

Remembering Guy Powles: As Constitutional Review Commissioner, Mentor, And Friend

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Introduction

In early 2005 I had the huge pleasure of meeting Dr Guy Powles and his wife Maureen Powles at the Australian National University. We were attending Asia-Pacific Week, at which young post-graduate scholars had an opportunity to present their research and meet others with similar research interests. I had read some of Guy's work before meeting him and so knew of our shared interest in Pacific constitutions. Like probably every person who ever met him, I was immediately impressed by his warmth, kindness, wit and intellect. He and Maureen had driven from Melbourne to Canberra because they were interested in learning about what young scholars in a range of disciplines were working on in the Pacific. Guy was a great listener and also generous with his (gentle) advice and wisdom. We struck up a friendship and stayed in touch from that point on. Guy assisted me greatly in my PhD research, and also gave me very useful feedback on a couple of papers I presented at conferences of the Australian Association for the Advancement of Pacific Studies (of which we were both founding members).

As many readers of this special issue will know, Guy had lived and/or worked in the Pacific Islands region since 1949, and had therefore spent more than 65 years getting to know the Pacific, forming friendships all over the Pacific, and contributing to the practice and theory of law in the region. Guy developed and taught Pacific law-related subjects for 25 years at Monash University in Melbourne. He also taught the laws of the Pacific Island states at law schools of the Universities of the South Pacific and Hawai'i.

One aspect of Guy's Pacific experience and expertise that may be less widely known is his longstanding connection with, and his work in, Nauru. Guy was admitted to practice in the Supreme Court of Nauru in 1977, less than a decade after Nauru gained independence. In that same year he appeared for Hammer De Roburt and other members of Parliament in a constitutional reference relating to the lawfulness of a Supply Act. Guy appeared again in a constitutional case in Nauru in 1992. Many moons later, Guy was to spend 3 months over the

summer of 2006-2007 slaving away over a lengthy report on Nauru's Constitution. And in the final year of his life he joined a group of fellow public law scholars to publicly urge the restoration of the rule of law in Nauru.

Guy's work on the Constitutional Review Commission

In 2006 I undertook some work in Nauru, advising Nauru's Parliamentary Standing Committee on Constitutional Review on the proposed review of Nauru's 1968 independence Constitution. The Committee decided to pursue a 6-step process of constitutional review.¹ After the completion of steps 1 and 2 in that process (public awareness and public consultation), we were ready to embark on step 3: an independent review of the Constitution by a 3-member Constitutional Review Commission.² The Committee had decided that the Commission would comprise 2 eminent Nauruans and 1 expatriate expert in Pacific constitutional law. It established the Commission under the Constitutional Review Committee Act 2004, and appointed 2 former members of the Nauru Parliament: Ruby Thoma and Leo Keke. Ruby was at that point the only woman ever to have served in Nauru's Parliament, and was the Director of Public Health. Leo was the only Nauruan lawyer in private practice in Nauru, and former Minister for Justice and Secretary for Justice. Guy was appointed as the foreign expert, and I served as legal counsel to the Commission.

Guy travelled to Nauru in late 2006 to begin his work on the Commission, and stayed until just before Christmas. He did a lot of work from his home in Melbourne over Christmas and the new year, and returned to Nauru again early in the new year for a further stint of about 3 weeks. Guy and Leo already knew each other and had a great mutual respect. Guy and Ruby got to

¹ The six steps were: 1 – public awareness, 2 – public consultation, 3 – Constitutional Review Commission, 4 – Constitutional Convention, 5 – Bills to amend the Constitution introduced to Parliament and passed in accordance with the requirements of Article 84 of the Constitution (90 days between introduction and passage, and passage by not less than two thirds of the total number of members of Parliament), 6 – referendum for amendments to certain Articles in accordance with Article 84 of the Constitution (passage requires two thirds of the votes validly cast).

² The Commission (like the other steps in the process) was funded by the United Nations Development Programme Fiji Multi-Country Office in Suva with assistance from the United Nations Democracy Fund, New York.

know and admire each other quickly through the intensive work of the Commission. The Commission was given space in the Parliament building to do its work, though the Commissioners also did some of their work from home (or in Guy' case, from his hotel room) in the evenings.

The following excerpt (written by Guy) from the introduction to the Commission's report neatly captures the background to the need for constitutional reform in Nauru:

Nauru became one of the smallest independent states in the world after adopting a Constitution by Constitutional Convention in 1968. Due to the mining and sale of phosphate, it was also one of the wealthiest. Local mismanagement, dishonesty and the predations of clever money merchants and lawyers from a cast of international fraudsters, coincidental with disasters felt in all markets globally, brought Nauru to bankruptcy in the late 1990s. Its 10,000 people (4,800 adults) are asking what went wrong, and the constitutional, legal and administrative systems and structures are under close scrutiny.

In light of the above, it is not surprising that the Commission gave considerable thought to identifying the underlying factors that provide background to the need for constitutional reform. Having considered Nauru's recent political history and economy, the Commission summarises them broadly as—

- The failure of institutions due to defective or ineffective laws, including the Constitution and statutes.
- Lack of motivation or incentive to preserve wealth for the future, and account for its management and drawings upon it.
- Absence of machinery for enforcing accountability and transparency, and for punishing breaches.
- Failure of leaders to learn the principles of good governance and elements of the cabinet-parliamentary system, and make a commitment to them.
- In planning for improvement in the above areas, a serious shortage of human capital, particularly people with appropriate skills, and accountants and lawyers.

In the Commission's view, the Constitution of 1968 was the product of a time when constitutions typically outlined the bare essentials of the law and left institutions and their leaders to develop without guidance from the constitution. Today, the Constitution

appears ineffective in a number of areas, particularly in the regulation of the relationships between Cabinet and Parliament, rules conducive to stability in government, the standards expected of leaders, the control of public money and the provision of opportunities for citizens to take action for breaches of the law. This Report seeks to address these issues, along with many others which require constitutional reform, in the light of the public's expressed concerns.³

The Commission's terms of reference required it to consider the extent to which the Constitution met the present and future needs of the people of Nauru and to recommend any amendments to the Constitution it considered necessary and desirable. The Commission was also required to pay particular regard to the views of the public that had been expressed in public consultations and written submissions and to include in its report a fair account of the range of alternative views presented by members of the public. The terms of reference directed to the Commission to 'explain the rationale for each recommendation and the way in which the Commission arrived at its recommendations.'⁴

The Commission had quite a short period of time in which to complete its demanding task: it began work in early December 2006 and had to submit its report to the Standing Committee by 28 February 2007. The timeframe was tight because the Standing Committee and the UNDP were keen to have the whole process wrapped up by the end of the parliamentary term in which it had begun (lest there be a change of government and a loss of political will for constitutional reform). The 16th Parliament had begun in October 2004 and its 3 year term was due to expire in October 2007, so the race was on to complete the 6-step process between July 2006 and October 2007.⁵

The Commission began by absorbing the large volume of material that had been gathered during the public consultation phase. The Commission's administrative assistants prepared useful indexes and cross-referencing guides to help the Commissioners navigate the 180 pages of minutes from the 40 public consultation meetings that had been attended by over 700 people

³ Nauru Constitutional Review Commission, *Naoero Ituga Report*, 2007, 3-4.

⁴ Appendix 1 – Constitutional Review Commission Terms of Reference, *ibid*, 201.

⁵ Although for a number of complicated political reasons, the process ended up dragging on until 2012.

around the island, and the 40 written submissions. Guy lamented the fact that the public consultations had been conducted prior to the Commission, as he would very much have enjoyed listening to people's views and discussing the Constitution with them. But he was grateful for, and keenly interested in, reading about what people had said. The Commission also invited certain people and organisations to meet with it.

Guy and the other Commissioners read widely and held lengthy discussions on all aspects of the Constitution. They considered the colourful history of Nauru's post-independence years, and in particular the political game playing that had resulted in 35 changes of government in the 39 years since independence (that score is now 44 changes of government in 48 years). The Commissioners looked at other Pacific constitutions for examples of the ways in which Nauru's constitutional problems might be addressed. Guy's fellow Commissioners were assisted greatly by Guy's expertise in comparative constitutional law and his extensive knowledge of how Pacific constitutional systems in particular operated in theory and in practice.

The Commission prepared a report that is just over 250 pages long, examining each provision of Nauru's Constitution, the way it had operated since independence and any litigation concerning the particular provision, views expressed by the public, and what amendments were proposed and the rationale for them. The Report is divided into chapters that mirror the structure of Nauru's Constitution. The Commissioners divided up the chapters between them, and then shared and discussed their drafts and modified them to reflect their agreed position. While the Commissioners had some very robust debates, some of which I took part in, they were ultimately able to reach a consensus on all issues.

Guy personally took on a great share of the work and seemed to have boundless energy for it. As the 28 February deadline drew near, there were at least 2 occasions when Guy and I worked all through the night and into the next day without running out of steam. We both seemed to be energised by the task and were optimistic about the positive changes that might be effected through the work of the Commission (and the Standing Committee) and the brighter constitutional future that might bring. The Commission completed its report on time, in the late afternoon of 28 February, and delivered it to President Ludwig Scotty and the members of the Standing Committee at a special party that was held for the occasion. The few copies of the report that we had been able to print at the Australian High Commission (we did not have the

facilities in Parliament to print and bind such a large document, and the power was always going off) were literally hot off the press when we handed them over, still warm from the printer at the Menen Hotel rooms of the High Commission just a 2 minute hitch hike away.

The Commission's recommendations were intended to improve the stability and accountability of government in Nauru, and to reduce the scope for political game-playing. They included a recommendation that the President be directly elected, with candidates being selected by and from among members of Parliament (as in Kiribati), the addition of social and economic rights to the bill of rights, an increase in the number of members of Parliament and a Speaker being selected from outside Parliament (as in Solomon Islands), and certain limits being imposed on the use of motions of no confidence.

Beyond the Commission

The Commission's recommendations were debated by an elected Constitutional Convention in April and May 2007, and accepted with some modifications. The resolutions of the Convention were translated into 2 bills to amend the Constitution, which were referred to a Select Committee on Constitutional Amendment Bills after introduction, and were scrutinised in great detail. The Bills eventually secured the necessary two-thirds majority in Parliament and were enacted in 2009. However, certain amendments that also required the approval of two-thirds of votes cast in a referendum failed to pass in the 2010 referendum, and the consequential amendments necessary to enable the parliamentary amendments to commence were defeated in 2012.

Even after his work on the Commission was completed, Guy followed the remainder of the constitutional review process, and Nauru politics with keen interest and concern. He was close enough to Nauru and knew enough of the players to see clearly the connections and tensions between the ongoing political shenanigans and the efforts at constitutional reform. Guy's assessment of the failure of the proposed constitutional amendments to come to fruition was that those members of Parliament who sincerely desired to see Nauru governed as a democratic Republic under its Constitution, and who supported the reforms, were defeated by politicians and groups who believed that reform would not be in their political interests. A few months after the latter group achieved a majority in Parliament in 2013 and formed a new government, Guy expressed to me his dismay at the descent into arbitrary rule and the breakdown in the rule

of law. The new government's interference with the judiciary and the extreme measures it took to silence critics were deeply troubling.⁶

Guy was among a group of academic lawyers with expertise in constitutional law, international law, and/or human rights law who in July 2015 signed an open letter to New Zealand's Minister for Foreign Affairs, Hon Murray McCully, urging him to take action in relation to Nauru. The letter urged Minister McCully to 'make urgent representations to the government of Nauru in respect of its persistent breaches of human rights and its disregard for the rule of law and parliamentary democracy', and to persuade the government of Nauru to revoke its decision to cancel the passports of opposition MPs, lift the suspension of opposition MPs, restore freedom of expression and other civil and political rights, and refrain from further interferences with the operation of the justice system.⁷ The letter suggested that Minister McCully should withdraw New Zealand funding from Nauru's Department of Justice and Border Control if Nauru did not move swiftly to take remedial action. Two months later, after attempts to talk with Nauruan representatives, Minister McCully announced that New Zealand would suspend its funding to Nauru's justice sector.⁸

Guy was a generous and supportive friend, and devoted a lot of time and energy to doing what he could to help my husband and me when we were personally affected by events in Nauru. He was a model of compassion and kindness, who always saw the good in everyone. I feel very lucky to have known Guy, and will remember him lovingly.

⁶ For discussion of some of the relevant events see Stewart Firth, 'Australia's Detention Centre and the Erosion of Democracy in Nauru' (2016) 51 *The Journal of Pacific History* 286.

⁷ An open letter to Murray McCully, <http://pundit.co.nz/print/3732> (accessed 9 December 2016).

⁸ New Zealand suspends aid to Nauru's justice system, ABC Pacific Beat, 3 September 2015, <http://www.abc.net.au/news/2015-09-03/new-zealand-suspends-aid-to-naurus-justice-system/6747742>.