBER 2012		1,509,276
Forecasted expenditure for December 2012	608,574	
Forecasted expenditure for January and February 2013	395,077	
TOTAL EXPENDITURE (UNAUDITED)		2,512,927

Major expenses to be incurred in December 2012 include: Commissioners, legal drafters and staff salaries; and the printing and dissemination of draft constitution, explanatory report and a quick user guide for the general populace. The Commission will wind down its activities from January whereby all information will be collated for national archives as well as copies disseminated to the local universities. Final audit of accounts and hand over of equipments/resources purchased as per donor guidelines will take place towards the end of January and February 2013.

Attachment 1: Commission staff

Name	Start date	End date	Position
Keshwa Reddy	5/09/2012	28/02/2013	Executive Secretary
Ashish Chand	14/08/2012	28/02/2013	Director Finance and Administration
Mithleshni Gurdayal	6/08/2012	31/01/2013	Director Communications

Nilay Singh	20/08/2012	28/02/2013	Accountant
Nemani Mati	10/09/2012	07/12/2012	Lead Research Analyst
Raijeli Tuivaga	7/08/2012	30/11/2012	Research Analyst
Mesake Dawai	10/09/2012	07/12/2012	Research Analyst
Paradise Tabucala	10/09/2012	31/01/2013	Communications Officer
Jona Vula	1/11/2012	31/11/2012	Events and protocol officer
Sonia Ali	1/09/2012	31/01/2013	Administrative support
Karalaini Tagivetaua	1/09/2012	31/12/2012	Logistics Secretary
Mary Chapman	27/07/2012	14/11/2012	Consultation Coordinator
Maraia Voka	2/08/2012	14/11/2012	Secretarial Reporter
Sera Banuve	9/08/2012	14/11/2012	Secretarial Reporter
Alesi Draunimasi	9/08/2012	14/11/2012	Secretarial Reporter
Arishma Nandani	23/08/2012	14/11/2012	Interpreter Hindustani
Masilina Raumakita	17/08/2012	07/12/2012	Interpreter iTaukei
Nemani Bainivalu	1/09/2012	31/10/2012	Interpreter iTaukei
Joji Qaranivalu	7/08/2012	31/10/2012	Events and protocol officer
Bui Rita	13/09/2012	31/12/2012	Generalist
Lusiana Lomaloma	13/09/2012	31/12/2012	Generalist
Sailosi Mara	28/08/2012	14/12/2012	Driver
Daya Nand Ram	28/08/2012	14/12/2012	Driver
Ajesh Prasad	27/09/2012	31/10/2012	Driver
Pene Andrea	27/09/2012	31/10/2012	Driver
Alipate Vatuwaliwali	28/08/2012	18/09/2012	Driver
Jone Moli	28/08/2012	18/09/2012	Driver
Mereoni Chung	9/07/2012	30/08/2012	CR Project Officer

Marlene Dutta	10/07/2012	31/08/2012	CR Project Officer
Adi Litia Qionibarabi	10/07/2012	31/08/2012	CR Consultation Consultant
Vivian Nainoca	07/08/2102	31/08/2012	CR Finance Project Consultant

Attachment 2: Expert input into the constitution development process

Name	Funding	Expertise
In-house international experts and research assistance		
Philip Knight	NZ Aid, EU	Legislative Drafter (Canada)
Coel Kirby	NZ Aid	Student researcher (Canada)
Elly Patira	NZ Aid	Student researcher (Australia)
Jill Cottrell	ABA	Senior Legal Researcher (Kenya)
John Wilson	ABA	Legislative Drafter (England)
External consultation for short papers and review of bills		
Venkatesh Nayak	NZ Aid	Centre of Human Rights Initiative --Freedom of Information paper
Gundmunder Alfredson	ABA	Paper on application of indigenous rights conventions to Fiji context
Ian Lienart	ABA	Public Finance Consultant
Richard Calland	EU	Review of Access to Information Bill
International peer review of draft constitution		
Anthony Regan	ABA	Constitutional expert
Cheryl Saunders	ABA	Constitutional expert
Johan Froneman	ABA	Justice, Constitutional Court of South Africa
Seminar: Democratic Transitions: A Comparative Analysis 17th October, 2012		
General Agus Widjojo	ABA	Former Chief of Territorial Affairs for the Indonesian National Armed Forces, and current Executive Director of

		the National Institute for Democratic Affairs
Daniel Slater	ABA	Associate Professor, Department of Political Science, University of Chicago and the author of numerous books and articles on democratic transitions
Nicole Rajjeli	ABA	Graduate of the University of the South Pacific (B.A. History/Politics and Economy) and University of Canterbury, Christchurch, NZ (Masters in International Law and Politics)
Seminar: Electoral Reforms: Systems of Proportionate Representation 23rd October, 2012		
Kåre Vollan	ABA	Expert and advisor on Electoral Reform and has worked in more than thirty different countries including Nepal, Zimbabwe and Kenya
Wadan Narsey	Volunteer	Professor of Economics. He has written extensively on the subject area as well as trained government officials, voters and enumerators on the alternative vote system in the 1997 Constitution.
David Arms	Volunteer	A Catholic priest who has worked in Fiji for over thirty years and has been a keen observer of Fiji's elections. He has written and spoken frequently on electoral reforms for Fiji
Seminar: Role of Religion and State 1st November, 2012		
Abdul Qayyum Khan		Senior Vice President, Fiji Muslim League
Dr. Holger Szesnat		Academic Dean and Senior Lecturer in Biblical Studies, Pacific Theological College
Dr. Lynda Newland		University of the South Pacific
Elder Taniela Wakolo		Church of Jesus Christ of Latter Day Saints
Father Jim Kolodisi		Pacific Regional Seminary

Pastor Wame Sausau		General Secretary, Seventh-Day Adventist Church in Fiji
Rev. Dr. Cliff Bird		Senior Lecturer in Theology & Ethics, Pacific Theological College
Reverend Tuikilakila Waqairatu		General Secretary, Methodist Church of Fiji
Tessa Mackenzie		Interfaith Search Fiji
Vijendra Prakash		National Secretary, Shree Sanatan Dharm Pratinidhi Sabha Fiji
Seminar: Poverty and the Constitution 17 October, 2012		
Ben Vakaloloma		Representative from the informal settlements
Fr. Kevin Barr		Catholic priest
Govind Sami		Permanent Secretary for the Ministry of Social Welfare, Women and Poverty Alleviation
Rachel Bhagwan		Human rights activist, women and children's advocate
Democratic Transitions: local discussion group 18-19 October, 2012		
Claire Slatter		University of the South Pacific
Kaci Solomone		Retired
Koila Kostelo		Pacific Centre for Peace Building
Ratu Joni Madraiwiwi		Lawyer
Ratu Meli Vesikula		Retired
Robbie Robertson		James Cook University
Vijay Naidu		University of the South Pacific
Local peer review of draft constitution 23-24 November		
Akuila Yabaki		Citizens Constitutional Forum

Alipate Qetaki		iTaukei Land Trust Board
Biman Prasad		University of the South Pacific
Clair Slatter		University of the South Pacific
Fay Volatabu		National Council of Women
Joji Kotobalavu		Retired senior civil servant
Kevin Barr		Pacific Centre for Peace Building
Marie Chan		Lawyer – Chan Law
Nainendra Nand		University of the South Pacific
Premila Kumar		Consumer Council
Ratu Cokanuto Tuakitou		Former President of the Senate
Sandra Tarte		University of the South Pacific
Vijay Naidu		University of the South Pacific
Wadan Narsey		Consultant
All others		
Koila Costello Olsson		Pacific Centre for Peace Building
Krishna Datt		Council of Pacific Education
Marie Chan		Chan Law
Mohit Prasad		University of the South Pacific
Parmesh Chand		Public Service Commission
Pio Tikoduadua		Permanent Secretary, Prime Minister’s Office
Priscilla Singh		Pacific Centre for Peace Building
Rishi Ram		Retired senior civil servant
Suliana Siwatibau		Retired and social worker
Ratu Joni Madraiwiwi		Lawyer

3: PUBLIC CONSULTATION PROCESS: LISTENING TO THE PEOPLE

The Decree 57 of 2012 which established the process for the preparation of the Draft Constitution by the Constitution Commission states that the Draft Constitution must make a draft constitution that:

- is the result of full, inclusive and fair participation of the people of Fiji
- meets the needs of Fiji and the aspirations of its people
- unites the people of Fiji; and is based
- upon the wishes of the people of Fiji
- the lessons of the past and
- best relevant practice

and is based on principles and values set out in section 3.

The Decree requires the Commission to ensure the participation of all the people of Fiji.

In order to do this, the Commission was mandated to “receive the views of the people through visiting as many parts of the country as possible and —

- (i) holding public meetings and hearings;
- (ii) holding, but only for good reason, meetings and hearings in private;
- (iii) receiving oral submissions; and
- (iv) receiving written submissions;”

IMPORTANCE OF CONSULTATIONS

The Commission welcomed this emphasis on people’s participation, reflecting that sovereignty resides with the people. Their submissions enhance the Commission’s understanding of their needs and aspirations, meeting which is an essential task of the Commission. The legitimacy of the constitution depends on its acceptance of the constitution which is difficult to secure unless they have been involved in the process and consider that they have contributed to its preparation. Participation also deepens their understanding of and commitment to the constitutions and equips them to use and safeguard it

OUTREACH AND CIVIC EDUCATION

The Commission was required to co-ordinate the collection of public views with the civic education of the people, so they would understand constitutional issues before giving the Commission their views. Civic education itself was not a responsibility of the Commission. It had a number of meetings with civil society and professional groups to find out how far they had provided civic education. Unfortunately they had not done much, in part because of restrictions on meetings and assemblies under section 8 of the Public Order Act. Section 8 restrictions were suspended at the request of the Commission’s Chair, but unfortunately the suspension lasts only until the Commission presents the Draft Constitution to the President—and will operate during the critical period leading to and during the sessions of the Constituent Assembly.

Nor had the government provided much civic education as expected.

To ensure that people were fully prepared to take part in this consultation process, the Commission was authorized to:

- take steps to ensure that its work of collecting public views is coordinated with civic education,
- ensure that members of the public have as good an understanding as possible of the issue before they are asked to submit their views.

To meet these goals, the Commission undertook outreach and civic education activities. To ensure that people were well-informed about the constitution-making process, the Commission created a website and Facebook page, both launched in August 2012, which can be found at: <http://www.constitution.org.fj> and <https://www.facebook.com/ConstitutionCommissionFiji> respectively. The Facebook page and website were updated several times a week, if not daily, during the consultation phase with information about recent and upcoming hearings, press alerts, and photos. Demonstrating the success of these outreach efforts, the Commission Facebook page has received over 80,000 individual visits since its inception on 25 July 2012, and the Commission website, launched at the end of August, has received approximately 16,000 individual visits.

In addition, the Commission published a brochure and handbook. The brochure explains in simple language the principles and values of the new constitution, the process of the constitution-making process, and how to make a submission to the Commission. The 60-page handbook (*Building the People's Constitution: Your Responsibility*) explains the constitutional principles and values in a more in-depth fashion. This book was used to train civil society organizations on these concepts and how to teach these concepts to people throughout Fiji. The commission provided these brochures and books to provincial councils in advance of the hearings and at the hearings themselves, and also distributed the material through civil society organizations. In total, 130,000 copies of the brochures - in English, Fijian and Hindi - and 50,000 copies of the handbooks were distributed across Fiji. The brochure and handbook were also uploaded onto the Commission website.

PUBIC HEARINGS AND MEETINGS

The Commission made great efforts to hear the views of as many of the people of Fiji as possible, and traveled extensively throughout Fiji from early August through mid-October 2012. The Commission consulted widely with people from all Divisions and Provinces including the outer islands, Lau and Rotuma. During this time, the Commission held hearings in 110 venues, at which the Commission heard the views and opinions of people from over 500 villages, towns and cities. The Commission made special efforts to hear from people of all ethnic backgrounds, and from women, youth, and the disadvantaged. In some villages and towns, the Commissioners met separately with women to hear their specific concerns.

The Commission publicised the hearing schedule widely to ensure that they heard the views of as many people as possible. Each week during the consultation phase, the Commission announced the upcoming schedule in newspapers and on radio, and in some places through SMS text. Specifically, the Commission advertised the weekly hearing schedule in the Fiji Sun on Saturdays and Tuesdays, and in the Fiji Times on Saturdays, Mondays and Thursdays. Hearing locations and times were also advertised six times per day on 5 radio stations (Legend, FM 96, Viti FM, Navtarang and Sargam) in English, Fijian and Hindi. Community messages were advertised on FBC radio for specific targeted communities to announce events. In addition, the commission advertised hearings at 24 venues by

sending out SMS text in the days before these events, notifying over 213,000 people of these hearings in this way.

In a further effort to inform the population, the Commission sent an outreach team to each village or town where a hearing was to be held days in advance of the hearing to meet with chiefs or local leaders and ensure that people were aware of the upcoming event.

WRITTEN AND ELECTRONIC SUBMISSIONS

As noted in the decree, the Commission received written submissions as well as submissions at public hearings. Through its Facebook page and website, the Commission notified the public on how to send in submissions through post, email, the website, and hand delivery. Further, the Commission brochure and handbook (see Outreach and Civic Education above) was distributed broadly and helped to inform people throughout Fiji on how to send in written submissions.

TOTAL SUBMISSIONS RECEIVED

The Commission has received 7170 submissions from the people of Fiji. Of these, 1,831 people gave oral and/or written submissions at one of the 110 public hearings. In addition, the Commission received 4945 written submissions by post or hand delivery, and 394 electronic submissions by email or through the website.

Over 1000 of these submissions were submitted on behalf of groups of individuals, such as local community groups, civil society organizations, political parties, businesses, faith-based groups, trade unions and other associations. Thus, the total submissions received represent the opinions of a far more than 7,000 Fijian citizens.

The Commission's efforts to reach all of Fiji's diverse citizenry proved successful. Approximately 1/3 of submissions from individuals came from women. 20 youth groups presented submissions, representing a broad range of youth from all Divisions. In addition, all ethnic groups were well represented, with 66% of submissions coming from iTaukei Fijians, 24% from Indo-Fijian, and 10% from other ethnic groups.

The Commission made concerted efforts to reach remote areas and submissions from people in rural areas represent approximately 70% of all submissions. These include 35 people who made submissions at the hearings in Lau Group, and 184 Rotumans who made submissions either by post or at the public hearing in Rotuma.

ANALYSIS OF SUBMISSIONS

Every one of the 7170 submissions has been read. On a daily basis, submissions were reviewed and summarized to note the issues of concern to the people of Fiji. As new issues and opinions arose, these were brought to the attention of the Commission for deliberation. While a broad range of issues have appeared in the thousands of submissions, the topics that the people of Fiji discussed most include:

- Social and economic rights, such as rights to education, health care, and basic public services;
- Rights for special groups, such women, children, and the disabled;
- Employment and labour rights

- Leadership and integrity in public life, and accountable government
- Local Government
- Great Council of Chiefs
- Land issues
- Coup Culture

In addition to the review and summary process described above, the Commission developed a database in which was logged available demographic information about submitters, such as age, sex, ethnicity, citizenship, division of residence, and whether the submission was made by an individual or on behalf of a group, organization, association or community. Further, to help track key issues, Commission staff entered information into the database reflecting whether a submission discussed key topics, broken down into 18 broad categories and 111 sub-categories. The 17 broad categories include: 1) the constitution-making process, 2) citizenship and ethnicity, 3) language, 4) human rights, 5) electoral systems, 6) leadership and integrity in public life, 7) system of government, 8) accountable government, 9) judiciary, 10) regional, provincial, local government and village bylaws, 11) great council of chiefs, 12) land, 13) iTaukei Issues, 14) military, 15) coup culture, 16) immunity, 17) transition arrangement, and 18) religion.

Submissions have been uploaded onto the Commission website for the public to view.

WHAT PEOPLE TOLD THE COMMISSION

The views of the people are analysed in the main text of this Report (pp. 4-7) and at numerous other places.