

MAKING LAW AND POLICY: THE INSTITUTIONS OF GOVERNMENT

9.1 In this chapter the Commission sets out its proposals about the main institutions of government through which political power is exercised. We discuss the roles, and the consequent arrangements for the appointment or election, of the following bodies and offices:

- the Bose Levu Vakaturaga
- the President
- the Prime Minister and Cabinet
- the Opposition
- Parliament, consisting of
 - the Bose Lawa (at present known as the House of Representatives), and
 - the Bose e Cake (at present known as the Senate),
 as well as the President.

We also outline the system which should be used for the election of all candidates for elected office, and other aspects of the arrangements for the election of Members of Parliament. These are fully discussed in Chapter 10.

LINKAGES AND WIDER IMPLICATIONS

9.2 Before discussing each of the institutions mentioned, we should like to make three points. The first is that, as the organs through which the state makes policy and laws, the composition and functions of all of these main institutions of government are interwoven. It is not possible to think about the arrangements for any one of them, without focussing on the implications for the others. We acknowledged this inter-relationship early in our own discussions by describing it as a “web”. Our proposals about the functions and composition of each institution link them to one another in ways that will, we believe, create a viable, coherent and enduring constitutional structure. For that reason, we urge that the institutions be considered as a whole, not in isolation. A significant modification of the proposals for any one of them would risk weakening the tensile strength of the whole structure, and make it incapable of serving its intended purposes.

9.3 Secondly, it is important to focus on what those purposes are. In Chapters 2, 3 and 5, the Commission explained why, in the interests of all communities, political power should be shared among them. We recommended that the encouragement of multi-ethnic government should be the main objective of new constitutional arrangements.

9.4 We have also recommended the continuing recognition of the principle that Fijian interests are paramount, with the object of ensuring that, in the formation of a multi-ethnic government and its conduct of the affairs of the nation, the interests of the Fijian community are not subordinated to the interests of other ethnic communities. Fijian interests can and should be safeguarded in the context of the duty of all governments, whatever their ethnic makeup or political orientation, to take full account of the interests of all communities. If those interests appear to conflict, all parties should have a duty to enter into negotiations in good faith in order to reach agreement. We have recommended that these principles should be set out in the Constitution in the form of a Compact among all the people of the Fiji Islands.

9.5 We have also recommended that, in the light of these and other safeguards for the interests of the Fijian and Rotuman people, the electoral arrangements for the Bose Lawa can and should be based on the principle of equal suffrage. That principle should be departed from only to the extent necessary for the purpose of bringing about a transition from the present system of communal representation to a more open system. Even then, the departure should be kept as small as possible.

9.6 The Commission has also recommended that the Constitution should encourage the emergence of multi-ethnic governments by

- continuing to provide for the parliamentary form of government, under which the Prime Minister and Cabinet are chosen from among members of Parliament;
- recognising the role of political parties in forming governments that can command the support of a majority in Parliament's Lower House;
- providing incentives for cooperation among ethnic communities in forming and supporting political parties;
- phasing out communal representation, but still providing reasonable assurances to all communities that they will continue to be adequately represented in Parliament;

- imposing controls on the exercise of governmental powers so that, if multi-ethnic governments take office, all communities can be confident that their rights and interests will still be fully protected.

9.7 That leads to the third point. The proposals put forward in this chapter about the composition, election and powers of the country's political institutions must be looked at in the context of the safeguards provided by the Constitution as a whole. We have already described the purpose and content of the recommended Compact among all the people of the Fiji Islands.

9.8 We have also shown that the Bill of Rights provides strong guarantees to individuals and groups that their fundamental rights and freedoms, including their rights to land, cannot be interfered with by any government. In upholding these rights, the courts play their part, along with the executive and legislative branches, in protecting citizens against the power of the state. We have also proposed that the Constitution should place on governments a clear duty to take reasonable and necessary measures to promote ethnic and gender equality and social justice for all citizens.

9.9 In later chapters we discuss other constitutional safeguards, including arrangements for giving backbench members of all parties in Parliament the opportunity to influence executive decision-making; the protection of the independence of the courts; and arrangements to ensure efficient and politically neutral state services and ethical and accountable government. The Constitution will also protect the existing rights of all communities and groups. These include the rights of landowners under the 1990 Constitution in respect of natural resources and all rights under the entrenched legislation relating to Fijians, Rotumans and Rabi Islanders as well as to agricultural landlords and tenants.

9.10 The proposed arrangements for the institutions dealt with in this chapter should be evaluated in this wider setting. Only then can the people of the Fiji Islands make decisions about their future constitutional arrangements that will enable them to overcome the negative aspects of their constitutional inheritance. We have described this in Chapter 2 as the divisive and destructive interaction of the Westminster system of government on the one hand, and communal representation on the other, especially coupled with the perception that the protection of Fijian interests required the perpetuation of a predominantly Fijian government.

9.11 The following proposals put in concrete form constitutional arrangements that involve significant changes from the 1990 Constitution, and indeed the 1970 Constitution. The Commission believes that these changes are essential, if all communities are to live in unity and harmony in these islands and join together in governing them. We urge all citizens to consider not only the proposals themselves, but the reasons why the Commission has put them forward. It is time for all individuals and communities to reassess many of their existing assumptions about the structure of the main institutions of government.

THE BOSE LEVU VAKATURAGA

Need for greater recognition in the Constitution

9.12 Submissions from members of all communities expressed their respect for the Bose Levu Vakaturaga and its pre-eminent role in Fijian affairs. They recognised its beneficial influence in promoting not only the well-being of indigenous Fijians, but also that of the nation as a whole. There was wide support for the idea that the Constitution should not merely “recognise” the Bose Levu Vakaturaga as it does now, but also specify its composition, functions and powers.

9.13 The Commission endorses this view. The constitutions of a number of other Pacific Island countries embody aspects of their traditional chiefly systems and combine them successfully with democratically elected legislatures and governments. The Constitution should therefore provide that the chiefly council, known as the Bose Levu Vakaturaga, shall continue to exist, and have the composition, functions and powers provided for in the Constitution.

Membership

9.14 The submissions expressed a variety of views about the desirable composition of the Bose Levu Vakaturaga. Members of other communities recognised that this was largely a matter for Fijians. Among Fijians, there was emphasis on recognising the position of the paramount chiefs, but also on the need to include persons with the education and experience to contribute to the discussion of important issues. Some favoured a mixture of hereditary and elected members.

9.15 Interest was expressed in recognising the special place of the recognised successors to those chiefs who signed the Deed of Cession. The Commission’s researches revealed, however, that the composition of the group who actually signed the Deed of Cession on 10 October 1874 was partly a matter of chance. It did not include some chiefs who were senior in rank or who had been involved in

earlier negotiations about cession. It also included more than one member of some families. Nor does the composition of the signatory group at that time reflect arrangements that have since become well-accepted. For these reasons, the Commission considers that the Deed of Cession should not be used as a reference point for determining the present-day composition of the Bose Levu Vakaturaga (also referred to as the BLV).

9.16 The composition of the BLV should take account of its contemporary role. We consider that it should continue to be essentially an advisory body, though with the important functions of nominating candidates for the office of President and exercising a veto power over amendments of the entrenched legislation relating to Fijians, Rotumans and the Rabi Island community. As we explain below, it should be more independent of government than it is now.

9.17 The Commission considers that the Bose Levu Vakaturaga should consist of 46 members, and be made up as follows:

- Ex officio members:* The President;
The heads of the traditionally recognised confederacies of Kubuna, Burebasaga and Tovata;
The minister responsible for Fijian affairs;
- Appointed members:* Twenty members selected by the heads of the three confederacies jointly;
Five members, being persons of wide knowledge and experience in business, the professions, or other fields, nominated by the Chairperson of the BLV and confirmed by the BLV as a whole;
- Elected members:* Fourteen members elected by the Provincial Councils, one by each;
One member elected by the Council of Rotuma;
A person elected by the Rabi Island Council should be invited to attend when matters relating to the Banaban Land Act or the Banaban Settlement Act are under discussion.

9.18 Under this proposal, the BLV will be slightly smaller than its present size of 56. The Commission envisages that provincial interests will be reflected not only through the members elected by the Provincial Councils, but also through

those appointed by the heads of the confederacies. We see this mechanism as taking into account traditional territorial subdivisions and chiefly responsibilities in a more flexible way than is permitted by the direct representation of the provinces themselves.

9.19 There will no longer be any political input into the process of selecting members. However, the Minister responsible for Fijian Affairs will remain the main link between the BLV and Government. The Prime Minister will no longer be a member in that capacity, but can be invited to attend meetings. Members of Parliament who are not Ministers or Deputy Ministers should be eligible for appointment or election as members of the BLV, but their seats should become vacant if they accept appointment as a Minister or Deputy Minister.

9.20 The term of appointed and elected members should be three years. There should be no formal qualifications for membership, apart from those of the members to be nominated by the Chairperson. The concept of a "chiefly council" does not preclude the membership of persons who are not chiefs, but appointments by the heads of the three confederacies and elections by the Provincial Councils are likely to ensure adequate representation of persons of chiefly descent.

9.21 On the death of a head of a confederacy, the successor to that office will become a member of the BLV. If a head of a confederacy should be elected as President, or to any other political office, he or she should be entitled to designate a person to sit in the Bose Levu Vakaturaga for the time being as the representative of that confederacy. Other casual vacancies in the BLV's membership should be filled by appointment or election, as applicable to the member whose seat has become vacant. New members appointed or elected should serve for the balance of the term of their predecessors but should be eligible for re-appointment or re-election.

Procedure

9.22 The BLV should elect one of its members to be its Chairperson as the first item of business at its first meeting after the regular election of members by the Provincial Councils. The Secretary of the BLV should preside for this purpose. The members nominated by the Chairperson should be confirmed as the first item of business at the next following meeting and, if confirmed, invited to take their seats. Otherwise, the BLV should be free to regulate its own procedure. We assume most decisions would continue to be taken by consensus, but the possibility of a vote should not be excluded.

9.23 Consistently with our proposals for the Bose Levu Vakaturaga to be more independent in the exercise of its functions, it should be free to convene at times of its own choosing, as well as at the request of the Minister. It should meet not less frequently than once a year. It may need to convene at short notice if the office of President should become vacant, or there is a need to consider a Bill over of which it has a veto power. At any meeting, the Bose Levu Vakaturaga should be entitled to take up any matter relevant to its functions.

Functions

9.24 The Constitution should provide that the functions of the Bose Levu Vakaturaga are to advise the Government of the Republic of the Fiji Islands principally on any matter relating to the well-being of the Fijian people, but also on matters affecting the nation as a whole, whether referred to it by the Minister or the Fijian Affairs Board, or taken up by the Bose Levu Vakaturaga on its own initiative. Such a provision would reproduce the substance of section 3(2) of the Fijian Affairs Act, but go beyond it in giving the Bose Levu Vakaturaga a mandate to consider any matter of national concern, whether or not it particularly affects the well-being of the Fijian people. The Government can be expected to give due weight to the Bose Levu Vakaturaga's views.

9.25 The Bose Levu Vakaturaga should also have the functions concerning the nomination of candidates for the office of President proposed later in this chapter, and the responsibility of approving Bills altering the entrenched legislation relating to Fijians, Rotumans and the Banaban community settled on Rabi Island, or any other Bill certified by the Attorney-General as affecting Fijian land or customary rights. That responsibility is fully discussed in Chapter 20.

9.26 The Bose Levu Vakaturaga will thus take direct responsibility for approving Bills in the circumstances where section 78 of the 1990 Constitution now requires the approval of not less than eighteen of the twenty-four nominees of the Bose Levu Vakaturaga in the Senate. This change is proposed for two reasons.

9.27 First, many submissions urged that alterations to the entrenched legislation and other matters affecting Fijian land or other customary rights should be taken out of the hands of Parliament, so that they no longer appear to be at the mercy of the political process. The Commission agrees with this approach. Parliament will still need to be involved in any proposals to change the existing law, but, as proposed in Chapter 20, the Bose Levu Vakaturaga will have a veto power. This should reassure indigenous Fijians that the proposed changes in the composition

of Parliament and the encouragement of multi-ethnic governments will not put their land or other customary rights at risk.

9.28 Secondly, the proposed arrangements for the membership of the Bose e Cake provide for a largely elected body. For the reasons explained below, Fijian members are likely to predominate. We therefore propose that the only power to appoint members of the Bose e Cake should reside in the President, for the purpose of taking account of ethnic or gender imbalances in the composition of Parliament as a whole. For these reasons, there will no longer be a need for the Bose Levu Vakaturaga to nominate members of the Bose e Cake.

9.29 The Constitution should authorise Parliament to confer additional functions on the BLV by Act. Any such functions should be required to be compatible with the duty to act independently.

Duty to act independently

9.30 In view of the important functions of the Bose Levu Vakaturaga just described, specially those concerning the nomination of candidates for the office of President and the approval of changes to the entrenched legislation, the Constitution should protect its independence from the Government. As in the case of the constitutional officers and Commissions whose independence is already recognised, it should provide that the Bose Levu Vakaturaga shall not be subject to the direction or control of any other person or authority in the exercise of its functions.

9.31 This implies an independence not only from Government, but also from any political party. Submissions from some Fijians expressed concern about the identification of the Bose Levu Vakaturaga with party politics. That development was a product of its time. The conferment of additional constitutional responsibilities on the Bose Levu Vakaturaga and explicit recognition of its duty to act independently will give it the opportunity to distance itself from party politics, though the BLV will continue to be involved in politics in the broader sense.

9.32 The Commission considers that, as a facet of its independence from Government, arrangements should be made for the Bose Levu Vakaturaga to have reasonable autonomy in matters relating to its secretariat and its funding. Because the BLV meets only at intervals, it might be necessary for both to continue to be provided through the Ministry of Fijian Affairs or the Fijian Affairs Board. However, the BLV should have delegated authority to approve expenditure within the limits of the amount appropriated for its use by Parliament, and the members

of the secretariat should be answerable to the BLV and its Chairperson in the exercise of their duties.

Not a substitute for the Senate

9.33 Some submissions favoured giving greater powers to the Bose Levu Vakaturaga so that it could replace the Senate. The Commission believes that the Bose e Cake, as we suggest that body be called, can continue to serve a useful purpose as a House of review. That purpose can be enhanced by the new arrangements governing its membership, as proposed below. Accordingly, our proposals about the Bose Levu Vakaturaga should be considered in the light of our later recommendation for the retention of an Upper House.

RECOMMENDATIONS

205. The Constitution should provide that the chiefly council, known as the Bose Levu Vakaturaga, shall continue to exist, with the composition, functions and powers provided for in the Constitution.

206. The Bose Levu Vakaturaga should consist of 46 members, made up as follows:

Ex officio members: **The President;
The heads of the traditionally recognised confederacies of Kubuna, Burebasaga and Tovata;
The minister responsible for Fijian affairs;**

Appointed members: **Twenty members selected by the heads of the three confederacies jointly;
Five members, being persons of wide knowledge and experience in business, the professions, or other fields, nominated by the Chairperson of the Council and confirmed by the BLV as a whole;**

Elected members: **Fourteen members, each of whom shall be separately elected by each Provincial Council;
One member elected by the Council of Rotuma;**

A person elected by the Rabi Island Council should be invited to attend when matters relating to the Banaban Land Act or the Banaban Settlement Act are under discussion.

207. The terms of appointed and elected members should be three years. There should be no formal qualifications for membership, apart from those of the members to be nominated by the Chairperson. Other aspects of membership should be dealt with as proposed in paragraphs 9.19 - 9.21.
208. The BLV should elect one of its members as Chairperson as the first item of business at its first meeting after the regular election of members by the Provincial Councils. Other aspects of its procedure should be provided for as proposed in paragraphs 9.22 - 9.23.
209. The Constitution should provide that the functions of the Bose Levu Vakaturaga are to advise the Government of the Republic of the Fiji Islands principally on any matter relating to the well-being of the Fijian people but also matters affecting the nation as a whole, whether referred to it by the Minister or the Fijian Affairs Board, or taken up by the Bose Levu Vakaturaga on its own initiative.
210. The Bose Levu Vakaturaga should also have the functions later recommended concerning the nomination of candidates for the office of President, and the approval of Bills altering the entrenched legislation relating to Fijians, Rotumans and the Banaban community, or any other Bill certified by the Attorney-General as affecting Fijian land or customary rights.
211. The Constitution should authorise Parliament to confer additional functions on the Bose Levu Vakaturaga by Act, so far as those functions are consistent with its recommended duty to act independently.
212. The Constitution should provide that the Bose Levu Vakaturaga shall not be subject to the direction or control of any other person or authority in the exercise of its functions.
213. As a facet of its independence from government, arrangements should be made for the Bose Levu Vakaturaga to have reasonable autonomy in matters relating to its secretariat and funding.

AN INDO-FIJIAN COUNCIL

9.34 The Commission received submissions that the Indo-Fijian community should have the possibility of being consulted or expressing its views to Government, through a body which would bring together its religious and other community leaders on a widely representative basis. We endorse the principle behind this suggestion, but think that, initially, it should be taken up informally by the Indo-Fijian community. If there is agreement about the basis for the selection of the members of such a body, and it is able to meet and work in a way that demonstrates broad support for its composition and role, consideration should then be given to providing it with a statutory or constitutional base.

9.35 In the meantime, the Minister responsible for Ethnic affairs should be supportive of any initiative to form such a body. As a community-based, non-governmental organisation, it may be eligible for some financial support.

RECOMMENDATION

214. **The Indo-Fijian community should be encouraged to explore informally the possibility of forming a body to bring together its religious and other community leaders on a widely representative basis for the purpose of regular consultations with Government. If such a body proves to be broadly supported, consideration should be given to providing it with a statutory or constitutional base.**

THE PRESIDENT

9.36 The Commission's recommendation that the name of the state should be the Republic of the Fiji Islands implied that the Constitution should continue to provide for a republican form of government. In keeping with this recommendation, we also propose that the Head of State should continue to be described as the President. A recent Australian comparative study of Heads of State makes the point that, logically, the method of selection of the President, the qualifications for appointment and the tenure of office should depend on the role which the holder of that office is expected to perform. That might not be wholly true in the Fiji Islands, where there are firmly held views about the identity and method of selection of the President. Even so, it is useful to evaluate those views in the light of the President's constitutional functions.

The President's role and functions

Head of State

9.37 The 1990 Constitution made the minimum changes to the 1970 provisions about the office of Governor-General. The existence of that office implied that the Sovereign was the Head of State. Similarly, the creation of the office of President in 1987 implied that the holder of that office would assume that role. We consider, however, that the Constitution should provide expressly that the President is the Head of State of the Republic of the Fiji Islands.

Commander-in-Chief

9.38 Section 31 of the 1990 Constitution describes the office as that of "President and Commander in Chief". Again, that is a reflection of fact that the 1970 Constitution constituted the office of "Governor-General and Commander in Chief". The title reflects, in part, the modern role of the British monarch as nominally the supreme commander of the armed forces and also the fact that colonial Governors were usually authorised to exercise some of the prerogative powers of the Crown to organise and dispose of the armed forces in the colony.

9.39 It must be assumed that any residual common law powers of the Crown in this and other fields are to be regarded as part of "the executive authority of Fiji" vested in the President by section 82(1) and exercisable mainly through ministers. Moreover, in countries comparable with Fiji, most if not all aspects of the governance of the armed forces are now comprehensively provided for by statute. That is presumably a matter which will be looked at closely in the current Defence Review.

9.40 In any event, it is clear that, in contrast to the position in the United States of America, the coupling of the office of Commander-in-Chief with that of President does not confer legal powers in relation to the armed forces on the holder of the office. The title of Commander-in-Chief is purely honorary. It is well-understood that it conveys no power of actual command over the military forces. We understand that there is a general desire to continue to designate the President as Commander-in Chief. The Constitution should so provide.

The role of the President under a parliamentary system of government

9.41 The President's role and functions are greatly affected by another of the Commission's early recommendations: that the Fiji Islands should retain the parliamentary system of government. This means that most executive power will

continue to rest with the Cabinet. For the most part, the President will be bound to act on the advice of ministers. The holder of the office will not be what is sometimes called an “executive President” who combines the role of Head of State with that of head of the government. In consequence, the President’s office closely resembles that of the former Governor-General.

The symbolic value of the office of President

9.42 Like many who made submissions, the Commission attaches importance to the symbolic value of the office of President. In a multi-ethnic society like that of Fiji, the office of President should be seen as exemplifying the unity of the nation. The holder of the office should not be involved in party politics and should be able to command the loyalty of the members of all communities. Although the office of President has been in existence only since 1987, such an expectation is already strong. The question is whether the Constitution should refer expressly to the symbolism of the office of President of the Republic.

9.43 There are two examples of such provisions among Pacific constitutions. The Constitution of Vanuatu provides that “the head of the Republic shall be known as the President and shall symbolise the unity of the nation”. Similarly, although Tuvalu is a monarchy, its constitution provides that “... the office of Head of State is a symbol of the unity and identity of Tuvalu, and the Head of State is entitled to proper respect accordingly”.

9.44 The Commission considers that, in view of the proposals made below about eligibility to be President, the Constitution should provide expressly that the office of President symbolises the unity of the Republic. Such a provision will be an important signal not only to the people of the Fiji Islands and the person elected to fill the office, but also to the Government, about the advice it might tender on the way in which the President should carry out the duties of the office.

The President as the personification of the state

9.45 In most countries the Head of State performs formal functions reflecting the fact that this is the highest constitutional office in the land. The President attends all state occasions, receives foreign dignitaries and makes state visits to other countries. He or she signs the credentials of the Republic’s ambassadors and receives those of ambassadors accredited to the Fiji Islands, and may also perform other formal actions in relation to the conduct of foreign affairs. As the fount of honour, the President confers decorations on citizens who have made a notable contribution to the country.

9.46 In exercising these formal functions, the President acts generally in accordance with the advice of ministers, but within the constraints inherent in the office, is likely to be left considerable latitude, for example in the content of speeches. The exception is the President's speech at the beginning of a new session of Parliament. That document is produced under the direction of the Cabinet to outline the Government's policies and proposals for the coming year.

9.47 The presidential functions arise from the nature of the office of Head of State. They do not need to be provided for specifically in the Constitution, unless it is desired to make provision about how they will be exercised. Other functions will be discussed in later chapters. They include assent to legislation; the appointment of the Prime Minister, other Ministers, judges and other high officers; the summoning, prorogation and dissolution of Parliament and the issue of writs for elections; the exercise of the prerogative of mercy and the power to refer questions as to the effect of the Constitution to the Supreme Court. In exercising most, but not all, of these powers, the President is again required to act in accordance with the advice of ministers, or another constitutional body.

9.48 In Chapter 12, we discuss the matters on which the President acts in his or her "own deliberate judgment". Even then, the President takes account of conventions about the way in which the parliamentary system works in practice. The essence of the President's "reserve" powers is that they are a backstop - there only to ensure that the Prime Minister and other political leaders themselves act constitutionally.

9.49 Under the Constitution, the Prime Minister is required to keep the President informed concerning the general conduct of the government of Fiji, a duty corresponding to that owed to the Sovereign in Britain. The reference to this duty implies that, in his or her confidential discussions with the Prime Minister, the President has the right "to be consulted ... to encourage ... to warn", to quote the well-known words of the 19th century commentator, Walter Bagehot. The President is in a position to exercise considerable influence, rather than power.

9.50 In the Fiji Islands, as in most other countries with a parliamentary system of government, the President's functions are influenced by the way in which the office of Head of State has evolved historically. The role of the President under the Constitution should continue to parallel closely the former role of the holder of the office of Governor-General. In exercising that role, the President should take account of the express constitutional provision already recommended, that the office of President symbolises the unity of the nation. The nature of the President's role should be reflected in the arrangements for choosing the holder of the office.

Choosing a President

Ethnicity

9.51 The majority of those making submissions expressed views about who should be eligible to be President and how the holder of that office should be selected. There was very wide support among all communities for the idea that the President should continue to be an indigenous Fijian. Some thought that, as is the case under the 1990 Constitution, this should not be provided for expressly, but should continue to flow from the manner of choosing the President - a process which should continue to involve the Bose Levu Vakaturaga. This would leave open the possibility that, some day, a member of another community might be acceptable as President of the Republic.

9.52 Others thought that the Constitution should stipulate that the President should be an indigenous Fijian. This group included a number of Indo-Fijians and members of other communities who wished to make it clear that they recognise the special place of Fijians as the indigenous inhabitants of these islands.

9.53 The Commission believes that the office of President should be filled by an indigenous Fijian. That symbolic recognition of Fijians as the indigenous people should be balanced by making constitutional provision for a Vice-President. The holder of that office should be required to be a member of another community. The Constitution should make provision to this effect. Our proposals for the selection of both the President and the Vice-President are set out below.

Qualifications for office

9.54 Some submissions expressed the view that the President should not only be a Fijian, but should also be of chiefly descent. Others took the view that eligibility should focus more on personal qualities, such as integrity, wide experience and ability to provide leadership, regardless of whether the person concerned was a chief or not.

9.55 The Commission shares this last-mentioned view. Apart from the proposed provision about the ethnicity of the President and the Vice-President, we consider that the Constitution should set the same qualifications for the holders of both offices. Reflecting the criteria already established by the Bose Levu Vakaturaga, candidates should be citizens of the Republic who have had a distinguished career in any aspect of national or international life, whether in the public or the private sector.

9.56 Otherwise, the qualifications should be the same as those required of candidates for election as members of Parliament. Although the offices of President and Vice-President require political neutrality, persons who hold, or have held, political office, or other offices in the service of the state, should not be excluded. In Fiji as in other countries, distinguished political figures have demonstrated that they can move without difficulty from membership of Parliament to a constitutional role as Head of State.

9.57 A person holding another public office should not be required to resign from it before accepting nomination for the office of President or Vice-President, but election to either office should automatically terminate his or her service in any other public capacity. Private activities should be governed by the conflict of interest rules applicable to Ministers under an integrity.

Selection

9.58 A number of submissions suggested that the Bose Levu Vakaturaga should be involved in selecting the President. Some thought it should continue to make the actual appointments, but others thought that, because the President is the Head of State of the whole country, the process should involve all communities. Some thought that the President should be elected by all voters. Others suggested that the choice should be entrusted to the people's representatives in Parliament.

9.59 The Commission considers that, in view of the fact that the President's role will be largely ceremonial, despite the important duties associated with the formation or replacement of a government, it would not be desirable for the office to be filled by popular vote. That might lead to the politicisation of the office. A President with a mandate from the majority of voters might have difficulty in accepting that responsibility for the conduct of government remains in the hands of the Prime Minister and other members of the Cabinet.

9.60 We consider that the President should be indirectly elected by the people's representatives in Parliament. For this purpose, the members of the Bose Lawa and the Bose e Cake should sit together as an Electoral College. The presiding officer should be provided for in the standing orders of Parliament.

9.61 On each occasion when the election of a President is required, the Bose Levu Vakaturaga should be required to nominate not fewer than three and not more than five candidates. Though this might appear to involve making invidious decisions, it is a less onerous task than making the appointment itself. Although a member of the Bose Levu Vakaturaga, the President should not be present during

the nomination process. A President completing a first term in office should be eligible for nomination and re-election.

9.62 Once the indigenous Fijians nominated by the Bose Levu Vakaturaga have signified their willingness to be candidates, they should each be required to nominate as their choice of candidate for Vice-President an eligible person belonging to another community. Candidates for the office of President and Vice-President will thus be running mates, standing together on a single ticket. This system should make it easier for them to work together if elected.

9.63 As in the case of the election of the President of Mauritius by the members of Parliament in that country, the election of the President and the Vice-President by the Electoral College should be held without prior debate about the merits of the candidates. The election itself should be by secret ballot conducted under the general supervision of the Electoral Commission.

9.64 Like the elections of the members of Parliament themselves, the election should be conducted under the preferential system known as the alternative vote. That system is described briefly in this chapter, and more fully in Chapter 10.

9.65 To be elected, the paired candidates will need to obtain the support of more than 50% of the members of the Electoral College taking part in the vote, when first and, if necessary, subsequent preferences are counted. That will usually mean that the successful candidates will have significantly more support than would be required if the elections were held under the system known as "first past the post". In that case, the winners would be the candidates with the greatest number of votes on the first count, but they would not necessarily have the support of the majority of the members taking part.

9.66 The President and the Vice-President should hold office for terms of 5 years from the date of taking office. Before taking office, they should each take the Oath of Allegiance and an Oath for the due execution of their respective offices before the Chief Justice, the President of the Court of Appeal or another judge. New nominations should be called for and elections held not more than three months, and not less than one month, before the expiry of the term of the President and Vice-President, and also within three months of the date of any vacancy in the office of President.

9.67 The Vice-President should be empowered to discharge all or any of the functions of the office of President whenever the office of President is vacant, or the President for any reason is unable to discharge that function. There will no

longer be an Acting President. As one submission pointed out, this will mean that, if the President is discharging one of the functions of the office by making an official visit to another country, the Vice-President will be able to discharge other functions at home. In practice, the Vice-President is likely to have a busy calendar of engagements in his or her own right.

9.68 If the office of President becomes vacant, the Vice-President will not succeed to the office of President. He or she will simply discharge the functions of the office until a new President and Vice-President are elected. If, on any occasion, neither the President nor the Vice-President is available to act, the function should be performed by the Speaker.

9.69 If the office of Vice-President becomes vacant during the term of a President, the President should be required to nominate another person eligible to be Vice-President. The nomination should be confirmed by the positive votes of more than 50% of the members of the Electoral College taking part in the vote. If the candidate is not confirmed, the President must put forward another.

Removal

9.70 The Electoral College should also have the responsibility of removing a President or Vice-President. Infirmity of body or mind making it impossible to carry out the functions of the office, or gross misconduct in or affecting the performance of the functions of the office, should be grounds for removal. The reference to gross misconduct *affecting* the performance of the functions of the office is new. It would include conviction for a serious offence, even if not related to the conduct of the office. The Prime Minister should continue to have the responsibility of setting in train the processes for investigation and removal if he or she has or is given reason to believe that either ground may apply.

9.71 Allegations of gross misconduct should continue to be investigated by a Tribunal whose members are appointed by the Chief Justice. It should consist of three persons who are, or are eligible to be, judges of a superior court of the Republic. Allegations of infirmity should continue to be investigated by a Medical Board appointed by the Chief Justice. It should consist of not fewer than three persons qualified as medical practitioners under the law of the Republic. From the time at which a Tribunal or a Medical Board is appointed, the President should be taken as unable to perform the functions of the office.

9.72 On receiving the report of the Tribunal, the Chief Justice should submit it to the Prime Minister, with recommendations. The Chief Justice should forward

the Medical Board's report to the Prime Minister without comment. In either case, the Prime Minister should decide whether there is good reason to submit the report to the Electoral College for its consideration. The Electoral College should be free to debate the report. Removal should require the positive vote of three fourths of the members of the Electoral College present and voting.

Incidental matters

9.73 Parliament should be empowered to make provision by Act for any matter incidental to the nomination, election, terms and conditions of office or removal of the President or Vice-President.

The President's Council

9.74 Section 32 of the 1990 Constitution makes provision for a President's Council. It is to be composed of the President as Chairman and such citizens of Fiji as the President may appoint in his own deliberate judgment. The President may convene the Council to advise him on any matters of national importance. The Report of the *Manueli Commission* indicates that provision was made for such a Council as a means of enabling both the paramount chiefs and distinguished citizens to have an influential role in national affairs. However, no one has ever been appointed to the Council.

9.75 The Commission considers that the idea behind the provision for a President's Council remains valid. We have already proposed that the need for the guidance of the paramount chiefs and other members of the Bose Levu Vakaturaga should be expressly recognised by giving that body an advisory role under the Constitution. The Council should therefore be the vehicle through which the President can derive information and ideas from a wider range of sources.

9.76 However, such a function is capable of putting it on a collision course with the Prime Minister and Cabinet who, under the Constitution, are the President's responsible advisers. There are few national issues on which the Council could express a view publicly without risk of being seen as critical of government policies in the relevant area. This could make it difficult for the President to work constructively with Ministers on the normal confidential basis. Perhaps one reason why the Council has never been convened is the absence of any clear understanding about its relationship with the Cabinet. Another may be lack of provision for its funding. We consider that, if the constitutional provision for a President's Council is to have any significance, these potential difficulties need to be overcome.

9.77 The kind of Council we have in mind would be quite different from the Privy Council in Jamaica, which makes recommendations about the exercise of some of the President's formal executive functions like the exercise of the prerogative of mercy. Nor would it be a body like the presidential councils in Singapore and Portugal which advise a popularly-elected President in the exercise of functions designed to impose constitutional constraints on the actions of the Cabinet.

9.78 We see the Council as a forum in which the President can discuss issues of national importance with a group of distinguished citizens. The Council should not have a formal advisory status, but should function as a non-political think-tank. Its purpose should be to enable the President to bring to bear well-informed views about issues of national importance in the confidential discussions with the Prime Minister and other members of the Cabinet, and also in public speeches and other activities within the bounds of the normal conventions about responsible government.

9.79 In keeping with this purpose, the Constitution should provide that the Council meet with the President in private and keep its proceedings confidential, unless the President, with the concurrence of the Prime Minister, decides otherwise. This means that, with the Prime Minister's agreement, a meeting on a particular topic could be open to the news media and the public, or a report of its proceedings subsequently released. We hope that a convention will emerge under which the Prime Minister will agree that the Council's proceedings should be made available to the public whenever it discusses broad strategies for the long-term solution of issues of national importance.

9.80 The Council should be a standing body of 10 to 15 citizens who have achieved distinction in the professions, commerce, industry, agriculture, cultural activities, social service, religion or the service of the state. There should be a balance in terms of gender, ethnicity, age and regional origin. Serving members of Parliament or other persons holding public office should not be eligible. The President should appoint its members for a term of two years. They should be eligible for reappointment, but care should be taken not to make the Council the preserve of a few. All members should cease to hold office when the office of President becomes vacant.

9.81 The Council should meet as and when convened by the President, but at least once a year. The appropriation for the Office of the President should include reasonable funding for its operation.

RECOMMENDATIONS

215. **The Constitution should provide expressly that the President is the Head of State of the Republic of the Fiji Islands.**
216. **It should continue to give the President the title of Commander-in Chief (which does not confer any powers of actual command).**
217. **The Constitution should provide expressly that the office of President symbolises the unity of the Republic.**
218. **The role of the President under the Constitution should continue to parallel the former role of the holder of the office of Governor-General, as proposed in later recommendations.**
219. **The Constitution should make provision for the office of Vice-President.**
220. **It should provide that the office of President shall be held by an indigenous Fijian and the office of Vice-President shall be held by a member of another ethnic community.**
221. **Candidates for each office should be required to be citizens of the Republic who have had a distinguished career in any aspect of national or international life, whether in the public or the private sector, and have the other qualifications required of candidates for election as members of Parliament. However, a person holding another public office should not be required to resign from it before accepting nomination for the office of President or Vice-President, but election to either office should automatically terminate his or her service in any other public capacity.**
222. **On each occasion when the election of a President is necessary, the Bose Levu Vakaturaga should be required to nominate not fewer than three and not more than five candidates.**
223. **Each candidate accepting nomination by the Bose Levu Vakaturaga should be required to nominate, as his or her choice of candidate for Vice-President, an eligible person belonging to another community.**
224. **The Constitution should provide that the members of the Bose Lawa and the Bose e Cake should sit together as an Electoral College for the purpose of electing, as President and Vice-President, one of the pairs of candidates nominated for those offices.**

225. **The election should be by secret ballot, held without prior debate, and conducted under the preferential system known as the alternative vote, under the general supervision of the Electoral Commission.**
226. **The President and the Vice-President should hold office for a term of 5 years. Before taking office, they should each take the Oath of Allegiance and an Oath for the due execution of their respective offices. Each should be eligible for election for a second term but not more.**
227. **The Vice-President should be empowered to discharge all or any of the functions of the office of President whenever the office of President is vacant, or the President is for any reason unable to discharge that function. If neither the President nor the Vice-President is available to discharge a function of the President, it should be performed by the Speaker.**
228. **If the office of President becomes vacant, the Vice-President will not succeed to that office, but will discharge the functions of the office until a new President and Vice-President are elected.**
229. **If the office of Vice-President becomes vacant, the President should be required to nominate another eligible person to be Vice-President. The nomination should be required to be confirmed by the positive votes of not less than 51% of the members of the Electoral College taking part in the vote.**
230. **The Constitution should provide for the removal of the President or Vice-President by the Electoral College, on the grounds of infirmity of body or mind making it impossible to carry out the functions of the office, or gross misconduct in or affecting the performance of the functions of the office. The Prime Minister should continue to have the responsibility of setting the processes for investigation and removal in train, if he or she has reason to believe that either ground may apply.**
231. **Allegations of gross misconduct should continue to be investigated by a Tribunal and allegations of infirmity should continue to be investigated by a Medical Board, as proposed in paragraphs 9.70 - 9.71. From the time at which a Tribunal or a Medical Board is appointed, the President should be taken as unable to perform the functions of the office.**

232. **The Prime Minister should be required to decide whether there is good reason to submit the report of the Tribunal or Medical Board to the Electoral College for its consideration. If so, the Electoral College should be free to debate the report. Removal should require the positive vote of three fourths of the members of the Electoral College present and voting.**
233. **Parliament should be empowered to make provision by Act for any matter incidental to the nomination, election, terms and conditions of office or removal of the President or Vice-President.**
234. **The Constitution should continue to make provision for a President's Council as a forum in which the President can discuss issues of national importance with a group of distinguished citizens.**
235. **It should provide that the Council will meet with the President in private and keep its proceedings confidential, unless the President, with the concurrence of the Prime Minister, decides otherwise.**
236. **The Council should be a standing body consisting of 10 to 15 citizens who have achieved distinction in the professions, commerce, industry, agriculture, cultural activities, social service, religion or the service of the state, but should not include serving members of Parliament or state servants. It should meet as and when convened by the President, but not less than once a year. The appropriation for the Office of the President should include reasonable funding for its operation.**

THE PRIME MINISTER AND CABINET

The goal of multi-ethnic government

9.82 In a parliamentary democracy, the Cabinet is the institution which has overall authority and responsibility for the exercise of executive government. This is well-understood in the Fiji Islands, though, as a reflection of the legal position of the Sovereign in Britain and other Commonwealth monarchies, the Constitution formally vests the executive authority of the Republic in the President. We leave until Chapter 12 a discussion about the way in which the Constitution should formulate legal rules about the situation and exercise of executive power. Here

we wish to concentrate on how the Constitution can best promote the goal of multi-ethnic government. This means that, ideally, the Cabinet should consist of members who belong to different ethnic communities.

9.83 In Chapter 2, we referred to the wide support for this goal, not only among political parties but also among other citizens who put forward views either as individuals or members of representative groups. It is fair to say, however, that the proposals for achieving the desired goal did not look deeply into how it was to be achieved in a manner compatible with the principles of parliamentary government. Not surprisingly in the present circumstances of the Fiji Islands, there was ambiguity about whether, in forming a Cabinet from among members of the Lower House of Parliament, the emphasis should be placed on their ethnicity, or on the extent of the electoral support received by the party to which they belong. Some proposals called for regard to be paid to both, though it was not always clear exactly how this should be done.

The role of political parties

9.84 In Chapter 2, the Commission recommended that the Constitution should expressly recognise the role of political parties in the formation of a government. Majority rule, as it is sometimes called, is not the product of any theory about the allocation of political power. It was born out of the actual experience of the English House of Commons in the nineteenth century, at a time when the introduction of universal suffrage transformed the House from a body controlled by royal patronage to one controlled by the people. The only way in which this popular participation could provide opportunities for coherent choices was by organising political parties and seeking the support of voters for their different philosophies and policies.

9.85 Among the submissions, there was general acceptance of the idea that, in appointing the Prime Minister, account should continue to be taken of the electoral support received by the party of which he or she is the leader. It was assumed that the Prime Minister would be the leader of the largest party in Parliament. That is likely to be the case under the parliamentary system if there are two main parties, of which one has a clear majority of the seats in the Lower House. However, the emergence of a number of parties in Parliament may mean that no single party has the necessary majority to form a government on its own.

9.86 In those circumstances, a government will have to be formed either by a coalition among two or more parties, or by the willingness of other parties to support a minority government, at least on issues of confidence and supply, even

though they are not taking part in the Cabinet. The leader of the largest party is still likely to be Prime Minister, but the possibility of another choice in the interests of achieving a coalition or support for a minority government cannot be excluded.

A government of national unity?

9.87 One submission proposed that the Prime Minister should be the leader of the largest party in the Lower House of Parliament, but that the formation of the Cabinet should not depend on that party's majority in that House, either alone or with the support of independent members or other parties. Instead, Cabinet should be formed from all parties, in proportion to their representation in the Lower House but subject to a minimum threshold. The leader of the second largest party should be the Deputy Prime Minister, instead of being the Leader of the Opposition, as is usually the case.

9.88 It was suggested that this arrangement should be supported by electoral arrangements under which all communities could expect representation in proportion to their number in the population, that is if parties continued to be communally based and voters continued to support candidates on the basis of their ethnicity. We believe, however, that such arrangements are likely to perpetuate the divisive effect of those which have been in operation in the Fiji Islands since before independence. The cooperation in Cabinet which might result from the requirement for a government of national unity would be unlikely to lead to any change of outlook among parties or voters.

9.89 The proposal itself was very closely based on the arrangements for elections and a government of national unity in force under the interim constitution of South Africa. Our visit to that country was largely for the purpose of finding out how the government of national unity was operating in practice. It quickly became clear that the requirement for a government of national unity had been an essential element in achieving a peaceful transition from the former constitutional arrangements. These had permitted a small minority of white South Africans to rule the entire country through a Parliament in which the coloured community was separately represented and black South Africans not at all. The assurance that the National Party would continue to be represented in the Cabinet, no matter what share of support it received from the electorate, was a key element in enabling it to persuade its supporters to accept a democratic constitution.

9.90 We also found that the Cabinet had worked reasonably smoothly. Among the positive consequences, the participation of the National Party had led to major modifications of the ANU's economic policies in ways that have made South

Africa more attractive to overseas investors. Although Chief Buthelezi's Inkatha Freedom Party was participating only sporadically in the negotiations for the final constitution, he himself was an effective minister. There was a good working relationship between ministers and the still largely white civil service. On the negative side, the ANC, although the party with an overwhelming majority, had experienced frustrations in reaching a consensus with other parties about some important aspects of its policies. Education was mentioned as an example.

9.91 However, the real sticking point appeared to be the absence of what might be described as a "Parliament of national unity". Backbenchers were anxious to make their influence felt. They had the opportunity to do so through the vigorous parliamentary committee system to which we refer in Chapter 11. No party felt bound to support the policies and legislative proposals originating in the Cabinet. The government could not be sure how its proposals would be received in Parliament. The choice for the ANC in the negotiations about a final constitution was whether to persist with the existing arrangements for a government of national unity or put itself in a position to exercise the mandate to govern that would otherwise flow from its decisive majority.

9.92 By the time of our visit, it had become clear that arrangements for a government of national unity would not be a feature of the final constitution. With the subsequent adoption of that constitution, the National Party has withdrawn from the government of national unity. It has assumed the role of Opposition, and is reported to be seeking to broaden its support among the non-white communities.

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9.93 We mention the South African situation in some detail, because we considered carefully whether provision for a government of national unity in the Fiji Islands could facilitate the participation in government of members of all communities. However, we are satisfied that, for the reasons which have prevented it from becoming a permanent part of the constitutional machinery in South Africa, it does not hold out the promise of succeeding here.

9.94 We also considered whether constitutional provision for a government of national unity in the Fiji Islands for an interim period could be a useful short term measure providing reassurance to all communities until longer-term measures can be put in place and become effective. We concluded, however, that, in contrast to the position in South Africa, such provision is not an essential precondition for reaching agreement on new, long-term constitutional arrangements.

9.95 We do not exclude informal ways of achieving cooperation among the parties for the purpose of putting new constitutional arrangements in place. That

cooperation will be essential, but it should flow from agreement, not from a constitutional requirement. Although interim constitutional arrangements can provide reassurance, they can also set up tensions about what will happen when they are due to be replaced. They may also create incentives running counter to those intended to be provided by the longer-term measures.

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hint mechanism compulsory

Promoting multi-ethnic government

9.96 In the Fiji Islands, the participation of all communities in governing the country should be encouraged, not by attempting to move away from the concept of the winning party or coalition being the government but by seeking to alter the character of some or all of the political parties themselves. This should be done through the incentives to seek multi-ethnic support created by the arrangements for the election of members of the Bose Lawa. Our proposals are set out later in this chapter.

9.97 These proposals result from our finding in Chapter 2 that the communal system of representation is an obstacle to the emergence of a multi-ethnic political culture and the formation of governments consisting of members of all communities. It does not protect Fijian interests or those of other communities. We see the nature of the electoral system and the nature of government by the people's elected representatives as inextricably linked. Multi-ethnic government is unlikely unless the electoral arrangements lead to the creation of multi-ethnic parties or coalitions. If the people of Fiji want to encourage the emergence of broadly-supported multiracial governments, the arrangements for electing the members of the Bose Lawa need to be changed.

9.98 The Commission proposes that the Constitution should maintain the present system under which a government must have the support of a majority in the Bose Lawa. It should do so in the expectation that the proposed changes in the electoral arrangements will encourage the emergence of multi-ethnic parties or coalitions that will be in a position to form a government.

9.99 This approach has the advantage of ensuring that, in normal circumstances, a united government will be in a position to secure the implementation of its policies. The concept of "winner take all", condemned in a number of submissions, will still apply, but it should no longer have its present effect of allocating government and opposition, not only between parties, but also between ethnic communities. We discuss below the way in which an opposition party or parties will fit into our proposals for multi-ethnic government. In Chapter 11, we also describe our proposals for ensuring that all members of Parliament who are not

ministers, whether from the Government or Opposition parties, have the opportunity to influence the content of legislation.

Choosing a Prime Minister

9.100 The mechanism for appointing a Prime Minister is set out in section 83(2) of the 1990 Constitution. In words which are standard in written Westminster constitutions, the President “acting in his own deliberate judgment” is required to decide which member of the House of Representatives “appears to him best able to command the support of the majority of the members of that House”. Although, in law, the provision gives the President a discretion, it is one that should be exercised after taking due account of the parliamentary situation.

9.101 In countries like Fiji with a well-developed party system, there is a constitutional convention that, in appointing a Prime Minister, the President has to consider the electoral support received by the various parties and any other factors which may affect their ability to form a government, alone or in coalition. Under the parliamentary system, this is the mechanism for obtaining a democratic government elected by the people.

9.102 The 1990 provision introduced a further requirement that the President must choose the Prime Minister from among the Fijian members of the House of Representatives. This requirement may cut across the principle that the choice of the Prime Minister must depend on the political situation arising from the representation of the various parties in the House. It is also incompatible with the international standards. These require every citizen to have the right and the opportunity, without distinctions on a forbidden ground, including race, and without unreasonable restrictions, to take part in the conduct of public affairs, directly or through freely chosen representatives.

9.103 For these reasons, the Constitution should not require the Prime Minister to be of a particular ethnicity. As we now explain, other ways should be found of meeting the concerns of all communities about the choice of the person who should hold that office.

Negotiations about the formation of a government

9.104 In discussing the draft *Compact* proposed in Chapter 5, we set out in detail how the interests of indigenous Fijians, as well as those of other communities, can and should be taken into account in the negotiations among parties which may need to precede the formation of a government. Such negotiations, before or

after an election, are likely to focus, among other things, on the identity of the person who should be Prime Minister.

9.105 The negotiations about the formation of a government are likely to lead to agreement about the ethnic composition of the Cabinet. They will be concerned with its party make-up, especially if there is to be a coalition government, rather than a government formed by a multi-ethnic party. This approach provides a basis for protecting the interests of all communities in the identity of the Prime Minister and the composition of the Cabinet. It is sounder in principle and also likely to be more acceptable than any mandatory constitutional requirement.

9.106 The President's confidential discussions with the Prime Minister in office immediately before an election, and if necessary with the leaders of other parties, will ensure that he or she is kept well-informed about the progress and outcome of any negotiations about the formation of a government. It should be understood and accepted by all concerned that any agreement reached will be reflected in the exercise of the President's power to appoint the Prime Minister and the Prime Minister's own recommendations about the composition of the Cabinet.

RECOMMENDATIONS

237. **The Constitution should maintain the present system under which a government must have the support of a majority in the Bose Lawa. It should do so in the expectation that the proposed changes in the arrangements for the election of the members of the Bose Lawa will encourage the emergence of multi-ethnic parties or coalitions with the necessary support to form a government.**
238. **The Constitution should continue to require the President, acting in his or her own deliberate judgment, to appoint as Prime Minister the member of the Bose Lawa who appears to the President best able to command the support of the majority of the members of that House. There should be no stipulation about that member's ethnicity.**
239. **The Constitution should also continue to provide that the President appoints the other members of the Cabinet on the advice of the Prime Minister.**
240. **The Constitution should not make any express provision about the ethnicity of either the Prime Minister or the other members of the Cabinet.**

- 241. It should be clearly understood that, in exercising the power to appoint a Prime Minister, the President will take account of the electoral support received by the various parties and other relevant factors, including the outcome of negotiations about the formation of a government, the identity of the Prime Minister and the composition of the Cabinet.**

THE OPPOSITION

The nature of the Opposition

9.107 In this report we have placed much emphasis on the need for multi-ethnic government. It follows that, just as government should not be the preserve of particular communities, so also, no community should be cast in the role of perpetual opposition. We believe that our proposals for the election of members of the Bose Lawa are likely to increase the extent to which the Opposition, as well as the Government, is multi-ethnic.

9.108 That is a necessary evolution if the Opposition is to have an effective role in debating government policies and proposals. Submissions made the point that critical analysis cannot be penetrating nor effective if it is possible to portray it as racially based. Fijians need to be in the Opposition as well as in Government, so that they can hold the Government to account for those matters affecting Fijians that Opposition members from other communities would be hesitant to raise.

9.109 Before looking further at the likely nature of the opposition party or parties, it is worth discussing the role of the Opposition under the Westminster system. Democratic government is based on electoral contests for political power. The idea that the people should have a choice about who is to govern them is fundamental.

9.110 Not all democratic systems assign the same constitutional significance to the role of opposition. Under the Westminster system, the proceedings of Parliament are organised on the assumption that its procedures should facilitate the questioning of the Government's policies and proposals by the members of Parliament not in government - "Her Majesty's Opposition" as they are officially called in the British Parliament. A leading authority on constitutions has pointed out that this description is no mere flourish.

It means much more than that opposition is permitted or even that it is legal. It means that it is constitutional; that it is "loyal"; that although the Opposition may disagree with the government on important matters, it

agrees with it on the rules of the game. It means that some fundamental questions are outside the party fight. There is agreement about the regime, about the form of government.

The Leader of the Opposition

9.111 Section 97 of the 1990 Constitution makes provision for the appointment of the Leader of the Opposition by the President. It provides for the appointment in this capacity of the leader of the opposition party which has greater numerical strength in the House of Representatives than any other opposition party. If the two largest opposition parties have the same number of seats, the President is required to appoint the member of the House whose appointment would, in the President's judgment, be most acceptable to the leaders in the House of all opposition parties. There is a fall-back provision designed to encourage agreement by providing that the President need not appoint a Leader of the Opposition if satisfied that there is no member of the House who would be acceptable to such parties in that capacity.

9.112 The Constitution should continue to provide for the office of Leader of the Opposition. We received no submissions about the method of choosing the holder of that office, and assume that the substance of section 97 is generally acceptable. It should therefore be retained, unless it emerges that opposition parties would rather choose a leader by a vote, or by drawing lots, in the event that the two largest opposition parties should have the same number of members in the House. The essential point is that the Leader of the Opposition should be chosen independently of the Government.

9.113 In most countries, the responsibilities of the Leader of the Opposition are recognised by making special provision for the salary and other allowances and benefits payable to the holder of the office. Section 64 of the 1990 Constitution sets up an Independent Parliamentary Emoluments and Benefits Committee. However, section 64(2), which lists those whose salaries the Committee has the responsibility of reviewing, does not refer specifically to the Leader of the Opposition. The provision treats the holder of the office simply as a Member of Parliament. We understand that, in principle, the Leader of the Opposition receives the same salary, allowances and benefits as a Cabinet Minister.

9.114 In Chapter 11 we make certain proposals about the mechanism set up by section 64. Here we propose that the special responsibilities of the Leader of the Opposition should be recognised explicitly by referring to that office in the list of those whose salaries, allowances and benefits ought to be set through the constitutionally prescribed process.

The role of the Opposition in relation to that of Government

9.115 From the nature of the Opposition it follows that its role ought to be recognised in a number of ways. For example, the need for a non-partisan approach to constitutional issues should be reflected in those provisions of the Constitution concerned with the appointment of high officers and other bodies intended to function independently of government. It should also be recognised in the provisions for the amendment of the Constitution or the entrenched legislation. Proposals for these purposes are made in subsequent chapters. They are based on the assumption that, if there is more than one opposition party, the Leader of the Opposition will in turn consult the other leaders.

9.116 We think that a bipartisan or multipartisan approach should also be taken in other areas. They include ceremonial state occasions on which it is appropriate for the Leader of the Opposition to appear in public alongside the Prime Minister. This is an important way of demonstrating the legitimacy and value of the Opposition's role.

9.117 Some substantive issues should not be allowed to become "political footballs". They are those on which, for the sake of certainty and continuity, it is important to reach agreement among all parties about the policies which ought to be followed. Major issues of foreign policy are one such area, but there may also be significant domestic issues on which the aim should be to achieve long-term consistency of policy, no matter which party or parties are in government.

9.118 In Parliament itself, the members of the Opposition are charged with the duty of examining what the government has done or proposes to do. Traditionally, the members of the Government caucus will have made their views known privately. Occasionally they complain publicly, but the main task of promoting public debate falls to the Opposition. While we do not wish to downgrade this role, it is important that the making of counter-proposals by the Opposition should not degenerate into a dialogue of the deaf. In Chapter 11 we propose a constructive role for all backbench members working through strong, parliamentary sector standing committees.

9.119 This proposal will give all members of Parliament the opportunity to work within a framework that allows maximum concentration on the substance of issues and less temptation to use them as a means of making political capital. Yet it must not be forgotten that, in theory at least, the Opposition offers itself to the country as an alternative government. The Opposition must be allowed to indicate what it would do if it were in office. Therefore, so the argument runs, it is

encouraged to be responsible in its criticism. If it succeeds in defeating the Government at the polls, it will have the opportunity to become the Government and put its proposals into effect.

9.120 The reality is that, in a multi-ethnic country in particular, the nature of the opposition parties depends a great deal on the nature of the political polity as a whole. This point can be illustrated by comparing the Opposition in two other countries we visited: Malaysia and Mauritius.

9.121 In Malaysia, the ruling National Front, formerly known as the Alliance, has been in power since before independence. It is a coalition of ethnic parties, dominated numerically and in influence by UMNO, the main Malay party. The primary opposition is from the Chinese-based Democratic Action Party and the fundamentalist Malay party, the PAS. Realistically, neither of these parties has a chance of becoming the government as long as the National Front and UMNO maintain their unity. Even so, ethnically based parties on the fringes of a broadly based multi-ethnic coalition serve the useful purpose of requiring the coalition to pay adequate attention to the special concerns of particular communities.

9.122 Mauritius provided a contrasting example of the role of opposition. Parties are mainly ethnically-based, but the electoral arrangements, providing for the election of three members by ethnically-mixed constituencies, encourage them to come together in multi-ethnic coalitions for the purpose of fighting elections. The alliances among parties appear to be fluid. They are based on political philosophy and sometimes on personalities.

9.123 The effect of the first-past-the post electoral system in Mauritius is that comparatively small movements in the support for a particular coalition can not only result in the government's defeat, but virtually wipe out its electoral representation. On two occasions, the second being late in 1995, no Opposition members were elected at a general election. However, if past experience is a guide, the opposition forces will revive, perhaps on the basis of new political alignments, so that, at the next general election, two multi-ethnic coalitions will again contest the right to govern.

9.124 We mention these examples, not because we favour one approach rather than the other, or wish to use either as a model. We do so to show that it is hard to predict the impact on opposition parties in the Fiji Islands of greater electoral inducements for ethnically based parties to cooperate or reorganise on a multi-ethnic basis. It is an open question whether opposition will remain ethnically

based, on the fringes of a broadly-based multi-ethnic coalition or party that has sufficient support to govern, or whether, as in Mauritius, elections will eventually become a contest between multi-ethnic coalitions or parties. In either case, the role of the Opposition, in Parliament and on the hustings, will remain significant. It deserves respect for its essential contribution to a democratic system of government.

RECOMMENDATIONS

- 242. The constitutional role of the Opposition should be respected for its essential contribution to democratic government. The emergence of multi-ethnic Oppositions, as well as multi-ethnic Governments, should be encouraged.**
- 243. The Constitution should continue to provide for the office of Leader of the Opposition. On the assumption that the provision under which the President chooses and appoints the Leader of the Opposition under section 97 of the 1990 Constitution is generally acceptable, its substance should be retained.**
- 244. The special responsibilities of the Leader of the Opposition should be recognised explicitly by including that office in the list of office-holders whose salaries, allowances and benefits ought to be set through constitutionally prescribed processes.**
- 245. The need for broad agreement with the Opposition in decisions of a constitutional nature should be reflected in those provisions of the Constitution concerned with the appointment of high officers of state and other institutions intended to function independently of government, as well as the special majorities required to amend the Constitution or the entrenched legislation.**
- 246. The Opposition should be represented at ceremonial state occasions. The possibility of achieving a multi-partisan approach to important issues on which it is important to achieve long-term consistency of policy should be explored.**

A BICAMERAL PARLIAMENT

9.125 Submissions to the Commission showed that people are in no doubt about the importance of the House of Representatives. The election of the members of that House serves the dual purpose of deciding who should represent a particular constituency, and also of deciding which political party or parties should form the

government. In general, it was accepted that the parties in government were entitled to use their majority support in the Lower House for the purpose of securing the passage of their budgets and the enactment of their legislative programmes without being blocked by the Upper House.

9.126 Not surprisingly, a number of submissions saw little need for the Senate. In their view, its only useful purpose was to provide a group whose support was required for the amendment of the entrenched legislation relating to Fijians, Rotumans, and the Banaban community. They suggested that the Bose Levu Vakaturaga, instead of advising on the appointment of Fijian members of the Senate to discharge this responsibility, should itself be given the power to protect the entrenched legislation. In their view the Senate should be abolished.

9.127 Others were of the opinion that the Senate served a useful purpose as a House of review with the power to delay the passage of legislation. However, some who favoured its retention criticised the lack of ethnic balance, and made the point that the President's nomination of persons from communities other than Fijians did not necessarily give them a mandate to act in a representative capacity.

9.128 The Commission evaluated these arguments by reference to the purposes of a second chamber. One is to secure better legislation by giving it the power to block or delay the passage of Bills passed by the Lower House. Another is to allow the representation of different interests within the country, such as ethnicity or territorial identity. We look briefly at how a second chamber could serve each of these purposes.

9.129 There is general agreement that it is hard to devise a basis for the appointment or election of a second chamber *solely* for the purpose of improving the quality of legislation. If the Upper House is elected, it may come into conflict with the Lower House that provides the government. The use of the Upper House to block legislation is likely to be seen as the attempt of the minority to overrule the majority. If the Government has control of both Houses, then presumably its legislative proposals will be allowed to pass in the Upper House as well. Therefore, it may be asked, does the second chamber really help to produce better laws? Many commentators conclude that there are other, more effective ways of making sure that laws are enacted in a workable and coherent form. One way is the use which we propose of sector standing committees in the Lower House.

9.130 Although there are limits to the Senate's effectiveness in improving the quality of legislation, in our opinion an Upper House can serve a valuable purpose. In a multi-ethnic society, it can provide a way of representing a wider variety of

interests, or allowing those interests to be represented in different ways, so that each is given greater opportunity to exert its influence on the political process. Upper Houses are usually designed to represent interests that are inherent and permanent. Lower Houses are designed to reflect the ebb and flow of more transient interests that seek to make a more immediate impact on laws and policies.

9.131 In many countries, the representation of particular geographical subdivisions of the country in the Upper House is seen as a way of recognising not only the sense of territorial identity of its inhabitants, but also the ethnic identity and shared values of the communities which happen to predominate in the whole or parts of the subdivision concerned. Generally speaking, territorial representation is seen as less problematic than the representation of particular ethnic communities. The neutrality of belonging to a particular territorial subdivision serves as a basis for bridging differences between communities in a multi-ethnic society. As has been seen, representation on the basis of ethnicity tends to draw communities apart and sharpen the differences between them.

9.132 The Commission concluded that there would be considerable value in retaining a bicameral Parliament in the Fiji Islands if citizens were represented on a different basis in each of the two Houses. That would provide better opportunities for all interests to be taken into account.

9.133 We therefore propose that the Upper House should become a mainly elected body in which the 14 provinces should be represented on a basis of equality by members elected by all citizens resident in the province. There should also be an elected member representing Rotuma. In addition, there should be provision for a small number of appointed members to represent communities and groups which would otherwise be under-represented in Parliament as a whole.

9.134 While the universally recognised name "Parliament" should continue to be used to describe the legislature as a whole, the two Houses of Parliament should, we believe, have Fijian names. This will give them a unique character and distinguish them from the legislative bodies of other countries. The term Bose Lawa is already used as the name of the House of Representatives in the Fijian language. It should become the official name of that body. We propose that the Senate should be renamed the Bose e Cake, which means the Upper Chamber.

9.135 The 1990 Constitution provides that the President should be part of Parliament, as the Governor-General had been under the 1970 Constitution. However, section 62(4) provides that, when a Bill is presented to the President for assent, he shall signify his assent. The former provision had appeared to allow

the Governor-General a discretion whether to assent to, or withhold assent from, a Bill. However, the change was more one of form than of substance, because there was a constitutional convention that the Governor-General would not withhold assent.

9.136 We consider that, in recognition of the status of the office of President and its historical antecedents, the President should continue to be part of Parliament. The provision making it clear that the President has no discretion to refuse assent to Bills passed by the Bose Lawa and the Bose e Cake should be retained.

9.137 Accordingly, the Constitution should provide that there shall be a Parliament for the Republic of the Fiji Islands, consisting of the President, the Bose Lawa and the Bose e Cake. In Chapter 11, we discuss the relationship between the two Houses. We propose that the Bose e Cake should become solely a House of review.

9.138 In the next sections of this chapter we set out our detailed proposals for the composition of the two Houses. We also explain the reasons for our proposals and the effect they are likely to have in practice.

RECOMMENDATIONS

247. **A bicameral Parliament should be retained as a way of allowing citizens to be represented in Parliament on a different basis and so providing better opportunities for all interests to be taken into account.**
248. **The Constitution should provide that there shall be a Parliament for the Republic of the Fiji Islands, consisting of the President, the Bose Lawa and the Bose e Cake.**
249. **The provision making it clear that the President has no discretion to refuse assent to Bills should be retained.**
250. **The Bose e Cake should become a mainly elected body in which the 14 provinces should be represented on a basis of equality by members elected by all citizens resident in the province. There should also be an elected member representing Rotuma. In addition, there should be provision for a small number of appointed members to represent communities and groups which would otherwise be under-represented or not represented in Parliament.**

THE BOSE LAW

The objectives

9.139 Nationally and internationally, a great deal of attention has been focussed on the present arrangements for electing the members of Fiji's Lower House. It is the main legislative organ and, even more crucially, the party alignments of its elected members determine which party will form the government and which party leader will become Prime Minister. It is at the centre of the web of the country's political institutions.

9.140 The Commission has already recommended that the present arrangements governing the composition of the Lower House and the election of its members should be revised. We have recommended also that the revised arrangements should be designed in such a way as to meet the following objectives:

- they should encourage the emergence of multi-ethnic governments;
- they should comply with the international standards by applying the principle of equal suffrage;
- they should be based on a more open system of representation;
- they should provide a gradual but decisive means of moving away from the present constitutional arrangements.

9.141 The Commission has thought carefully about how these objectives can best be achieved. It considers that there need to be changes both in the composition of the Bose Law and also in the system for electing its members.

Number of seats

9.142 A number of submissions considered, or took it for granted, that the size of the Lower House should remain at or near its present number of 70. Some thought that, as a cost-saving measure, its size should be reduced to a number nearer the 52 provided for under the 1970 Constitution. The Commission recognises that the cost of Parliament has to be kept within reasonable limits. However, the Lower House should not be so small that it unduly restricts the ability of the Prime Minister to choose a balanced Cabinet from among the members of the majority coalition or party. Moreover, any reduction in the size of the Bose Law would make it more difficult to implement the changes we propose to its composition. The Commission therefore favours retaining the present number.

A mixture of open and reserved seats

The 1990 system

9.143 For the system of communal and national seats under the 1970 Constitution, the 1990 Constitution substituted a system under which all seats are communal. The distribution of seats is 37 for Fijians, 27 for Indians, 1 for Rotumans, and 5 for general voters. All seats are filled by voting on communal rolls.

9.144 Many people in Fiji seem to be unaware that the system under which all seats are filled on a communal basis appears now to be unique, though such arrangements were not uncommon during the period of decolonisation. A study of the voting systems of 150 of the world's 186 sovereign states by the Inter-Parliamentary Union in 1993 shows that, in 25 states, some members are elected or appointed to the legislature to represent particular groups. These groups include women and interest groups as well as ethnic communities. In each case, the number of special seats is very small in comparison with the size of the legislative body.

9.145 The study recognises that there are ways other than quotas of securing parliaments that reflect the makeup of the population. We mention this to show that, in other multi-ethnic countries, an electoral system based *exclusively* on communal voting has not been seen as the answer to the fair parliamentary representation of all communities and the encouragement of cooperation among them.

A return to "national" seats?

9.146 Some submissions expressed support for the present composition of the Bose Lawa, or wanted to see it more heavily weighted in favour of indigenous Fijians. Other submissions, from individuals and groups in all communities, argued that at least some seats should be filled by allowing the candidates to be elected by voters from all communities. Many saw the seats filled by "cross-voting" under the 1970 Constitution as a desirable model. These seats were reserved for particular communities, but filled by voting on a national roll comprising the voters registered on one or other of the three communal rolls.

9.147 For the reasons explained in Chapter 2, the cross-voting system was only partly successful in bringing about a more conciliatory and less communally-based attitude to national politics. The choice of candidates for national seats and the style of the campaign had to take account of the fact that candidates would be

elected by the votes of members of all communities. This induced moderation. However, there was a tendency to feel that the national seats were the property of the community concerned. That community sometimes found it hard to accept that members elected mainly by the votes of other communities really represented the community to which the seat belonged. The Commission does not consider it desirable to return to the cross-voting system.

A move to "open" seats

9.148 The time has now come when most seats in the Bose Lawa should no longer be reserved for particular communities but should be what we propose to call "open" seats. Candidates for those seats should be elected by the voters of all communities. All parties, whether or not ethnically based, should be eligible to compete for them by nominating candidates without regard to their ethnicity.

9.149 This will in itself induce at least some parties, both in their choice of candidates and in their policies, to make an appeal for the support of all communities. We have already made the point that a system that encourages parties or coalitions that wish to become the government, to take account of the interests of all communities, is the best safeguard for the interests of individual communities.

9.150 We make proposals below about the choice of voting system and the principles for drawing constituency boundaries. These are intended to provide further inducements to parties to widen the basis of their appeals to voters. Parties, or coalitions of parties, will have a strong incentive to nominate a multi-ethnic slate of candidates, both within the multi-member constituencies we propose, and across all constituencies. The proposals will also be likely to encourage the trading of preferences in the manner we describe in Chapter 10.

9.151 For these reasons, we do not see elections for open seats as contests between candidates standing for exclusively communally-based parties. There is little reason to fear that they will give rise to communal hostility. We believe that the election of candidates for open seats will in fact encourage the members of all communities to look at the needs and aspirations they have in common, not at what divides them. A greater awareness of common interests should help people to realise that the ethnicity of individual candidates is not all-important. What they and their parties stand for is what matters.

9.152 In this respect, the open seats will have the advantages of the former national seats but not their disadvantages. The fact that no community can

legitimately claim that it "owns" a particular open seat should make people readier to accept the result of the poll, whatever the party and ethnicity of the successful candidate.

9.153 That said, we have laid stress on the need for multi-ethnic government and the likelihood of the parallel development of multi-ethnic opposition. This means that we would expect the ethnic composition of Parliament to broadly reflect the ethnic composition of the population as a whole. Parties will be competing not only for the open seats but also for the reserved seats in the Bose Lawa proposed below, as well as the seats in the Bose e Cake. They, too, will be open seats. No community will have reason to fear that it will not be adequately represented.

Retention of some "reserved" seats

9.154 To give all communities greater confidence, however, the Commission proposes as a transitional measure, the retention of some "reserved" seats in the Bose Lawa for each community. We accept that people in Fiji, with their experience of communal representation, may be unwilling to move to a totally open system in a single step.

9.155 However, it would frustrate the whole purpose of creating open seats if in comparison with the number of open seats, the number of reserved seats was too great. If that situation were to eventuate, the demands of community would dominate. Parties would have little inducement to become multi-ethnic in their membership and policies. The people of Fiji have to make a conscious choice about whether they wish to take a decisive step away from the communal system that has made ethnic politics inevitable since before independence.

The recognition of communities and groups for representation purposes

9.156 A number of the smaller communities in the Fiji Islands asked that their identity should be recognised by regarding them as a separate community for electoral purposes and allocating them an appropriate number of seats. Some groups also proposed that seats be specifically allocated to women, to take account of the fact that parties seldom nominate women as candidates for winnable seats.

9.157 The Commission has evaluated these submissions in the light of its view that the retention of reserved seats should be essentially a transitional measure, even though we have not proposed a timetable for their phasing out. As we have recognised, provisions for the mandatory review or automatic expiry of transitional

arrangements can themselves produce tensions. Nevertheless, we are strongly of the view that all reserved seats should be converted into open seats as soon as possible.

9.158 In these circumstances, the Commission does not favour placing greater stress on ethnic identity or gender for representation purposes by allocating seats to communities or groups which presently are not separately represented. The effort should go into healing existing divisions, not creating new ones. Similarly, parties should actively work to break down the barriers which stand in the way of the nomination and election of women. However, we do propose some remedial measures to ameliorate the consequences of the present definitions of communities for voting purposes, and the under-representation of women.

9.159 Citizens of Melanesian, Polynesian or Micronesian origin should again vote with members of the Fijian community rather than as general voters. Citizens of mixed descent should have the option of regarding themselves as members either of their father's community or their mother's community for voting purposes (but not for any other constitutional purpose, and without any effect on any matter relating to the ownership of land). Finally, the President should be empowered to appoint six members to the Bose e Cake to represent communities or groups that would otherwise be under-represented in Parliament. The first two proposals are further discussed in Chapter 10, and the last later in this chapter when we describe our proposals for filling the seats in the Bose e Cake.

The allocation of reserved seats among communities

9.160 Submissions emphasised the need for a fairer allocation of reserved seats among communities. We consider that the allocation should be based on population figures. Without creating imbalancing, it should also take account of historical and other factors that have affected the present and past allocations of communal seats. The starting point for our recommendations was the Bureau of Statistics projection of the total population as at 31 December 1995, but the proposed allocation also takes account of the other factors mentioned. Therefore, there would be no reason to revise it even if the census about to be taken shows that the actual distribution of ethnic communities in the population is somewhat different from what was projected. We believe that the proposed allocation of reserved seats will be generally perceived as fair and acceptable.

Reserved seats and the international standards

9.161 We earlier found that communal representation was not in itself inconsistent with the international standards, especially if it operates within a

framework both of individual choice and the principle of equal suffrage. There is an example of communal representation within the region that meets both criteria. In New Zealand, Maori have the choice of registering on the Maori roll or the general roll. The number of Maori constituency seats is determined under a formula which takes account of the number of electors who choose to register on each roll. The votes cast by Maori and by general electors for constituency members are therefore of equal value. Under the newly introduced mixed member proportional system of representation, no distinction is made between Maori electors and general electors in voting for the party of their choice.

9.162 Our own proposals for reserved seats are not quite so elastic. We consider that, within the narrow limits referred to above, it will be necessary to prescribe communal identity for voting purposes. Freedom of choice to vote communally or not might distort the outcomes in a way which cuts across the purpose of retaining some reserved seats for the time being.

9.163 The arrangements proposed restrict to some degree individual freedom to determine personal identity for representation purposes, and, when the results of the forthcoming census are known, may be found to deviate slightly from the principle of equal suffrage. Even so, we believe that, as a transitional measure, they will be recognised as being within the “margin of appreciation” that international law allows to states in applying the international human rights standards.

9.164 The purpose of the reserved seats is to achieve the objective referred to at the beginning of this chapter - to move away decisively but gradually from the present communal voting arrangements. Members of all communities will be able to vote without distinction for candidates for the open seats in the Bose Lawa and for the provincial seats in the Bose e Cake.

The composition of the Bose Lawa

9.165 For the reasons explained, we propose that the 70 seats in the Bose Lawa should be allocated as follows:

Reserved seats:	Fijians (including Pacific Islanders)	12
	Indo-Fijians	10
	General voters	2
	Rotumans	1
Open seats		<u>45</u>
Total		70.

9.166 The 25 reserved seats represent approximately 36% of the total number of seats in the Bose Lawa and the open seats 64%. The Commission sees that proportion of open seats to reserved seats as the bare minimum necessary to allow them to act as a spur to the development of multi-ethnic politics.

Constituencies for elections to the Bose Lawa

9.167 As a further incentive to the emergence of multi-ethnic governments, we propose that the 45 open seats should be filled by voting in 15 three-member constituencies. The criteria for the drawing of the boundaries of the open-seat constituencies should include the requirement that, so far as possible, they should be heterogeneous - that is, they should be composed of members of different ethnic communities. In Chapter 10, we explain the reasons for both these proposals and discuss the way the electoral system is likely to work in practice.

9.168 The principle of equal suffrage requires that, within acceptable limits, the boundaries of all constituencies for the election of members of the Lower House of a Parliament should be drawn so that each contains approximately the same number of inhabitants. All votes can then be said to be of equal value. Many submissions pointed out that the existing arrangements for the Fijian communal seats did not achieve equity between the large and heavily populated provinces and the smaller provinces. Nor did they achieve equity between the Fijian urban constituencies and the provincial constituencies. We understand that a main reason for the divergences was the desire that Fijians should, so far as possible, vote in the province to which they belong, rather than the province where they happen to reside.

9.169 Some submissions also expressed the view that the use of the provinces as constituencies for the election of the Fijian members of the House of Representatives had led to divided loyalties. It was not always clear whether members represented their parties or the Provincial Councils which had often been instrumental in their selection. In addition, old inter-provincial rivalries had tended to come to the fore, to the detriment of a focus on national issues and interests.

9.170 For these reasons, we consider that the provinces should no longer be the constituencies for the Fijian reserved seats, but, as already recommended, should become the basis for representation in the Bose e Cake. Where the Upper House is designed to allow the representation of particular territorial units of unequal geographical size and population, there is a recognised freedom to depart from the principle that every vote should be of equal value. Despite differences in population, it is accepted that each unit may be represented on an equal basis.

9.171 We therefore propose that the constituency boundaries for seats in the Bose Lawa should be drawn so as to divide the Fiji Islands into the requisite number of territorial constituencies for each category of seats. With some modifications, the principles at present set out in section 48(3) of the 1990 Constitution should be applied. As far as possible, each constituency for a reserved seat should contain an equal number of inhabitants belonging to the community whose seat it is. Similarly, each constituency for an open seat should, as far as possible, contain an equal number of inhabitants regardless of their community. The drawing of constituency boundaries should ensure that the inhabitants of every constituency are effectively represented, taking into account geographical features, the boundaries of existing administrative and recognised traditional areas, means of communication and density and mobility of population. And as already mentioned, the constituencies for the open seats should be required to be heterogeneous. We come back to these proposals in more detail in Chapter 10.

Voting system

9.172 In discussing the method of electing the President by an electoral college consisting of all members of the two Houses of Parliament, we explained the advantages of the preferential system of voting known as the alternative vote. It ensures that the winning candidate, or, in a multi-member constituency the winning candidates, gain an absolute majority of the votes cast - that is, more than 50%. As we show in Chapter 10, that may not happen under the first-past-the post or proportional systems if there are more than two candidates for any seat.

9.173 Under the alternative vote system, each voter numbers the candidates on the ballot paper in order of preference. A candidate who obtains more than 50% of valid first preferences is declared elected. If no candidate has that number of votes, the candidate with the lowest number of votes is eliminated. The votes cast for the eliminated candidate are transferred to the remaining candidates according to the voters' second preferences. The elimination of candidates and the transfers of votes continue until one candidate has an absolute majority of valid votes. The system is used for elections to the Australian House of Representatives and the Lower Houses of most Australian states.

9.174 For reasons explained in Chapter 10, the Commission sees the absolute majority support required under the alternative vote system as being of most importance in the election of candidates for the open seats in the Bose Lawa and the provincial seats in the Bose e Cake. However, it considers that, to avoid confusion, the election of candidates for the reserved seats should also be held

under that system. It therefore proposes that all elections of candidates for seats in the Bose Lawa and the Bose e Cake should be held under the preferential system known as the alternative vote. The reasons for that proposal are fully explained in Chapter 10.

THE BOSE E CAKE

9.175 As foreshadowed in our proposals about the role, and therefore the membership, of the Bose e Cake, and also about the drawing of constituency boundaries for the Fijian reserved seats, the Commission considers that the Bose e Cake should provide for the distinct identity of the provinces of Fiji, as well as Rotuma, to be represented in Parliament. In discussing our proposals for the representation of particular communities and women, we also indicated that there should be provision for the appointment to the Bose e Cake of a limited number of members to represent communities and groups that would otherwise be under-represented in Parliament, or not represented at all.

9.176 The Commission therefore proposes that the Bose e Cake should consist of 35 members, as compared with the present 34. It should be made up of 28 members elected to represent the provinces, one member elected to represent Rotuma and 6 members appointed by the President to represent communities and groups which would otherwise be under-represented in Parliament.

The representation of provinces

9.177 In our journeys throughout Fiji to receive submissions, it was evident that members of all communities share a sense of belonging to the province with which they have their closest links. In the case of Fijians, the link is with the vanua. The place in which a person is registered as having customary rights to land in that vanua establishes his or her identity more strongly than any other single factor.

9.178 Members of other communities have a similarly strong sense of territorial identity, through birth or residence in a particular place. Those who have cultivated the land feel a strong sense of identification with it, even if they are tenants, not owners. This sense of a common identity among people who belong to the same area also arises from shared or complementary interests. Time and again we were told by members of all communities belonging to a particular area that "here, we all get on well together". For these reasons, we propose that the members representing provinces in the Bose e Cake should be elected by the voters from all communities resident in the province. This will help to strengthen the sense of a

common identification with the province and their economic and, sometimes social, interdependence.

9.179 The integration of the provinces with the nation as a whole is likely to be enhanced by this widening of the focus to include all communities, and also by the role of political parties. We expect elections to the Bose e Cake to be contested by parties, in the same way that they already contest elections to the Bose Lawa. That development will be inevitable, particularly as the general elections of the members of both Houses will be held at the same time, for reasons explained more fully in Chapter 11. We propose that the members of each House should be elected for a four-year term, but an early dissolution of the Bose Lawa will result in the automatic dissolution of the Bose e Cake.

9.180 In these circumstances, we think that the alliances among different parties and the trading of preferences that we expect to occur in respect of elections to the Bose Lawa will also affect elections to the Bose e Cake. But we realise that the distribution of the different communities is very uneven among the provinces. In some provinces, the population is overwhelmingly Fijian. In provinces where the population is more heterogeneous, we would expect the same factors to operate as in the heterogeneous constituencies electing candidates for open seats in the Bose Lawa. We accept that because of the distribution of population, the members for the provincial seats in the Bose e Cake are likely to be predominantly Fijian, though, as members elected from provincial constituencies, they will represent provincial rather than narrow ethnic interests. We say more about the role of the Bose e Cake in Chapter 11.

Appointed members

9.181 As earlier indicated, the Commission considers that the President should be given power to appoint 6 persons as members of the Bose e Cake to represent communities or groups otherwise under-represented or not represented in Parliament. Although the Constitution should not seek to govern the exercise of the power more tightly, we see it as being relatively sharply focussed.

9.182 After each general election, the Electoral Commission should be required to provide the President with an analysis of the composition of both Houses, indicating the gender of their members and their ethnicity and other relevant characteristics, as far as is known from the information available to it. We consider that the appointing power should be used to redress the likely gender imbalance and allow the representation of groups such as the disabled, and the smaller

communities or groups who may not be adequately represented as members of the larger communities to which they belong for representation purposes.

9.183 We have in mind the ethnic communities and cultural or religious groups who form part of a larger community for the purposes of representation. We do not foresee a need to use the appointing power to redress any lack of proportionality between the main communities. It may not be possible to do justice to all groups on all occasions, but, over time, all groups should get a chance to be represented.

9.184 The Commission considered carefully whether the fact that most elected members of the Bose e Cake are likely to have a party allegiance was compatible with the inclusion of appointed members. We concluded that it was not likely to create problems. The different bases for the election of the members of the two bodies mean that, even if the elections to each are held at the same time, the party or coalition which has a majority in the Bose Lawa will not necessarily have majority support in the Bose e Cake. The President's power to appoint members should be exercised without regard to their party membership, if known. If the appointments happen to change the balance of power in the Bose e Cake between parties, this will probably have no significant consequences.

9.185 The Commission also considered whether the President, before exercising the appointing power, should be required to undertake consultations in order to discover which persons from particular communities or groups would be likely to command wide respect and support. Again, we thought that no constitutional provision was necessary. However, before acting in his own deliberate judgment, the President could well decide to take soundings from the members of the President's Council, for example, or from a range of community organisations. We believe that the President's appointments are likely to be well-considered and generally accepted.

RECOMMENDATIONS

251. **The Bose Lawa should continue to consist of 70 members.**
252. **Approximately two-thirds of the seats should no longer be reserved for particular communities but should become open seats, candidates for which should be elected by the voters of all communities.**
253. **As a transitional measure, approximately one-third of the seats should be reserved for particular communities.**

254. In the light of the recommendation that the retention of reserved seats should be transitional, no reserved seats should be allocated to communities or groups at present not separately represented.
255. Citizens of Pacific Island origin should again vote with members of the Fijian community rather than as general voters.
256. Citizens of mixed descent should have the option of regarding themselves as members either of their father's community or their mother's community for voting purposes (but not for any other constitutional purpose, and without any effect on any matter relating to the ownership of land).
257. The President should be empowered, in the exercise of his own deliberate judgment, to appoint six members to the Bose e Caka to represent communities or groups that would otherwise be under-represented or not represented in Parliament.
258. The allocation of reserved seats among communities should be based on population figures but should also take account of historical and other factors that have affected the present and past allocations of such seats.
259. Although the recommended arrangements for the filling of reserved seats restrict to some degree individual freedom to determine personal identity for representation purposes, and may be found to deviate slightly from the principle of equal suffrage when the results of the forthcoming census are known, they should, as a transitional measure, be recognised as being within the "margin of appreciation" that international law allows to states in applying the international human rights standards.
260. The seats in the Bose Lawa should be allocated as follows:
- | | | |
|-----------------|---------------------------------------|-----------|
| Reserved seats: | Fijians (including Pacific Islanders) | 12 |
| | Indo-Fijians | 10 |
| | General voters | 2 |
| | Rotumans | 1 |
| Open seats: | | <u>45</u> |
| Total | | 70. |

261. The recommended proportion of open seats to reserved seats in the Bose Lawa should be regarded as the minimum necessary to allow them to act as an encouragement to the development of multi-ethnic politics.
262. The 45 open seats should be filled by voting in 15 three-member heterogeneous constituencies - that is constituencies in which there is a mixed population made up of members of the different ethnic communities.
263. The provinces should no longer be the constituencies for the Fijian reserved seats, but, as already recommended, they should become the basis for representation in the Bose e Cake.
264. The constituency boundaries for all seats in the Bose Lawa should be drawn so as to divide the Fiji Islands into the requisite number of territorial constituencies for each category of seats. As far as possible, each constituency for a reserved seat should contain an equal number of inhabitants belonging to the community whose seat it is. Similarly, each constituency for an open seat should, as far as possible, contain an equal number of inhabitants regardless of their community. The drawing of constituency boundaries should ensure that the inhabitants of every constituency are effectively represented, taking into account geographical features, the boundaries of existing administrative and recognised traditional areas, means of communication and density and mobility of population, and, in the case of the open seats, the criterion referred to in Recommendation 196.
265. All elections of candidates for seats in the Bose Lawa and the Bose e Cake should be held under the preferential system known as the alternative vote.
266. The Bose e Cake should have 35 members, comprising 28 members elected to represent the provinces, one member elected to represent Rotuma and 6 members appointed by the President to represent communities and groups which would otherwise be under-represented or not represented in Parliament. The two members representing each province and the member representing Rotuma should be elected by all voters resident in the province or in Rotuma.

- 267. To assist the President in exercising the power to appoint 6 persons as members of the Bose e Cake to represent communities or groups who are otherwise under-represented in Parliament, the Electoral Commission, after each general election, should be required to provide the President with an analysis of the composition of both Houses, indicating the gender of their members, and their ethnicity and other relevant characteristics, as far as is known from the information available to it. The President should also be free to consult informally about possible appointments.**