

EXECUTIVE GOVERNMENT: THE RESPONSIBILITIES OF THE PRESIDENT, THE PRIME MINISTER AND THE CABINET

THE NATURE OF THE CONSTITUTIONAL RULES

12.1 This chapter focusses on the structure of the executive branch of government. In this area, more than any other, the basic principles of the Westminster system have evolved gradually, as substantive power was transferred from the Sovereign to Ministers responsible to Parliament. This evolution left formal power in the hands of the Sovereign, but required that power to be exercised in accordance with informal rules, known as constitutional conventions. These are generally accepted understandings about when and how political figures such as the Head of State, the Prime Minister and other Ministers, ought to exercise their legal powers or take other steps that will have legal consequences.

12.2 In the codified Westminster Constitutions, the principle that executive power is vested in the Head of State was retained. Some constitutional conventions affecting its exercise were codified, and have now become legal rules. It is sometimes argued that, if a convention recognised in Britain was not codified in this way in the constitution of a former colony, it no longer applies. We believe this is an over-simplified view.

12.3 As we show, there are some areas in which the exercise of the legal powers and duties of the President and the Prime Minister in particular cannot produce an acceptable result unless there are informal understandings about how those powers should be exercised in various circumstances. We agree, however, that there is no obligation to follow the particular conventions that have evolved in Britain or any other country with a Westminster constitution. As one would expect, there are now quite wide divergences in the practice followed in different countries in dealing with the same issue. The Fiji Islands, too, is free to develop the necessary conventions in a way that suits its circumstances.

12.4 It is implicit that, over time, a convention may evolve or otherwise be changed to meet new circumstances or new views about the way it ought to work. If at some stage there is a departure from what was thought to be a convention, there may be a question whether the convention has changed or has been broken. Generally speaking, such a question is eventually resolved through the political process, not the courts. Although we express what we believe to be the present conventions in certain areas, they will remain subject to this process of evolution

and change. In itself, that is often a good reason for not writing them into the Constitution.

THE EXECUTIVE AUTHORITY OF THE REPUBLIC

Basic principles

12.5 Reflecting the choice of a republican form of government, section 82(1) of the 1990 Constitution vests the executive authority of Fiji in the President. That provision must be read in the light of three further provisions which clarify its effect:

- Section 82(1) provides that the executive authority of the Republic may be exercised by the President, the Cabinet, or any Minister authorised by the Cabinet.
- Section 88(1) requires the President to act only in accordance with the advice of the Cabinet or a Minister, except in those cases where he is required by the Constitution to act on the advice of, or after consultation with, some other person or body, or in his own deliberate judgment.
- Section 85(2) provides that the Cabinet is collectively responsible to Parliament for any advice given to the President by the Cabinet or a Minister, and for all things done by or under the authority of any Minister in the execution of his office.

The Constitution should continue to include these basic principles on which executive government rests, but should make their fundamental nature and their interaction clearer than it is at present.

12.6 The Cabinet, Ministers acting under the authority of the Cabinet, and, through them, the departments and other government agencies, are the main instruments through which executive authority is exercised. The President is involved only when, under the Constitution or some other law, he or she is required personally to perform some formal act. Even then, the President ordinarily acts on the advice of Cabinet or a Minister.

12.7 Under section 89 of the 1990 Constitution, the Prime Minister has a duty to keep the President informed. That duty should be retained. As we indicated in Chapter 9, its existence implies that the President has the right to be consulted about major issues, and to encourage Ministers in their initiatives or warn them of possible disadvantages. But the President does not govern.

12.8 The Constitution sometimes requires the President to act on the advice of, or after consulting, some specified person or body, other than the Cabinet or a

Minister, or in the exercise of his own deliberate judgment. The most important of the President's personal discretions are concerned with finding or changing a Prime Minister. That task is logically prior to the President's duty to act on the advice of the Cabinet and other Ministers.

12.9 The rule that the Cabinet is collectively responsible to Parliament for its exercise of executive authority is fundamental to democratic government. It is the only link between the policy decisions of the Cabinet or individual Ministers and their implementation through the departments and other government agencies, on the one hand, and, on the other, the will of the people as expressed through the election of members of Parliament.

12.10 The concept of collective responsibility to Parliament reflects the principle that the Government must have the confidence of a majority of the members of the *Bose Lawa*. The rules about the choice of a Prime Minister and the circumstances in which the Prime Minister should resign, or seek a new mandate from the country, are designed to secure the observance of that principle. The President acts as a facilitator, and if necessary an enforcer of these rules. Because they precede the formation of a Cabinet, or may lead to the resignation of its members, individually or as a group, the Cabinet is not responsible for the Prime Minister's advice to the President about the appointment and responsibilities of Ministers or the dissolution of Parliament.

12.11 Collective responsibility also means that the members of the Cabinet stand or fall together. The rules about the tenure of office of individual Cabinet Ministers reflect this principle, as well as the principle that, while the Government remains in office, Ministers serve at the pleasure of the Prime Minister.

12.12 However, a Prime Minister is not free to govern without other Ministers. The Constitution requires there to be a Cabinet. A Prime Minister who has been displaced from the leadership of the governing party or coalition must resign from office. If he or she does not do so, the other members of the Cabinet are likely to resign, thus forcing a change of Prime Minister.

Content of executive authority

12.13 Like most constitutions, neither the 1990 Constitution nor the 1970 Constitution contain any provision about the source and content of executive authority. In this area the 1990 Constitution remains firmly based on the same principles as its predecessor, despite the change to a republican form of government. It is therefore safe to say that the content of executive authority has

not changed. It is to be ascertained by reference to the powers of the Sovereign under the common law, often described as the prerogative, except so far as modified by the Constitution or by statute.

12.14 All powers conferred on the President by the Constitution are to be regarded as declaring or amplifying the scope of the executive authority of the Republic. As section 82(2) indicates, that authority can be further amplified by statutes that are consistent with the Constitution. The Bill of Rights prohibits the executive from interfering with the rights and freedoms of individuals, except by or under a law. Such a law must be one coming within a permitted limitation of the right or freedom concerned. Furthermore, as we explain in Chapter 16, the executive cannot raise revenue or spend money without the consent of Parliament.

12.15 In some areas there are likely to be conventions about matters which, although within the *powers* of the executive, ought nevertheless to be approved by Parliament, informally or formally, before the executive power is exercised. The acceptance of major treaty obligations is one such area, even if the treaty does not impose obligations which need to be implemented by changes to the law.

RECOMMENDATIONS

369. The Constitution should continue to vest the executive authority of the Republic of the Fiji Islands in the President, and provide for its exercise in accordance with the following rules:

- (a) The President, the Cabinet, or a Minister authorised by the Cabinet, as well as a department or other government agency acting under the direction and control of a Minister, should be empowered to exercise the executive authority of the Republic.**
- (b) To the extent that the executive authority of the Republic is exercised by the President, he or she should be required to act only in accordance with the advice of the Cabinet or a Minister, except in those cases where the President is required by the Constitution to act on the advice of, or after consultation with some other person or body, or in the President's own deliberate judgment.**
- (c) The Cabinet should be collectively responsible to Parliament for any advice given to the President by the**

Cabinet or a Minister (except advice given by the Prime Minister about the appointment or responsibilities of Ministers or the dissolution of Parliament) and for all things done by or under the authority of any Minister in the execution of the Minister's office.

- 370. The Constitution should continue to require the Prime Minister to keep the President informed concerning the general conduct of the government of the Republic, and to supply such other information about any particular matter relating to the conduct of government as the President may request.**

APPOINTING THE MEMBERS OF THE CABINET

12.16 The Commission's recommendations 237 - 241, contained in Chapter 9, set out the basic rules for the formation of a government. In discussing the more detailed rules about the composition of the Cabinet, we build on those recommendations.

Composition of the Cabinet

12.17 The Constitution should provide that there shall be a Cabinet, consisting of the Prime Minister and not more than 15 other Ministers. It should also permit the appointment of not more than 5 Assistant Ministers who are not members of the Cabinet, but attend Cabinet meetings on invitation if a matter for which they are responsible is under discussion. In the Fiji Islands, Assistant Ministers are often referred to as Ministers of State, but we keep the original terminology as indicating more clearly their role and status. All Ministers and Assistant Ministers should be required to be elected members of Parliament.

12.18 The Commission decided to recommend a ceiling on the number of Ministers and Assistant Ministers, both as an economy measure and because it is important that the governing party or coalition should have a certain number of backbench members. In the House itself, Government backbench members are likely to speak and vote in accordance with the party whip, but in the confidentiality of the caucus room, they are an important moderating influence on a Government with a majority.

12.19 The Commission also considers that, in a Parliament with 99 elected members, there is no reason for Ministers to come from among the six appointed members of the Bose e Cake. They are there to ensure that the concerns of under-represented communities and groups can be aired in Parliament, but the fact that

Ministers come from among elected members and remain collectively responsible to the Bose Lawa provides the only link with the voters. No Government is likely to have difficulty in selecting well-qualified elected members to fill all ministerial positions.

12.20 There is already an understanding that, as a general rule, most Ministers should come from the Bose Lawa, not the Bose e Cake. Although, under our proposals, most members of the Bose e Cake will also be elected, the Cabinet does not need to have the support of a majority in that House. Without proposing the inclusion of a provision in the Constitution, we record our view that not more than one quarter of all Ministers and Assistant Ministers should be appointed from among the elected members of the Bose e Cake. We have already recommended that, as at present, the Prime Minister should be required to be a member of the Bose Lawa.

12.21 Section 83(1) of the 1990 Constitution requires the Cabinet to include an Attorney-General and a Minister responsible for defence and security. While we do not doubt the need for Ministers to be assigned responsibility for these portfolios, there seems no need to mention that fact specifically, while not referring to the inclusion in the Cabinet of a Minister responsible for Finance, for example. We consider that the Constitution should not specifically require the inclusion in the Cabinet, of Ministers responsible for particular portfolios, but, subject to what we say below about the Attorney-General, should preserve the freedom of the Prime Minister to advise the President to create such Ministerial portfolios as the Prime Minister considers desirable.

12.22 We return later to the allocation of responsibilities among the members of the Cabinet. The ceiling on the total number of Ministers and Assistant Ministers means that some members of the Cabinet will have more than one area of responsibility.

The Attorney-General

12.23 Some submissions expressed the view that, as the state's chief legal adviser with responsibilities for upholding the Constitution, the Attorney-General should not be an elected member of Parliament, or a member of the Cabinet, but should be an independent constitutional officer. They suggested, as a requirement, that the Attorney-General should be not merely a person entitled to practise as a barrister and solicitor in Fiji, but one who has had a prescribed period of actual practice.

12.24 The Commission considered these concerns but believes that the Attorney-General should continue to be a member of the Cabinet, and that the person appointed to that office should continue to be a member of Parliament. The Attorney-General is likely to exercise the greatest influence over the members of the Cabinet and of Parliament if he or she is equal to them in responsibilities and status.

12.25 The Attorney-General's membership of the Cabinet does not unduly politicise the office. For one thing, the responsibility for taking decisions about the institution or discontinuance of criminal proceedings, which in some countries rests with the Attorney-General, is in the Fiji Islands the responsibility of a constitutionally independent officer, the Director of Public Prosecutions.

12.26 For another, the Attorney-General is advised and assisted by the Solicitor-General who is at present independently appointed by the Judicial and Legal Services Commission. We propose below that the office of Solicitor-General should be given constitutional status, and that he or she should be appointed by the Constitutional Offices Commission and given an element of independence in making decisions about litigation in which the state is involved. In Chapter 10, we recommended that the possibility of a direct conflict of interests should be avoided by giving the Solicitor-General, rather than the Attorney-General, standing in relation to election petitions and claims that the seat of a member of Parliament has been vacated.

12.27 Although the Attorney-General may conduct civil litigation on behalf of the state, the principal role of the holder of that office will remain that of advising the Cabinet and Parliament on the legal parameters within which policy decisions ought to be taken. The Attorney-General will also have the responsibility of explaining to Parliament the reasons for particular decisions taken by the Solicitor-General or the Director of Public Prosecutions in the exercise of their independent responsibilities, and answering for the general policies they apply.

12.28 The Constitution should continue to provide that the Attorney-General is the principal legal adviser to the Government and that the person appointed to that office must be qualified to practise as a barrister and solicitor in the Fiji Islands. The Attorney-General should continue to have the right to take part in the proceedings of either House of Parliament, but to vote only in the House of which he or she is a member.

12.29 Section 83(4) provides that, if the person holding the office of Attorney-General is for any reason unable to perform the functions of that office, they may

be performed by another qualified person, whether or not a member of Parliament, appointed by the President on the advice of the Prime Minister. This provision now seems unnecessary and should be repealed.

12.30 We make a general proposal below about the exercise of a Minister's responsibilities by a Cabinet colleague, if the Minister is unable to perform the functions of the office. It should be provided that a Minister may be appointed to act as Attorney-General, whether or not legally qualified, but, in order to ensure that there is always someone who can exercise the Attorney-General's legal powers, it should also be provided that, in such a case, the Solicitor-General may exercise any power specifically conferred on the Attorney-General by law, or by virtue of the Attorney-General's appointment to any body or office created by or under a law. The Government will in any case be able to call on the Solicitor-General for advice, whether or not the Attorney-General is available.

12.31 Section 86(2) makes it clear that the Attorney-General may be assigned other ministerial responsibilities. That should continue to be the case, though it does not need to be provided for specifically. It has been the usual practice to assign to the person holding the office of Attorney-General the responsibility for the Justice portfolio. Some submissions expressed concern about the likelihood of confusion about what belongs to the office of Attorney-General, and what is the responsibility of the Minister for Justice.

12.32 The possibility of confusion is not lessened by the fact that the Solicitor-General, in effect, usually acts as the Permanent Secretary of a department with wide ranging responsibilities in the justice area. This department administers the courts, as well as having a number of other responsibilities. In Chapter 13, we endorse a recommendation of the *Commission of Inquiry on the Courts of Fiji* that a separate Court Services Department should be established. That Commission suggested that the new department should be headed by a separate Permanent Secretary called the Chief Courts Administrator. Responsibility for the new department will have to be assigned to a Minister, possibly the Minister who is already Attorney-General and responsible for the Justice portfolio.

12.33 The new arrangements will make it more important than ever for the substantive responsibilities of the different Ministerial portfolios and those of the departments or offices coming under the general direction and control of a particular Minister to be clearly defined. Although this comment is made in the context of the portfolio of Attorney-General and related portfolios, it is one that applies generally.

The appointment of the Prime Minister

12.34 The Commission has already recommended that the Constitution should continue to require the President, acting in his or her own deliberate judgment, to appoint as Prime Minister the member of the Bose Lawa who appears to the President best able to command the support of the majority of the members of that House. It added that the need for the President to take account of the electoral support received by the various parties and other relevant factors, including the outcome of negotiations about the formation of a government, the identity of the Prime Minister and the composition of the Cabinet, should be clearly understood.

12.35 Although the people of Fiji are used to learning the result of a general election within 24 hours of the closing of the polls, we believe they will accept that it is likely to take longer than that to determine the results of a general election conducted under the alternative vote system (AV). They will also need to accept that, even when the result of the general election is known, it may not always be clear immediately who should be appointed as Prime Minister. That was the case after the first election in 1977, and again in 1992.

12.36 When a single party or pre-election coalition wins the support of a majority of the seats in the Bose Lawa, the Prime Minister is normally the leader of that winning coalition or party. The convention is already established that, if that party or coalition's *leadership* is not clear, the President should leave it to the party or coalition itself to sort out that question.

12.37 In discussing the recommended *Compact*, we have proposed that account should be taken of a further matter before a Prime Minister is appointed. A party or coalition based exclusively or predominantly in a particular ethnic community which is in a position to govern alone should nevertheless consider whether there is a political basis for forming a multi-ethnic government.

12.38 If, after a general election, no one party or coalition is in a position to form a government, then, of necessity, all parties will immediately begin the process of assessing one another as potential coalition partners. Again, the duty under the *Compact* to take account of the interests of all communities will come into play. We have made the point in Chapter 11 that, although AV is not a proportional system, the encouragement it affords to parties to cooperate across ethnic lines may result in no one party or pre-election coalition achieving a majority. Here we wish to focus on the role of the President in that situation.

12.39 Some guidance can be obtained from the way in which the Governor-General of New Zealand proposes to discharge his responsibilities, if a similar

situation arises when the first general election under a proportional system of representation is held in October 1996. It is worth quoting at some length from a recent public speech given by His Excellency:

The formation of a government is a political decision. It should be arrived at by politicians. My job in all of this is to ascertain the will of Parliament, that is, to find out where the necessary support lies and make an appointment accordingly. ...

I would expect that at some stage, there would be clear and public evidence that the necessary political agreement had been reached, and that a government could be formed which had the support of a new Parliament. That might be in the form of a joint public statement by the party leaders. It might be a fully-fledged coalition agreement. It might be a public acknowledgment by smaller parties that they will support a larger one as a minority government. ...

There may come a stage where it becomes necessary for me to talk with the party leaders. I may need to satisfy myself that I understand the arrangements that have been made. Or, if coalition negotiations become protracted, or bogged down, a little encouragement may not be out of place. My role *then* is simply that of facilitator, providing such assistance as I can to bring about the formation of a new government.

12.40 The Governor-General explained that he laid stress on a public outcome of the political negotiations for two reasons. First, the people who cast their votes should know what is happening and understand the basis for the appointment of the Prime Minister. Secondly, a clear and public agreement among the parties would allow him to make the appointment while remaining distanced from the political negotiations.

12.41 We consider that the President should have a corresponding role. However, unless the Prime Minister in office before the general election has tendered a resignation, the President should not hold discussions with the leaders of other parties without the Prime Minister's knowledge and consent. We also endorse the need for the political parties themselves to make public the outcome of their negotiations, to the extent that it provides a basis for the appointment of a Prime Minister.

12.42 The words of the 1990 Constitution, following almost exactly those of the 1970 document, do not capture these underlying realities of the process of choosing a Prime Minister, or fully reflect the formal position while this process is going on. Section 84(3)(b) provides that the office of Prime Minister becomes

vacant if, at the first sitting of the House of Representatives after any general election, he is not a member of the House. Section 84(2) provides that

If at any time between the holding of a general election and the first sitting of the House of Representatives thereafter the President, acting in his own deliberate judgment, considers that, in consequence of changes in the membership of the House resulting from that general election, the Prime Minister will not be able to command the support of a majority of the members of the House, the President may remove the Prime Minister from office.

12.43 These provisions imply, but do not state, that after a general election a Prime Minister who has not been re-elected to the Bose Lawa, or who clearly no longer commands the support of a majority of the House, should tender a resignation but must remain in office in a caretaker capacity until a new Prime Minister is appointed. If the parliamentary situation is not clear, a Prime Minister who is still a member of the Bose Lawa is under no obligation to resign, but is entitled to stay on and try to obtain the support of a majority.

12.44 If necessary, the position can be resolved by waiting until Parliament meets, as it must do within 30 days after the date specified in the writs for the commencement of polling. A Prime Minister who meets Parliament and survives a vote of no-confidence or is not challenged will simply remain in office.

12.45 The provisions under which the Prime Minister vacates office if not re-elected to the House, or may be dismissed by the President on the ground that the Government no longer commands the support of a majority, are fail-safe mechanisms which should never need to be used. The prominence given to them, and the failure to state other relevant principles, obscure the duties of the Prime Minister after a general election, including the requirement that the country must never be left without a Government. The relevant provisions of the Constitution should be rewritten to accord more closely with all the constitutional principles relevant to a possible change of government after a general election. The President should have a residual power to dismiss the Prime Minister only in circumstances where the Prime Minister is under a constitutional duty to resign but does not do so.

12.46 In the light of the principles just explained, section 80(1)(b) of the Constitution is an anachronism. It provides that

if the office of Prime Minister is vacant and the President considers that there is no prospect of his being able within a reasonable time to appoint to

that office a person who can command the support of a majority of the members of the House of Representatives, the President, acting in his own deliberate judgment, may dissolve Parliament.

The office of Prime Minister will be vacant in the literal sense only if the Prime Minister ceases to be a member of Parliament otherwise than by reason of a dissolution. That includes the case where the Prime Minister dies in office. The governing party or coalition will presumably move quickly to select a new leader whom the President can, "within a reasonable time" appoint as Prime Minister.

12.47 As has been seen, if there is no one party with a majority after a general election, or at any other time during the life of Parliament, it is for the political leaders themselves to work out how a Government is to be formed and who is to be appointed as Prime Minister. The President should be a facilitator of that process, but not a prime mover, though, in the last resort, he could appoint a caretaker Prime Minister. A Government which has not been clearly defeated in a general election may remain in office until Parliament meets. If it is not then defeated on a confidence vote, it will continue to govern. If it is defeated, then the rules covering that situation will apply. We discuss them below. Section 80(1)(b) should be repealed.

The appointment of other Ministers

12.48 The Commission has already recommended that the Constitution should continue to provide that the President appoints the other members of the Cabinet on the advice of the Prime Minister. The same rule should continue to apply to Assistant Ministers. The Prime Minister's recommendations will need to be made within the limit on the number of Ministers and Assistant Ministers proposed above.

Cabinet secrecy

12.49 All members of the Cabinet should continue to be required to take the Oath of Allegiance and the Oath for the due execution of office. That Oath binds the members of the Cabinet not to disclose without authority anything that has transpired in or in relation to the proceedings of the Cabinet while in office or at any time thereafter. The duty not to disclose differences of opinion among members of the Cabinet is traditionally seen as necessary to support the doctrine of the Cabinet's collective responsibility to Parliament. In fact Cabinet secrecy is often taken a great deal further than is necessary for that purpose. It should be looked at critically in the light of the principles it serves, so that it can be reconciled with the competing principle discussed in Chapter 15 that there ought to be freedom of access to official information unless there is good reason to withhold it.

Tenure of office of other Ministers

12.50 The Constitution should continue to provide that a Minister or Assistant Minister may be dismissed by the President on the advice of the Prime Minister. Again this is a safeguard. A Prime Minister who wishes to change the membership of the Cabinet will normally ask for and receive the resignations of Ministers whom he or she wishes to remove from office.

12.51 The Constitution should continue to make it clear that the members of the Cabinet stand or fall with the Prime Minister. Again, the provisions in section 84(4) and 84(5)(d) that Ministers vacate office on the appointment of a new Prime Minister or on the Prime Minister's resignation or removal after the adoption of a no-confidence motion are there only as a backstop. A Prime Minister who tenders his or her resignation after losing the support of the majority of the members of the House, or the leadership of the governing party or coalition, normally tenders also the resignations of all other Ministers and Assistant Ministers.

12.52 At present, the Constitution contains no provision expressly permitting a Minister to tender a resignation from office or providing when that resignation takes effect. The general provision about resignations from office in section 155 is not wholly apposite. The Constitution should provide for the vacation of the office of a Minister or Assistant Minister if its holder tenders his or her resignation, or ceases to be a member of Parliament otherwise than by reason of a dissolution, or is not re-elected to Parliament after a general election. However, in all cases where the vacation of office is associated with a need for a change of Government, the Constitution should recognise that the Prime Minister and other members of the Cabinet who tender their resignations remain in office until the new Prime Minister is appointed.

Responsibilities of Ministers

12.53 The substance of section 86(1) providing that the President, acting on the advice of the Prime Minister, may assign to any Minister, including the Prime Minister, responsibility for the conduct of any business of the Government, including responsibility for any department, should be retained. There should be a further provision that the Prime Minister has responsibility for any matter in respect of which no such assignment has been made.

12.54 Such a provision avoids the possible consequences of an accidental omission to assign responsibility for a particular aspect of the business of the Government. It also reinforces the constitutional principle that, as one leading

authority put it, “there is nothing for which a Minister is not responsible”. What he meant was that, even if the Government has sought to take a particular matter out of its own hands by giving responsibility for it to an independent authority, or privatising it, the Government is still answerable for the decision to do so. That does not mean that the Constitution should in any way prejudge the correctness or otherwise of such decisions. It simply means that, at all times, Ministers retain a responsibility for considering whether the Government ought to take action in respect of any situation or state of affairs arising within, or affecting, the country or its citizens.

12.55 The substance of section 87 concerning the performance of the Prime Minister’s functions during illness or absence should be retained, apart from the requirement that a Minister performing the functions of the Prime Minister shall be a Fijian. There should be a corresponding provision allowing the President, on the advice of the Prime Minister, to authorise another Minister to perform the functions of a Minister who is ill or absent. Again, the general provision for acting appointments in section 152 is insufficiently precise. The fact that a Minister has been authorised to perform the functions of the Prime Minister or another Minister should be required to be notified in the Gazette.

CONFIDENCE MOTIONS AND DISSOLUTIONS

12.56 The Constitution assumes, rather than provides for, the right of a member of Parliament to move a motion of no confidence in the Government. It makes no express reference to the case where the Prime Minister moves a positive motion that the House has confidence in the Government, or chooses to regard the passage of particular legislation, such as the annual Appropriation Bill, as an issue of confidence. The failure of the Bose Lawa to pass a Government Bill that has not been made an issue of confidence may be politically embarrassing, but it should not be seen as having constitutional consequences. We use the words “confidence motions” to describe the various procedural initiatives, of the Opposition or the Government itself, which put to the test the Government’s continuing ability to command the confidence of a majority of the members of the Bose Lawa.

12.57 If a confidence motion results in a clear expression by the House that it has no confidence in the Government - a situation we describe as a vote of no-confidence - the Prime Minister has the alternative of resigning or of advising a dissolution of Parliament. That is the implication of Section 80(1)(a) which provides that

if the House of Representatives passes a resolution that it has no confidence in the Government and the Prime Minister does not within three days either

resign from his office or advise the President to dissolve Parliament within seven days or at such later time as the President, acting in his own deliberate judgment, may consider reasonable, the President, acting in his own deliberate judgment, may dissolve Parliament.

12.58 The President's power to dissolve Parliament without advice means that, even if the Prime Minister fails to resign or advise a dissolution after being defeated in Parliament, he or she will still go into the ensuing general election as Prime Minister, with all the advantages that position carries. We consider that the President should have no power to dissolve Parliament without the advice of the Prime Minister.

12.59 Section 80(1)(a) should be rewritten to provide that, if the Government is defeated on a confidence vote, the Prime Minister must resign or advise a dissolution. A Prime Minister who fails to take either step should be dismissed by the President. The fact that the Government has been defeated on a confidence vote implies that a Prime Minister appointed from among the Opposition members, or those of any party or faction that has ceased to support the Government, is likely to be able to command the support of the majority of the Bose Lawa.

12.60 The present provision, and the revised version we propose, imply a convention that, if a Prime Minister defeated on a confidence vote requests a dissolution, the President will grant the request. Not all Westminster or similar parliamentary systems give a Prime Minister the option of advising a dissolution in such circumstances. For example, the convention in the Australian Federal Parliament now is that another Government should be found from among the members of the existing House if at all possible. In Fiji, however, as in Britain, the Constitution and the conventions that support it recognise that a Prime Minister defeated in the House should have the opportunity to appeal to the voters against the decision of Parliament.

12.61 We consider that, to avoid uncertainty, this convention should be formalised. In a situation where a coalition Government is in office, it is a safeguard against the instability which might occur if the parties making up the coalition were free to leave it and combine in a different way to form another Government. If they know that a departure from the coalition will almost certainly lead to a dissolution, they will be unlikely to leave it on the basis of mere opportunism, but only on a major issue of principle. This approach may enhance the stability of a Government formed by a multi-ethnic coalition or party.

12.62 The Constitution should make it clear that, if a Prime Minister advises a dissolution, the President must act in accordance with that advice, except in the circumstances we refer to below. This does not emerge clearly from the introductory words of section 80(1), perhaps because they were intended to give the President a necessary element of discretion to refuse a request for a dissolution in the following circumstances:

- if the Government in office before a general election is defeated on a vote of no-confidence shortly after Parliament meets following a general election. Such a vote merely confirms what was presumably unclear until then - that the former Government has been defeated and a new one elected. The Prime Minister cannot seek to overturn the verdict of the voters by obtaining another dissolution.
- if a new Government formed after a general election is defeated shortly after meeting Parliament. This situation is the converse of the first. A new Parliament should have a reasonable opportunity to see if it can find a Government from among its members before being dissolved. If another general election is inevitable, then the rule that a Prime Minister who is defeated on a confidence vote is entitled to a dissolution should be allowed to take its course. This may involve the President in making a decision about when to grant a dissolution rather than refuse it, but the invidious nature of such a decision is not avoided by retaining the President's existing power, in these circumstances, to dissolve Parliament without advice.
- if the Prime Minister is displaced from the leadership of the governing party or coalition, whether or not he has also been defeated on a confidence vote. Section 85(3)(b) of the Constitution recognises the convention that, in advising a dissolution, the Prime Minister is not obliged to consult the Cabinet. This convention assumes, however, that the Prime Minister retains the leadership of the governing party or coalition. If that is not the case, he must resign from the office of Prime Minister. He is not entitled to be granted a dissolution so that he can appeal to the voters over the heads of the members of the ruling coalition or party.

We consider that the Constitution should include express rules giving effect to these principles.

RECOMMENDATIONS

371. **The Constitution should provide that there shall be a Cabinet, consisting of the Prime Minister and not more than 15 other Ministers appointed from among elected members of Parliament. It should also permit the appointment, from among elected members, of not more than 5 Assistant Ministers. There should be a convention that not more than a quarter of all Ministers and Assistant Ministers should be appointed from among the elected members of the House of Representatives. The Constitution should no longer require the inclusion in the Cabinet of Ministers responsible for named portfolios.**
372. **The Constitution should provide that the office of Attorney-General must be filled by a member of the Cabinet qualified to practise as a barrister and solicitor in the Republic of the Fiji Islands. The Attorney-General should continue to be the chief legal adviser to the Government and have the right to take part in the proceedings of either House of Parliament, but to vote only in the House of which he or she is a member.**
373. **Section 83(4), providing that, if the person holding the office of Attorney-General is for any reason unable to perform the functions of that office, they may be performed by another qualified person, whether or not a member of Parliament, appointed by the President on the advice of the Prime Minister, should be repealed. The Constitution should provide that, in such a case, a Minister may be appointed to act as Attorney-General, whether or not legally qualified, and that the Solicitor-General may exercise any power specifically conferred on the Attorney-General by law, or by virtue of the Attorney-General's appointment to any office or body created by or under a law.**
374. **With particular reference to the Attorney-General, but with reference also to other members of the Cabinet, the substantive responsibilities of each Ministerial portfolio assigned to a member of the Cabinet, and those of the departments or offices coming under the general direction and control of the Minister holding that portfolio, should be clearly defined.**
375. **If after a general election, no one party or pre-election coalition is in a position to form a government, the President should, if**

- necessary, facilitate negotiations among political parties about the formation of a coalition government. Unless the Prime Minister in office before the general election has tendered a resignation, the President should obtain the Prime Minister's consent before talking to the leaders of other parties.
376. The political parties should make public the outcome of their negotiations, to the extent that it provides a basis for the appointment of a Prime Minister.
377. Sections 84(2) and (3) should be rewritten to make it clear that, after a general election, a Prime Minister who has not been re-elected to the Bose Lawa, or who clearly no longer commands the support of a majority of the House, must tender a resignation, but remains in office in a caretaker capacity until a new Prime Minister is appointed. It should be implicit that a Prime Minister who has not clearly lost the support of the majority is entitled to remain in office until Parliament meets. The President should have a residual power to dismiss the Prime Minister only if the Prime Minister is under a constitutional duty to resign but fails to do so.
378. Section 80(1)(b) of the Constitution, authorising the President, acting in his own deliberate judgment, to dissolve Parliament, if the President considers that there is no prospect of his being able within a reasonable time to appoint to that office a person who can command the support of a majority of the members of the House of Representatives, should be repealed.
379. All members of the Cabinet should continue to take the Oath of Allegiance and the Oath for the due execution of office which binds the members of the Cabinet not to disclose without authority anything that has transpired in or in relation to the proceedings of the Cabinet while in office, or at any time thereafter.
380. The doctrine of Cabinet secrecy should be looked at critically in the light of the principles it serves, so that it can be reconciled with the competing principle that there ought to be freedom of access to official information unless there is good reason to withhold it.
381. The Constitution should continue to provide that a Minister or Assistant Minister may be dismissed by the President on the advice of the Prime Minister.

382. It should provide for the vacation of office by a Minister or Assistant Minister if its holder tenders resignation, or ceases to be a member of Parliament otherwise than by reason of a dissolution, or is not re-elected to Parliament after a general election, or if the Prime Minister vacates office. The Constitution should recognise that the Prime Minister and other members of the Cabinet who tender their resignations in anticipation of a change of Government remain in office until the new Prime Minister is appointed.
383. The substance of section 86(1) providing that the President, acting on the advice of the Prime Minister, may assign to any Minister, including the Prime Minister, responsibility for the conduct of any business of the Government, including responsibility for any department, should be retained. There should be a further provision that the Prime Minister has responsibility for any matter in respect of which no such assignment has been made.
384. The substance of section 87 concerning the performance of the Prime Minister's functions during illness or absence should be retained, apart from the requirement that a Minister performing the functions of the Prime Minister shall be a Fijian. There should be a corresponding provision allowing the President, on the advice of the Prime Minister, to authorise another Minister to perform the functions of a Minister who is ill or absent. The fact that a Minister has been authorised to perform the functions of the Prime Minister or another Minister should be notified in the Gazette.
385. Section 80(1)(a) should be rewritten to provide that, if the Government is defeated on a confidence vote, the Prime Minister must resign or advise a dissolution within prescribed time limits. A Prime Minister who fails to take either step should be dismissed by the President. The President should have no power to dissolve Parliament without the advice of the Prime Minister.
386. The Constitution should make it clear that, if a Prime Minister advises a dissolution, the President must act in accordance with that advice, unless
- (a) the Prime Minister was in office before a general election and his Government is defeated on a vote of no-

confidence shortly after Parliament meets following a general election; or

- (b) the Prime Minister is the leader of a new Government formed after a general election and that Government is defeated shortly after meeting Parliament; or**
- (c) the Prime Minister is displaced from the leadership of the governing party or coalition.**

THE NON-POLITICAL EXECUTIVE

12.63 The distinction between the Cabinet and the non-political executive is an important feature of the Westminster system as it applies in the Fiji Islands. In Chapter 3 we explained that, although a system under which some legislators are members of the political executive may seem to cut across the principle of the separation of powers, there is a balancing factor. The duty of a permanent, politically neutral public service to administer the law and give Ministers free and frank policy advice offsets the fact that, at the political level, the same persons exercise both legislative and executive functions.

12.64 In this section of the chapter we look at how, in carrying out their own responsibilities, the departments, the police and the armed forces come under the direction and control of Ministers. We also look at why certain executive functions have been excluded from direct ministerial control and have become the responsibility of independent constitutional officers.

The Departments

12.65 Section 92 encapsulates two important principles:

- a Minister responsible for a department exercises general direction and control over it;
- the department is under the supervision of a Permanent Secretary or some other supervising officer who is required to be a public officer.

These deceptively simple statements have a number of implications and consequences.

12.66 The first statement reflects, though it does not articulate, the constitutional doctrine that Ministers are individually responsible to Parliament for the work of their departments. The present-day effect of that doctrine is much debated. Some argue that individual ministerial responsibility is no longer meaningful, because

the Government's majority in Parliament shelters individual Ministers from censure or dismissal if their departments make mistakes or otherwise fail to perform. A discussion of that question is beyond the scope of this report. However, individual ministerial responsibility still provides the basic link between the actions of public servants and the democratic process.

12.67 Section 92 refers in terms only to the authority flowing from the Minister to the department. The exercise of "general direction and control" by the Minister is contrasted with the "supervision" of the Permanent Secretary or other supervising officer. That office is a "public office", a term which, as we have mentioned, carries more weight in the Constitution than it should be made to bear. It signifies, among other things, that the Permanent Secretary must be appointed by the Public Service Commission or another service commission. Its holder is a public servant who is expected to have the qualities of experience and professionalism, and to serve the Government of the day loyally, without becoming involved in party politics.

12.68 The language of section 92 does not reflect the subtlety of the relationship between a Minister and a Permanent Secretary. Ministers, and through them the Cabinet, have control of policy, but policy is often developed within a department. Even if it is not, the Permanent Secretary has a role in advising the Minister of the implications of policies developed elsewhere. Nevertheless, the Minister's exercise of "general direction and control" rightly indicates that, once the policy is settled, the department must carry it out faithfully.

12.69 The reference to the Permanent Secretary's "supervision" of the Department is a signal that the Minister should not be concerned with the actual running of the department. Effective Ministers will, however, be aware of the strengths and weaknesses of their departments. The statement that departments are "under the supervision" of their Permanent Secretaries does not throw much light on the nature of their responsibilities. Nor does the section state that the Permanent Secretary is responsible to the Minister for carrying out this task.

12.70 The modern focus is on the duty to "manage" the department - a task that requires the Permanent Secretary to ensure that the department carries out its functions effectively, efficiently and economically. It includes the financial management of the department and responsibility for its financial performance.

12.71 In Chapter 16, we show how the public funds required for a department's work must be appropriated by Parliament. Most countries, including Fiji, are now focussing more sharply on mechanisms that ensure not only accountability

for the money appropriated, but also facilitate scrutiny of what “output” the expenditure achieved, whether that output contributed to the attainment of the government’s objectives, and whether good value was obtained for the money spent.

12.72 On the private sector model, some countries have introduced “performance contracts” between Ministers and their Permanent Secretaries - a concept that is hard to square both with traditional constitutional doctrine and the fact that the power to “hire and fire” public servants remains with an independent Commission. Nevertheless, it is an indication of the seriousness with which Governments are trying to ensure that they can implement their policies while reducing public sector spending.

12.73 Section 92 gives no inkling that responsibility also flows from the department to the Minister, who is accountable to Parliament for the department’s work. Ministers must respond to questions in the House about any matter within their portfolio. Major issues concerning the operation of their departments can be made the subject of a full-scale debate. If it becomes apparent that problems need to be addressed, at the very least, the Minister will give an assurance that effective remedial action has been, or is being, taken.

12.74 A long-standing convention has traditionally required the Minister not to name individual public servants responsible for mistakes or wrong-doing, but their identity often becomes public knowledge in other ways. It is questionable whether the convention continues to serve a useful purpose, except as a reflection of the principle that attacks should not be made in Parliament on named persons - whether or not they are public servants - who are unable to speak in their own defence. Unless the Minister is guilty of personal wrongdoing, the collective responsibility of the Cabinet will usually shield him or her from a need to respond to calls to resign.

12.75 A succinct constitutional provision cannot capture all the nuances of the different responsibilities of a departmental Minister and the Permanent Secretary. We consider, however, that the Constitution should recognise that the Minister exercises general direction and control over the department and is accountable to Parliament for its work. It should also state that, subject to the Minister’s general direction and control, the Permanent Secretary or other officer in charge of the department is responsible to the Minister for its efficient, effective and economical management.

12.76 The term “department” is not defined, except for the indication that it includes the offices of the Prime Minister and other Ministers. It should be seen as including all government offices, regardless of the name by which they are called. All independent constitutional officers are either serviced by a department or, in effect, head a department which supports them in the exercise of their functions. As disciplined services, the police and the armed forces are not “departments” but, as will be seen, a Minister must have control over the responsibilities of those services though not the precise way in which those responsibilities are carried out. To help ensure that the policies governing the roles of the disciplined services are sufficiently broadly based, the Minister should have access to policy advice from civil service officers as well as from officers of the disciplined service.

The Police Force

12.77 Section 95 of the 1990 Constitution creates the office of Commissioner of Police, provides for the appointment of the holder of that office, and provides that the Police Force is under the command of the Commissioner. It authorises the Prime Minister or another Minister to give general policy directions to the Commissioner of Police, and preserves the President’s power, on the advice of the Prime Minister, to assign to a Minister responsibility for the organisation, maintenance and administration of the Police Force. Within those limits, the Commissioner is to act independently in exercising responsibilities and powers with respect to the use and operational control of the Force. Provision for all those matters needs to be made in the Constitution, but the details of the arrangements should be varied in the ways we now propose.

12.78 The Constitution should continue to constitute the office of Commissioner of Police, and provide that the Police Force is under the Commissioner’s command. Section 95(1) provides that the Commissioner of Police shall be appointed by the Police Services Commission *on the advice of* the Prime Minister for a term of five years. There is a conflicting provision in Section 129(1) which requires the Police Services Commission to make the appointment after *consulting* the Prime Minister. As we explain in Chapter 15, the whole point of requiring appointments to be made by a commission is that they should be made independently. Therefore service commissions should be required only to consult the relevant Minister before making the appointment.

12.79 In view of the independent responsibility of the Commissioner of Police for the deployment and operational control of the Police Force, and consistent with the concept that all police officers are personally responsible for acting within

the law in exercising their powers in respect of individual citizens, the Commission considers that the existing constitutional independence of the Commissioner should be reinforced. The holder of that office should be appointed by the Constitutional Offices Commission recommended in Chapter 14, after the Commission has consulted the Minister responsible for the Police Force.

12.80 The Constitution should provide that the Commissioner is responsible for the organisation, maintenance and administration of the Police Force, as well as for determining its use and controlling its operations. In matters pertaining to the organisation, maintenance and administration of the force, the Commissioner of Police should be under the general direction and control of the Minister responsible for the Police Force. The Commissioner should also be required to act in accordance with such general directions of policy with respect to the maintenance of public safety and public order as may be given by that Minister. In exercising his or her powers and authorities for the purpose of determining the use and operational control of the Force, the Commissioner should not be subject to the direction or control of any other person or authority.

12.81 The effect of the existing constitutional provision requiring the Commissioner of police to exercise responsibilities and powers with respect to the use and operational control of the force, free of the direction and control of any person or authority, was recently in issue before the Court of Appeal. The Court held that, by reason of that provision, there was no jurisdiction to issue a writ of mandamus requiring the police to undertake a criminal investigation. (It also expressed the view that, even if there had been jurisdiction, no order should have been made on the merits.)

12.82 The Court's decision reflects section 158 of the Constitution which saves aspects of the jurisdiction of the courts in respect of the functions of a person or authority which is "not subject to the direction or control of any other person or authority". A court may determine whether such a person or authority "has performed those functions in accordance with this Constitution or any other law or should not perform those functions". This formula omits any reference to the issue of a writ of mandamus ordering the person or authority to perform any function.

12.83 The Commission was invited to consider whether there is a need for a constitutional amendment to authorise courts to direct police officers to execute arrest warrants and other legal processes, as they do at present under section 50 of the Magistrates' Courts Act. As we explained in Chapter 7, the exercise of certain

police powers is dependent on first obtaining authority from the courts or acting at their direction.

12.84 However, such an authorisation or direction is given by the courts to individual police officers, by name or by description. We believe that those authorisations or directions should not be regarded as impinging on the responsibility of the Commissioner to determine the use and control the operations of the Force, without being subject to the direction or control of any other person or body. For example, it is inconceivable that a court would regard itself as prevented by that requirement from issuing a writ of habeas corpus ordering a member of the police who is holding a person in custody to bring that person before the court. Accordingly, we do not think that any constitutional amendment is necessary to meet the point raised.

The Republic of Fiji Military Forces

12.85 The 1990 Constitution departed from the 1970 Constitution by making express provision for the Republic of Fiji Military Forces. Section 94 provides that there shall be such a force, and that it shall be under the command of a Commander appointed by the President on the advice of the Prime Minister. Section 94(3) provides as follows:

It shall be the overall responsibility of the Republic of Fiji Military Forces to ensure at all times the security, defence and well being of Fiji and its peoples.

12.86 The inclusion of provision for the existence of the Republic of Fiji Military Forces in the Constitution raises a basic issue of constitutional principle. The Bill of Rights passed by the British Parliament in 1688 contained the following provision:

That the raising or keeping a standing army within the kingdom in time of peace unless it be with the consent of Parliament is against the law.

This was a clear recognition that the existence of a standing army is a potential threat to the liberties of the subject. Ever since 1688, the British Parliament has provided by Act for the raising of the army, and later the air force, though not the navy which was not regarded as being "within the kingdom". Until comparatively recently, the authorising Act expired after twelve months and had then to be renewed. It still has a limited duration.

12.87 Commenting on the Bill of Rights provision, which is part of Fiji's constitutional heritage, a standard constitutional law textbook observes:

This declaration remains important today, not because there is now any possibility that Parliament would withdraw authority for the continued

maintenance of an army but because it asserts that the armed forces are constitutionally subordinate to Parliament.

In the light of this principle, the Commission considers that the provisions of section 94 of the Constitution requiring there to be a military force to be called the Republic of Fiji Military Forces and specifying their responsibilities, unduly constrain Parliament in the control it should have over the existence and functions of any military force in the Fiji Islands.

12.88 We therefore propose that provision for the existence of the Republic of Fiji Military Forces should be made by Act, rather than in the Constitution. The Constitution should restate the principle in the 1688 Bill of Rights. It should provide that a military force may be raised or maintained in the Fiji Islands only under the authority of an Act. The current Defence Review gives the Government the opportunity to consider whether the Act should confer authority to maintain such a force indefinitely, or for a specified period, after which a renewal would be required. Section 94(1) should be repealed.

12.89 The Commission also considers that the Constitution should refer in a more definite way than it does now to ministerial responsibility for the armed forces. As mentioned above, section 85(1) requires the Cabinet to include a Minister responsible for defence and security. However, there is no express provision giving that Minister any authority in respect of the Republic of Fiji Military Forces.

12.90 We believe that, nearly a decade after the events of 1987, it has again been fully accepted that, like other parts of the non-political executive, the Republic of Fiji Military Forces exist solely to serve the purposes of the Government. Any deployment for a particular purpose must be in response to a decision taken at the ministerial level.

12.91 In practice, the matter would first be considered by the responsible Minister who would be likely to take it to Cabinet. If the situation were at all serious, the Minister or the Prime Minister would be likely to consult Parliament before taking a decision. If that were not possible before making a decision, the Government would certainly inform Parliament as soon as possible afterwards.

12.92 The political control just referred to is distinct from the power to command a military force. "Command" refers to the authority of a member of that force to issue lawful orders to members of lower rank. There is a chain of command stretching downwards from the Commander. The power to command encompasses

also responsibility for the highly professional organisation, training and planning activities of a modern military force, so that it is in a position to undertake any duties or operations for which the Government decides that it should be deployed.

12.93 The Constitution should provide for both ministerial control of the Republic of Fiji Military Forces and for its command. We do not wish to preempt the outcome of the Defence Review by being too specific about the terms in which it should do so but consider that effect should be given to the following principles:

- The Republic of Fiji Military Forces should be under the control of the Government of the Republic of the Fiji Islands, exercised through the Cabinet and a Minister responsible for those forces.
- The Republic of Fiji Military Forces should be under the command of a Commander appointed by the President acting in accordance with the advice of the Prime Minister.

As in the case of the Commissioner of Police, there is no need to provide in the Constitution for the length of the term.

12.94 The Commission received a number of submissions questioning the effect of section 94(3), quoted above, on the ground that it gives the Republic of Fiji Military Forces functions going beyond those which should properly be assigned to the armed forces. The Commission considers that the purposes for which the armed forces may be raised or deployed should not be specified in the Constitution. They, too, should be prescribed by Act of Parliament. Section 94(3) of the Constitution should be repealed. The Act should also set out the circumstances and the machinery through which decisions may be taken by the Government to use the armed forces or any part of them to perform a public service or to provide assistance to the police.

12.95 The use of the armed forces to provide a public service is relatively straightforward, as when the army helps to clean up after a cyclone. It is sensitive, however, if the armed forces are used to provide services when these have been interrupted by an industrial dispute. It may be desirable to make a distinction between using the armed forces to provide minimum essential services to the public in those circumstances, and using their labour to help break the strike.

12.96 Sometimes, the military forces may need to assist the police, for example in a major terrorist incident if the police have neither the training nor the equipment to act alone on the scale required. The key element is that the members

of the armed forces assisting the police should be given, by Act, the powers that may be exercised by a member of the police. Otherwise, members of the armed forces would have only the more limited powers of private citizens when called upon to assist the police. The powers of the police are themselves severely restricted. Members of the armed forces assisting the police are not permitted to act as they would in engaging in armed conflict when they are subject only to the limits imposed by international humanitarian law.

12.97 The Act should also give members of the armed forces assisting the police the protections that members of the police have against criminal and civil liability. The members of the armed forces concerned should at the same time retain the legal protection they may acquire by having acted in obedience to a lawful order - a defence not available to members of the police who must always act on their own responsibility. The availability to members of the armed forces of the defence of superior orders is justified because they do not have the training which is designed to help police officers exercise their powers within the limits of the law.

12.98 Finally, the Act should prescribe a procedure for obtaining the authority of a Minister before the armed forces are used to provide a public service or assist the police on a particular occasion. Although that occasion may loosely be described as an "emergency", it will seldom give rise to the need to declare a *state of emergency* as discussed in Chapter 20. The key feature of a state of emergency is that it gives the Government access to legal powers additional to, and often in conflict with, those provided under the regular law or ordinarily permitted under the Constitution. The armed forces are also likely to be needed when a state of emergency is declared, but that situation should not be confused with the more common and less serious situations described above.

12.99 There is an example of a statutory provision authorising the use of the armed forces to provide a public service or assist the civil power in section 9 of the Defence Act 1990 (NZ). The underlying issues are fully discussed in the New Zealand Law Commission's *First Report on Emergencies: Use of the Armed Forces* (NZLC R12).

The independent officers

12.100 Our discussion of the responsibilities of the Commissioner of Police has shown that, although the conduct of executive government should generally be under the control of Ministers, there are some functions which need to be exercised independently of the pressures to which the political executive may be subjected.

These functions concern the exercise of executive powers or authorities in specific cases. Even then, Ministers should remain responsible for the broad policies governing the exercise of the power or authority, but the application of the policy in the particular case should be left to the discretion of an independent officer or body.

12.101 In this chapter we make proposals about two officers who should be given this kind of independence, the Solicitor-General and the Director of Public Prosecutions. The exercise of the prerogative of mercy is another exercise of executive discretion which needs to be similarly protected, but, because it is so closely linked with the administration of justice, we deal with it in Chapter 13.

The Solicitor-General

12.102 The office of Solicitor-General is recognised in the Constitution only through the provision for appointments to that office to be made by the Judicial and Legal Services Commission. As in the case of the Attorney-General, the office of Solicitor-General is deeply-rooted in British constitutional history. As the two positions evolved, the holders of both were recognised as Law Officers of the Crown. The Solicitor-General was junior to the Attorney-General, but there was no marked distinction in their functions.

12.103 In Britain, the holders of both offices are now members of Parliament and Ministers. In the Fiji Islands, as in most other common law countries which maintain the office, the Solicitor-General, appointed as a civil servant by the colonial administration, has remained an officer of the non-political executive. The creation in Fiji of the office of Director of Public Prosecutions and its constitutional independence means that the Solicitor-General is solely concerned with civil matters.

12.104 In this sphere, the Solicitor-General's responsibility as legal adviser to the Government is second only to that of the Attorney-General. Obviously, the Solicitor-General and the Attorney-General must work closely together, but, if the Solicitor-General gives legal advice, he or she takes personal responsibility for it, and does not act on the instructions of the Attorney-General.

12.105 The Commission considers that the Constitution should make provision for the office of Solicitor-General. Because the duties of that office and its relationship with the office of Attorney-General have evolved through the historical process just mentioned, the Constitution should not attempt to describe them in general terms. However, there are some aspects of the Law Officers' functions

which the Constitution should assign to the Solicitor-General rather than the Attorney-General, so that they can be exercised independently, without reference to political considerations.

12.106 We have in mind decisions to initiate or discontinue legal proceedings in civil cases in which the state is the plaintiff, and decisions to defend or settle civil cases in which the state is the defendant. It is not so much that the Solicitor-General should have a discretion to make these decisions without discussion with Ministers. Certainly, the Solicitor-General should not commit the Government to a settlement of a civil claim involving the payment of damages without obtaining authorisation for the necessary expenditure as required by the financial accountability mechanisms discussed in Chapter 16. However, none of the actions mentioned should be taken *without the concurrence* of the Solicitor-General. In giving or withholding that concurrence, the Solicitor-General should not be subject to the direction or control of any other person or authority.

12.107 Such a provision will safeguard individual Ministers from the pressures to initiate, defend or settle civil litigation by or against the state, to which they may otherwise be subject. It will also safeguard the resources of the state against the consequences of uninstructed or unwise decisions in respect of those matters.

12.108 The Constitution should provide that the office of Solicitor-General is required to be filled by a person qualified to be appointed as a judge of the High Court. He or she need not necessarily come from among legal officers already in the employment of the state.

12.109 In view of the recommendation in Chapter 13 that the present Judicial and Legal Services Commission should be replaced by a Judicial Service Commission concerned exclusively with judicial appointments, the Solicitor-General should be appointed by the Constitutional Offices Commission recommended in Chapter 15. Before making the appointment, that Commission should consult the Attorney-General.

12.110 The Solicitor-General cannot have the requisite degree of independence in the exercise of the functions of that office unless appointed to it for a fixed term. The term must be long enough to remove any sense of pressure to conform with the Government's wishes in the hope that the appointment will be renewed.

12.111 We have mentioned already that, in effect, the Solicitor-General has the responsibilities of a Permanent Secretary of a Justice Department. This compounds

the confusion that can arise from the fact that the Attorney-General usually holds the portfolio of Minister of Justice. While the Solicitor-General continues to act, in effect, as Permanent Secretary of a Department of Justice or any other department, the responsibilities of the various offices should, so far as possible, be kept distinct.

The Director of Public Prosecutions

12.112 It has always been accepted that the state needs to have an element of discretion in deciding whether to prosecute a person for the alleged commission of an offence. It also needs a discretion to discontinue a prosecution if it is found not to be justified. The need for such a discretion reflects at least three broad considerations:

- No one charged with a criminal offence should be made to stand trial for that offence if the evidence against them is patently insufficient to enable the state to discharge the burden of proving their guilt beyond reasonable doubt.
- Life would be intolerable if everyone appearing to have transgressed the criminal law were always to have its whole weight visited upon them. There needs to be a way of taking account of circumstances and deciding whether a warning or other diversionary action would be sufficient to deter further offending. A prosecution should be brought only if, in the light of all the circumstances, it is in the public interest.
- The creation of offences designed to protect the state against overthrow or insurrection, or the incitement of ill-will between different communities, or less serious but still significant evils such as indecent or offensive behaviour, or the consequences of prolonged industrial action, often involves an exercise of judgment about the purpose or effect of people's actions that may, in themselves, be lawful. For this reason it is usual to provide that no prosecution may be brought for such an offence without the express consent of an officer of the state in a position to make such a judgment.

12.113 No decision of the executive branch of government needs to be taken with more probity and independence from political pressure than the decisions just mentioned. At the same time, the decisions often need to be made with considerable sensitivity to their political implications. A tradition of independence in the making of decisions about the institution or the withdrawal of prosecutions has grown up, even when those decisions are made by an Attorney-General who

is a Minister. However, in a number of countries, of which Fiji is one, prosecutorial decisions have been taken out of the hands of a member of the political executive and given to an independent officer.

12.114 Under section 96 of the 1990 Constitution, the discretion in respect of prosecutions has been vested exclusively in a Director of Public Prosecutions (also referred to as the DPP). Even when a prosecution has been initiated by another person or body, the DPP has an overriding authority. The DPP exercises this discretion in accordance with well-recognised and publicly known principles. Section 96 contains the usual safeguard that, in the exercise of the powers it confers, the Director of Public Prosecutions shall not be subject to the direction or control of any other person or body. The Constitution should maintain these arrangements.

12.115 At present the Director of Public Prosecutions is appointed by the Judicial and Legal Services Commission. The 1990 Constitution made significant changes in the provisions governing the qualifications for membership of that body. It also provided that the Commission may not select a person for appointment to the office of Director of Public Prosecutions unless the Prime Minister has agreed that such a person may be so selected.

12.116 The *Commission of Inquiry on the Courts of Fiji* recommended that the Judicial and Legal Services Commission should be reconstituted to deal exclusively with judicial appointments. It went on to recommend as follows:

Upon the establishment of the new Judicial Commission, the Solicitor-General in consultation with the Attorney-General, should be responsible for appointing all government legal officers including the Director of Public Prosecutions.

12.117 This Commission endorses the recommendation that a separate Commission should be established to deal with the appointment of judicial officers and related matters. We so propose in Chapter 13. However, we consider that the proposal that all government legal officers including the Director of Public Prosecutions should be appointed by the Solicitor-General in consultation with the Attorney-General, does not take account of several relevant considerations. We refer to some of these in Chapter 15, in proposing that the Public Service Commission should appoint government legal officers, other than the Director of Public Prosecutions and the Solicitor-General (for whose office no method of appointment was recommended by the *Commission of Inquiry on the Courts*).

12.118 In respect of the Director of Public Prosecutions, the recommendation did not reflect the DPP's co-ordinate, rather than subordinate, position in relation

to the Solicitor-General in the exercise of their different legal functions. A 1983 decision of the Privy Council made it clear that the Attorney-General's general direction and control of the DPP's office was to be seen as upholding, rather than undermining its independence. The Solicitor-General has no professional responsibility for the discharge of the functions of the DPP.

12.119 We therefore propose that, like the Solicitor-General, the Director of Public Prosecutions should be appointed by the Constitutional Offices Commission recommended in Chapter 14. Before making the appointment, that Commission should consult the Attorney-General. The Director of Public Prosecutions should continue to be a person qualified to be appointed as a judge of the High Court. As in the case of the Solicitor-General and for the same reasons, the appointment should be for a fixed term of sufficient length to ensure independence.

Constitution of other offices

12.120 Section 98 of the 1990 Constitution provides as follows:

Subject to the provisions of this Constitution and of any other law, the President may constitute offices for Fiji, make appointments to any such office and terminate any such appointment.

This provision is a remnant of the Sovereign's constituent power in respect of the colonies customarily delegated to the Governor. The 1970 Constitution preserved it in the hands of the Governor-General, and it has now passed to the President. In accordance with section 88(1), the power would have to be exercised on the advice of the Cabinet or a Minister.

12.121 Although the power to constitute and make appointments to offices looks significant, in reality it has little practical importance. The power it confers to create offices and make appointments to them is subject to the Constitution and any other law. In those cases where provision for the constitution of offices by the Constitution or any other law is to be regarded as an exclusive code, the President would have no power to constitute offices of a like nature. For example, the President could not create a judicial office. It is well-settled under the common law that such an office may be created only by the Constitution or by Act.

12.122 Even where there may be room to *constitute* an office, the net at present provided by section 127(1) of the Constitution would catch all offices so constituted by regarding them as public offices and vesting the power of appointment in the Public Service Commission. This is a necessary protection against patronage. Almost without exception, when a new office is required within the executive branch of government, the Public Service Commission exercises its statutory power

to establish the office and its constitutional power to fill it. However, the provision could conceivably serve some useful purpose, and should be allowed to remain.

RECOMMENDATIONS

387. **The Constitution should recognise that the Minister responsible for a department exercises general direction and control over it and is accountable to Parliament for its work. The Constitution should also state that, subject to the Minister's general direction and control, the Permanent Secretary or other officer in charge of the department is responsible to the Minister for the efficient, effective and economical management of the department.**
388. **The term "department" should include all government offices other than a disciplined service.**
389. **The Constitution should continue to constitute the office of Commissioner of Police, and provide that the Police Force is under the Commissioner's command.**
390. **The Commissioner of Police should be appointed by the Constitutional Offices Commission, after the Commission has consulted the Minister responsible for the Police Force.**
391. **The Constitution should provide that the Commissioner is responsible for the organisation, maintenance and administration of the Police Force, as well as for determining its use and controlling its operations.**
392. **In matters pertaining to the organisation, maintenance and administration of the Force, the Commissioner of Police should be under the general direction and control of the Minister responsible for the Police Force. The Commissioner should also be required to act in accordance with such general directions of policy with respect to the maintenance of public safety and public order as may be given by that Minister. In exercising the powers and authorities of the office for the purpose of determining the use and operational control of the Force, the Commissioner of Police should not be subject to the direction or control of any other person or authority.**
393. **The Constitution should provide that a military force may be raised or maintained in the Fiji Islands only under the authority**

- of an Act. Section 94(1) of the 1990 Constitution, requiring the maintenance of the Republic of Fiji Military Forces, should be repealed.
394. The Constitution should give effect to the following principles:
- (a) The Republic of Fiji Military Forces should be under the control of the Government of the Republic of the Fiji Islands, exercised through the Cabinet and a Minister responsible for those forces;
 - (b) The Republic of Fiji Military Forces should be under the command of a Commander appointed by the President acting in accordance with the advice of the Prime Minister.
395. The purposes for which the armed forces may be raised or maintained should be specified in an Act, rather than the Constitution. Section 94(3) of the Constitution, specifying the present responsibility of the Republic of Fiji Military Forces, should be repealed.
396. Such an Act should set out the circumstances in which, and the machinery through which, decisions may be taken by the Government to use the armed forces or any part of them to perform a public service or to provide assistance to the police.
397. The Act should give members of the armed forces assisting the police, the powers that may be exercised by a member of the police and the protections of a member of the police against criminal and civil liability, but without prejudice to the legal protection they may otherwise acquire by having acted in obedience to a lawful order.
398. The Act should prescribe a procedure for obtaining the authority of a Minister before the armed forces are used to provide a public service or assist the police on a particular occasion.
399. The Constitution should make provision for the office of Solicitor-General.
400. It should provide that no legal proceeding in a civil case in which the state is the plaintiff may be initiated or discontinued and no legal proceeding in a civil case in which the state is the defendant may be defended or settled without the concurrence

- of the Solicitor-General. In giving or withholding that concurrence, the Solicitor-General should not be subject to the direction or control of any other person or authority.
401. The Constitution should provide that the Solicitor-General must be a person qualified to be appointed as a judge of the High Court.
 402. The Solicitor-General should be appointed by the Constitutional Offices Commission. Before making the appointment, that Commission should consult the Attorney-General.
 403. The responsibilities of the office of Solicitor-General should be kept distinct from other responsibilities which that office-holder has as, in effect, Permanent Secretary of a Department of Justice or any other department.
 404. The Constitution should maintain the substance of the arrangements in section 96 of the 1990 Constitution under which the discretion in respect of prosecutions is vested exclusively in a Director of Public Prosecutions. It should continue to provide that, in the exercise of the powers conferred by the Constitution, the Director of Public Prosecutions shall not be subject to the direction or control of any other person or body.
 405. The Director of Public Prosecutions should continue to be a person qualified to be appointed as a judge of the High Court. Appointments to that office should be made by the Constitutional Offices Commission, after consulting the Attorney-General.
 406. The substance of section 98 of the 1990 Constitution, which empowers the President to constitute offices for Fiji, make appointments to them and terminate the appointments, subject to the provisions of the Constitution and of any other law, should be retained.