

ETHICAL AND ACCOUNTABLE GOVERNMENT

15.1 In this chapter, we examine special measures to secure the ethical and accountable use of public power and resources by Ministers, state servants, and other agencies of the state. Many submissions proposed the strengthening of existing measures and the introduction of additional ones.

15.2 Institutions which we review include the Ombudsman and Auditor-General, the independent constitutional offices charged with inquiring into and reporting on the Government's administration and its management and use of public money and property. We also review the constitutional rules which guarantee independence to the holders of these and other constitutional offices so that their sensitive functions and powers are exercised in an impartial manner.

15.3 In addition, this chapter addresses the submissions which proposed that the Constitution should provide standards of ethical conduct for important officers. It also responds to those which sought a constitutional provision regarding official information in order to secure greater government accountability and transparency.

CONCEPT OF ACCOUNTABILITY

15.4 Because a democratic government derives its powers and resources from the people, it is accountable to the people for the way in which those powers and resources are used. Generally, a government is accountable for its policies, either to the people's representatives in Parliament, through questions, motions of censure or confidence votes, or directly to the people themselves at a general election.

15.5 Public accountability is also concerned with the way in which individuals in Government use public power or resources. Experience shows that there are always some in every society who abuse the power and resources entrusted to them. They may do so by victimising others, prolonging their hold on power, deriving personal gain or in a variety of other ways. Public trust may also be abused through discrimination, mismanagement, inefficiency and inaction.

15.6 People everywhere seek laws and institutions to deter such practices. To that end, their constitutions provide for specific mechanisms to prevent abuse of office and to secure accountable and ethical government. They are entrenched to

ensure that the laws upholding accountability and ethical government are not easily changed or interfered with by those holding political power.

Need for special measures

15.7 The basic safeguards in any democracy are those contained in the rules guaranteeing the democratic process itself and, in particular, the people's right to change the Government periodically. In addition, there are the checks and balances provided by the rules which maintain the separation of powers between the different branches of government.

15.8 In earlier chapters, we made recommendations for written constitutional provisions guaranteeing two democratically elected houses of Parliament exercising the state's legislative power. We proposed the retention of provisions for a Cabinet and Ministers who are collectively and individually responsible to Parliament for executive government. To strengthen their accountability, we recommended provisions to ensure an effective opposition and a system of sector standing committees in the Bose Lawa. In addition, we made proposals for independent courts vested with the judicial power to enforce the Constitution and the rule of law. We also recommended the strengthening of the constitutional Bill of Rights to ensure, among other things, that public opinion, enlightened by a free press, can be fully expressed.

15.9 Special measures are necessary to supplement those basic safeguards. The scale of executive government and the state services and the powers and public resources at their disposal have no historical precedent. As governments have grown, the capacity of the legislature and the judiciary to fulfil their traditional roles as checks on abuse of authority has been correspondingly reduced.

15.10 The fact that the same political party or parties control both the legislative and executive branches of government in the Westminster system already provides one limitation on public accountability. Apart from this, in view of the number of decisions and actions state servants take daily, it is not possible for members of Parliament to keep all government activity under constant scrutiny. Legislatures now tend to be almost wholly occupied with considering laws. Their accountability role has therefore become restricted to questioning policy and the occasional very blatant instance of corruption, abuse of authority or maladministration. Even then, it may not always be easy for Parliament as an institution to carry out impartial, detailed investigations into those allegations.

15.11 Traditionally, the Courts have been entrusted to keep executive government ethical and accountable. However, they too lack investigating

authority, and are limited to determining only criminal or civil matters brought before them for adjudication. Furthermore, they are generally limited to applying laws and standards made by Parliament. To its credit and despite these limitations, the Judiciary has attempted to keep pace with the growth in the executive government and its powers. It has done so through the development of the common law, especially the principles of administrative law and the process of judicial review.

15.12 In view of these factors, special constitutional measures are needed to strengthen the ability of Parliament and the Courts to scrutinise executive action. In addition, some recent constitutions contain provisions which provide specifically for ethical standards of conduct for important office holders. We consider that option below.

ETHICAL GOVERNMENT

Submissions

15.13 The Commission received many submissions proposing that the Constitution should contain provisions directed towards preventing official corruption and achieving higher ethical standards of conduct for those holding important offices of the state. The submissions indicate great concern among the citizens of the Fiji Islands for the integrity of government and the prevention of official misconduct.

15.14 The submissions did not allege that all Ministers, politicians and state servants are corrupt or promote their own private interests at the public expense. Rather, they wanted to reduce the possibility that one or more of these persons may fail to uphold the standards expected. They also sought to ensure the election or appointment of persons of high personal qualities. The submissions were about public confidence in Fiji's system of government and the integrity of its leaders. Effective democratic governments are built on the trust and confidence of the people. It seems clear to us that the people of the Fiji Islands seek to protect their trust and confidence in their government.

Existing laws

15.15 The Constitution and statutes already provide some standards and rules to ensure ethical government. Under sections 42 and 55(2) of the 1990 Constitution, a person is not qualified to become a member of either House of Parliament or, consequently a Minister if, among other things, he or she is an undischarged bankrupt, or under sentence of death or imprisonment for more than twelve months,

or disqualified by a law relating to electoral offences. Under other provisions, a person who is already a member of either House, or a Minister, vacates office, if any of these circumstances arise. In Chapter 10, we proposed that these disqualifications should be retained in the Constitution. We also recommended the re-introduction of a constitutional provision allowing Parliament to provide by Act that those who have a prescribed interest in government contracts should be disqualified from membership of Parliament and from holding ministerial office.

15.16 Various statutes, regulations and orders contain ethical standards and rules which apply to state servants, members and officers of statutory bodies and provide for disciplinary penalties or removal from office in the event of their breach.

15.17 Fiji's Penal Code (Cap. 17) also contains important provisions. Chapter XI of the Code creates a number of criminal offences relating to official corruption and abuse of office. Severe penalties are provided. The provisions apply to the President, Ministers, members of Parliament, state servants, and members of the various disciplined services, as well as members of local government bodies, statutory authorities and their employees. They also apply to private persons who are implicated in official misconduct.

Codes of conduct for important officeholders

15.18 Some submissions suggested that in addition to these existing protections, the Constitution should also provide for a code of conduct setting specific standards for Ministers, members of Parliament and important state servants.

15.19 Codes of conduct are not new to Fiji. At present, Ministers in Fiji are subject to standards contained in guidelines issued by the Prime Minister. A decree of the Military Government, the Executive Council of Ministers - Responsibilities of Leadership Code Decree, 1987 also applied a code of conduct to Ministers of the Military Government.

15.20 Integrity codes, leadership codes and other kinds of codes of conduct are concerned with securing the public confidence in those to whom they apply. By providing rules these codes aim to prevent the exercise of public power or use of resources in a way which demonstrates a lack of integrity or which may cause that integrity to be called into question.

15.21 Conduct subject to a code may amount to the recognised criminal offences of corruption or abuse of office. It would include a person's conduct in

circumstances in which he or she faces a “conflict of interest”. Such conduct is not presently subject to the sanction of the criminal law.

15.22 The term “conflict of interest” when applied to important government officials describes situations in which a person’s public duties and private interests conflict, or would have the appearance of, or potential to, conflict. Codes may therefore set standards for both public conduct as well as private behaviour which may be related to the exercise of public duties. Very few codes set standards for private behaviour with no immediate relationship to the exercise of public power.

15.23 All codes of conduct contain a special focus on abuse of office and conflicts of interest which have a pecuniary aspect. The submissions show that people in Fiji are particularly worried about officials using their offices for personal gain and about private business or employment activities which could give rise to a conflict of interest.

15.24 Different codes of conduct deal in various ways with business and employment interests which may give rise to conflicts of interest. This is partly because business interests may take a number of forms. A person may be directly interested in a business through shares, a directorship, loans or advances made to a business or through other contractual relationships. Indirect interests may exist through holding companies, trusts or through family members or friends.

15.25 Additional complexities arise because business investment or outside employment may be necessary or unavoidable in the circumstances of a particular country. The salaries paid to members of Parliament may be relatively low and it may be essential for them to carry on outside employment or business activities. Alternatively, especially in smaller countries, officeholders may hold scarce skills or capital. They may also have interests in businesses, particularly family or community companies, which they might find difficult to divest. A blanket prohibition in either of these circumstances may prevent people of ability and integrity from seeking office, thereby depriving the people of their service.

15.26 Cultural factors also account for variations in integrity codes. What constitutes an abuse of office or a conflict in one culture may not be the same in another. Rather than being prohibited outright, traditional relationships, values, norms and expectations often need to be reconciled with the powers, resources and responsibilities of modern government in a sensitive and practical way.

15.27 Although it is generally agreed that Ministers, members of Parliament

and state servants should always avoid conflicts of interest and should never let private interests take precedence over the public interest, the matter is not clear-cut. Some conflicts of interest are unavoidable. A person's personal interests as a member of a particular social group, whether described by age, gender, occupation, marital status, ethnicity, area of residence or even sporting or social associations, are unavoidable and generally recognised. Indeed, members of Parliament are often legitimately called upon to articulate or protect the interests of such groups. Thus, in addition to prohibiting certain kinds of behaviour and prescribing procedures and rules designed to prevent situations where a conflict of interest may exist or appear to exist, codes of conduct may also prescribe ways to resolve conflicts where these are unavoidable.

15.28 The Commission considers the main purpose of a code of conduct for Fiji's leaders is to promote the public integrity of those who govern and to maintain public confidence in them. We believe that a code provides a basis upon which important officeholders can be held accountable for their conduct and activities. It reminds leaders and the public of the minimum ethical standards which are expected of these officers. A code also expresses the common ethical values, standards and expectations of the people. As such, it has an important symbolic purpose.

Integrity code

15.29 We propose that the Constitution should provide an integrity code containing general, broad standards of conduct for important officeholders. It should place a duty on Parliament to provide by Act for a more detailed integrity code which implements the standards contained in the Constitution.

15.30 We do not consider the present situation in which some standards of ministerial behaviour are contained in rules issued by the Prime Minister and others in conventions to be satisfactory. When ethical standards are enforceable largely by the Prime Minister, there is less public accountability and more room for public suspicion and speculation. When the suspicion and speculation is unfounded, this may unfairly undermine confidence in the Government and consequently its ability to govern. A constitutional or statutory code has the advantage of certainty and publicity.

15.31 In substance, the Constitution should provide that the President, the Vice-President, all Ministers, all members of Parliament, all constitutional office holders and such other persons as may be prescribed by Act shall conduct themselves in

such a way as not:

- (a) to place themselves in positions in which they have or could have a conflict of interest;
- (b) to compromise the fair exercise of their public or official functions and duties;
- (c) to use their office for private gain;
- (d) to allow their integrity to be called into question;
- (e) to endanger or diminish respect for, or confidence in, the integrity of the Government of Fiji; or
- (f) to demean their office or position.

15.32 By constitutional officeholders we mean all persons in the state services (excluding judicial offices), whose offices are established by the Constitution. We also include all persons appointed to commissions established by the Constitution. As we explain later in this Chapter, independent constitutional officeholders and members of commissions are removable only for serious misconduct. We propose that those removal provisions should be linked to the constitutional integrity code.

15.33 We do not propose that the constitutional integrity code should apply to judicial officers, although they should be subject to the provisions of the Act. We envisage that until an Act is passed, the constitutional standards would be enforceable through comment by Parliament, the media and the public. The Commission does not think it is in the interests of justice for the Constitution to appear to license public criticism of judicial processes.

15.34 We do not propose that other state servants and members and employees of statutory and local government bodies should be subject to the general constitutional code. Existing provision for their discipline or removal from office for breaching ethical standards exists at present under various Acts. If Parliament thinks it is desirable, then provision for these officers can be made under the proposed Integrity Act.

15.35 Our recommendation focuses on public conduct and the public integrity. We do not believe that it is necessary to make private conduct not affecting the exercise of public duties subject to the integrity code.

15.36 We propose a more detailed Integrity Act for several reasons. Unlike

constitutions which must be broad and general, Acts are able to deal in detail with the various forms which abuse of office or conflicts of interests can take. They can specify offences and penalties, which may not usually be provided in constitutions. In addition, Acts can place obligations and sanctions on private persons who are implicated in official misconduct. Constitutions, on the other hand, as we explained in Chapter 3, normally regulate only the Government and those who constitute it. Acts have the further advantage of being able to provide special investigatory or monitoring bodies and enforcement procedures and to provide a variety of different mechanisms for preventing or resolving the different kinds of conflicts of interest which can arise.

15.37 An Act may also make detailed and specific provisions to deal with the various kinds of conflicts of interest in ways which suit Fiji's circumstances. It may require divestiture of all or some business interests or prohibit all or only specific kinds of outside employment. It may require certain kinds of disclosure to be made, or disqualifications to apply, in respect of particular kinds of decisions. It may provide different requirements for different kinds of offices, depending on the particular decision-making powers and control over resources which are involved. Special rules should also be devised to avoid or resolve a clash between traditional culture and democratic ethical standards.

15.38 We received a number of submissions which proposed that an expanded Ombudsman's office or a new constitutional Corruption Commission should be responsible for enforcing ethical standards contained in any code of conduct. Without pre-empting the possibility of this occurring in the future, we do not consider that the Constitution should vest this jurisdiction specifically in the Ombudsman or establish a Corruption Commission. We believe that the mechanisms for monitoring, enforcing and investigating offences against the code must be designed very carefully after a full study of the experience in other countries, before being provided for in the Act.

15.39 We understand these submissions to be concerned that the person or body charged with implementation of the code should have constitutional independence. We propose that this concern should be dealt with by a general constitutional provision which confers freedom from direction and control on the person or body who is charged under the Act with monitoring compliance with the code and with investigation of breaches. It should also apply other constitutional measures which ensure the independence of constitutional officers and which we describe later in this chapter.

15.40 In providing mechanisms for the investigation of and prosecution for offences, the Act must allow the Director of Public Prosecutions and the Police to fulfil their respective constitutional roles.

15.41 Some Integrity Acts make important officeholders liable to monitoring, investigation or prosecution for offences only while they remain in office. Wrongdoers in those countries have therefore escaped investigation and charges by resigning from office. The submissions urged the Commission to ensure that any integrity code for Fiji should avoid this possibility. We endorse this concern.

RECOMMENDATIONS

- 503. The Constitution should contain an Integrity Code containing general, broad standards of conduct for important officeholders.**
- 504. In substance, the Constitution should provide that the President, the Vice-President, all Ministers, all members of Parliament, all constitutional office-holders and such other persons as may be prescribed by Act shall conduct themselves in such a way as not:**
- (a) to place themselves in positions in which they have or could have a conflict of interest;**
 - (b) to compromise the fair exercise of their public or official functions and duties;**
 - (c) to use their office for private gain;**
 - (d) to allow their integrity to be called into question; or**
 - (e) to endanger or diminish respect for, or confidence in, the integrity of the Government.**
- 505. The Constitution should place a duty on Parliament to provide a more detailed integrity code under an Act .**
- 506. The mechanisms for monitoring, investigating breaches of, and otherwise enforcing, the code must be designed very carefully after a full study of the experience in other countries and should be provided for in the Act.**
- 507. The Constitution should contain a general provision which confers freedom from direction and control on the person or body charged under the Act with investigating or monitoring compliance with the Code. It should also apply other measures**

which assure independence to other constitutional officeholders.

- 508. The Act must allow for the Director of Public Prosecutions and the Police to fulfil their respective roles in respect of offences.**
- 509. The provisions of the Act should ensure that important officeholders remain liable to monitoring, investigation and prosecution for offences even after they have left office.**

CONSTITUTIONAL OFFICES TO SECURE ETHICAL AND ACCOUNTABLE GOVERNMENT

15.42 Fiji's constitutions, since 1970, have provided for special independent officers to keep government ethical and accountable. There is provision for an Ombudsman, whose function is to investigate maladministration by the Government and its instrumentalities. There is also provision for an Auditor-General charged with examining and reporting on the government's accounts. Both officers are traditionally officers of Parliament and are required to report to it. We now review the constitutional provisions relating to these officers.

THE OMBUDSMAN

Constitutional provisions

15.43 Chapter X of the 1990 Constitution is dedicated exclusively to the establishment of the office of the Ombudsman and provision for his or her functions and powers. Some procedural provisions are contained in the Ombudsman Act (Cap. 3). There is also an Ombudsman Decree, 1987 promulgated shortly after the abrogation of the 1970 Constitution, which re-established the office of Ombudsman. Although the 1990 Constitution subsequently made the necessary constitutional provision for the Ombudsman, the Decree appears to be still in force. As it is no longer necessary and contains some provisions which are inconsistent with the Constitution, it should be repealed.

15.44 The existing constitutional provisions are relatively complex. They set out the Ombudsman's powers, and the relevant procedures in great detail, as compared to the provisions which apply to other constitutional officers. Elsewhere we recommended that the Constitution should concentrate on stating general principles, leaving detailed statements of powers and procedures to Acts of Parliament. The case of the Ombudsman is somewhat unique. In view of this

office's quite extraordinary powers and the need to entrench these powers against legislative or executive interference, some detailed provision is necessary. In our view, the Constitution should contain only those provisions which are needed to define the Ombudsman's main constitutional functions and powers in respect of the Government and its officers and agencies. For all other matters, it should empower Parliament to make provision by Act.

Purpose of Ombudsmen

15.45 The Office of the Ombudsman is of Scandinavian origin. The Ombudsman investigates individual grievances against government administration. He or she may also be empowered to investigate an administrative matter on behalf of Parliament or on his or her own volition. The Ombudsman is authorised to make a finding generally as to the legality, reasonableness or justice of the matter complained of, and to make recommendations as to the appropriate remedial action which should be taken. These findings and recommendations are usually given to the state servant responsible for managing the relevant department or agency of the government. Unlike a court or tribunal, the Ombudsman has no power to order or direct. Although his or her recommendations are not mandatory, in the event that they are not followed, the Ombudsman has the power to report the matter to Parliament. The Ombudsman's power is therefore rightly described as the "power to persuade".

15.46 Because the Ombudsman was originally a response to the growing size and complexity of government's bureaucracy and as an adjunct to the democratic process, the traditional focus of the office is on the exercise of the government's executive power, specifically that involving state servants, rather than its legislative or judicial powers. In some countries, the ambit of the Ombudsman's investigative powers extends to statutory bodies and companies which perform some of the government's executive functions.

15.47 The Ombudsman, in our opinion, is a vital part of Fiji's constitutional structure. For those without easy access to their members of Parliament or for whom parliamentary or court action might not be feasible, the Ombudsman provides the only real redress for illegal or unreasonable state action. In particular, we are aware that for prisoners and detained persons as well as their family and friends, the Ombudsman provides one of the few available avenues of complaint. A large number of submissions supported the retention and strengthening of this office. We agree that it should be retained and given independence by the Constitution. As now, this independence should be expressed in terms of freedom from direction and control by any other person or authority.

Immunity from review

15.48 In addition to investing the Ombudsman with freedom from the direction and control of other persons or authorities, section 139(1) provides that the proceedings of the Ombudsman “shall not be called into question in any court of law”. This means that unlike other constitutional officers, the proceedings of the Ombudsman are not subject to judicial review.

15.49 This provision is necessary because it reflects the Ombudsman’s status as an office of Parliament. The Courts have traditionally declined to exercise jurisdiction over Parliamentary proceedings. In addition, the provision avoids the confusion and possible delay arising out of conflict between the respective jurisdictions of the Ombudsman and the Courts. As the Ombudsman has only recommendatory and reporting powers and is subject to a requirement to allow all involved persons to respond to a complaint, the inability to review the proceedings does not cause any substantial injustice. We therefore propose that this provision should be retained.

15.50 Later, we recommend that the Constitution should allow Parliament by Act to confer additional functions on the Ombudsman. In view of this, we propose that the Ombudsman’s immunity from judicial review should apply only to proceedings arising out of his or her constitutional functions.

Title of Office

15.51 We received submissions proposing that the title of this office should be changed to “Ombudsperson” or some other gender-neutral name. Although the Commission fully supports the use of a non-discriminatory language, we none the less propose that the title ‘Ombudsman’ should be retained. We consider the term ‘Ombudsperson’ to be unduly cumbersome. Furthermore, the existing title has been in use for over twenty-five years and any change may be confusing.

Functions

15.52 The 1990 Constitution does not set out the basic functions of the Ombudsman in clear terms. These functions can be deduced from a careful reading of sections 135 and 138 of the 1990 Constitution, but it is essential that the Constitution state these functions clearly and positively. We review the existing provisions in the succeeding paragraphs and comment on matters which should be included in the statement of the Ombudsman’s functions.

Action

15.53 Subsection 135(1) provides that the Ombudsman may investigate “any action” taken by “any officer or authority”, covered by the section, in the exercise of the “administrative functions” of that officer or authority. Under subsection 135(10) ‘action’ is expressed to include any “failure to act.”

15.54 Subsection 138(2) in setting out the conclusions which the Ombudsman may reach, to justify stating an opinion and making recommendations, indicates that “action” means “any act, omission, decision” or “recommendation”. These are the main forms of administrative action. We consider that they should be included in the proposed section stating the function of the Ombudsman.

Administrative functions

15.55 The term “administrative functions” covers any administrative action taken in the exercise of executive power. It does not cover any exercise of the judicial or legislative powers of the state. It may include the action of ministers which have an administrative aspect, but it does not include political action of ministers which do not involve state servants. This is clear from the existing prohibition contained in subsection 135(7) against investigating the action of a minister certified to have been taken in his or her own deliberate judgement. The term has also become defined by the practice of the Ombudsman in Fiji, and elsewhere in the world. We believe it is a flexible term and should be retained.

Persons who may lodge complaints

15.56 Under subsection 135(1) of the 1990 Constitution, the Ombudsman may commence an investigation if a complaint is made that a private person or body of private persons has suffered injustice as a result of administrative action. Subsection 135(3) provides that the complaints may be by an individual or a body of persons, whether incorporated or not.

15.57 Subsection 135(4) provides that individual complaints must be made by a person aggrieved. However, where the person is dead or cannot “for any reason” act for himself or herself, the subsection permits the complaint to be made by the person’s personal representative, a family member or any other person deemed suitable to represent him or her. Subsection 140(1)(b) of the Constitution also allows Parliament to make provision in an Act permitting complaints to be transmitted to the Ombudsman through a member of Parliament. Later we will discuss the separate ability of a parliamentarian to invite the Ombudsman generally to investigate any administrative action.

15.58 These provisions reflect the Ombudsman's basic function and apply some necessary procedural limitations. We propose that the Constitution should continue to vest the Ombudsman with the function of investigating complaints in relation to any private person or any body of persons. It should also continue to require that private complaints must be lodged by a person or persons affected, but should allow the Ombudsman the discretion to investigate on the complaint of another, if the person or persons affected cannot for any reason act for themselves. Parliament should continue to be authorised by the Constitution to make provision allowing individual complaints to be made through a member of Parliament.

15.59 At present, the Ombudsman is only empowered to commence an investigation on the complaint of an individual person or body of persons, and conversely a person or body of persons is only entitled to complain to the Ombudsman, if they have already *suffered* injustice as a consequence of an administrative action. We consider that this requirement as it applies is unnecessarily narrow. At the time when an action, decision, recommendation or omission is made or taken, any likely consequential injustice to a person or group of persons in the future may be apparent. Especially where a particular action is likely to have a general impact, we consider that early intervention may reduce or prevent the likely injustice and may make remedial action easier to achieve. Moreover, when injustice seems likely, it would appear to us to be itself unjust to require that it actually be suffered before an investigation can proceed. The Commission considers that the Constitution should allow personal complaints to be investigated if the person or persons are *affected* by an administrative action.

15.60 Under subsection 135(5), the Ombudsman cannot investigate a complaint unless the aggrieved person is (or was at the time of death), resident in Fiji, or the complaint relates to action taken in relation to the complainant while he or she was in Fiji, or in relation to rights or obligations that accrued or arose in Fiji.

15.61 It is not necessary to restrict the Ombudsman's jurisdiction in this broad way. The Ombudsman's jurisdiction is limited to reviewing the exercise of the powers of the Government of Fiji and its agencies. This power should be exercisable regardless of where the action is taken and where the affected person or persons reside. It should also be exercisable whether or not a "right or obligation" is involved. Increasingly, many Fiji citizens are taking up residence overseas for professional, educational or other personal reasons. Many of them continue to deal with the Government because they have family or property. Furthermore, with government encouragement, many overseas residents are investing in business and property and pay taxes in Fiji. The Commission believes that they too should have this avenue of redress for bureaucratic wrongs which they may suffer.

15.62 Subsection 135(3) disqualifies any government department or authority, and any authority constituted for the purposes of the public service or local government from making complaints. It also disqualifies “any other authority or body whose members are appointed by the President, or by a Minister or whose revenues consist wholly or mainly of moneys provided from public funds”. By implication, the subsection does not disqualify individuals within those departments and authorities from lodging personal complaints.

15.63 The subsection reflects the fact that the Ombudsman exists principally to investigate complaints *against* administration on behalf of individuals who are affected in their *personal* capacities, or on behalf of Parliament and its members. It is not a part of the Ombudsman’s functions to investigate complaints by state offices or agencies against each other. We consider that the Constitution should continue to require complaints to be made in respect of personal grievances. It should not, in effect, allow complaints to be initiated by the government bodies which are presently disqualified. We leave to the drafter the question whether it is necessary for the Constitution to contain this express exclusion.

Other Investigations

15.64 Under paragraphs (b) and (c) of subsection 135(1), the Ombudsman may also investigate any action taken by an officer or authority in the exercise of administrative functions, if invited to do so by a member of either House of Parliament or on his or her own motion. In these cases, no “complaint” is involved and the existing provisions which limit investigations initiated by “complaints” do not apply. Notably, in these circumstances, an investigation may proceed whether or not injustice has yet been suffered by anyone.

15.65 We consider that this relatively wide power is necessary and should be retained. In view of the recommendations for sector standing committees of the Bose Lawa which we make in Chapter 11, we consider that the Constitution should specifically also allow investigations to take place on the invitation of a sector standing or other Parliamentary committee.

15.66 The Constitution is not clear whether, after conducting an investigation on the invitation of a member of Parliament, the Ombudsman can report directly to the member, or whether he or her is restricted to the procedure set out in subsection 138(1). We propose that the Constitution should also allow the Ombudsman to report to the member or Parliamentary committee at whose invitation an investigation was commenced.

Ombudsman's Remedies

15.67 Under subsection 138(1), after conducting an investigation, the Ombudsman is entitled to find that the act, omission, decision or recommendation investigated was either:

- contrary to law;
- based wholly or partly on a mistake of law or fact;
- unreasonably delayed; or
- otherwise unjust or manifestly unreasonable,

15.68 If he makes any such finding, he is empowered to report his opinion and make recommendations to the principal officer of the relevant department or authority as to the course of remedial action which should be taken.

15.69 The reference to "law" would include the provision of the Constitution, in particular the Bill of Rights. We consider that these existing findings adequately empower the Ombudsman and should be retained.

15.70 The subsection specifically empowers the Ombudsman to give the relevant principal officer in respect of any matter investigated, an opinion that:

- that the matter should be given further consideration;
- that the omission should be rectified;
- that the decision should be cancelled, reversed or varied;
- that any practice on which the act, omission, decision or recommendation was based should be altered;
- that any law on which the act, omission, decision or recommendation was based should be altered;
- that any law on which the act, omission, decision or recommendation was based should be reconsidered;
- that reasons should have been given for the decision; or
- that any other steps should be taken.

15.71 In reporting this opinion to the principal officer, the Ombudsman may request the officer to notify him or her within a specified time of the remedial steps which are proposed. The Ombudsman must send a copy of his or her report and recommendations to the Prime Minister and to any other Minister concerned.

These are necessary powers which should be retained in the Constitution.

15.72 If, after a reasonable time, no “adequate and appropriate” remedial step appears to him or her to have been taken, the Ombudsman may, after considering the comments of the relevant department or authority, make a further report to both Houses of Parliament. This is the Ombudsman’s ultimate weapon which should continue to be provided for under the Constitution.

Offices subject to investigation

15.73 Subsection 135(2) sets out in some detail, the categories of offices and authorities which the Ombudsman may or may not investigate. Paragraph (h) of the subsection allows Parliament to prescribe by Act other “officers or authorities” which are not covered by the subsection.

15.74 Those which are subject to his or her jurisdiction comprise all government departments and officers of those departments, the Police Force and its members, the Prisons Service as well as any other government service and all officers of those services. The subsection expressly includes any officer or authority empowered to make determinations as to government contracts.

15.75 The armed forces are not expressly included among government services subject to investigation by the Ombudsman. As the armed forces do not deal with the public on a day to day basis, we do not propose that they be made generally subject to investigation like other services. However, the Constitution should make it clear that the Republic of Fiji Military Forces and its officers are subject to investigation in regard to contracts, other than contracts of appointment, entered into on behalf of the Government.

15.76 The 1990 Constitution, for the first time, also made “local government bodies”, “rural local authorities” and “statutory bodies not covered by the Ombudsman Act” subject to the constitutional jurisdiction of the Ombudsman. The last-mentioned reference appears to us to be ill-conceived. First, no statutory bodies appear to be “covered by the Ombudsman Act”. Secondly, as a matter of legal principle, it seems to us that it is wrong to provide a residual constitutional provision to catch what is not covered by an Act, more so where the constitutional provision itself authorises the existence of Act. Lastly, the effect of the provision would seem to be that all bodies set up by statute, are to be subject to the investigating power of the Ombudsman, regardless of their functions and whether satisfactory redress procedures exist under the statute. The Commission believes that this is undesirable.

15.77 Many statutory bodies and their staff are responsible for implementing government policy and are as much involved in “administration” as government departments and their officers. However, some statutory bodies may exercise particular functions and powers which are not suited to investigation by the Ombudsman. They may also have adequate redress procedures provided for under their Acts. We believe a better approach would be for the Constitution to make statutory bodies generally subject to the Ombudsman, unless Parliament by Act prescribes that a particular statutory body should not be. This would allow Parliament the discretion to exempt a particular statutory body on a case-by-case basis.

15.78 Apart from this modification, we favour the retention of existing offices and authorities which are made expressly subject to the investigating jurisdiction of the Ombudsman.

15.79 We also favour retaining a constitutional provision allowing Parliament to prescribe additional bodies and offices which are to be subject to investigation by the Ombudsman. Increasingly in Fiji and elsewhere, government administration is being carried out through the vehicle of private companies. The wording of the provision therefore should be broad enough to allow it to make provision for companies which exercise government functions but may not strictly fall within the existing term “authority or officer”. In view of the complexity of this area, provision for these bodies should be made on a case-by-case basis in an Act of Parliament rather than by an all-encompassing provision in the Constitution itself.

Exempt offices and authorities

15.80 The proviso to subsection 135(2) at present exempts various offices from the purview of the Ombudsman. Paragraphs (i) to (iv) reproduce, with a small nominal amendment, the authorities and officers who were exempt from investigation under the 1970 Constitution.

15.81 Paragraph (i) of the proviso exempts the President and his personal staff from investigation by the Ombudsman. Under the Constitution, the President is vested with largely formal functions. In most cases, he is required to act on the advice of, and sometimes after consultation with, Ministers or other specified persons. Subsection 88(3) of the 1990 Constitution provides that the question of whether he has so acted cannot be inquired into in a court of law. In a few cases, he is vested with power to act in his own deliberate judgement. In none of these cases do we consider the President to be exercising administrative functions of

the type which should be investigated by the Ombudsman. This exemption should be retained. For similar reasons, we would add the President's Council to this exemption.

15.82 Under paragraph (ii) of the proviso, all constitutional commissions and their staff are also exempt. We understand this exemption to be an aspect of their freedom from direction or control guaranteed them by the Constitution. However, the Constitution guarantees this independence only in respect of their constitutional functions. Existing Commissions have constitutional responsibilities for electoral matters, the prerogative of mercy and for state service appointments. Elsewhere we propose the establishment of new commissions to deal with human rights, Parliamentary emoluments and the appointments of constitutional officers. We also propose that the Native Lands Commission should be given constitutional status.

15.83 Parliament has, by Act, vested further administrative functions and powers in some constitutional commissions. The commissions do not enjoy constitutional independence in respect of their statutory functions which are not directly related to their constitutional ones. As drafted, the present constitutional exemption applies to any function of a commission, regardless of whether it is a constitutional or statutory function. In our view, the existing exemption is too wide. We propose that the Constitution should provide that constitutional commissions and their staff may not be investigated by the Ombudsman in relation to the exercise of any of their constitutional functions and such of their statutory functions as Parliament may exempt by Act. This will mean that statutory functions will be subject to review, unless Parliament has taken a deliberate decision to exempt particular functions.

15.84 Paragraph (iii) exempts from investigation, all other persons and authorities in the exercise of appointing, disciplinary, removal or pension powers over state offices. The provision covers any case in which a service commission has delegated any such power. It also covers the powers of the Commissioner of Police over non-gazetted police officers which we discussed in Chapter 14. This Commission considers that given the nature of these decisions, they are not appropriate for investigation by the Ombudsman. In Chapter 14, we recommended that Parliament should once more be empowered to set up a system of appeals against personnel decisions in the civil service. We consider that such a system will provide adequate redress for personal grievances in that area.

15.85 The Director of Public Prosecutions and those acting under his or her instructions by paragraph (iv) of the proviso are also not subject to investigation

by the Ombudsman. In view of the functions of that constitutional officer, and his or her subordinates as well as the need for definitive, independent decisions on prosecutions, we propose that this exemption should be retained.

15.86 The 1990 Constitution introduced specific exemptions applying to the Bose Levu Vakaturaga, the Native Lands Commission, the Native Fisheries Commission, the Native Lands Trust Board, the "Rotuma Island Council" and the "Banaban Island Council". The new provisions were aimed at exempting the main statutory bodies which are established by and operate under the provisions of the various Acts which are entrenched by the Constitution. We understand that, in part, they reflected a sensitivity about the relationship between modern democratic institutions and procedures on the one hand, and traditional matters and the institutions that are charged with responsibility for them on the other.

15.87 The need for an express exemption of these bodies became necessary as a result of the extension, in 1990, of the Ombudsman's responsibilities to statutory bodies in general. We received submissions proposing that some or all of the exemptions should be done away with.

15.88 Earlier, in Chapter 9, we proposed that the Constitution should provide for the composition and main functions of the Bose Levu Vakaturaga. None of those functions is administrative. As such it should continue to be exempt from the purview of the Ombudsman.

15.89 In Chapter 17, we also propose that the Native Lands Commission should become an independent constitutional commission, and discuss its functions. In view of our recommendation above, it would, by reason of its status as a constitutional commission, remain exempt from the Ombudsman's jurisdiction. There should no longer be a need for any specific exemption.

15.90 We do not consider that the continuing exemption of the Native Lands Commission will cause injustice or hardship. In Chapters 8 and 10, we proposed that the status of any person as a 'Fijian' for political or other constitutional purposes, should no longer be certified or determined by the Native Lands Commission. This will mean that the Native Lands Commission will no longer have a decision-making role in national political matters. As before, their decision will principally affect only those directly involved in the issue considered. We believe that our proposals for a system of appeals under the Act and for judicial review which we make in Chapter 17, provide ample redress for those who might be directly affected by decisions of the Native Lands Commission.

15.91 The Native Fisheries Commission is constituted by section 14 of the Fisheries Act (Cap. 158). It is charged with investigating and recording the title to, and boundaries of, customary fishing rights. The Act provides for appeals to an appeals tribunal by “any person aggrieved by any decision of the Commission”. As legislation affecting “Fijian customary rights”, the provisions are entrenched by section 78(1) of the 1990 Constitution. Unlike the Native Lands Commission, the Native Fisheries Commission is at present subject to challenge through judicial review. We consider the Commission to be a quasi-judicial body. As such, and in view of the existing system of appeals as well as availability of judicial review, we propose that it should remain outside the purview of the Ombudsman.

15.92 We understand that the references in subsection 135(1) to the ‘Rotuma Island Council’ and the “Banaban Island Council” are intended to mean the Council of Rotuma and Council of Leaders established by the Rotuma Act (Cap. 122) and the Banaban Settlement Act (Cap. 123) respectively. The Councils exist for the purposes of the separate administration of the communities on those islands. Each is charged with the good government of their community. Although they have legislative and advisory functions, they also have administrative functions and powers like any other local government body. As with other such bodies, their administration should in principle be subject to the investigation by the Ombudsman. We therefore propose that they should no longer be exempt in respect of the exercise of their administrative functions.

15.93 Under the Native Land Trust Act (Cap. 134), the Native Land Trust Board has various functions and powers regarding the leasing of native land. The Board is the biggest landlord in Fiji and the Commission understands that there are also proposals for the Board to administer leases of various categories of state land. Unlike other bodies which we have just considered, the Native Land Trust Board deals directly with a wide section of the public and many of its functions may be described as administrative. The Commission believes that for the better protection of individuals and groups of individuals, whether landlords or tenants, the Board should be subject to investigation by the Ombudsman in discharge of its administrative functions.

Ombudsman’s discretions

15.94 Chapter X of the 1990 Constitution gives the Ombudsman a number of discretions. Subsection 139(2) gives him or her the absolute discretion to determine whether to initiate, continue or discontinue any investigation. It specifically confers on the Ombudsman the discretion to decide whether a complaint has been duly

made in accordance with the constitutional requirements. As we noted above, the proceedings of the Ombudsman may not be challenged in court of law. The Ombudsman therefore has exclusive power to define his or her own jurisdiction. These discretions are essential to the independent and effective exercise of the Ombudsman's functions. They should continue to be provided for in the Constitution.

15.95 Subsections 135(6) and (8) set out the circumstances in which the Ombudsman should decline to investigate a complaint. Subsection (6) begins by prohibiting him or her from investigating a complaint if the person or persons aggrieved has or had a right of appeal, reference or review to a tribunal under statute or a right to take legal proceedings in a court of law. It then allows the Ombudsman to conduct an investigation if he or she is satisfied that in the circumstances the person or persons cannot or could not avail themselves of the right or remedy or if a breach of any individual right protected by Chapter 2 of the Constitution may be involved. Although the section appears to state a prohibition, in effect, it gives the Ombudsman a necessary discretion whether to investigate a complaint in these circumstances. This discretion is all the more necessary in view of the significant expansion, since 1970, of administrative law procedures and remedies, to almost all government action.

15.96 We agree with the principle behind this provision, that the Ombudsman exists as an adjunct to the courts and other special bodies established by Parliament to deal with citizen's complaints. He or she should not pre-empt or interfere with other redress or remedies unless there is very good reason. Good reason exists where individuals are unable, through no fault of their own, to obtain other redress or where there has been an alleged breach of the fundamental standards contained in the Bill of Rights. The Commission proposes that the Constitution should continue to contain these principles.

15.97 Under subsection 135(8), the Ombudsman also has a discretion to decline to investigate any complaint if he or she considers:

- that the complaint is frivolous or vexatious or trivial;
- that the person aggrieved has insufficient interest in the matter complained of; or
- that the complaint has been delayed without reasonable cause for more than twelve months.

15.98 These powers are similar to those exercised by courts of law in respect of

legal proceedings. They are necessary to prevent abuse of the Ombudsman's powers. In view of the general discretions which we propose should be retained in the Constitution, this particular provision, which does not in any way limit the Ombudsman's powers but rather only amplifies them, should be contained in the Ombudsman Act.

Other prohibited inquiries

15.99 Under subsection 135(7), the Ombudsman may not investigate any action which the Prime Minister certifies in writing was taken personally by a Minister in his or her own deliberate judgement. By definition, such action would not involve any state servant and is not of the type with which an Ombudsman is traditionally concerned. Rather, redress lies through the political and Parliamentary processes and the rules regarding ministerial responsibility. Redress may also be available under the proposed integrity code. We consider that the substance of this provision should be retained.

Information

15.100 Additional restrictions also apply because of provisions allowing certain types of information and documents to be withheld from or by the Ombudsman.

15.101 Section 137 gives the Ombudsman wide power to require any minister, member or officer of any department or authority or any other person who, in the Ombudsman's opinion, is able to do so, to disclose any information or produce any document relevant to any investigation. The Ombudsman is expressly given the powers of the High Court in relation to the attendance and examination of witnesses and the production of documents. Although qualified by subsequent provisions, under subsection 137(3), any law which otherwise prohibits a state servant from disclosing official information does not affect their duty to supply the Ombudsman with any information or document. These laws would include the Official Secrets Act. The section also disallows the state, in relation to any document or evidence, from making any claim of state privilege which it would normally be able to make in a court of law. As all of these provisions regulate the relationship between Ombudsman and the Government and give the Ombudsman powers to obtain necessary information, they should continue to be provided for in the Constitution.

15.102 Subsection 137(6) preserves the ability of individuals to claim before the Ombudsman, any other type of privilege available in a court of law. This is a necessary protection. We believe that individuals should be in no worse position

than they would be in a court of law. We propose, however, that as this does not deal with the Ombudsman's powers in respect of the Government, the Constitution should allow the privileges of individuals to be provided for by Act.

15.103 Under subsection 137(4), information and documents relating to the proceedings of the Cabinet or any sub-committee may not be supplied to the Ombudsman. The subsection provides that any certificate issued by the Secretary to the Cabinet, with the approval of the Prime Minister, shall be conclusive for this purpose. We addressed the matter of Cabinet confidentiality in Chapter 12. Because it relates to another constitutional provision and is a limitation on the Ombudsman's power in relation to the Government, this matter should continue to be provided for in the Constitution.

Disclosure of information

15.104 Subsection 137(5) deals with disclosure of information or documents by the Ombudsman and his or her staff. The provision authorises the Attorney-General to give notice to the Ombudsman that it would be contrary to the public interest in relation to defence, external relations or internal security if a specified document or information, or information or documents belonging to a specified class were disclosed. In that case, although the Ombudsman is entitled to have access to the information or documents, the Ombudsman and his or her officers are prohibited from disclosing such documents or information to any person for any purpose. The Commission recognises that the state may have legitimate reasons for not disclosing information or documents relating to these matters. The ability to restrain the disclosure of such information should be retained in the Constitution.

Procedure in respect of investigations

15.105 Section 136 of the 1990 Constitution provides the procedure the Ombudsman is to follow in carrying out any investigation. Subsection (1) requires the Ombudsman to put the allegations to the principal officer of the department or authority concerned as well as to any person who is alleged to have taken or authorised the action in question. These persons are to be given an opportunity to comment on the allegations. The provision enshrines the principle of natural justice that everyone against whom an adverse finding or decision may be made should have the right to be heard.

15.106 Subsection 136(2), in a complex way, provides that all investigations by the Ombudsman should be conducted:

- in private;

- in accordance with procedures required in the Constitution;
- in accordance with the procedure specified in any Act passed by Parliament under its special, limited authority to make supplementary and ancillary provisions not inconsistent with the Constitution;
- subject to the Constitution and any such Act, in the manner which the Ombudsman considers appropriate.

15.107 Subsection 136(2) also specifically empowers the Ombudsman to obtain information from any person in such manner as he or she sees fit and to make such enquiries. It also authorises the Ombudsman to allow a person to be represented by a barrister and solicitor or some other person during an investigation.

15.108 These are important matters but the Constitution should only provide that the Ombudsman has a discretion as to how information is to be obtained and how an investigation is to proceed. It should also provide for persons implicated in a complaint to have a general right to be heard by the Ombudsman on the complaint. All other matters contained in this section should be provided for by Act.

Annual reports

15.109 In order to fulfil his or her role as an officer of Parliament, the Constitution should continue to require the Ombudsman, in addition to periodic reports which might be needed, to make an annual report to the President concerning the discharge of his or her functions over the previous year. It should require that the report shall be laid before the Bose Lawa and the Bose e Cake.

Additional functions and size

15.110 Some of the submissions which proposed a constitutional code of conduct also proposed that the Constitution should vest the Ombudsman's office with responsibility for monitoring and investigating breaches of the code. Others suggested that the Ombudsman's office should be given constitutional responsibility for monitoring access to official information. In view of these expanded functions, the submissions proposed that the Ombudsman's office should become an Ombudsman Commission consisting of a Chief Ombudsman and two others.

15.111 Earlier we proposed that a detailed integrity code of conduct should be

authorities. We also said that a proper comparative study of relevant experience of other countries should first be carried out. We acknowledged, however, the possibility that the Ombudsman might be conferred with additional functions under that Act. Later we also comment on the possibility of an Act giving the Ombudsman a role in access to official information.

15.112 In order to provide the necessary flexibility, and to cater for possible future growth in the number of complaints of maladministration made to the Ombudsman, the Constitution should provide for the existence of at least one office of Ombudsman, but expressly allow Parliament to establish other offices of Ombudsman by Act. It should also empower Parliament, in the event that other offices of Ombudsman are established, to provide by Act for the designation of one of them as the Chief Ombudsman responsible for the administration of the office and the co-ordination and allocation of the work between the Ombudsmen. The Constitution should also provide that subject to this, all powers and privileges conferred on the Ombudsman by the Constitution apply equally to each Ombudsman.

15.113 We do not propose that an Ombudsman Commission be established. Commissions are usually required to act collectively. We envisage that if any additional office of Ombudsman is established, the holder will act individually in respect of any complaint which he or she is investigating. This is no different from the manner in which High Court Judges consider most matters which come before them.

Appointment of Ombudsman

15.114 Subsection 134(2) of the 1990 Constitution provides that the Ombudsman is to be appointed by the President acting on the advice of the Prime Minister and in consultation with the Leader of the Opposition and those persons who appear to the President to be leaders of parties in the House of Representatives. The procedure reflects the Ombudsman's role as an officer of Parliament.

15.115 In Chapter 14, we recommended that the Constitution should provide for a Constitutional Offices Commission with responsibility for appointing the various constitutional officers. We discuss the reasons for and functions of that Commission in the next section of this Chapter. In Chapter 11, we also proposed the introduction of a system of sector standing committees of the Bose Lawa. In view of these recommendations, we also propose a change in the way in the

view of these recommendations, we also propose a change in the way in the Ombudsman is appointed.

15.116 We propose that the President should continue to appoint the Ombudsman but on the recommendation of the Constitutional Offices Commission, and with the concurrence of the Prime Minister and the approval of the sector standing committee of the Bose Lawa responsible for matters relating to administrative services.

15.117 In procedural terms, the Constitutional Offices Commission would be initially responsible for making a recommendation to the Prime Minister. The Prime Minister will be able either to concur in the recommendations or ask the Commission to reconsider its recommendation. In the event that the Prime Minister concurs, the recommendation should be placed before the sector standing committee. The committee will have authority only to approve or disapprove the recommendation. If approved, the Prime Minister would advise the President to make the appointment, but if the recommendation is not approved, the Constitutional Offices Commission would have to make a fresh recommendation.

15.118 This proposal follows with necessary modifications our earlier proposal in Chapter 13 for the appointment of judges. The principles regarding the scrutiny by the sector standing committee which we mentioned there would also apply in this case.

15.119 We are confident that the purpose behind the existing requirement to consult party leaders will be adequately catered for by sector standing committee.

15.120 When the office of Ombudsman is vacant, or if the holder of the office is for any reason unable to perform his or her functions, the Constitution should authorise the President to make an acting appointment on the recommendation of the Constitutional Offices Commission and with the concurrence of the Prime Minister tendered after the Prime Minister has consulted the Leader of the Opposition.

15.121 In order to avert the possibility of an acting appointee continuing for an indefinite period, we propose that only a superior judge should be qualified to be appointed to act as Ombudsman when the office is vacant. We see this as a way of ensuring that a recommendation for a substantive appointment is submitted to the sector standing committee in a timely manner.

Qualification and disqualifications for appointment

15.122 Under subsection 134(3) of the 1990 Constitution, a person is not qualified

to be appointed Ombudsman if he or she is a member of either House of Parliament or of any local authority, a candidate for election as a member of the House of Representatives nominated with consent, or a local government officer. Subsection 134(5) further provides that the Ombudsman shall vacate his office if any of these circumstances arises while holding office.

15.123 These qualifications are designed to ensure that the Ombudsman is non-partisan. We consider them necessary and propose that they should be retained in the Constitution.

15.124 Subsection 134(4) provides that the Ombudsman shall not *perform* the functions of any other public office. It also provides that the Ombudsman may not, without the approval of the Prime Minister, *hold* any other office of emolument or engage in any occupation for reward outside the duties of the office of Ombudsman.

15.125 These provisions are necessary to ensure that in receiving any complaint regarding any department or authority, the Ombudsman does not face a conflict of interest. The discretion vested in the Prime Minister allows for situations in which the person appointed to be Ombudsman may hold a concurrent appointment, for example as a judge, which it is not considered necessary to relinquish. The prohibition on performing another office's functions means that the Ombudsman can continue to hold the concurrent appointment, but must be devoted exclusively to the duties of Ombudsman. We propose that these provisions should be retained in the Constitution.

15.126 At present, the Constitution does not provide any affirmative qualifications, nor does it prescribe any retiring age. The Commission considers that this arrangement should continue. We are confident that the procedure which we propose will ensure that a person of appropriate calibre and ability will be appointed.

15.127 In the next section of this Chapter, we deal with the constitutional principles and rules relating to removal from office and other terms of office, salaries and resources, which should apply equally to Ombudsman and all other constitutional offices.

RECOMMENDATIONS

510. The Ombudsman Decree, 1987 should be repealed.
511. The office of Ombudsman should continue to be established

by the Constitution.

512. It should continue to provide that the Ombudsman shall not, in the exercise of his or her constitutional functions, be subject to the direction and control of any other person or authority.
513. The Constitution should continue to provide that no proceedings of the Ombudsman in exercise of constitutional functions shall be called in to question in any court of law.
514. The Constitution should state the Ombudsman's functions in clear terms. It should provide that it is a function of the Ombudsman to investigate any decision or recommendation made, or any act done or omitted by any officer or authority (to whom the power to investigate applies), in the exercise of the administrative functions of that officer or authority and affecting any person or body of persons, whether incorporated or not, in his or her or its personal capacity. In substance, it should not allow complaints to be initiated by government bodies which are presently disqualified.
515. The existing requirement that private persons must have suffered injustice as a consequence of an administrative act before their complaint can be investigated should not be retained. The Constitution should allow personal complaints to be investigated if the person or persons are "affected" by an administrative action.
516. It should continue to require that private complaints must be lodged by a person or persons affected, but should allow the Ombudsman a discretion to investigate on the complaint of another if the person or persons affected cannot for any reason act for themselves. Parliament should continue to be authorised by the Constitution to make provision allowing individuals' complaints to be made on their behalf by a member of Parliament.
517. The provisions contained in subsection 135(5), under which the Ombudsman cannot investigate a complaint unless the aggrieved person is (or was at the time of death), resident in Fiji or the complaint relates to action taken in relation to the complainant while he or she was in Fiji or in relation to rights or obligations that accrued or arose in Fiji should be done away

with.

518. **The Constitution should continue to provide that the Ombudsman may investigate any action taken by an officer or authority in the exercise of administrative functions, if invited to do so by a member of either House of Parliament or on the Ombudsman's own motion. The Constitution should specifically allow investigations to take place on the invitation of a sector standing committee or any other committee of Parliament. It should allow the Ombudsman to report to the person or body at whose invitation an investigation was commenced.**
519. **The Constitution should continue to require the Ombudsman to find that the action, omission, decision, recommendation or practice investigated was either:**
- **contrary to law;**
 - **based wholly or partly on a mistake of law or fact;**
 - **unreasonably delayed; or**
 - **otherwise unjust or manifestly unreasonable,**
- before being able to state an opinion and make recommendations.**
520. **When the Ombudsman makes a finding referred to in the previous recommendation, the Constitution should, in respect of any matter investigated, continue to empower him or her to give the relevant principal officer an opinion:**
- **that the matter should be given further consideration;**
 - **that the omission should be rectified;**
 - **that the decision should be cancelled, reversed or varied;**
 - **that any practice on which the act, omission, decision or recommendation was based should be altered;**
 - **that any law on which the act, omission, decision or recommendation was based should be altered;**
 - **that any law on which the act, omission, decision or recommendation was based should be reconsidered;**

- that reasons should have been given for the decision; or that any other steps should be taken.
521. The Ombudsman should continue to be empowered to request the principal officer of the relevant department or authority to notify the Ombudsman within a specific time of the steps proposed to be taken or which have been taken. The Constitution should also empower the Ombudsman to make a report to both Houses of Parliament, if after a reasonable time, no adequate and appropriate remedial action appears to have been taken. Before so doing, the Ombudsman should be required to consider the comments of the relevant department or authority.
522. The requirement that the Ombudsman must send a copy of his or her opinion and recommendations to the Prime Minister and to any other Minister concerned should be retained in the Constitution.
- 523 Subject to the next recommendation, in substance, the existing offices and authorities which are made expressly subject to the investigating jurisdiction of the Ombudsman should be retained.
- 524 The Constitution should make statutory bodies subject to the Ombudsman, but should allow Parliament by Act to exclude a statutory body.
- 525 The Constitution should continue to allow Parliament to prescribe additional bodies and offices which are to be subject to investigation by the Ombudsman. The wording of the provision should be broad enough to provide for companies which exercise government functions but which may not strictly fall within the existing term "authority or officer".
- 526 The following persons and authorities should be exempt from investigation by the Ombudsman:
- The Bose Levu Vakaturaga;
 - The President and his personal staff;
 - The President's Council;
 - All constitutional commissions, (including the Native Lands Commission) in the exercise of their

constitutional functions and such of their statutory functions as Parliament by Act may prescribe;

- All other persons and authorities in the exercise of appointing, disciplinary, removal or pension powers over state offices;
- The Native Fisheries Commission;
- The Director of Public Prosecutions.

527. The Native Land Trust Board, Council of Rotuma and Council of Leaders on Rabi Island should no longer be exempt in respect of the exercise of their administrative functions.
528. The Constitution should continue to give the Ombudsman the absolute discretion to determine whether to initiate, continue or discontinue any investigation. It should also confer the Ombudsman with the discretion to decide whether a complaint has been duly made in accordance with the constitutional requirements.
529. The Constitution should provide that if the person or persons aggrieved has or had a right of appeal, reference or review to a tribunal under statute or a right to take legal proceedings in a court of law, the Ombudsman shall not proceed to investigate their complaint unless satisfied that the person or persons cannot or could not avail themselves of the right or remedy or that a breach of any individual right protected by Chapter 2 of the Constitution may be involved.
530. The Ombudsman's existing discretion to decline to investigate any complaint which he or she considers frivolous or vexatious or trivial, or where he considers that the person aggrieved has insufficient interest in the matter complained of, or where the complaint has been delayed without reasonable cause for more than twelve months should be provided for in an Act.
531. The Constitution should continue to provide that the Ombudsman may not investigate any action which the Prime Minister certifies in writing was taken by a minister acting in his or her own deliberate judgement.
532. The Constitution should continue to give the Ombudsman wide power to require any minister, member or officer of any department or authority or any other person who in the Ombudsman's opinion, is able to do so, to disclose any

- information or produce any document relevant to any investigation.
533. It should continue to give the Ombudsman the powers of the High Court in relation to the attendance and examination of witnesses and the production of documents.
534. The Constitution should also continue to provide that any law which otherwise prohibits a state servant from disclosing official information does not affect their duty to supply the Ombudsman with any information or document.
535. The Constitution should continue to disallow the state from making, in relation to any document or information required by the Ombudsman, any claim of state privilege which might normally apply in a court of law.
536. The Constitution should authorise Parliament to provide in an Act for the ability of individuals to claim before the Ombudsman any other type of privilege available in a court of law.
537. The Constitution should continue to provide that information and documents relating to the proceedings of the Cabinet or any sub-committee of the Cabinet may be withheld from the Ombudsman following certification by the Secretary to the Cabinet, acting on the advice of the Prime Minister.
538. It should continue to authorise the Attorney-General to give notice to the Ombudsman that it would be contrary to the public interest in relation to defence, external relations or internal security if a specified document or information, or information or documents belonging to a specified class were disclosed. It should provide that in these circumstances those matters cannot be disclosed by the Ombudsman or his or her officers.
539. The Constitution should provide that the Ombudsman has a discretion as to how information is to be obtained and how an investigation is to proceed.
540. It should also provide for persons implicated in a complaint to have a general right to make comments to the Ombudsman on the complaint.
541. The Constitution should no longer provide for the other procedural matters contained in section 136. These should be

provided for by Act.

542. The Constitution should continue to require the Ombudsman to make an annual report to the President concerning the discharge of his or her functions, and to require that the report shall be laid before the Bose Lawa and the Bose e Cake.
543. In order to provide necessary flexibility, the Constitution should provide for the existence of at least one office of Ombudsman but expressly allow Parliament to establish other offices of Ombudsman by Act. The Constitution should also provide that, in the event that other offices of Ombudsman are established, Parliament should provide for the designation of one of them to be Chief Ombudsman responsible for the administration of the office and the co-ordination and allocation of the work between the Ombudsmen. The Constitution should also provide that subject to this provision for the Chief Ombudsman, all powers and privileges conferred on the Ombudsman by the Constitution apply equally to each Ombudsman.
544. The President should continue to appoint the Ombudsman. He or she should do so on the recommendation of the Constitutional Offices Commission, with the concurrence of the Prime Minister and the approval of the sector standing committee of the Bose Lawa responsible for matters relating to administrative services.
545. If the office of Ombudsman is vacant or the holder of the office is for any reason unable to perform his or her functions, the Constitution should authorise the President to make an acting appointment on the recommendation of Constitutional Offices Commission and with the concurrence of the Prime Minister, tendered after the Prime Minister has consulted the Leader of the Opposition.
546. The Constitution should provide that only a judge of a superior court may be appointed to act as Ombudsman when the office is vacant.
547. The existing disqualifications for appointment should also be retained.
548. The existing provisions that the Ombudsman shall not perform

the functions of any other public office and that the Ombudsman may not, without the approval of the Prime Minister, hold any other office of emolument or engage in any occupation for reward outside the duties of the office of Ombudsman should be retained.

THE AUDITOR-GENERAL

Functions

15.128 Section 148 of the Constitution establishes the office of the Auditor-General as a public office and provides for its constitutional powers and functions. It is another vital part of the constitutional system for securing ethical and accountable government. Generally, the Auditor-General's function is to ensure accountability for public money and other property entrusted to all branches of the government.

15.129 Subsection 148(2) of the 1990 Constitution sets out the constitutional function of the Auditor-General. He or she is required to audit and report on "the public accounts of Fiji and of all courts of law, all authorities and officers of the Government". These include the accounts of statutory bodies other than those which, under an Act, are to be audited and reported on by some other person. Potentially, the Auditor-General's powers extend to all government spending, whether by ministers or state servants, the courts, the legislature or other agencies of government. Currently, the Auditor-General examines the accounts of all ministries and departments, city and town councils, rural local authorities, drainage boards, the Fijian Affairs Board, provincial councils and twenty-one of the existing thirty-one statutory authorities.

15.130 The Audit Act (Cap. 70) sets out the Auditor-General's actual duties. Section 6 of the Act requires him or her, on behalf of the Parliament, to inquire into and audit government accounts in the manner he or she deems necessary. It requires the Auditor-General to ascertain whether:

- the accounts have been faithfully and properly kept;
- all reasonable precautions have been taken to safeguard the collection of public moneys and that the laws, directions or instructions relating to them have been duly observed;
- expenditure has been properly authorised and applied to the purpose for which funds were appropriated by Parliament and has been otherwise properly accounted for; and that the regulations and

procedures applied are sufficient to secure an effective control over expenditure and that it has been incurred with due regard to economy and avoidance of waste and extravagance;

- adequate stores regulations and procedures have been made to ensure the proper receipt, issue and custody of stores and other property of whatsoever nature and that such regulations have been duly observed; and
- the provisions of the Constitution and Finance Act (Cap 69) and of any other law relating to money and stores subject to audit have been in all respects complied with.

15.131 Under the Act, the Minister responsible for finance may also require the Auditor-General to carry out any special audit which the Minister considers desirable in the public interest. The Auditor-General is also empowered at any time, on his or her own volition, to make to the Minister, for presentation to Parliament a special report on any matter incidental to the powers and duties under the Act.

15.132 The constitutional provisions do not specify any time-frame for the exercise of the Auditor-General's functions. In particular, the Constitution does not link the Auditor-General's functions with the annual Parliamentary authorisation procedures required by the Constitution which we review in Chapter 16 . A link is provided for under section 12 of the Audit Act (Cap. 70). Under that section, the Auditor-General is required to prepare and transmit to the minister responsible for finance, within 8 months of the end of each financial year (or longer, if a Parliamentary resolution permits), a report upon his or her examination and audit of all accounts relating to public moneys and property.

15.133 In view of the critical importance of the Auditor-General, the Constitution should continue to establish that office and state its basic functions. However, we consider that the Constitution would be improved if the Auditor-General's functions were specified in more detail, expressly linking them to the system of annual authorisation of spending. We consider that the constitutional statement of functions should go beyond accounts and also reflect the Auditor-General's role in relation to the control of public money and property.

15.134 We propose that the Constitution should provide that, at least once every financial year, the Auditor-General shall inspect and audit and report to Parliament on the:

- the public accounts of Fiji;

- the control of public money and property of Fiji;
- all transactions with or concerning public money or property of Fiji.

15.135 It should also require the Auditor-General to ascertain whether all transactions with or concerning public money or property have been authorised by or under the Constitution and any applicable law, and that all expenditure has been applied to the purpose for which it was authorised.

15.136 The provision should be drafted in a way which covers all branches, departments, agencies and instrumentalities of the Government, but should continue to allow statutory bodies to be exempted by Act.

Audit of state-owned companies

15.137 At present, the Auditor-General is not required to audit the accounts of any of the twelve incorporated companies in which the Government holds shares. These accounts are audited by professional accountants in the private sector appointed by the companies' boards. In his submission to the Commission, the Auditor-General pointed out that under present arrangements the accountability of such boards to Parliament is not assured as their auditors are not required to report to Parliament. The Auditor-General sought the constitutional power to review the audits of these private sector auditors and to report his findings to Parliament.

15.138 The Commission agrees with the principle that all public investment must be subject to Parliamentary scrutiny. We also agree that an accurate and full picture of the state of public finances is vital in a democratic society. However, the relative size of the Government's investments varies from company to company. Some companies are wholly-owned by the Government while in others it has only a small share. Some are owned through the intermediary of statutory corporations or as subsidiaries of another government-owned company. Again there is also great variety in the form of government investment in companies. Besides the investment of public money in the form of shares, the Government may also invest by lending money or may commit public money by issuing guarantees to lending institutions.

15.139 The principle that Parliament should be as fully informed as possible of all activities involving public money must also be balanced against the need for public enterprises to maintain their competitiveness in the marketplace. This competitiveness will in part depend on their ability to keep some details of their

financial status and activities confidential.

15.140 Given these complexities, the Commission believes that if the Auditor-General is to be given these additional functions it should be by an Act of Parliament. We recommend however that the Constitution provide that the Auditor-General shall have such additional functions and powers as may be prescribed by an Act of Parliament. This provision would authorise Parliament by Act to confer on the Auditor-General the function of conducting modern forms of audits such as efficiency audits and value-for-money audits.

Independence

15.141 Subsection 128(4) provides that in the exercise of his or her constitutional functions, the Auditor-General shall not be subject to the direction or control of any other person or authority. This independence is vital for the effective discharge of this office's functions. The Constitution should continue to contain this provision.

Access to Records, etc

15.142 To enable the Auditor-General to fulfil his or her constitutional functions, section 148(2) of the 1990 Constitution gives him or her and any other person authorised by the Auditor-General, access to all "records, books, vouchers, documents, cash, stamps, securities, stores or other government property in the possession of any officer". This is a necessary power that should be retained in the Constitution.

Reporting

15.143 Subsection 148(3) of the 1990 Constitution requires the Auditor-General to submit his or her reports to the Minister responsible for finance who in turn is required to cause them to be laid before each House of Parliament. Section 148 does not prescribe any time within which the Minister is required to table the reports in Parliament. Section 12 of the Act, however, requires the Minister to lay a report before Parliament within thirty days of receiving it or, if Parliament is not then in session, at its next meeting.

15.144 The section also authorises the Auditor-General "at any time, if he considers it desirable" to transmit a special report on any matter incidental to his or her powers and duties under the Act to the Minister "for presentation in like manner to Parliament".

15.145 The Commission proposes that the Constitution should continue to provide that the Auditor-General shall submit every report made in pursuance of constitutional functions to the Minister responsible for finance. In addition, it should require the Minister to lay the reports before Parliament within thirty days or, if Parliament is not then in session, at its next meeting. The Constitution should also require the Minister, if so required in any other special report of the Auditor-General, to lay that report before Parliament within the same period.

15.146 We received submissions proposing that the Constitution should provide that if the Minister fails to comply with the requirement to lay a report before the Parliament, the Auditor-General should be able to submit his report to the chairperson of the Public Accounts Committee. We do not think that this is necessary. In the very unlikely event that a Minister might not wish to lay a report before Parliament, the Auditor-General's ability to take or threaten court proceedings against the Minister, should ensure that this constitutional duty is fulfilled.

Appointment of Auditor-General

15.147 Earlier we made recommendations for the procedure to be followed in appointing the Ombudsman. As the Auditor-General is also an officer of the Parliament, we propose that the same procedure should apply, with modifications, to appointments to this office.

15.148 The Constitutional Offices Commission should have power to make recommendations for appointment. In this case, the concurrence of the Minister responsible for finance will be necessary. Similarly, it would be the sector standing committee of the Bose Lawa responsible for public accounts which would have the power to approve or reject a recommendation.

Acting appointments

15.149 In the event of a vacancy or the officeholder not being able to perform the office's functions, acting appointments should be made in the same way as a substantive appointment.

RECOMMENDATIONS

549. The Constitution should provide that the Auditor-General, at least once every financial year, shall inspect and audit, and report to Parliament on:

- (a) the public accounts of Fiji;**
- (b) the control of public money and property of Fiji;**
- (c) all transactions with or concerning public money or property of Fiji.**

- It should also require the Auditor-General to ascertain whether all transactions concerning public money or property have been authorised by or under the Constitution and any applicable law, and that all expenditure has been applied to the purpose for which it was authorised.**
- 550. The provision should be drafted in a way which covers branches, all departments, agencies and instrumentalities of the Government. It should continue to allow statutory bodies to be exempted by Act.**
- 551. The Constitution should allow the Auditor-General to have such additional functions and powers as may be prescribed by an Act of Parliament.**
- 552. The Constitution should continue to provide that the Auditor-General shall not be subject to the direction or control of any other person or authority.**
- 553. It should confer on the Auditor-General and on any other person he or she authorises, access to all records, books, vouchers, documents, cash, stamps, securities, stores or other government property.**
- 554. The Constitution should continue to provide that the Auditor-General shall submit every report made by him or her in pursuance of the constitutional functions to the Minister responsible for finance.**
- 555. It should, in addition, require the minister to lay the reports before Parliament within thirty days or, if Parliament is then not in session, at its next meeting.**
- 556. The Constitution should also require the Minister, if so required in any other special report of the Auditor-General, to lay that report before Parliament within the same period.**
- 557. The Auditor-General should be appointed by the President acting on the recommendation of the Constitutional Offices Commission, and with the concurrence of the Minister responsible for finance and the approval of the sector standing committee of the Bose Lawa responsible for public accounts.**
- 558. In the event of a vacancy in the office of Auditor-General or the officeholder not being able to perform the office's functions, acting appointments should be made in the same way as a substantive appointment.**

MEASURES TO SECURE INDEPENDENCE

Constitutional Office Holders

15.150 In this section, we examine and make recommendations on appropriate provisions to secure independence for all independent constitutional office holders. As well as the Ombudsman and the Auditor-General, the 1990 Constitution also establishes the office of Director of Public Prosecutions and the Supervisor of Elections as independent constitutional offices. In addition, the Constitution gives the Commissioner of Police independence in regard to the use and operational control of the Police Force. In Chapter 12, we proposed that the Solicitor-General should also be conferred with independence in respect of the politically sensitive functions of that office.

15.151 Where independence presently exists, it is conferred by an express statement in the provisions dealing with the particular officer, that in the exercise of all or particular constitutional functions, he or she “shall not be subject to the direction and control of any other person or authority”. Under section 158 of the Constitution, apart from the proceedings of the Ombudsman, this independence is subject to the court’s power to determine whether the independent officer has performed the protected functions in accordance with the Constitution and the law, or should not perform those functions.

15.152 In addition to this express grant of freedom from direction or control, the 1990 Constitution provides for additional measures to ensure the holders of the independent offices are insulated from certain kinds of political or other pressures which may cause their independence to be compromised.

15.153 It does so by providing special appointment and removal procedures as well as special provisions for terms and conditions of office including salaries.

Appointment

15.154 All constitutional offices, other than the Ombudsman, are at present appointed by one or other of the existing service commissions. As we explained in Chapter 14, service commissions exist in order to ensure that appointments to the state services are made on an impartial, non-partisan basis. In that chapter, we also recommended that the Constitution should establish a new service commission to be called the Constitutional Offices Commission. As its name indicates, the new Commission should have responsibility for the appointment and removal of persons holding constitutional office.

15.155 This proposal is in response to a number of submissions which sought the establishment of a special body to make appointments to existing independent constitutional offices as well as some others. All of the offices were perceived as exercising important state functions and powers, which require special protection from political interference. We agree that the nature and status of these offices warrant different treatment from other offices in the state services and see a separate Constitutional Offices Commission as reinforcing the independent nature of these offices.

Constitutional Offices Commission

15.156 The Commission should comprise a chairperson and two other members. Members should be subject to the general disqualifications and appointing procedure that we recommended in Chapter 14 as applicable to all service commissions. We do not propose specific constitutional qualifications but we envisage that the Chairperson and all members should be eminent people with significant experience in the public or private sector. They should be persons of high integrity with a record of distinguished service to the community.

Appointing functions

15.157 In addition to responsibility for recommending persons for appointment as Ombudsman and Auditor-General, we proposed in Chapters 10, 11 and 12, that subject to specified consultations, the Constitutional Offices Commission should have constitutional responsibility for making appointments to the following offices:

- The Solicitor-General;
- The Director of Public Prosecutions;
- The Secretary-General to Parliament;
- The Supervisor of Elections; and
- The Commissioner of Police.

15.158 We here propose that it should also have responsibility for appointing the Governor of the Reserve Bank of Fiji.

15.159 We include the Governor of the Reserve Bank because we received a number of submissions seeking an impartial way of making appointments to that office, which would ensure that the appointee is independent. The Reserve Bank, and its Governor in particular, are conferred with important functions which, in

the interests of Fiji's financial system and its economy, must be exercised in an independent manner.

15.160 In exercising its powers over the office of the Governor of the Reserve Bank, the Commission should be required by the Constitution to consult the minister responsible for finance and the Board of the Reserve Bank.

15.161 In view of our proposal that the Governor of the Reserve Bank should be appointed by the Constitutional Offices Commission, we also propose that the Constitution should contain a provision establishing that position. It should not provide that it is a "public office". This will mean that the Governor should remain an employee of the Reserve Bank rather than become a state servant. The existing qualifications for, and tenure of, this office should remain provided for under the Reserve Bank Act (Cap. 210).

15.162 We propose that the Act should provide that the Deputy Governor should perform the Governor's functions when there is a vacancy or an inability to perform the functions of office. If an acting appointment is considered necessary, the Act should also empower the Constitutional Offices Commission, with the concurrence of the Minister responsible for finance, to appoint a member of the Board to act as Governor.

Disciplinary control

15.163 As a general rule, apart from their power to appoint and remove, service commissions are conferred with responsibility for exercising disciplinary control over the holders of offices to which they may make appointments. The term, "disciplinary control" refers to the power to punish officeholders for minor infractions not serious enough to deserve removal. At present, no commission exercises disciplinary control over independent constitutional officeholders.

15.164 The possibility of disciplinary control has the potential to compromise these officeholders' independence. In view of the importance of these offices, and also the appointing procedure which we recommend, this Commission envisages that only persons of high personal integrity will be appointed. We therefore do not believe it is necessary to vest responsibility for disciplinary control in the Constitutional Offices Commission.

Removal

15.165 The Constitution contains various provisions governing the removal of independent constitutional offices.

15.166 Subsections 134(6) and section 130 of the 1990 Constitution, when read together provide that the Ombudsman may only be removed from office for “inability to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour”. They provide an exclusive procedure for such removal.

15.167 If the President, acting in his own deliberate judgement, considers that the Ombudsman should be removed for either reason, he or she must appoint a tribunal to investigate the matter. The tribunal must consist of a chairperson and two other members, all of whom must hold or have held high judicial office in Fiji or any other country prescribed by Parliament. The tribunal is required to inquire into the facts and to advise the President whether or not the Ombudsman should be removed.

15.168 The provisions authorise the President to suspend the Ombudsman while the tribunal investigates and to revoke the suspension at any time. It is automatically revoked if the tribunal advises the President that the Ombudsman should not be removed.

15.169 Similar procedures apply for the removal of the Supervisor of Elections, the Director of Public Prosecutions and the Auditor-General under section 131 of the 1990 Constitution. In their cases, the service commissions which appointed them, exercise the various powers after first consulting the Prime Minister. The tribunals to consider the removal of these officers should comprise a minimum of three persons with judicial office or experience.

15.170 There is no purpose in providing for independent constitutional offices if they can be easily dismissed and replaced. We therefore recommend that the existing limited grounds and procedure for removing these officeholders should be retained and extended to all officers appointed by the Constitutional Offices Commission. We propose, however, that in expressing the ground of misbehaviour, the Constitution should make a link with the integrity code proposed above.

15.171 The Constitution should provide that the Constitutional Offices Commission shall have power to remove all constitutional officers. It should exercise the removal powers, at present, vested in the various service commissions and in the President.

15.172 Except in relation to the Governor of the Reserve Bank and the Secretary-General to Parliament, the Commission should be required to act after consulting

the Prime Minister. In addition, when exercising the power to remove the Solicitor-General and the Director of Public Prosecutions, the Commission should consult the Attorney-General. Before exercising its powers over the Ombudsman and the Auditor-General, the Commission should in addition to the Prime Minister consult the Leader of the Opposition .

15.173 Before exercising any of its removal powers over the Governor of the Reserve Bank, the Commission should consult the Minister responsible for finance as well as the Board of the Bank. In the case of the Secretary-General to Parliament, the Speaker and the President of the Bose e Cake should be consulted.

Tenure in office

15.174 The 1990 Constitution makes various provisions affecting the tenure of existing independent constitutional offices. Subsection 134(5)(a) gives the Ombudsman a fixed term of four years in office. The holder of that office may however be re-appointed for the same term in accordance with the general rule contained in section 153(1). Subsection 95(1) provides that the Commissioner of Police is to be appointed for a fixed term of five years but the Constitution is not clear whether the holder of this office may be re-appointed under the general rule.

15.175 Section 151 of the Constitution allows appointments of the Supervisor of Elections, the Director of Public Prosecutions and the Auditor-General to be made for a fixed term of *not less* than four years. These officers may therefore be appointed for a longer, or indefinite, term.

15.176 Under section 131(1) of the 1990 Constitution, the Supervisor of Elections, the Director of Public Prosecutions and the Auditor-General are required to retire at the age of fifty-five. The provision, however, allows the President, after consultation with the Prime Minister and the Public Service Commission, to permit the Auditor-General to continue in office for an additional six months to finish off any audits or reports which are still in progress.

15.177 The 1970 Constitution had provided for a retiring age of sixty years for these offices. It would seem that the reduction in the retiring age was to bring it into line with the general retiring age for all other civil servants. This general retiring age is not prescribed in the Constitution but is contained in a statute and can be easily amended.

15.178 Another change made by the 1990 Constitution was a new provision allowing the relevant Commission to re-appoint any of these officers after

retirement “for such period as it sees fit”. The fact that re-appointments can occur means that the existing retirement age is not a strict one. It would seem that post-retirement re-appointments are not subject to the minimum term of four years. We consider that both aspects of this provision give great potential to compromise an officeholder’s independence.

15.179 This Commission has seriously considered the question of the appropriate period of tenure for independent constitution officeholders. We have come to the conclusion that it is not desirable to all constitutional officeholders to have unlimited tenure in their office. We consider that periodically the body which appointed them should review their suitability for the position. We have sought to balance this principle with the recognition that these persons require reasonable security of tenure to be able to perform their functions independently.

15.180 We therefore propose that all constitutional officeholders appointed by or on the advice of the Constitutional Offices Commission should be appointed for fixed terms of five years but should be eligible for re-appointment.

15.181 We are aware that the combination of a fixed term of five years and a compulsory retirement age of fifty-five years may be unfair. This would occur if a person became eligible for appointment or re-appointment to one of these offices after he or she had turned fifty-one years but before fifty-five years. Our recommendation for fixed term appointments would mean that such a person could not be appointed or re-appointed.

15.182 One way of dealing with this potential problem would be to allow, in these circumstances only, a shorter contractual period ending on the day on which the person must retire. But this would be inconsistent with the principle that officeholders must have reasonable tenure in office.

15.183 We therefore propose the Constitution should no longer provide any retiring age for constitutional officers. We believe that the need to maintain consistency with the retiring age applying to the civil service should be given appropriate weight by the Constitutional Offices Commission when considering any appointment or re-appointment.

15.184 In view of the nature of the Auditor-General’s functions and the time that an audit may take to complete, we also propose that the Constitution should allow the Constitutional Offices Commission, acting after consultation with the Prime Minister and the Minister responsible for finance, to permit the Auditor-

General to continue in office for a period not exceeding six months after the expiry of any contract.

Delegation

15.185 At present, the various commissions which appoint or remove independent constitutional officers may not delegate these powers. Similarly, the Constitutional Offices Commission should have no power to delegate.

Guaranteed Remuneration

15.186 The power to increase, reduce or withhold remuneration levels of any independent officeholder gives the person or authority holding that power the ability to influence the officeholder. This might undermine the ability of the officer to act independently.

15.187 Section 146 of the 1990 Constitution therefore provides that the salaries and allowances payable to independent officeholders must be prescribed by Act of Parliament. As we explain in Chapter 16, these salaries are “charged on the Consolidated Fund”. This means that once fixed, unlike other expenditure, payment of these salaries does not require any further approval by Parliament.

15.188 These rules ensure that the salaries and allowances are set in an open and accountable way and cannot be used as a means to influence or victimise officeholders. We propose that they should continue to be provided in the Constitution. They should apply to the Ombudsman, Director of Public Prosecutions, the Auditor-General, the Solicitor-General, the Secretary-General to Parliament, the Commissioner of Police and the Supervisor of Elections. We do not include the Governor of the Reserve Bank because this office is not a public office. As such, the salary and allowances payable to the holder of this office are not paid out of the Consolidated Fund.

15.189 Under subsection 146(3), an individual officeholder’s salary and terms and conditions of employment cannot be altered to his or her disadvantage during tenure in office. This means that if Parliament or another body exercises its power to reduce salaries and allowances, it cannot affect the holder of an office and will only take effect on a new appointment. This protection should apply to all the constitutional officers including the Governor of the Reserve Bank.

Guarantee of Resources

15.190 In Chapter 15, we have made recommendations regarding the exercise of the Public Service Commission's powers over the staff of the Ombudsman and the Auditor-General.

15.191 The Commission received some submissions proposing that the Constitution contain a general provision guaranteeing all independent constitutional officeholders control over the levels of staff and other resources so that they are able to perform their constitutional functions with effective independence. The submissions saw the Government's power to allocate resources as a potential means of thwarting the effectiveness and independence of these officers.

15.192 The Commission considered this question very carefully. It concluded that a constitutional provision to that effect would not be practical. At any one time, there are always competing priorities for the allocation of financial resources between the various activities and departments of the Government. There is also a similar competition for skilled human resources. These are matters of policy. In our view, the Government must have the ability, subject to Parliamentary approval, to decide how limited national resources are to be allocated.

15.193 Any constitutional guarantee in this area would necessarily have to be in broad terms. In many countries which have such general constitutional provisions, the Courts have continuously been drawn into the area of policy and politics by independent officers seeking more and better resources. This is not desirable.

15.194 In these circumstances, we believe that the existing constitutional statement that these officers are not to be "subject to direction and control" provides some protection at least from the strategic withdrawal of resources. The Privy Council in an appeal from Fiji indicated that in cases where resources are denied or are withdrawn by the Government with the clear purpose of undermining independence, the Courts would not be powerless to intervene.

RECOMMENDATIONS

- 559 The Constitutional Offices Commission should comprise a chairperson and two other members. Membership should be subject to the general disqualifications we recommend for all service commissions in Chapter 14. The chairperson and members should be appointed in accordance with procedures outlined in that Chapter.**

560. In addition to responsibility for recommending candidates for appointment as Ombudsman and Auditor-General, and for appointing:

- **The Solicitor-General;**
- **The Director of Public Prosecutions;**
- **The Secretary-General to Parliament;**
- **The Supervisor of Elections; and**
- **The Commissioner of Police,**

the Commission should also appoint :

- **the Governor of the Reserve Bank of Fiji.**

Before appointing the Governor of the Reserve Bank, the Commission should be required to consult the Minister responsible for finance and the Board of the Reserve Bank.

561. The Constitution should contain a provision establishing the position of Governor of the Reserve Bank. The provision should not provide that this office be a public office. The existing qualifications for and tenure of this office should continue to be provided for under the Reserve Bank Act (Cap. 210).

562. The Reserve Bank of Fiji Act should provide that the Deputy Governor should perform the Governor's functions when the position is vacant or if when the Governor is temporarily unable to perform the functions of that office. If an acting appointment is necessary, the Constitutional Offices Commission should be empowered to appoint a member of the Board with the concurrence of the Minister responsible for finance.

563. The Constitutional Offices Commission should not have disciplinary control over the independent constitutional offices.

564. In substance, the Constitution should provide that an officer appointed by or on the recommendation of the Constitutional Offices Commission can only be removed for inability to perform the functions of his or her office (whether arising from infirmity of body or mind or any other cause) or misbehaviour.

565. The existing tribunal procedure for removing independent officeholders should be retained. However, in expressing the ground of misbehaviour, the Constitution should make a link with the integrity code proposed above.
566. The Constitution should provide that for all constitutional officers, the Constitutional Offices Commission should exercise the powers at present vested in the various service commissions and in the President.
567. Before exercising any power in regard to the removal of the holders of any office other than the office of Secretary-General to Parliament or Governor of the Reserve Bank, the Commission should be required by the Constitution to consult the Prime Minister. For the Director of Public Prosecutions and the Solicitor-General, it should also be required to consult the Attorney-General. Before exercising the power to remove the Ombudsman and the Auditor-General, it should consult the Leader of the Opposition.
568. Before exercising any power to remove the Secretary-General to Parliament from office, the Constitutional Offices Commission should first consult the Speaker and the President of the Bose e Cake.
569. Prior to exercising its powers to remove the Governor of the Reserve Bank, the Commission should be required by the Constitution to consult the Minister responsible for finance and the Board of the Reserve Bank.
570. The Constitutional Offices Commission should not be permitted to delegate any of its powers.
571. The Constitution should provide that the Ombudsman, the Director of Public Prosecutions, the Solicitor-General, the Auditor-General, the Secretary-General to Parliament, the Supervisor of Elections and the Commissioner of Police shall be paid such salaries and allowances as may be prescribed by Parliament.
572. It should provide that the salary and allowances and the terms of office of all constitutional officers within the area of responsibility of the Constitutional Offices Commission may not be altered to their disadvantage after appointment.

- 573. All constitutional officeholders within the area of responsibility of the Constitutional Offices Commission should be appointed for a fixed term of five years with eligibility for re-appointment.**
- 574. The Constitution should allow the Constitutional Offices Commission, acting after consultation with the Prime Minister and the Minister responsible for finance, to permit the Auditor-General to continue in office for a period not exceeding six months after the expiry of his or her contract.**
- 575. The Constitution should no longer stipulate any retiring age for constitutional officers.**

INDEPENDENCE OF CONSTITUTIONAL COMMISSIONS AND TRIBUNALS

15.195 The 1990 Constitution also guarantees independence of action to members of independent constitutional commissions and tribunals established for special investigatory purposes.

15.196 The tenure of members of the various commissions is set by individual provisions applying to the particular commission. We have elsewhere made recommendations on this matter.

15.197 Under subsection 157(4), all constitutional commissions are not 'subject to the direction or control of any other person or authority, except where otherwise provided under the Constitution'. The exception allows for those situations in which commissions are required to consult or obtain the concurrence of some other person. This provision is applied to constitutional tribunals by subsection 157(7).

15.198 Under section 146, the salaries and allowances of commissioners, like those of independent officers, are to be prescribed by Act and may not be altered to their disadvantage. This provision should be retained.

15.199 Section 130 sets out the procedure for the removal of Commissioners. It is the same procedure which we described above as applying, at present, to the Ombudsman. Although section 130 expressly applies only to the existing service commissions, other sections which deal specifically with other constitutional commissions at present apply the provisions of the section to those commissions.

15.200 By section 130, the power to remove a commissioner is vested in the President. Commissioners can only be removed for “inability to discharge the functions of office (whether arising from infirmity of body or mind or any other cause) or misbehaviour”. We propose that these limited grounds should be retained, subject to a reference to the proposed integrity code.

15.201 They may be removed by the President only on the advice of a three-member tribunal especially appointed to investigate allegation of infirmity or misbehaviour. All the members of a tribunal to investigate a member of the Judicial Legal Services Commission must hold or have held high judicial office. In the case of a tribunal to investigate a member of any other commission the chairperson and one other member should be so qualified.

15.202 In exercising the powers of removal in relation to a member of the Judicial Legal Services Commission, the President must consult the Chief Justice, and for a Public Service Commissioner or a Police Service Commissioner, the Prime Minister must be consulted. Under subsections 47(5) and 51(4) of the 1990 Constitution, the President acts in his own deliberate judgement for the removal of members of the Constituency Boundaries and Electoral Commissions.

15.203 The procedure required by existing provisions should be retained. We propose, however, that only the chairperson and one member of a tribunal to investigate the removal of any commissioner should have judicial qualifications. We make this proposal in light of our earlier recommendations that the appointed member of the Judicial Service Commission need not be a judicial officer.

15.204 We also propose that the President should not be required to act in accordance with the advice of the Chief Justice in appointing and removing the appointed member of the Judicial Service Commission. In any case involving the removal of any member of a constitutional commission, the President should act in accordance with the advice of the Prime Minister, tendered after the Prime Minister has consulted the Leader of the Opposition.

RECOMMENDATIONS

- 580. The Constitution should continue to give all constitutional commissions and special constitutional tribunals freedom from the direction and control of any other person or authority except as otherwise provided by the Constitution.**

- 581. The Constitution should provide that the salaries and allowances of all commissioners should be prescribed by Act of Parliament. It should also provide that these cannot be altered to a commissioner's disadvantage after appointment.**
- 582. The Constitution should continue to provide that a member of a constitutional commission can only be removed for "inability to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause) or misbehaviour".**
- 583. The tribunal procedure presently required for the removal of members of commissions should be retained, subject to changes we propose in the following recommendations.**
- 584. The Constitution should require that the chairperson and at least one other member of a tribunal appointed to advise on the removal of a commissioner should hold or have held high judicial office.**
- 585. The Constitution should provide that in any case involving the removal of any member of a constitutional commission, the President should act in accordance with the advice of the Prime Minister, tendered after the Prime Minister has consulted the Leader of the Opposition.**

OFFICIAL INFORMATION

Submissions

15.205 The Commission received a number of submissions proposing that the Constitution should secure greater public access to official information. By "official information" we mean all information collected and kept by the Government as well as information about the Government's activities.

15.206 Some submissions sought to have a general right to official information included with the fundamental rights and freedoms in Chapter 2 of the Constitution.

Existing Law

15.207 At present, section 13 of the 1990 Constitution includes freedom to receive information within the ambit of an individual's freedom of expression. This seemingly broad right may, however, be limited by any law which makes provision

for the imposition of restrictions upon public officers. Under that limitation, many existing laws effectively restrict public access to official information.

15.208 The present law on official information in Fiji is almost wholly composed of statutes and rules introduced during colonial times. The main rules are found in the Official Secrets Act 1911, (a British colonial statute which was applied to Fiji as an imperial Act), the Public Records Act (Cap.108) and in the General Orders made by the Public Service Commission under statutory power. Other provisions for preserving confidentiality in specific areas exist in the Income Tax Act (Cap. 201), the Statistics Act (Cap. 71), the Factories Act (Cap. 99), the Employment Act (Cap. 92) and other Acts .

15.209 The policy underlying the general legislation assumes that official information is government property which should not be given to anyone without specific reason and authorisation. Those seeking information must take the initiative and provide a good reason, while those who supply it are required to inquire whether authority and justification exist. Until then, any official information remains an "official secret". Criminal or disciplinary sanctions apply for any information "wrongfully" communicated.

Principles

15.210 We do not believe that secretive policy is appropriate for an independent democratic nation like Fiji. The submissions reflect a growing desire among the people of Fiji for fuller information about the Government's policies and activities, both past and present. This desire has been recognised by the Government itself in its various announcements that it will conduct its business in an open and transparent manner. These developments in part are due to the changing opinion in many countries about the proper relationship between governments and those who they govern. It is now generally accepted that governments have a duty to keep citizens informed of their activities and to give clear reasons for their decisions.

15.211 There are compelling reasons for reversing the thrust of the present laws from the protection of official secrets to providing for access to official information. These include the need to ensure more open and transparent government; to secure a greater accountability of public office holders; to increase people's participation in public affairs; and to protect the rights and interests of individuals.

15.212 Access to official information is all the more important in view of the extent to which government officials direct and regulate economic as well as social activity in Fiji. In particular, the Government, as the principal agent of

development, is responsible for initiating many projects and policies which have a direct impact on people's lives. Fiji Islanders therefore have every reason for wanting to know what their government is doing or has done, and why.

15.213 Our reference to the need for more open, transparent governance is based on the principle that people need to be fully informed so that they can play their rightful part in the democratic system. The public is not really able to judge policies, electoral platforms and the performance of governments without full information. Conversely, a government cannot expect full support for difficult or controversial policies and projects unless those who are to be affected have access to all relevant information. If they do, controversial decisions can more easily be said to be made by the people. One country's Committee on Official Information put the matter in the following way:

As the major force in national activity, the Government needs to have its aims broadly supported, its decisions understood and accepted. It is not to be expected that every one of these decisions will be popular, but the Government depends ultimately on public cooperation with the changes its decisions impose on people.

15.214 Many submissions which sought constitutional access to information reasoned that access is essential to ensure that politicians and administrations are accountable for their actions. We agree that without information, Parliament, the media and the public cannot properly scrutinise the actions of government or the reasons for those actions. We believe that unhealthy suspicion of government and its advisors can occur if decisions are reached without a full public explanation of how they have been reached.

15.215 In Chapter 3, we briefly described how Fiji faces the major challenge of adapting to rapidly-changing international economic conditions. We believe that a better information flow between government and the people, and the public discussion this will engender, will help achieve more creative and popular responses.

15.216 Elsewhere in the world, greater access to information has also been in response to concerns that individual citizens should know how much information on their personal affairs the government has collected and the need to have access to that information. The concerns arise, in part, because of the ability of modern technology to amass personal data on individuals. Many decisions affecting individuals may be based on personal information gathered in this way. For related reasons, in Chapter 9, we proposed that the Constitution should protect a right to personal privacy.

15.217 Official information about individuals may become available if they institute legal proceedings in respect of a particular decision. The Commission considers that recourse to legal process may not always be appropriate or available. We believe that, with some necessary exceptions, individuals should have a legal right to be told and if necessary, have corrected, any personal data held by the Government or its agencies.

15.218 For the foregoing reasons, we believe that as a basic principle, official information should be made available to the public unless there are good reasons to withhold it.

15.219 The Commission does not propose, however, that there be any constitutional provision on official information. We recognise that good public interest reasons may exist for keeping particular kinds of information confidential. These may include Fiji's internal and external security, public order, economic stability, commercial transactions, legal privilege (including client relationships), the privacy of individuals and the effective conduct of government business.

15.220 We also recognise that the existing laws and policies on official information are reflected in many longstanding practices and procedures of all Government departments and agencies. Considerable adjustments in these, as well as in the philosophies and attitudes of state servants will be necessary. We believe that any attempt at immediate administrative reform would not be workable.

15.221 We propose that the principle of access to official information should be implemented through an Official Information Act. The new Act should replace the Official Secrets Act.

15.222 The proposed Act should state the principle that official information should be made available to the public unless there are good reasons to withhold it. It should set out the grounds upon which information may be withheld. These grounds would coincide with the ones we stated earlier. The Act should allow for progressive application of the principle to different categories of information held by the Government.

15.223 The Act should also vest some person or authority with the function of hearing complaints from the public about the withholding of official information and resolving questions arising from these. In some countries, this function is performed by the Ombudsman. This option should be examined.

15.224 We envisage also that on the passage of the Act, some unit of the government will be charged with reviewing the practices of Government departments and agencies to ensure that official information becomes available to the public in accordance with the requirements of the proposed Act.

15.225 Necessary changes must also be made to the existing statutes and rules. We recognise that thorough legislative reform cannot be accomplished overnight. However, a good place to start immediately would be the Public Records Act (Cap. 108). The Act establishes the National Archives of Fiji and requires public records to be deposited there. Under the Public Records (Access) Regulations, public records are only available for public inspection if they have been in existence for thirty years. The thirty-year rule applies to any public record regardless of its subject matter. However, some records which have been classified as sensitive may be closed for an indefinite period and may only be inspected with the permission of the responsible Minister. The Act provides no systematic way of de-classifying closed records of this kind.

15.226 We see no reason why, except for security or other sensitive documents, official records should not be made available at a much earlier time. In the interest of promoting research, disseminating information and general public education, we recommend that all official records be made available to the public after 15 years unless there is a good reason to withhold them. The Act should further require the systematic and timely de-classification of closed public records once the need to withhold them no longer exists.

RECOMMENDATIONS

586. The Official Secrets Act should be replaced with an Official Information Act. The proposed Act should provide that official information should be made available to the public unless there is a good reason to withhold it.

587. The Act should set out clear grounds upon which information may be withheld. These grounds may include:

- national security;
- public order;
- economic stability;
- commercial transactions;
- legal privilege;

- **individual privacy;**
- **effective conduct of government business.**

- 588. It should allow for progressive application of the principle to different categories of information held by the Government.**
- 589. With necessary exceptions, the Act should give individuals a legal right to be told and if necessary, have corrected, any personal data held by the Government or its agencies.**
- 590. The Act should vest some person or authority with the function of hearing and resolving complaints from the public about the withholding of official information. On the passage of the Act, a unit or department of the government should be charged with reviewing the practices of Government departments and agencies to ensure that official information becomes available to the public in accordance with the requirements of the proposed Act.**
- 591. Necessary changes must also be made to the other existing statutes and rules. The Public Records Act (Cap. 108) should be immediately reviewed and amended to bring it into line with the new principle of official information. The Act should provide that all official records should be made available to the public after 15 years unless there is a compelling reason to withhold them. It should also provide a system for the timely de-classification of closed records, once the reason for withholding them no longer exists.**