



The Nauru Constitutional Review Commission

“Naoero Ituga”

Report



Yaren, Nauru

28 February 2007



The Commission was funded by the
United Nations Development Programme
Fiji Multi-Country Office, Suva
With the assistance of the United Nations Democracy Fund, New York

TABLE OF CONTENTS

Foreword.....	1
Introduction.....	2
Milestones	2
Study Material	2
The Commission.....	2
Process	3
The Setting.....	3
The Report.....	4
Chapter 1: Preamble and Part I of the Constitution	5
Introduction.....	5
Issues and Questions.....	6
Section 1 – Amendment of the Preamble	6
Section 2 – Status of the Preamble	10
Section 3 – Sources of law	12
Section 4 – Language.....	14
Chapter 2: Protection of Rights and Freedoms	17
Introduction.....	17
Issues and Questions.....	17
Section 1 – Amendment of existing rights provisions.....	18
Section 2 – Limitation of rights.....	29
Section 3 – Inclusion of additional rights in Part II.....	31
Section 4 – Justiciability	37
Section 5 – Remedies.....	37
Section 6 – Standing to bring an action for breach of rights.....	38
Section 7 – Application of Part II.....	39
Section 8 – Interpretation.....	40
Section 9 – Compliance	42
Chapter 3: President and Cabinet, and their relationship with Parliament ..	43
Issues and Questions.....	43
Section 1 – Description of the President.....	44
Section 2 – the method of selecting the President.....	46
Section 3 – Number of terms of office of a President	50
Section 4 – Cabinet and allocation of ministerial duties	53
Section 5 – Collective responsibility	54
Section 6 – Statement of the powers and duties of Cabinet.....	56
Section 7 – Treaty making power.....	57
Section 8 – Clerk to Cabinet	57
Section 9 – Motions of no confidence in Cabinet	58
Section 10 – Offices of profit.....	67
Section 11 – Vacancy or incapacity in the office of President	68
Chapter 4: Parliament.....	75
Introduction.....	75
Issues and Questions.....	75
Section 1 – Role and function of Parliament	76
Section 2 – Number of members.....	77
Section 3 – Constituencies	78
Section 4 – Residence, birth of ‘substantial connection’	80
Section 5 – Women in Parliament.....	81

Section 6 – Voting age.....	82
Section 7 – Dual citizenship.....	83
Section 8 – Criminal conviction.....	85
Section 9 – Absence from Parliament	88
Section 10 – the Clerk of Parliament.....	90
Section 11 – the Speaker of Parliament.....	93
Section 12 – Definitions, and calling meetings.....	99
Section 13 – Term of Parliament.....	104
Section 14 – Certification of laws	105
Section 15 – Oaths of Office.....	106
Chapter 5: Judiciary and Legal System	109
Introduction.....	109
Issues and Questions.....	109
Section 1 – Judicial Power and the Independence of the Judiciary.....	110
Section 2 – Appointment of Judges.....	111
Section 5 – Lack of Resident Judge.....	115
Chapter 6: Finance	125
Introduction.....	125
Issues and Questions.....	125
Section 1 – Treasury Fund	126
Section 2 – Taxation	127
Section 3 – Budget estimates, appropriation and supply	128
Section 4 – Annual preparation, audit and tabling of public accounts	131
Section 5 – Director of Audit.....	132
Section 6 – Trust Funds	137
Chapter 7: Public Service	139
Issues and Questions.....	140
Section 1 – Position of Article 25.....	140
Section 2 – Powers of appointment, dismissal and discipline	141
Section 3 – Values and principles of the public service	144
Section 4 – Nauru Police Force.....	144
Section 5 – Appeals	145
Chapter 8: Citizenship	151
Introduction.....	151
Issues and Questions.....	152
Section 1 – Existing provisions of Part VIII.....	152
Section 2 – Dual citizenship.....	153
Chapter 9: Land	155
Introduction.....	155
Issues and Questions.....	155
Section 1 – Definitions of Property and Land.....	156
Section 2 – Recognition of customary land rights	156
Section 3 – Matters raised for a land review.....	157
Chapter 10: Emergency Powers	159
Introduction.....	159
Issues and Questions.....	159
Section 1 – Should ‘emergency’ be defined?.....	159
Section 2 – Who declares and how?.....	161
Section 3 – Role of Parliament.....	163
Section 4 – Threats to the Constitution and Fundamental Rights	166

Section 5 – Role of the Court.....	169
Chapter 11: Prerogative of Mercy	171
Introduction.....	171
Issues and Questions.....	171
Section 1 – Restriction of Presidential discretion	171
Chapter 12: Leadership Code and Ombudsman	176
Introduction.....	176
Issues and Questions.....	176
Section 1 – Leadership Code.....	176
Section 2 – Ombudsman	185
Chapter 13: Amending The Constitution.....	188
Introduction.....	188
Issues.....	189
Section 1 – Procedure for amendment.....	189
Section 2 – Periodic review of the Constitution.....	191
Chapter 14: Transitional Provisions	193
Introduction.....	193
Issue	193
Section 1 – Treatment of spent provisions.....	193
Section 2 – Repeal of certain transitional provisions	193
Bibliography	197
Appendices.....	201
Appendix 1 - Constitutional Review Commission Terms of Reference	201
Appendix 2 – Biographical details of Commissioners	202
Appendix 3 – Nauru Constitutional Review Process	203
Appendix 4 – Public Consultations Meeting Schedule	204
Appendix 5 – List of Written Submissions.....	205
Appendix 6 – Presidents of Nauru.....	207
Appendix 7 – Consolidation of Proposed constitutional amendments.....	208

Foreword

This Report has been prepared by the Constitutional Review Commission as part of a constitutional review process being undertaken and overseen by the Parliamentary Standing Committee on Constitutional Review. The Parliament of Nauru established the Standing Committee in November 2004 for the purpose of assessing whether there is a need to update and improve the independence Constitution that has been in force in 1968.

The Commission was appointed by the Parliamentary Committee to conduct an independent review, taking into account the views of the public, and to make recommendations for amendment to the Constitution. We have had three months to complete our task in accordance with our Terms of Reference and with the support and encouragement of the Committee and its Chairman Hon Mathew Batsiua MP, have worked hard to produce this Report and recommendations. Our Report will be tabled in Parliament and made available to the public. The recommendations are to be considered and debated by a representative Constitutional Convention that is to be convened in the coming months.

We feel honoured and privileged to be involved in laying the basis for development of an amended Constitution that will hopefully contribute to a brighter future for Nauru and ensure the protection of the fundamental and inalienable rights of the people of Nauru.

Our work would not have been possible without the assistance we have received from many quarters. We would like to acknowledge and thank: all those who attended and contributed to the public consultation meetings, those who made written submissions to the Commission and who accepted invitations to meet with the Commission; the Honourable Speaker and the Clerk of Parliament and their staff; Anne Billeam; Jennie Reiyetsi; the Australian Consul General to Nauru Robyn Jenkins and First Secretary Nanette Colyer; Winnie Tsitsi and Fimosa Temaki who have provided invaluable administrative assistance; and the United Nations Development Program Multi-Country Office in Suva, which is generously funding the Nauru constitutional review process including funding for the Commission. Special thanks to Katy Le Roy, who served as counsel to the Commission, without whose legal knowledge, positive and optimistic nature the Commission would have resigned after the first week.

God bless the Republic of Nauru.



Ruby Thoma
Chairperson



Leo D Keke
Commissioner



Guy Powles
Commissioner

Introduction

Milestones

Like any milestone along the journey's road, today's completion and launching of the Report of the Constitutional Review Commission of Nauru has a number on it, No. 3. The fact that it is the third milestone has great significance for those who, for some years now, have been pursuing the idea of subjecting the Constitution of Nauru to rigorous examination, while at the same time consulting with the people and taking the opportunity to raise their awareness of the important role that a constitution can play in their lives.

In 2004, a group of leaders decided that it was time to respond to allegations that weaknesses in Nauru's Constitution were at least partly to blame for the country's series of financial crises. Led by Hon. Dr Kieren Keke, a 'Parliamentary Select Committee on a Constitutional Review Convention' was established in June. This was overtaken on 4 November 2004 by a 'Standing Committee on Constitutional Review', formed under its own Act of Parliament to carry out an inclusive process of constitution review. Under the chairmanship of Hon. Dr Keke and later Hon. Mathew Batsiua, the Constitutional Review Committee with the advice of legal adviser Katy Le Roy, devised a six-step process, which means that, having completed No. 3, Nauru is now already half way there. This process comprises:

Step 1. a two-month community awareness project to provide information and options for change (July-Aug 06)

Step 2. wide public consultations and receipt of written submissions (Oct-Nov 06)

Step 3. Constitutional Review Commission and Report (Dec 06 – Feb 07)

Step 4. Constitutional Convention (elections Mar/April; sitting April/May 07)

Step 5. Act of Parliament (intro May/June – lie in Parliament 90 days – may be passed Aug 07)

Step 6. Referendum (awareness-raising Sep 07 – Referendum Oct 07)

No changes to the Constitution can occur until a new Parliament meets after the next elections near the end of this year.

Study Material

The research and writing for the essential *Background and Discussion Paper* was carried out by Katy Le Roy, and this, together with a thousand copies of the Constitution, has been essential reading for citizens and advisers alike. When the Commission was appointed by the CRC and met on Nauru at the beginning of December 2006, the members of the Commission had at their disposal 180 pages of minutes from 40 meetings attended by over 700 people around the island during the consultation stage, together with 40 written submissions (see Public Meeting Schedule and List of Submissions in Appendix 3 and 4 to this Report).

The Commission

The Commission comprised Mrs Ruby Thoma, Chairperson, Mr Leo Keke and Dr Guy Powles, Commissioners, with Ms Katy Le Roy as legal researcher and counsel, and Mrs Winnie Tsitsi and Mrs Fimosa Temaki as assistants.

From the outset, the Commission worked as a team coordinated by Katy Le Roy, and progress was planned in such a way that the large volume of material was able to be assimilated, conferences were able to be arranged with key Public Officers, and the Report was prepared and presented on schedule.

Process

The Commission's Terms of Reference (see Appendix 1) required it to 'pay particular regard to the views of the public that have 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'.

In studying the people's views, all members of the Commission read the full sets of minutes of the 40 meetings, together with the 40 written submissions. The Commission was greatly helped by the work of the project assistants who cross-referenced material under headings that follow the shape of the present Constitution. Obviously, it has not been possible to acknowledge and comment on all the views and submissions individually. Where a significant number of people agreed or disagreed on a particular viewpoint, the Commission has noted the numbers involved. In many cases, however, the range of issues and opinions on them was spread over many possibilities. The Commission was helped by having the individual opinions, even if there was no agreement on the subject.

The Commission then examined the experiences and constitutions of most of the 14 Pacific Island states which have adopted constitutions since 1962, and many of which have been adapted to suit their circumstances. The Commission has been able to draw upon models, styles and philosophies of constitution-building (and repairing) from a number of sources, from Africa as well as the Pacific.

The Constitution of Nauru and its history have been the subject of certain studies and academic papers which the Commission has taken into account. Internationally recognised principles and standards of rights and freedoms are also relevant. The Commission's primary responsibility, as laid down in its Terms of Reference, was to scrutinise and consider the extent to which the Constitution meets the present and future constitutional needs of the people of Nauru.

The Setting

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 the 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.

The Report

The Commission's Report is designed to be read beside the 1968 Constitution. Each Chapter begins with a short introduction and list of the issues covered. The Chapter is then divided into Sections which deal with the issues and set out, in boxes, the Commission's recommendations. Where amendment to the Constitution is recommended, the wording is contained in the box. The reader should note that many of the recommendations are inter-connected and that several recommendations may need to be considered together as a package, where rejection of one recommendation may mean rejection of all of them. At the end of the Report is a compilation of the amendments recommended for the entire Constitution (Appendix 7).

The Report is intended to be read by people with some background in, or understanding of, how a government works. In particular, the Report is for those people who committed themselves to a better understanding of the issues for Nauru at the many meetings and consultations held in 2006. Unfortunately, much of the language which must be used in this area is the language of government rather than of everyday life. The Commission has tried hard to produce a Report which, in the circumstances, is as easy to read as it possibly could be. It will be published for all Nauruans to consider, and bring to the Constitutional Convention in April.

Step 3. is now complete, and the authors of this Report hope that it will be a significant milestone on a remarkable journey.

Yaren
28 February 2007

Ruby Thoma, Chairperson
Leo Keke
Guy Powles

Chapter 1: Preamble and Part I of the Constitution

Introduction

The Preamble

Almost every written constitution begins with a preamble, which is an introductory statement that usually refers to the date of enactment of the Constitution and how it came about, as well as setting out things like certain historically significant events, the values or beliefs of the people, and the type of system established by the Constitution. In the Preamble to the existing Nauruan Constitution there are references to God, to the creation of a republic and to the sovereignty of the people of Nauru.

The Nauruan Preamble is unusually brief, and unlike most Preambles in the Pacific region, it does not contain any reference to history or to customs and traditions. As Nauru was one of the first countries in the Pacific to gain independence, there were very few Pacific constitutions around at the time of independence that could be looked to for guidance or examples. The Preamble omits factors that would identify Nauru's uniqueness.

Article 82(3) of the Constitution states that the Preamble and the marginal notes do not form part of the Constitution. It is therefore merely a symbolic statement, and does not have legal effect. Some constitutions include an interpretive clause that requires the courts to take the Preamble into account whenever there is ambiguity or uncertainty as to how the substantive provisions of the Constitution should be interpreted (see for example the Constitutions of Tuvalu and Papua New Guinea). The possibility of including such provision in the Constitution of Nauru has been canvassed, and is covered in Section 2 of this Chapter.

Part I of the Constitution

Article 1 of the Constitution asserts that Nauru is an independent republic. This is an uncontroversial statement of fact, and no amendments to this Article have been suggested by the public or considered by the Commission.

Article 2 provides that the Constitution is the supreme law. This Article effectively limits the powers of the Parliament and empowers the Supreme Court to declare laws invalid if they are inconsistent with the Constitution. Again, this is a typical and uncontroversial provision, and no amendments to this Article have been contemplated.

One issue that has arisen is the possibility of specifying in the Constitution what the various sources of law are in Nauru. This it seems to the Commission should be considered within the framework of Part I of the Constitution, which already refers to the Constitution as the supreme law, but does not mention other sources of law.

Some members of the public raised the issue of the language of the Constitution, and suggested that the Constitution should be available in Nauruan as well as English. This appears to the Commission to be an issue that relates to Part I of the Constitution, and thus it is considered in this Chapter.

Issues and Questions

In relation to the Preamble and Part I of the Constitution, the main questions that arise for discussion and consideration by the Commission, based on the input from the public and the deliberations of the Commission, are the following:

1. Should the Preamble be amended to give it more substance, highlighting Nauru's uniqueness?
2. Should Article 82(3) be amended (and/or other provisions inserted in the Constitution) to enable the Preamble to become part of the Constitution, and to be used as an aid in interpreting the Constitution?
3. Should a new provision be added to Part I of the Constitution (or elsewhere) setting out the sources of law in Nauru?
4. Should the Constitution provide that it is to be made available in the Nauruan language, or make any other provision concerning language?

These questions are addressed in distinct sections below, including a discussion of the views expressed by the public, material consulted by the Commission, and recommendations by the Commission.

Section 1 – Amendment of the Preamble

The brevity of the Preamble was noted in the Background and Discussion Paper, and was raised for discussion at the public consultation meetings. Participants were asked whether or not they wished to amend the Preamble to include more detail about common heritage and priorities, and/or perhaps to reflect the modern vision of Nauru's society and express the principal objects of the Constitution and the political community.

Not all participants had views to express on this question, but of those who did (over 300 people) the vast majority favoured amending the Preamble to include more detail about Nauru, its history and culture. People wanted their Nauruan identity to be highlighted. The specific issues that were suggested for inclusion in the Preamble are:

- a) God and Christianity (already in the Preamble)
- b) History of the Island and the People
- c) Customs/Traditions/Culture
- d) Matriarchal/matrilineal system
- e) Chiefs and leaders
- f) Phosphate and effects
- g) Tribal Laws and Clans, Districts
- h) National motto

One written submission (anonymous) recommended that the Preamble should include the motto 'God's Will First'. Mr Henry Harris submitted that the Preamble should be reworded to make specific reference to Nauru as 'a Christian nation' which acknowledged God as 'Father, the Lord Jesus Christ as the Son, and the Holy Spirit as the God of all comfort', and also to make reference to the wicked ways of the past and forgiveness of sins. A further submission

(anonymous) recommended that customary laws and traditions, mixed Nauruan cultures, and the anniversary of the arrival of the Gospel in Nauru should be included.

The Department of Justice submission was quite extensive in relation to the Preamble, and included the suggestion that the Preamble should be much more substantive and should play ‘a major role in interpretation as well as providing guiding principles as to how provisions should be viewed and implemented.’ The submission further stated:

We believe that if the Preamble is not as important as it should be within the Constitution, then how can the rest of the provisions be held together without any reference to basic principles that are to be enshrined and cemented as the Constitution. The foundation of the Constitution must be the people of Nauru and the Preamble must reflect that framework.

A written submission by Mr Rhudy Tokaibure recommended that there be no change to the existing Preamble. The Nauru Law Society submission proposed expansion of the Preamble to include references to the history, heritage of the people, their culture and traditional values, aspirations and Christian beliefs. It stated:

The current Preamble is unnecessarily brief. It should be more comprehensive and include matters that are important to the Nauruan people... The preamble of a document as important as the Constitution is the foundation of the philosophy of the people and gives a general indication of the high regard it is held in the esteem of the people as their own constitution born of their free will and labour of faith, hope and love for one another.

The written submission of the Commonwealth Human Rights Initiative recommended that Nauru’s Preamble should state that its main objective is to promote the active and direct participation of Nauru’s citizens in their governance.

Having considered the views of the public, the Commission looked to examples of other preambles around the Pacific region for comparison, and to examine the ways in which other countries do make reference to some of the items suggested by the people of Nauru, such as custom and tradition. It is apparent that there are a number of different approaches to the drafting of preambles, in terms of the style used. Some are rather stiff and formal and use old-fashioned or legalistic language. Others tell a story and are easy to follow as well as being quite inspiring. Some preambles contain guiding principles or values, whilst others are merely introductory statements.

The following provides a brief overview of the key aspects of some Pacific preambles:

Federated States of Micronesia: mentions inherent sovereignty of the people; affirms common wish to live together in peace and harmony and to preserve the heritage of the past and protect the promise of the future; respects diversity of cultures and refers to ancestors; ‘we wish no other home than this’; extends to others and seeks from them ‘peace, friendship, cooperation, and love in our common humanity’; and asserts that ‘with this Constitution’ the people of FSM become the proud guardians of their own islands, ‘now and forever’.

Fiji: seeks the blessing of God; includes a brief account of the history of Fiji including conversion to Christianity and the history of constitutional development; reaffirms recognition of human rights and fundamental freedoms, importance of the rule of law and of the family; recognises the multicultural society and commits to living in harmony and unity; mentions the ancestors of the indigenous Fijian and Rotuman people who settled the Fiji islands and mentions the blessing and approval of the Constitution by the High Chiefs.

Kiribati: acknowledges God; declares that the will of the people is paramount in the conduct of government, that resources are vested in the people and their government, that equality and justice shall be upheld, and that the customs and traditions of Kiribati shall continue to be upheld.

Marshall Islands: acknowledges trust in God; states that people are proud of their forefathers ‘who boldly ventured across the unknown waters of the vast Pacific Ocean’; acknowledges that the society has withstood the test of time; pledges to safeguard and maintain their sacred heritage and value ‘nothing more dearly than our rightful home on these islands’; affirms the desire to live in peace and harmony, ‘subscribing to the principles of democracy’; extends to other peoples and seeks from them ‘peace, friendship, mutual understanding and respect for our individual idealism and common humanity’.

Papua New Guinea: pays homage to the memory of ancestors, ‘the source of our strength and origin of our combined heritage’; acknowledges ‘the worthy customs and traditional wisdoms of our people’; acknowledges the guiding hand of God; asserts that all power belongs to the people acting through their elected representatives, that the people ‘reject violence and seek consensus as a means of solving our common problems’ and that national wealth should be equitably shared by all; includes detailed National Goals and Directive Principles: integral human development, equality and participation, national sovereignty and self-reliance, conservation of natural resources and environment and Papua New Guinean ways. The Preamble can be used as an aid in interpretation.

Solomon Islands: mentions pride in the wisdom and the worthy customs of their ancestors; acknowledges the guiding hand of God; accepts their diverse heritage and common destiny; declares indigenous ownership of the country and resources and declares that all power belongs to the people exercised through the institutions established in the Constitution; pledges that government shall be based on democratic principles, that principles of equality and social justice shall be upheld, that people shall participate in the governance of their affairs and that the different cultural traditions shall be cherished and promoted.

Tuvalu: recounts the history of colonisation and independence; provides that the state of Tuvalu is based on Christian principles, the Rule of Law and Tuvaluan custom and tradition; maintains Tuvaluan values such as traditional forms of communication rather than alien ideas of confrontation and divisiveness, traditional forms of communities, the strength and support of the family and family discipline; The Preamble is part of the Constitution.

The Commission recommends that the Preamble should be amended to reflect Nauruan identity and values. The Commission has prepared a suggested draft Preamble for consideration by the Constitutional Convention. Some elements of the existing Preamble are retained (reference to Almighty God) and references to custom, history and values have been inserted. The values in the second part of the Preamble are designed not only to affirm the principles of the Nauruan people, but also to enable the Court to make reference to the Preamble in interpreting the Constitution. An effort has been made to avoid using unnecessarily legalistic jargon, and to incorporate most of the suggestions made by the public.

The Commission recommends, that the following new Preamble be inserted to replace the existing Preamble to the Constitution:

PREAMBLE

Whereas Nauru became a sovereign independent republic on the thirty-first day of January, One thousand nine hundred and sixty-eight under a Constitution adopted by a Constitutional Convention which held its final meeting on the seventeenth day of May One thousand nine hundred and sixty-eight; and whereas after forty years, we have reviewed our independence Constitution, and a Constitutional Convention representing us has prepared a revised Constitution for Nauru, we hereby introduce our revised Constitution:

WE, THE PEOPLE OF NAURU, acknowledge God as the almighty and everlasting Lord and the giver of all good things. We humbly place ourselves under the protection of His good providence and seek His blessing upon ourselves and upon our lives. We honour our history and declare our aspirations in this document.

We proudly acknowledge our ancestors, who travelled across the vast Pacific Ocean to make this beautiful and isolated island their home. Nauru, our beloved island and birthplace of our ancestors, our present and eternal home, is the living link between all generations of Nauruans. On this island we have built our own unique society.

Nauru has faced and survived many challenges, including foreign rule and the impact of foreign cultures, the devastation of war, and the destruction of much of the natural beauty of our island. We have been blessed with vast phosphate resources, which has been a mixed blessing for our island and our people. In the face of these challenges, our people have proven themselves to be resilient and adaptable.

We deeply respect and acknowledge the great leadership and achievements of our founding forefathers, who struggled for and won our independence, and enabled us to take our place in the modern family of nations. We extend to other peoples and nations what we seek from them: peace, friendship, mutual understanding and respect for our common humanity and human dignity.

The expectations of Nauruan people for honest and accountable government since independence have not always been fulfilled and therefore we have reviewed our Constitution, striving to ensure that Nauru's future will be bright and that public institutions will serve the people with integrity.

The people of Nauru set out for themselves and for their governing institutions the following principles:

We strive for peace, justice, stability, welfare, progress and prosperity of the People;

Our institutions shall serve the people accountably and transparently and observe high ethical standards;

We affirm our commitment to democratic values and to the right of people to participate in their government;

We uphold respect for human dignity and the human rights of all people;

We seek to preserve the value of resolving matters of importance by consensus or compromise and recognise the need for courtesy and respect;

We recognise the importance of communities and the strength and support of the family;

We uphold the importance of sharing within the extended family and the community;

We affirm the matrilineal basis of our society and acknowledge the importance of kinship in matters concerning land;

We value highly verbal agreements and oral history;

We take pride in our traditions, culture, heritage and aspirations; respect for family life, tribes and kinship; and the preservation and unity of the People;

We acknowledge the need to be open to adapt to changing circumstances in the modern world and to not unnecessarily hamper the gradual development of changing values and priorities;

These principles, under the guidance of God, are solemnly adopted and affirmed as the basis of this Constitution, and as the guiding principles to be observed in its interpretation and application at all levels of government and organised life

AND WE DO HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION TO COME INTO FORCE ON THE THIRTY-FIRST DAY OF JANUARY, TWO THOUSAND AND EIGHT.

Section 2 – Status of the Preamble

In public consultation meetings, there was some discussion of whether or not people wish to amend Art 82(3) to enable the Preamble to form part of the Constitution and whether it is desirable to add an interpretive clause to enable the Preamble be used as an aid in interpreting other provisions of the Constitution in cases of ambiguity. A substantial number of people favoured such measures. The written submission of the Justice Department stated the Nauru should have ‘a much more substantive Preamble where it plays a major role in interpretation as well as providing guiding principles as to how provisions should be viewed and implemented. The Preamble needs to be given authority and respect by its application. It needs to be meaningful in its role in the Constitution’. The Nauru Law Society submitted that ‘the Preamble must be part of the Constitution and Article 82(3) be amended accordingly. The Preamble must be used as an aid to the Courts in interpreting provisions of the Constitution’.

The Commission believes the Constitutions of Papua New Guinea and Tuvalu are useful for the purposes of comparison in relation to this Section of the Report. The Constitution of PNG provides in schedule 1.3(1): ‘The Preamble to this Constitution (being the provisions that end immediately before the heading to Part I) forms part of this Constitution, but expresses general

principles and therefore must be read subject to any other provision of this Constitution, though it may be used as an aid to interpretation in cases of doubt’.

When the Constitution of Tuvalu was revised in 1986, the original Preamble was reaffirmed, and ‘Principles of the Constitution’ were added to the Preamble. The last line of the preambular principles states: ‘These Principles, under the guidance of God, are solemnly adopted and affirmed as the basis of the Constitution, and as the guiding principles to be observed in its interpretation and application at all levels of government and organized life.’

The Preamble forms part of the Constitution of Tuvalu and is referred to in a number of sections of the Constitution. Section 1 of the Constitution of Tuvalu provides: ‘Tuvalu is a sovereign democratic State, governed in accordance with this Constitution and in particular in accordance with the Principles set out in the Preamble’. Section 4 refers to rules for interpreting the Constitution and provides in sub-section (2) that ‘in all cases, this Constitution shall be interpreted and applied consistently with the Principles set out in the Preamble’. The Bill of Rights in the Tuvalu Constitution is preceded by a separate division on the Principles of the Bill of Rights, which includes the following provision in section 13: ‘The Principles set out in the Preamble are adopted as part of the basic law of Tuvalu, from which human rights and freedoms derive and on which they are based’. The Tuvaluan equivalent of Nauru’s Article 82 is found in Schedule 1 section 3 of the Constitution of Tuvalu and provides as follows:

3. Form of the Constitution

(1) The Preamble forms part of this Constitution, and establishes principles upon which this Constitution, and the conduct of the public affairs of Tuvalu, are to be based.

(2) The Schedules to this Constitution form part of this Constitution.

(3) The head-notes to the sections of this Constitution do not form part of this Constitution, but other headings do form part of it.

(4) A reference in this Constitution to a subdivision of this Constitution without further identification shall be read as a reference to the corresponding subdivision of the body of this Constitution (that is, excluding the Preamble and the Schedules).

The Commission considers that there could be great benefit in expressly providing that the Constitution is to be interpreted in a manner that takes account of the values espoused in the Preamble, if the Preamble is amended to contain a clear statement of what those values are. If the Preamble is not amended, but remains in its present form, it cannot feasibly be used as an aid to interpret the Constitution because it contains too little substance that could be used to guide a Court. However if Nauruans decide to substantially amplify the Preamble in the manner recommended in Section 1 or similar, then a companion amendment to give legal effect to the Preamble is useful way to ensure that the Supreme Court has due regard to Nauruan values and priorities when dealing with cases that concern the Constitution.

The Commission recommends a different form of words to those used in PNG and Tuvalu, and notes that whilst it is useful to look at the Tuvaluan provisions by way of example, the Commission does not wish to endorse an approach to values and principles that might undermine the fundamental rights protected in Part II of the Constitution. The Commission has recommended that the Court ‘takes into account’ the principles, rather than interpreting the

Constitution ‘in a manner consistent with’ the principles, because in some cases the principles and values listed in the recommended Preamble may be seen to conflict or compete with each other.

The Commission therefore recommends that a new clause (3) be inserted in Article 54 as follows, and that appropriate amendments be made to Article 82 as set out below:

Matters concerning the Constitution

54.(1.) The Supreme Court shall, to the exclusion of any other court, have original jurisdiction to determine any question arising under or involving the interpretation or effect of any provision of this Constitution.

(2.) Without prejudice to any appellate jurisdiction of the Supreme Court, where in any proceedings before another court a question arises involving the interpretation or effect of any provision of this Constitution, the cause shall be removed into the Supreme Court, which shall determine that question and either dispose of the case or remit it to that other court to be disposed of in accordance with the determination.

(3.) The Supreme Court shall interpret and apply the Constitution in a manner that takes into account the principles set out in the Preamble.

[note: additional amendments to this Article are recommended in Chapter 5]

...

Parts, etc. of Constitution

82. (1.) The Preamble forms part of this Constitution, and establishes principles upon which this Constitution, and the conduct of the public affairs of Nauru, are to be based.

~~(4~~ 2.) The headings of the Parts into which this Constitution is divided are part of this Constitution.

~~(2~~ 3.) A Schedule to this Constitution is part of this Constitution.

(3.) The ~~preamble and the~~ marginal notes to this Constitution do not form part of this Constitution.

Section 3 – Sources of law

The Constitution of Nauru provides in Article 2 that the Constitution is the supreme law of Nauru, and that any law inconsistent with the Constitution is invalid to the extent of the inconsistency. Most constitutions contain a similar provision. This provides some information about the hierarchy of laws in Nauru. That is, the Constitution is higher than other laws, and will override them in any case of inconsistency.

However, the Constitution of Nauru does not go into any detail about other sources of law, nor does it make any mention of custom or customary law, and whether or not it is part of the legal system in Nauru. Two of the written submissions received by the Commission recommended that the Constitution should be amended to expressly provide that customary law is recognised as part of the law of Nauru, and a number of people at public consultation meetings suggested that not only should custom be acknowledged in the Preamble, but it should also be provided for in the substantive provisions of the Constitution.

Most constitutions in the Pacific make specific provision for customary law. For example, the Constitution of the Solomon Islands provides in section 75 that ‘Parliament shall make provision for the application of laws, including customary laws’ and that ‘in making provision under this section, Parliament shall have particular regard to the customs, values and aspirations of the people of Solomon Islands’. The Fijian Constitution contains very similar provisions, setting out in section 186 that ‘Parliament must make provision for the application of customary laws and for dispute resolution in accordance with traditional Fijian processes’ and that ‘in doing so, the Parliament must have regard to the customs, traditions, usages, values and aspirations of the Fijian and Rotuman people’. The Constitution of the Federated States of Micronesia directs the courts to take custom into account by stipulating in Article XI Section 11, that ‘court decisions shall be consistent with this Constitution, Micronesian customs and traditions, and the social and geographical configuration of Micronesia’. Schedule 2 to the Constitution of Papua New Guinea says that ‘custom is adopted, and shall be applied and enforced, as part of the underlying law’ unless it is ‘inconsistent with a Constitutional Law or a statute, or repugnant to the general principles of humanity’, and also directs that Parliament may ‘provide for the proof and pleading of custom for any purpose’. Section 51 of the Constitution of Vanuatu provides that ‘Parliament may provide for the manner of the ascertainment of relevant roles of custom, and may in particular provide for persons knowledgeable in custom to sit with the judges of the Supreme Court or the Court of Appeal and take part in its proceedings’, and in section 74 declares that ‘the rules of custom shall form the basis of ownership and use of land in the Republic of Vanuatu’. Vanuatu also provides under Article 95 on Existing Laws, in sub-section (3): ‘Customary law shall continue to have effect as part of the law of the Republic of Vanuatu’.

The Constitution of Nauru provides in Article 85 that all laws in existence prior to independence will continue in force after independence until they are repealed. More information about the sources of law in Nauru is contained in an ordinary Act of Parliament: the *Customs and Adopted Laws Act 1971* (as amended). The *Customs and Adopted Laws Act* sets out which laws are to apply in Nauru, and in relation to custom, says that the ‘institutions, customs and usages of the Nauruans’ to the extent that they existed before the Act, shall be recognised by the courts and have the full force and effect of law in relation to matters concerning land and other property of Nauruans, inheritance (if a person dies without a will) and any matters affecting Nauruans only, except that such customs may be abolished, limited or changed by an Act of Parliament. The *Customs and Adopted Laws Act* also expressly abolished the custom of ‘taking or dealing with the property of any other person without that person’s consent’ and depriving the parents of a child of its custody and control without their consent. In spite of this legislation, it appears that the Supreme Court has at times been ambivalent about the application and proof of custom.

The Commission considers that it is unnecessary to specify in the Constitution that in addition to the Constitution itself, legislation (Acts of Parliament) and the common law are sources of law. However in order to ensure that the place of customary law is not overlooked by the courts, the Commission recommends that the continued application of customary law should be provided for in the Constitution.

The Commission recommends that the importance of customary law be acknowledged in the Constitution, and that a new Article be inserted in Part I as follows:

Customary Law

2A(1.) Customary law shall continue to have effect as part of the law of Nauru, to the extent that such law is not repugnant to the Constitution or to any Act of Parliament.

(2.) Parliament may make provision for the proof and pleading of custom for any purpose

Section 4 – Language

The Constitution of Nauru is written only in English. There is no constitutional requirement for the Constitution to be made available in Nauruan, and the Constitution has not been translated into Nauruan.

The Constitution does not contain any provisions relating to the ‘official language’ of Nauru. The Nauruan language is the predominant spoken language within Nauru, but English is widely used as the medium of instruction and for most forms of written communication.

At six of the forty public consultation meetings a total of 32 participants raised the issue of language and said that they believe their Constitution should be made available in Nauruan. Three written submissions recommended that the Constitution should be in Nauruan, one of these three also suggesting that Nauruan should be the official language of the state and suggesting a provision to the effect that ‘The Nauruan and English expressions of the Constitution of Nauru, an Act of Parliament, or any other statutes are of equal authority, but, in an instance of irresolvable conflict in the meaning and interpretation of any words or provisions in the Constitution of Nauru, the Nauruan language expression prevails, but in an Act of Parliament... the English language prevails’.

The Commission, in considering the suggestion made by some members of the public that the Constitution should be available in Nauruan, has looked at provisions relating to language in some other constitutions for comparison.

The Constitution of Vanuatu provides that the national language is Bislama. The official languages are Bislama, English and French. Languages of education are English and French (section 3). Subsection 64(1) of the Constitution of Vanuatu further provides that ‘a citizen of Vanuatu may obtain, in the official language that he uses, the services which he may rightfully expect from the administration of the Republic of Vanuatu’. And whilst most sections of the Constitution of Vanuatu can be amended by Parliament, section 86 provides that any amendment to the Constitution that concerns the status of Bislama, English or French will not come into effect unless it has been supported by a national referendum.

In Kiribati, the Constitution states that the provisions of the Constitution shall be published in a Kiribati language text as well as the English text, but in the event of any inconsistency between the two texts this English text will prevail (section 127).

The Constitution of Palau provides in Article XIII Section 1: ‘The Palauan traditional languages shall be the national languages. Palauan and English shall be the official languages. Parliament shall determine the appropriate use of each language’. Section 2 in the same Article provides: ‘The Palauan and English versions of this Constitution shall be equally authoritative; in case of conflict the English version shall prevail’. The constitution of the Marshall Islands contains a similar provision: ‘The Marshallese and English texts of this Constitution shall be equally authentic, but, in case of difference, the Marshallese text shall prevail’ (Article XIV section 5).

Article 6 of the Constitution of Uganda provides in clause (1) that the official language of Uganda is English. Clause (2) provides ‘Subject to clause (1) of this article, any other language may be used as a medium of instruction in schools or other educational institutions or for legislative, administration or judicial purposes as may be prescribed by law’. Article 4 requires the state to promote public awareness of the Constitution by translating it into Ugandan languages and disseminating it as widely as possible, and by providing for the teaching of the Constitution in all educational institutions and armed forces training institutions and regularly transmitting and publishing programmes through the media.

The Commission understands the importance of acknowledging people’s national language as part of their culture and is of the view that ideally the Constitution of Nauru would be available in the indigenous Nauruan language. However the Commission notes that the Nauruan language does not readily lend itself to expressing complex legal terms and also that there is no agreed spelling of the Nauruan language. The Commission anticipates that a requirement to translate the Constitution into the Nauruan language might cause difficulties, as the Nauruan language has not yet been fully developed to handle legal terms and constitutional principles.

Similarly, the Commission is reluctant to recommend that the Constitution should provide for an ‘official language’. Whilst the Commission has made note of some constitutions that do provide for an ‘official language’, many constitutions say nothing on the subject of language. In Nauru, it would be undesirable to provide that the official language is English, and it may be unfeasible to provide that the official language is Nauruan in view of the fact that written communication is almost exclusively in English. The Commission therefore recommends that the Constitution should make no provision for an ‘official language’.

The Commission sees merit in making some reference to the Nauruan language in the Constitution, without going so far as to prescribe an ‘official language’ or to insist on a Nauruan version of the Constitution that would prevail over the English text in cases of uncertainty. The Commission recommends that provisions be inserted in the Constitution requiring government to promote awareness of the Constitution, and to make educational materials regarding the Constitution available in Nauruan and English, along the lines of the provisions of the Constitution of Uganda referred to above.

The Commission also recommends that the importance of the Nauruan language be reflected in a new provision requiring the government to take measures to preserve and advance the use of the Nauruan language.

The Commission recommends that the following new Articles be inserted in Part I of the Constitution:

Promotion of awareness of the Constitution

2B(1.) The government shall make available, in the Nauruan and English languages, material including publications and audio and television broadcasts to promote public awareness of the Constitution and shall disseminate such material as widely as possible.

(2.) The government shall provide for the teaching of the Constitution in all educational institutions and police training programs.

Nauruan language

2C. The government must take positive and practical measures to preserve and advance the use of the Nauruan language.

Chapter 2: Protection of Rights and Freedoms

Introduction

Most written constitutions around the world include provisions for the protection of fundamental rights, also known as human rights. Human rights are regarded as universal. That is, every person in the world is inherently entitled to certain rights, and such rights are protected by international law, as well as by national constitutions. The protection of human rights is essential in order for a democratic system to function effectively. Democracy does not simply mean that people are able to elect their government, it also requires freedom of speech and freedom of assembly, protection against arbitrary arrest, the right to legal redress before fair and impartial courts, and so on. The constitutional protection of human rights is one of the ways in which the powers of government are *limited* under the constitution, to protect people from arbitrary or abusive exercise of power.

Human rights are set out in the UN Declaration of Human Rights and other international human rights instruments. Part II of the Constitution of Nauru provides protection of certain fundamental rights and freedoms, and is based largely on the European Convention on Human Rights ('ECHR'). Most of the rights contained in this part are qualified by lists of exceptions, which are specific circumstances where a person's right can be limited, and that limitation will *not* be regarded as a breach of the right. Part II does not expressly state whether the listed rights and freedoms can be enforced only against the state or also between private individuals, but it appears that some of the rights provisions do apply to the actions of private persons.

Issues and Questions

Issues and questions that arise in relation to Part II of the Constitution, from the submissions of the public as well as from other material surveyed by the Commission, cover both existing and prospective rights provisions, and can be broken down into the following sections:

1. Do any of the existing rights provisions in Part II of the Constitution require amendment?
2. Should the bill of rights be radically re-written to take a different approach to the limitation of and exceptions to rights? What are different ways in which exceptions can be provided for?
3. Should any additional rights be included in the Constitution, such as social and economic rights?
4. If new rights are included, should they be justiciable?
5. Should the Constitution specify what remedies are available for breach or infringement of rights? If so, what should those remedies be?

6. Should the Constitution be amended to make it more clear who has standing to bring an action in the Supreme Court for breach of rights? If so, who should be entitled to bring an action?
7. Should the Constitution specify who is bound by the bill of rights? If so, should it apply only to public action or also between private individuals?
8. Should the Constitution contain provisions on how the bill of rights is to be interpreted by the Courts? If so, what should be the relevant guidelines?
9. Should the Constitution establish a body to monitor compliance with human rights, such as a human rights commission? If so, how should its role and powers be defined?

These issues are covered below in sequential order, including background, public opinion, additional material and recommendations on each of them.

Section 1 – Amendment of existing rights provisions

At public consultation meetings, the facilitators raised a number of discussion points in relation to Part II of the Constitution and sought people's views on these questions. The principal discussion points related to Articles 3, 4 and 10. Participants also raised suggestions in relation to other Articles. Sixteen of the forty written submissions expressed views in relation to Part II of the Constitution.

Article 3 – Preamble

Article 3 provides that every person in Nauru is entitled to protection of the fundamental rights and freedoms in Part II, subject to the limitations contained in the provisions of Part II.

The marginal note and heading for Article 3 refer to it as the 'preamble' even though Article 3 is a provision of the Constitution and *not* the preamble to the Constitution. It is therefore likely that when Article 82(3) provides that the 'preamble and the marginal notes to this Constitution do not form part of this Constitution', it is referring to the Preamble to the Constitution (see Chapter 1) and not to Article 3. This would mean that Article 3 *does* form part of the substantive Constitution and may also confer substantive rights.

The Supreme Court of Nauru considered the meaning of Article 3 in the case of *Dogabe Jeremiah v Nauru Local Government Council* ('Jeremiah's case' 1970). In this case Mr Jeremiah sought to enforce a right which he argued was conferred and guaranteed by Article 3, the right to 'respect for his private and family life'. The Court held that Article 3 'is clearly not intended to refer to any pre-existing rights and freedoms but only to those set out in detail in Articles 4 to 13'. Article 3 was therefore interpreted in such a way as to render it practically meaningless.

It is important to note that many of the *positive* obligations from the ECHR appear only in Article 3, and not in any of the other provisions of Part II. This means most of the positive affirmations of rights that appear throughout the ECHR such as 'everyone has the right to liberty and security of person' and 'everyone has the right to life', are *not* contained in their equivalent articles in Part II of the Nauruan Constitution (where they are expressed in negative terms), but

are expressed together in positive terms only in Article 3. This gives further support to the argument that Article 3 was intended to have substantive meaning.

The majority of people who attended public consultation meetings favoured amending Article 3, either to change the heading/marginal note from ‘preamble’ to something that better describes the function of the Article, or to amend the wording of Article 3 to make clear that the rights enumerated in the Article are protected and enforceable, in particular the right to respect for private and family life which appears only in Article 3 (or both). Some people suggested that in addition to amending the heading/marginal note, a new Article should be inserted in Part II which covers the right to protection of private and family life.

Amendment of Article 3 in the manner outlined above – to clarify that it is a substantive provision and to protect the right to respect for private and family life - was also suggested in 5 written submissions. One written submission suggested that disability be added to the list of grounds on which people shall not be discriminated against in protection of rights in Article 3.

The Commission agrees with the views expressed by the public and outlined in the Background and Discussion Paper, that the heading and marginal note to Article 3 are the cause of confusion about the meaning of Article 3, and that it is desirable to remedy this problem. Article 3 should serve a useful purpose in providing that all people in Nauru are equally protected by the bill of rights. This is not dissimilar to an ‘equal protection’ clause, which appear in many constitutions and which say that all people are equal before the law and entitled to the equal protection of the law, except that the Nauruan provision is at present confined to the bill of rights. The Commission sees merit in amending Article 3 to make it a provision conferring equality in a general sense, and guaranteeing equal protection of the law.

It is interesting to note that the Constitutions of Kiribati and the Solomon Islands contain a provision almost identical to Article 3 (section 3 of the Constitution of Kiribati and section 3 of the Constitution of the Solomon Islands) and in both cases the provision carries the heading ‘Fundamental Rights and Freedoms of the Individual’ (rather than ‘preamble’). Also in both cases, the right to private and family life is differently worded, and restricted to ‘privacy of [the] home’ (which finds substantive protection under provisions preventing unlawful search and seizure). Section 11 of the Constitution of Tuvalu is similar in some respects.

All other bills of rights within the region, and most bills of rights elsewhere in the world, do not contain an equivalent of Article 3. Instead, bills of rights very often start with a statement about the obligation of the state to ensure that all rights are protected (see for example South Africa, and see Section 4 below), and/or a provision that sets out who is bound by the bill of rights (see for example Fiji and Section 7 below), and/or a provision relating to interpretation of the bill of rights (see for example Fiji, Tuvalu, and see also Section 8, below).

Article 3 makes clear that every person in Nauru is entitled to the rights and freedoms of the individual set out in Part II, and also that such rights are subject to lawful limitations and must be enjoyed in a manner that does not prejudice the rights and freedoms of others or the public interest. The Commission is of the view that Article 3 should be amended to make its intent clearer, and to afford equal protection of all laws and freedom from discrimination. If the Constitution is further amended to add protection of the right to private and family life (and possibly other rights, discussed below) then all rights would be protected under their own substantive article, and there would be no need to list the complete set of rights in Article 3.

The Right to equality and equal protection of the law is for example found in the Constitutions of Fiji, the Marshall Islands, South Africa, and East Timor. The wording of the amendment to Article 3 recommended by the Commission is based in part on section 38 of the Constitution of Fiji and Article II section 12 of the Marshall Islands Constitution.

The Commission recommends that Article 3 be amended as follows:

Preamble Right to Equality

3.(1) All persons are equal under the law and are entitled to the equal protection of the laws.

~~3. Whereas every person in Nauru is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following freedoms, namely:-~~

~~(a) life, liberty, security of the person, the enjoyment of property and the protection of the law;~~

~~(b) freedom of conscience, of expression and of peaceful assembly and association; and~~

~~(c) respect for his private and family life;~~

~~the subsequent provisions of this Part have effect for the purpose of affording protection to those rights and freedoms,~~

(2) Every person in Nauru is entitled to the protection of fundamental rights and freedoms set out in this Part, subject to such limitations of that protection as are contained in those provisions not inconsistent with the provisions of this Part, being limitations designed to ensure that the enjoyment of those rights and freedoms by a person does not prejudice the rights and freedoms of other persons or the public interest.

(3) No law and no executive or judicial action shall, either expressly, or in its practical application, discriminate against any person on the basis of gender, race, color, language, religion, political or other opinion, national or social origin, place of birth, age, disability, economic status, sexual orientation, family status or descent.

(4) A law is not inconsistent with clause (1), (2) or (3) on the ground that it:

(a) appropriates revenues or other moneys for particular purposes;

(b) imposes a retirement age on a person who is the holder of a public office;

(c) imposes on persons who are not citizens a disability or restriction, not imposed on citizens;

(d) imposes a restriction on a person on the grounds of their opinions or beliefs if those opinions or beliefs involve harm to others or the diminution of the rights or freedoms of

others;

(e) provides protection of indigenous land ownership to the exclusion of others; or

(f) provides for the protection or advancement of a class of persons who are disadvantaged;

but only to the extent that the law is reasonable and justifiable in a free and democratic society.

Article 4 – Right to life

Article 4 protects the right to life by providing that no person shall be deliberately killed, except in carrying out a death penalty for a crime that attracts the death penalty. It also contains a list of exceptions, being circumstances where killing a person will not be a breach of Article 4 if it results from the use reasonably justifiable force permitted by law in one of the prescribed circumstances, including in defence of public property or to defend a person from violence.

At the public consultation meetings, views were divided on whether the reference to the death penalty should be deleted from Article 4, but the majority of those who expressed a view favoured removal of such reference, many stating that their reason for such view was that Nauru is a Christian nation and that the death penalty should never be introduced. This issue was also raised in a number of written submissions: 5 submissions suggested that the reference to the death penalty be deleted, and 2 argued that it should be retained. Mr MacSporran, whose submission is one of those that recommends that the reference be deleted, noted in his submissions that ‘the death penalty does not apply in Nauru and in accordance with Nauru’s international obligations should be removed’. Nauru is a party to the Second Optional Protocol to the ICCPR Aiming at the Abolition of the Death Penalty (1989).

Article 4 offers a very weak protection of the right to life, due to the number and vagueness of the exceptions to the right. Unlike its counterpart in Article 2 of the ECHR, Article 4 does not provide for positive protection of the right to life by law.

The Commission is of the view that the reference to the death penalty should be deleted from Article 4, in accordance with public opinion on this point and in accordance with Nauru’s international obligations. The Commission also recommends that the exception in 4(2)(b) should be removed, as it should not be regarded as reasonable to take a person’s life in the defence of public property.

The Commission notes that at present the right to life in Article 4 is expressed only as a negative right not to be deprived of life. As this is a fundamental right, the Commission is of the view that it ought to be expressed and affirmed in positive terms, as it is in many other constitutions.

The Commission recommends that Article 4 be amended as follows:

Protection of right to life

4.-(1.) Everyone has the right to life. No person shall be deprived of his life intentionally, ~~except in execution of a sentence of a court following his conviction of an offence for which the penalty of deprivation of life is prescribed by law.~~

(2.) Deprivation of the life of a person is not a contravention of the provisions of clause (1.) of this Article where it results from the use, to such an extent and in such circumstances as is permitted by law, of such force as is reasonably justifiable in the circumstances of the case-

(a) for the defence of a person from violence;

~~(b) for the defence of public property;~~

~~(c-b)~~ in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or

~~(d-c)~~ for the purpose of suppressing a riot, insurrection or mutiny.

Article 5 – Protection of personal liberty

Article 5 provides that no person shall be deprived of their liberty, except in accordance with law in any of the circumstances listed in the Article, including if a person is imprisoned for a crime by a court sentence, to detain a person for his education or welfare, or to prevent the spread of a contagious disease.

No suggestions for amendment to Article 5 were made at public consultation meetings. Mr MacSporran’s written submission recommends that Article 5 be amended to make it more intelligible, and to reduce the age up to which a person may be ordered by a court to be detained for their education. He suggests that age up to which a person may be detained for his own welfare also be reduced to 16, and that a new clause be added to Article 5 which makes clear that persons must not be assumed to have consented to their own detention (in order to safeguard a person who makes a complaint about detention). The submission by the Justice Department suggests that the exceptions listed in Article 5 be deleted, and that the reference in clause (4) to the Supreme Court should be substituted for District Court, because the Supreme Court sits infrequently.

The Commission sees merit in the suggestion that the age up to which a person can be detained by court order for his own welfare or education be reduced to 16, and also in the suggestions that detention can be reviewed in the District Court as well as in the Supreme Court. Because the Constitution does not make reference to the District Court, but rather to the power of Parliament to create ‘subordinate courts’, the proposed amendment uses the same terminology. This means that the Article would still have the same effect if at some time in future Parliament abolishes the District Court and replaces it with some other court, or changes the name of the Court. The Commission has not adopted the suggestion that Article 5 should state that a person must not be

assumed to have consented to his own detention, because the Commission does not believe that a court would make such assumption, and therefore such amendment would be superfluous.

The Commission recommends that clauses (1) and (4) of Article 5 be amended as follows:

Protection of personal liberty

5.-(1.) No person shall be deprived of his personal liberty, except as authorised by law in any of the following cases:-

- (a) in execution of the sentence or order of a court in respect of an offence of which he has been convicted;
- (b) for the purpose of bringing him before a court in execution of the order of a court;
- (c) upon reasonable suspicion of his having committed, or being about to commit, an offence;
- (d) under the order of a court, for his education during any period ending not later than the thirty-first day of December after he attains the age of ~~eighteen~~ sixteen years;
- (e) under the order of a court, for his welfare during any period ending not later than the date on which he attains the age of ~~twenty~~ sixteen years;
- (f) for the purpose of preventing the spread of disease;
- (g) in the case of a person who is, or is reasonably suspected to be, of unsound mind or addicted to drugs or alcohol, for the purpose of his care or treatment or the protection of the community; and
- (h) for the purpose of preventing his unlawful entry into Nauru, or for the purpose of effecting his expulsion, extradition or other lawful removal from Nauru.

(2.) A person who is arrested or detained shall be informed promptly of the reasons for the arrest or detention and shall be permitted to consult in the place in which he is detained a legal representative of his own choice.

(3.) A person who has been arrested or detained in the circumstances referred to in paragraph (c) of clause (1.) of this Article and has not been released shall be brought before a judge or some other person holding judicial office within a period of twenty-four hours after the arrest or detention and shall not be further held in custody in connexion with that offence except by order of a judge or some other person holding judicial office.

(4.) Where a complaint is made to the Supreme Court or any subordinate court that a person is unlawfully detained, the Supreme Court or the subordinate court shall enquire into the complaint and, unless satisfied that the detention is lawful, shall order that person to be brought before it and shall release him.

Article 6 – Protection from forced labour

Article 6 protects people from forced labour, which includes protection against being forced into slavery or servitude. The Article lists certain exceptions, for example, labour required by the sentence or order of a court will not be regarded as forced labour. In relation to Article 6, a handful of people said that they believe that working for the current minimum wage constitutes forced labour and that this should be recognised in Article 6, in the sense of being expressly

prohibited. Legally however, forced labour refers to situations in which people are literally forced, often by threat of violence, to work against their will, and where they have no possibility to resign or escape. The Justice Department recommends that Article 6 be deleted entirely, but does not provide reasons.

The Commission makes no recommendation for amendment to Article 6.

Article 7 – Protection from inhuman treatment

Article 7 provides protection against torture and against inhuman or degrading treatment or punishment. There are no exceptions to this right. Article 7 generated very little comment from the public, as it is a clear statement of principle and has no controversial exceptions. A handful of people at public consultation meetings wanted Article 7 to be amended to expressly state that ‘inhuman treatment’ includes abuse by police officers and verbal or emotional abuse. The Commission notes that the rights protected by the Constitution need to be stated as broad principles, for application and interpretation in specific circumstances by the Courts, and that there already exist means to lodge complaints against police officers and to bring legal action against police officers if they are alleged to have committed abuse. The problems of interpretation of a provision such as this are likely to be exacerbated rather than diminished if any attempt is made to elaborate on what precisely is encompassed by the terms used. It is unnecessary to include such details in the Constitution.

The Commission makes no recommendation for amendment to Article 7.

Article 8 – Protection from deprivation of property

Article 8 provides for protection of property, subject to certain reasonable exceptions such as taking possession of or acquiring property for the purpose of executing a judgment or court order in civil proceedings, or for the purpose of vesting property in trustees for the benefit of beneficiaries in limited circumstances. Over 40 participants in public consultation meetings said that land rights should be added to Part II of the Constitution.

Article 8 was raised in six of the written submissions. Mr Connell recommended no change to the Article, but did suggest that Parliament consider enacting legislation to establish principles of valuation for property, for the purposes of being able to determine what is ‘just compensation’ if land is compulsorily acquired under Article 8. One submission (anonymous) recommended that Article 8 be amended to provide that no law may be passed to evict a person from their property (in other words, to remove the ability of government to compulsorily acquire land for a public purpose on just terms). The submission of the Justice Department recommends that Article 8 be amended to define the meaning of ‘public purpose’, ‘property’ and compensation on ‘just terms’. NIANGO submitted that Article 8 does not adequately cover the rights of landowners and recommended that it should be amended to include a list of factors that must be taken into account by a court when determining what is ‘just compensation’, including the use to which the property is being put and any hardship to the owner. Ms Olsson’s submission that ‘property rights should be made transparent, predictable and accountable’ is also relevant to Article 8. NIANGO, Ms Olsson, and the Nauru Law Society recommended in their submissions that indigenous land rights should be included in the ‘bill of rights’ in Part II of the Constitution, including the right to rehabilitation of land that has been mined. The submissions

of the Law Society were quite extensive on this point, and are detailed in Section 3 of this Chapter under the sub-heading ‘environmental rights’, and also mentioned in Chapter 9 of this Report which covers land.

It is necessary for governments to be able to acquire land for public purposes, and most constitutions around the world contain a provision similar to Article 8. The Commission believes it would be useful to define what is meant by ‘public purpose’. In some cases acquisition may be very clearly for a public purpose, such as a school or a hospital, but there may also be grey areas, particularly in instances of public-private partnerships. For example, is the establishment of a government-owned, privately-managed tourist resort from which profits are paid into the Treasury Fund a ‘public purpose’? However, the Commission believes that this is a matter that should be more closely examined by an inquiry into land issues, about which the Commission says more in Chapter 9 of this Report.

The practical meaning of ‘just terms’ also raises potential difficulties, as some of the submissions pointed out. Parliament may wish to consider the submission of Mr Connell that legislation for valuation of property be enacted, however this is a matter for Parliament and not for this Commission. The Commission is of the view that it would be unwise to attempt to define ‘just compensation’, but sees merit in the submission by NIANGO that the Constitution should contain criteria to be taken into account by a Court in deciding what is just in a particular case. This approach is adopted in the Constitution of South Africa (section 25(2) and (3)). The Commission recommends that a similar formulation appropriately altered for the context of Nauru be added to Article 8, in the manner set out below. It should be noted that the inclusion of this provision would not have retrospective effect, but would be applied to all future compulsory acquisition of land.

The Commission recommends that a new clause (1A) be inserted in Article 8 as follows:

Protection from deprivation of property

8.-(1.) No person shall be deprived compulsorily of his property except in accordance with law for a public purpose and on just terms.

(1A) The just terms of compulsory acquisition of property shall be agreed between the relevant parties, or, if no agreement can be reached, shall be decided by a Court, having regard to all relevant factors, including:

a.) the current use of the property;

b.) the history of the acquisition and use of the property;

c.) the importance of the public purpose for which the property is being acquired;

d.) the interests of those affected; and

e.) any hardship to the owner/s.

(2.) ...

Article 9 – Protection of person and property

Article 9 provides protection from unauthorised search of person or property, subject to some exceptions. No amendments to this Article were suggested at public consultation meetings, and nor were any changes recommended in written submissions.

The Commission notes that in some constitutions in the Pacific region, the equivalent of Article 9 relating to protection of person and property, or protection from unlawful search and seizure, also includes the right to privacy. As the public expressed a desire for protection of the right to privacy in their discussion of Article 3, the Commission has considered inclusion of the right to privacy in Part II of the Constitution, and the question of whether such protection should be included in Article 9, or should be covered in a separate Article.

In the Federated States of Micronesia (Article IV s.5) and in South Africa (s.14), the right to privacy is part of the protection against unlawful search of a person's home or property. The Commission is of the view that the right to privacy would be better protected in a separate Article, and discusses its recommendations in relation to privacy in Section 3 of this Chapter. However in relation to the privacy of a person's communications (including correspondence, telephone communications, etc) the Commission is of the view that this ought to be specifically covered by Article 9, and recommends an appropriate addition to clause (1) of Article 9.

Another question in relation to Article 9 was raised by the Background and Discussion Paper, and has been considered by the Commission. That is, whether Article 9 should be amended to specify whether evidence obtained in breach of Article 9 may be used in court? The Marshall Islands Constitution for example provides in Article II, section 3(5) that 'Evidence obtained through an unreasonable search and seizure, or pursuant to an invalid warrant, cannot be used to support a criminal conviction'. In Fiji the rights of accused persons include the right 'not to have unlawfully obtained evidence adduced against him or her unless the interests of justice require it to be admitted' (s.28(1)(e)). Whilst it may be that the Supreme Court would already interpret Article 9 of the Nauruan Constitution to imply that such evidence cannot be used, the Commission is of the view that it would be worthwhile to spell this out expressly, thereby reinforcing the protection afforded by Article 9.

The Commission recommends that Article 9 be amended as follows:

Protection of person and property

9.-(1.) No person shall without his consent be subject to the search of his person or property or the entry on his premises by other persons, and nor shall the privacy of his communications be infringed.

(1A.) Evidence obtained pursuant to an invalid warrant, or obtained in a manner that in any other way contravenes this Article, cannot be used to support a criminal conviction.

(2.) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of the provisions of clause (1.) of this Article to the extent that that law makes provision-

- (a) that is reasonably required in the interests of defence, public safety, public order, public morality, public health, the development or utilisation of natural resources or the development or utilisation of any property for a purpose beneficial to the community;
- (b) that is reasonably required for protecting the rights or freedoms of other persons;
- (c) that authorises an officer or agent of the Republic of Nauru or of a body corporate established by law for public purposes to enter, where reasonably necessary, on the premises of a person in order to inspect those premises or anything in or on them in relation to any tax or in order to carry out work connected with any property that is lawfully in or on those premises and belongs to the Republic or body corporate as the case may be; or
- (d) that authorises, for the purpose of enforcing the judgment or order of a court, the search of a person or property by order of a court or entry upon any premises under such an order.

Article 10 – Provision to secure protection of law

Article 10 provides important protections for persons accused and charged with criminal offences, and also provides for fair and prompt determination of civil matters by an independent and impartial court. Persons charged with an offence are guaranteed the right to a fair hearing within a reasonable time, to be presumed innocent until proven guilty, the right to be informed promptly and in detail the nature of the offence, the right to defend themselves and to have adequate time and facilities to prepare a defence, to have legal representation and in some cases a right to legal aid, the right to examine prosecution witnesses, the right to a public trial, to not be compelled to give evidence or to be a witness against themselves, and protection against being tried more than once for the same offence and against retrospective criminal laws.

These provisions are based on Articles 5, 6 and 7 of the ECHR, and similar provisions appear in most Pacific Constitutions, and in many constitutions around the world. Many of the rights included in Article 10 are absolute guarantees not subject to any exceptions or qualifications.

In relation to Article 10, the effect of section 3 of the *Republic Proceedings Act 1972* (which prevents most kinds of civil action against the Republic or an instrumentality without leave of Cabinet) was explained to participants at public consultation meetings, and they were asked whether or not they would favour a constitutional amendment to the effect that ‘no law shall prevent a citizen bringing civil action against the Republic or its instrumentalities’.

In response to the discussion point on Article 10 and the way in which it may be circumscribed by the *Republic Proceedings Act*, over 450 people favoured the insertion of a provision to the effect that ‘no law shall prevent a citizen bringing civil action against the Republic or its instrumentalities’. This discussion point emanated from a suggestion made by Peter MacSporran in 2005. The intention behind the proposed amendment is to render section 3 of the *Republic Proceedings Act* invalid, so that people are able to bring civil legal action against the government without having to seek the consent of Cabinet.

Six written submissions raised the issue of the *Republic Proceedings Act* limiting people’s access to the courts for determination of civil matters, and suggested that the Constitution be amended to effectively invalidate and prevent such legislation, namely the written submissions

of Peter MacSporran, Ruben Kun, Julie Olsson, NIANGO and the Law Society of Nauru (and one anonymous).

It should be noted that it may already be the case that certain provisions of the *Republic Proceedings Act* are invalid because they are inconsistent with Article 10(9) of the Constitution, but this provision is yet to be interpreted by the Supreme Court. In view of the injustice of the restriction on civil actions against the Republic, and the overwhelming public support the insertion of a new provision to the effect outlined above, the Commission recommends that such provision be inserted in Article 10, in order to enable people to bring civil action against the Republic without having to seek permission from Cabinet.

The Commission has considered other aspects of improving access to justice in Chapter 5 of this Report, which deals with the Judiciary and the legal system.

The Commission recommends that a new clause be added to Article 10 as follows:

Provision to secure protection of the law

10(1)...

(9.) A determination of the existence or extent of a civil right or obligation shall not be made except by an independent and impartial court or other authority prescribed by law and proceedings for such a determination shall be fairly heard and within a reasonable time.

(9A.) No law shall prevent a citizen bringing civil action against the Republic or its instrumentalities.

Articles 11-14

Articles 11-14 generated little discussion at public consultation meetings. Two people suggested that Article 11 be amended to prevent different religions coming to Nauru. Around 30 people suggested that nothing done under Articles 12 and 13 (ie expressing views, forming trade unions, protesting) should be able to be used against the person by the Republic or by the person's employer.

The Commission is of the view that no amendments are necessary to Article 11 (freedom of conscience), Article 12 (freedom of expression) or Article 13 (freedom of assembly and association). The Commission examines Article 14, and the jurisdiction of the Supreme Court more generally, in Chapter 5 of this Report, as well as in Sections 5 and 6 of this Chapter.

Derogation in an Emergency

Another issue that was discussed at public consultation meetings was the impact of emergency powers on human rights and whether and to what extent it should be permissible to infringe rights during an emergency. This issue is covered in Chapter 10 of this Report.

Section 2 – Limitation of rights

The Bill of Rights in the Nauru Constitution includes most of the ECHR rights, with detailed lists of exceptions – that is, circumstances or actions that will not be regarded as a breach of the right. It is interesting to compare this with different approaches in other constitutions. For example, the Constitution of Vanuatu takes a very broad and general approach to rights.

Subarticle 5(1) of the Constitution of the Republic of Vanuatu provides –

‘5. (1) The Republic of Vanuatu recognises, that, subject to any restrictions imposed by law on non-citizens, all persons are entitled to the following fundamental rights and freedoms of the individual without discrimination on the grounds of race, place of origin, religious or traditional beliefs, political opinions, language or sex but subject to respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health-

(a) life;

(b) liberty;

(c) security of the person;

(d) protection of the law;

(e) freedom from inhuman treatment and forced labour;

(f) freedom of conscience and worship;

(g) freedom of expression;

(h) freedom of assembly and association;

(i) freedom of movement;

(j) protection for the privacy of the home and other property and from unjust deprivation of property;

(k) equal treatment under the law or administrative action, except that no law shall be inconsistent with this sub-paragraph insofar as it makes provision for the special benefit, welfare, protection or advancement of females, children and young persons, members of under-privileged groups or inhabitants of less developed areas.’

Thus all these rights are simply recognised in one subarticle, subject only to ‘any restrictions imposed by law on non-citizens’ and to ‘respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health’. Subarticle 5(2) sets out in some detail what is included in ‘protection of the law’ and details the rights of accused persons. Article 6 provides that people can apply to the Supreme Court for enforcement of their rights. The Nauru Law Society recommended in its written submission that ‘the assertion of rights and freedoms should follow the example of the Vanuatu Constitution’, because the current provisions of Part II ‘are notoriously known more for their exceptions to the rights and freedoms enumerated rather than the maintenance and non derogation of those rights and freedoms.’

The *Canadian Charter of Rights and Freedoms 1982* adopts a very similar approach to the Vanuatu bill of rights. Section 1 of the Charter provides: ‘The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society’. The protected rights and freedoms, and access to the courts for alleged breach of rights, are provided for in the subsequent sections, with no further limitations except for the general limitation that is set out in section 1.

The Constitution of Papua New Guinea makes a distinction between ‘fundamental rights’ and ‘qualified rights’. The fundamental rights are the right to life (subject to similar limitations as

those contained in Article 4 of the Nauruan Constitution), freedom from torture and inhuman treatment, and the protection of the law (comprising rights of accused persons similar to the provisions of Article 10 in the Constitution of Nauru). All other civil and political rights (including freedom of expression, freedom from forced labour, right to freedom of information, right to vote, etc) are qualified rights. Sections 38 and 39 set out the conditions for a law that seeks to limit any of the qualified rights. The provisions are very detailed but include the requirements that such law must take into account the National Goals and Directive Principles, must specify the right or freedom that it regulates or restricts, and must be ‘reasonably justifiable in a democratic society having a proper respect for the rights and dignity of mankind’. Only the Court can determine whether or not a law restricting a right or freedom is ‘reasonably justifiable in a democratic society’ etc, and in doing so the court may have regard to the UN Charter, the ECHR, the Universal Declaration of Human Rights, laws, practices and judicial decisions in PNG or in other countries, and various other factors. The fundamental rights and qualified rights are further supplemented by the protection of a general ‘right to freedom’. Section 32 of the PNG Constitution provides that ‘freedom based on law consists in the least amount of restriction on the activities of individuals that is consistent with the maintenance and development of Papua New Guinea and of society in accordance with this Constitution and, in particular, with the National Goals and Directive Principles and the Basic Social Obligations’ and gives every person the right to freedom based on law, which means the legal right to do anything that does not injure the rights and freedoms of others and is not prohibited by law. It further provides that no person is obliged to do anything that is not required by law.

South Africa takes a similarly general approach to the limitation of rights, but also provides a list of factors that must be taken into account when seeking to determine whether a law that restricts rights is reasonable and proportionate. Article 36 of the South African Constitution provides:

36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including:

- a. the nature of the right;*
- b. the importance of the limitation;*
- c. the nature of the limitation;*
- d. the relation between the limitation and its purpose; and*
- e. less restrictive means to achieve the purpose.*

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

The Commission has considered whether it would be desirable to delete all or many of the specific exceptions listed in Articles 4, 5, 6, 8, 9, 11, 12, and 13, and instead replace them with a more general provision for laws which may limit rights, such as ‘to the extent that the limitation is reasonable and justifiable in a free and democratic society’. One advantage of this approach is that it would make the provisions of Part II considerably simpler and easier to understand. However the Commission notes that whilst the simpler approach may appear to provide greater protection of rights because it does not involve lists of exceptions, it may be the case that a general and simple limitation such as ‘reasonably justifiable in a democratic society etc’ in fact provides scope for *greater derogation* of rights than do the specific limits currently set out in the Nauruan Constitution. This is because a general limitation is somewhat cryptic and is open to various interpretations, including broad interpretations of what kind of limitations are acceptable. The Commission is of the view that the current approach to limitation of rights in the Constitution is appropriate and affords clearer protection of rights than would a more general

limitation provision. The Commission therefore does not recommend a radical re-drafting of the provisions of Part II with respect to limitations and exceptions.

Section 3 – Inclusion of additional rights in Part II

Social and economic rights

Social and economic rights include the right to work and to just conditions at work, the right to an adequate standard of living and to social security, and the right to education and health care. These and related rights were included in the Universal Declaration of Human Rights in 1948 ('UDHR'), which set out the human rights standards to which all nations should aspire. The basis for social and economic rights is that all people are 'entitled to living conditions consistent with human dignity' (Govender 2006, p 93).

The possibility of extending Part II of the Constitution to include social and economic rights was discussed at public consultation meetings. The facilitators were trained to provide a basic explanation of what social and economic rights are and some of the pros and cons of including such rights in a Constitution and making them justiciable. A significant number of people (over 400) favoured the idea of including social and economic rights in the Constitution. In particular, many people were keen to see the rights of women and children, rights of people with disabilities, and the right to a safe and clean environment included in Part II of the Constitution.

The submission by the Commonwealth Human Rights Initiative recommended that all rights to which Nauru has already committed itself to realising (through international agreements including the ICCPR, ICESCR, CORC, CERD and CAT) should be included in the Constitution. Two other written submissions made similar suggestions in terms of recognising Nauru's international commitments in the Constitution. Five written submissions suggest that Nauru should include social and economic rights in the Constitution, and some go into specific detail on particular rights (these are set out under separate sub-headings below). The NIANGO submission recommends that the rights to education, social security, employment and fair working conditions, leisure, good governance, and the right to an adequate standard of living be incorporated in Part II. NIANGO also suggested the inclusion of women's rights (to family, freedom from violence, maternity and adoptive leave and general welfare) and children's rights.

Employment rights

The Nauru Law Society recommended in its submission that the right to employment and equal opportunity in employment be included in the Constitution. They propose that the following provisions be inserted in the Constitution: 'Every person has a right to employment and no law or policy shall derogate from this right; Every person has the freedom of choice of a profession, trade or occupation subject to restrictions on the freedom by voluntary action or law, or a law that places restrictions on non-citizens or aliens'.

Ms Olsson recommended that Nauruan rights to employment be recognised, and that restrictions be placed on foreign businesses in order to maximise Nauruan employment, including for example a requirement that Foreign companies operating in Nauru must ensure that no less than 75% of their workforce is made up of Nauruans, and that Nauruan companies be given priority over contracts. The Commission regards these suggestions as matters for Parliament to consider implementing through ordinary legislation, as they are not constitutional matters.

Environmental rights

Three written submissions suggested that environmental rights should receive constitutional protection, including the right to rehabilitation of mined land. The Nauru Law Society recommended that the right to a healthy environment be included in the Constitution, which recognises people's right to an environment free of harm to their health and well-being, and also places an obligation on the government to take all reasonable steps to ensure that the environment of Nauru (land, air and sea) is clean and protected, and to meet all its international obligations in relation to the environment.

Rights to health and education

Five written submissions recommended that the rights to adequate health services and the right to education should be included in the Constitution (two of these as part of a general submission that all social and economic rights should be included and all international agreements to which Nauru is a party re acknowledged in Part II). The submission of the Nauru Law Society states that education services and opportunities since independence have never been 'given high priority as evidenced in the allocation of financial resources compared to other economic and social sectors of Nauru. Further, the standards of services have declined to levels unknown before and opportunities have diminished as well'. The society recommended a new Article on the right to education which would include 'freedom to pursue the kind of education [that will] best serve the person's own interests' and a requirement for the government to 'take all reasonable and necessary steps' to provide education services and opportunities. On the right to health, the Society stated that in Nauru 'medical services and standards are well below international levels' and that 'it is important to reiterate the rights of the people to health care and to expect a high level of standards in medical services'. The provision suggested by the Law Society includes 'the right to have access to health care services including maternity and related care for every woman' and a provision that 'no person shall be refused emergency medical evacuation or referral for overseas treatment'.

Constitutional protection of social and economic rights

When the rights contained in the UDHR became the subject of international agreements in the 1960s, they were divided into civil and political rights and economic, social and cultural rights. The division reflected the reluctance of many State Parties to accord the same status to economic and social rights as they do to civil and political rights, as well as the view that in the hierarchy of rights and freedoms, social and economic rights rank lower and are more difficult to uphold and enforce.

Most bills of rights in Constitutions around the world focus on protecting civil and political rights such as freedom of expression and freedom of religion. However a number of Constitutions also include social and economic rights, including India and South Africa. In some cases such rights are expressed as guiding principles and are not justiciable. They are aspirational statements rather than enforceable entitlements. But in other cases they are justiciable, which means that they can be disputed before a court and remedies may be sought for their breach.

The Constitution of South Africa, which came into effect in 1996, contains a comprehensive Bill of Rights which includes social and economic rights and expressly makes them justiciable. In addition to the civil and political rights already contained in Nauru's Constitution, the South

African Bill of Rights also provides for the right of access to housing, the right of access to healthcare, water, food and social security, rights of children, the right to education and the right to environmental protection and to an environment that is not harmful to health and well-being.

The main controversy in relation to social and economic rights is that fulfilment of such rights requires positive action by government, in contrast to the fulfilment of civil and political rights which essentially requires mere non-interference. This means that if a court is asked to enforce social and economic rights, it finds itself in the territory of government expenditure, and thus a separation of powers issue can arise. The government may argue that it is the prerogative of the democratically elected government, and not the court, to decide how public revenue is to be allocated, and the Court should not interfere for example by finding that the right to education is not being fulfilled and directing the government to spend more on education.

It is also said that complete fulfilment of social and economic rights is unrealistic in most places, especially where there is widespread poverty and economic hardship. The South African Constitution takes this into account by providing that the state has a positive obligation to take reasonable legislative and other measures to achieve realisation of all rights, but also stipulating that this means such measures as are reasonable ‘*within its available resources*’, and the realisation is not expected to happen overnight, but rather means ‘*progressive realisation*’. So, the state must do what it can with its limited resources to ensure that such rights are gradually realised. More is said about this in Section 4, below.

The Constitution of South Africa was drafted on the basis of Principles agreed in advance between various political forces in South Africa, and the second Principle was that under the Constitution which was to be drafted, ‘everyone shall enjoy *all* universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution’ (emphasis added). This was seen as absolutely essential in order to redress the serious injustices and human rights abuses of the previous South African regime. It is arguable that because the social and historical context of South Africa is so different to that of Nauru, perhaps it was necessary to include social and economic rights in the South African Constitution, but enforceable social and economic rights may be unnecessary, inappropriate or unviable in Nauru. However the Commission is of the view that as such rights are universal, there is no reason why the social and economic rights of people in Nauru should not be constitutionally protected.

The Commission also notes that some of Nauru’s neighbouring countries do provide protection of certain social and economic rights as well as some civil and political rights that are not included in Part II of the Nauruan Constitution. The Constitution of Fiji protects the right to education (section 39; a social and economic right), the right to equality, the right to privacy, and the right to vote by secret ballot (sections 38, 37, 36; civil and political rights). In the Marshall Islands, the right to health, education and legal services is constitutionally protected, as well as the right to ethical government (Article II, Sections 15 and 16).

The Commission recommends that the rights to health services, education, environmental rights, employment rights, and the rights of women and children be inserted in Part II of the Constitution, as set out in the draft provisions at the end of this Section. The right to health has not been worded in the manner suggested by the Nauru Law Society, as the Commission believes it would be impractical to provide that no person shall be refused emergency medical evacuation or referral overseas for treatment as this may well be beyond the means of the government and therefore impossible to comply with, particularly if circumstances were to arise in which a large number of people require emergency evacuation at the same time. Similarly, the

Commission does not recommend the inclusion of the right to social security, as this may well be beyond the means of the government.

Civil and political rights

Privacy

As mentioned in Section 1 of this Chapter in relation to Article 9, in the Federated States of Micronesia (Article IV s.5) and in South Africa (s.14), the right to privacy is part of the protection against unlawful search of a person's home or property. In some other countries, the right to privacy is covered separately as a distinct right. The constitutions of Fiji (s.37), Papua New Guinea (s.49) and the Marshall Islands (Article II s.13) for example, provide for the right to privacy. In PNG this means 'the right to reasonable privacy in respect of his private and family life, his communications with other persons and his personal papers and effects'. In the Marshall Islands, the right to personal autonomy and privacy means freedom from 'unreasonable interference in personal choices that not injure others and from unreasonable intrusions' into a person's privacy.

Right to information

The right to information was raised in three of the written submissions. The NIANGO submission recommended that legislation be enacted to provide for the right to information. Ms Julie Olsson's submission recommended that the right to information be included in the bill of rights, and that any information from Parliament and Government once made public, should be available to people for use as a matter of course. She also recommended that audit of funds should be constitutional right. The Commonwealth Human Rights Initiative submission went into great detail on the right to information, and recommended that the Constitution be amended to include protection of the right to information, and that the Constitution should also include a requirement that the Parliament of Nauru enact a law to establish mechanisms for accessing information. The CHRI submission states:

Information is a public good like clean air and drinking water. It belongs not to the state, the government of the day or civil servants, but to the public... It enables citizens to choose their representatives based on accurate and complete information, to participate in decisions making and policy development and to hold their representatives accountable. It is on the basis of these principles that the right to information has long been recognised as a fundamental human right that is integral to democratic governance, ... and that, when realised, can have the benefit of strengthening good governance and promoting effective development.

The submission also lists the benefits of entrenching the right to information as follows: it strengthens democracy, it supports participatory development, it is a proven anti-corruption tool, it supports economic development, and it helps to reduce conflict.

Right to ethical government

The submission of the Law Society of Nauru recommended that rights to responsible, transparent and ethical governance should be included in Part II of the Constitution, and stated 'the experience with nature of unethical and irresponsible government over the last 38 years suggest very strongly that such a right must be entrenched in the Bill of rights provisions of the Constitution'. The Commission does not recommend the inclusion of the right to ethical government, as it believes that this is a right that is too vague to enforce, and that the same ends

can be achieved via more specific provisions in the proposed constitutional and legislative Leadership Codes (see Chapter 12).

The Commission recommends that certain social and economic rights be included in Part II of the Constitution of Nauru, as well as additional civil and political rights, as set out below. Recommended provisions relating to the application and enforceability of rights are set out in Sections 6 and 7 below.

The Commission recommends that the following new provisions be inserted in Part II of the Constitution:

Protection of right to privacy and personal autonomy

13A. All persons shall be free from unreasonable interference in personal choices that do not injure others and from unreasonable intrusions into their privacy.

Right to information

13B.(1) Everyone has the right of access to information held by the government and its instrumentalities.

(2) As soon as practicable after the commencement of this Article, Parliament must enact legislation to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the government and to protect Cabinet confidentiality and sensitive information relating to foreign affairs or national security.

Right to health services

13C.(1) Everyone has the right to access basic health services, including maternity and related care for every woman.

(2) The government must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right, and to progressively improve the standard of health services.

Right to education

13D.(1) Every person has the right to primary and secondary education.

(2) The government must take reasonable measures to make education accessible and to progressively improve the standard of public education services and may provide support to private education services.

Environmental Protection

13E. Everyone has the right:

- a. to an environment that is not harmful to their health or well-being; and
- b. to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –
 - i. minimise pollution and environmental degradation;
 - ii. promote rehabilitation and conservation; and
 - iii. secure ecologically sustainable development and use of natural resources including marine resources while promoting justifiable economic and social development.

Employment rights

13F. (1) Every person has the right to fair labour practices.

(2) Every citizen has the right to choose their trade, occupation or profession freely.

(3) The practice of a trade, occupation or profession may be regulated by law.

Women's rights

13G. Every woman has the right to a reasonable period of maternity leave.

Children's rights

13H. Every child has the right:

- a. to a name and nationality from birth;
- b. to be cared for by parents, family or appropriate alternative care if removed from the family environment;
- c. to basic nutrition, shelter, and basic health care services;
- d. to be protected from maltreatment, neglect, abuse or degradation;
- e. to be protected from exploitative labour practices;
- f. not to be required or permitted to perform work or provide services that are inappropriate for a person of that child's age, or that place at risk the child's well-being, education, physical or mental health, or spiritual, moral or social development;
- g. not to be detained except as a measure of last resort, in which case, in addition to the rights the child enjoys under Articles 5 and 10, the child may be detained only for the shortest appropriate period of time, and has the right to be:
 - i. kept separately from detained persons over the age of 18 years; and
 - ii. treated in a manner, and kept in conditions, that take account of the child's age;
- h. to have a legal practitioner assigned to the child by the government, and at government expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
- i. not to be used directly in armed conflict, and to be protected in times of armed conflict.

Section 4 – Justiciability

To make a right justiciable means that it is a matter that can be raised before and decided upon by a court. In other words, the court has jurisdiction to deal with the issue, and remedies are available to the person raising the issue. As mentioned in Section 3, some countries that include social and economic rights in their constitution, such as India, do not make them justiciable because they are seen as too difficult to uphold, and because of the issue of separation of powers and the perceived inappropriateness of giving a court the power to interfere in government budget matters. Where social and economic rights are justiciable, such as in South Africa, these rights impose a positive obligation on the government to take steps to realise those rights. Civil and political rights on the other hand, generally impose only a negative obligation on the government to refrain from interfering with people's liberties. As was also mentioned in Section 3, the South African Constitution tries to make plain that the government is not expected to be able to fulfil everybody's social and economic rights immediately, but rather is obliged to 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation' of these rights (See Sections 25(5), 26(2) and 27(2) in relation to progressive realisation of the rights to land, housing, healthcare, food, water and social security).

The Constitutional Court of South Africa has taken a cautious approach to the enforcement of social and economic rights, and has in its decisions been expressly conscious of the issue of separation of powers. The Court seeks to find the minimum 'core content' of the various social and economic rights, and to test the reasonableness of government measures to achieve progressive realisation of rights with regard to the 'core content'. Thus the inclusion of social and economic rights in the South African Constitution has not led to a multitude of onerous court orders directing the government to spend its budget in particular ways, but in a handful of cases the Court has found that the government has fallen short of its obligations in relation to the core content of rights and has ordered appropriate remedial action.

The Commission recommends that the social and economic rights recommended for inclusion in Part II of the Constitution Nauru (in Section 3 above) be justiciable but that the burden on government be confined within same parameters as those set out in South Africa. The proposed provisions set out in Section 3 have been drafted with such constraints in mind (see proposed Articles 13B(2), 13C(2), 13D(2), 13E).

Section 5 – Remedies

Article 14 of the Constitution of Nauru provides:

14.-(1.) A right or freedom conferred by this Part is enforceable by the Supreme Court at the suit of a person having an interest in the enforcement of that right or freedom.

(2.) The Supreme Court may make all such orders and declarations as are necessary and appropriate for the purposes of clause (1.) of this Article.

This effectively enables the Supreme Court to grant any remedy that it sees fit in cases of breach of Part II, which means for example that the Court could make a declaration, or an order for an injunction, or even award compensation. Some constitutions spell out precisely the types of order that a court may make, or refer to specific remedies for breach of rights. The Constitution of the Solomon Islands provides that a person whose rights have been contravened is entitled to

compensation (Section 17) and that the Court may also ‘make such orders, issue such writs and give such directions’ as it thinks appropriate in a matter concerning infringement of rights and freedoms. The Constitution of South Africa provides that courts must declare any law or conduct that is inconsistent with the Constitution to be invalid to the extent of the inconsistency (section 172) and also provides that courts ‘may grant appropriate relief, including a declaration of rights’ in cases alleging that a right in the Bill of Rights has been infringed or threatened.

The Commission considers that the present Article 14 provides great scope for the court to award any appropriate remedy for breach of rights, and sees no need to amend Article 14 to name particular types of remedy (which are already available even though they are not listed).

The Commission does not recommend any change to Article 14.

The issue of remedies in a broader sense (not confined for remedies for infringement of Part II) is discussed in Chapter 5 of this Report.

Section 6 – Standing to bring an action for breach of rights

Article 14 provides in clause (1) that ‘a right or freedom conferred by this Part is enforceable by the Supreme Court at the suit of a person having an interest in the enforcement of that right or freedom’.

The Commission considers that this provision may be too narrow to provide adequate access to the Supreme Court in cases of infringement of rights, and recommends that Article 14 be amended to broaden the categories of people who may bring an action for infringement of rights, to include anyone acting on behalf of a person who cannot act in their own name (for example a child) and an association acting in the interest of its members.

The Commission recommends that Article 14 be amended as follows:

Enforcement of fundamental rights and freedoms

14.-(1.) A right or freedom conferred by this Part is enforceable by the Supreme Court at the suit of:

- (a) a person having an interest in the enforcement of that right or freedom;
- (b) a person acting on behalf of another person who would be entitled to bring a suit under (a) but who cannot act in their own name; or
- (c) an association acting in the interest of its members

(2.) The Supreme Court may make all such orders and declarations as are necessary and appropriate for the purposes of clause (1.) of this Article.

Section 7 – Application of Part II

Part II of the Constitution of Nauru contains no provision specifying which institutions or persons are bound by it. Because the three pillars of government are subject to the Constitution, it is clear that the Executive, Parliament and the Judiciary are bound to comply with the Bill of Rights. This means for example that Parliament cannot pass laws that breach the fundamental rights and freedoms in Part II (unless the law falls within one of the listed exceptions) and that the government cannot take any executive or administrative action in breach of those rights and freedoms (unless covered by a listed exception). However it is not clear whether, and to what extent, the provisions of Part II apply between and can be enforced against private individuals.

Many constitutions make express provision concerning the application of the Bill of Rights. The Constitution of Fiji provides in section 21 that the Bill of Rights binds the legislative, executive and judicial branches of government and all persons performing the functions of any public office. In Papua New Guinea the Bill of Rights has a broader application. Section 34 of the PNG Constitution provides that the rights provisions apply ‘as between individuals as well as between governmental bodies and individuals; and to and in relation to corporations and associations (other than governmental bodies) in the same way as it applies to and in relation to individuals, except where, or to the extent that, the contrary intention appears in this Constitution.’ The same provision appears in section 12 of the Constitution of Tuvalu. Similarly, the Constitution of South Africa provides:

Section 8

8.(1) The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary, and all organs of state.

(2) A provision in the Bill of rights binds natural and juristic persons if, and to the extent that, it is applicable, taking into account the nature of the right and the duty imposed by the right.

The Commission believes it would be useful to clarify how widely the provisions of Part II are to be applied and between whom, and recommends the insertion of a new Article in Part II which specifies that Part II binds natural and juristic persons as well as the state, in so far as applicable in the context of the right. The Commission is of the view that it is appropriate to bind not only government bodies but also individuals, to the extent that certain rights are capable of being so applied, and that such provision further strengthens the protection of rights afforded by Part II.

The Commission recommends that a new Article be inserted at the beginning of Part II as follows:

Application

2D.(1) The provisions of this Part apply to all laws and bind the legislature, the executive, the judiciary, and all public officers.

(2) A provision in this Part binds natural and legal persons if, and to the extent that, it is applicable, taking into account the nature of the right and the duty imposed by the right.

Section 8 – Interpretation

Article 15 of the Constitution of Nauru provides for the interpretation of particular words within Part II, and Article 81 provides further definitions of terms used in other Parts of the Constitution, and some general rules of interpretation. There is no provision that deals with the general approach to interpretation of Part II.

It is common in constitutions to give some direction to the courts as to the manner in which the bill of rights, or the Constitution more broadly, is to be interpreted. Some constitutions have *both* a provision covering interpretation of the whole constitution, and an additional separate provision relating to interpretation of the bill of rights. This is because there are often special considerations that apply to rights provisions, such as the need to balance competing rights and the fact that international law may be useful as an aid in interpreting rights provisions.

The Constitution of Fiji for example provides guidelines on the interpretation of the Constitution generally in section 3, whilst section 43 contains additional rules for the interpretation of the chapter on rights and freedoms. Section 43 provides:

Interpretation

43.-(1) The specification in this Chapter of rights and freedoms is not to be construed as denying or limiting other rights and freedoms recognised or conferred by common law, customary law or legislation to the extent that they are not inconsistent with this Chapter.

(2) In interpreting the provisions of this Chapter, the courts must promote the values that underlie a democratic society based on freedom and equality and must, if relevant, have regard to public international law applicable to the protection of the rights set out in this Chapter.

(3) A law that limits a right or freedom set out in this Chapter is not invalid solely because the wording of the law exceeds the limits imposed by this Chapter if the law is reasonably capable of a more restricted interpretation that does not exceed those limits. In that case, the law must be construed in accordance with the more restricted interpretation.

This is similar to the equivalent South African provision, which also refers to the promotion of values that underlie an open and democratic society based on human dignity, equality and freedom and provides that the bill of rights does not deny the existence of any other rights or freedoms to the extent that they are consistent with the Bill of Rights (s.39). The South African provision also provides that in the interpretation of the Bill of Rights, a court, tribunal or forum must consider international law, and may consider foreign law.

The Commission considers that whilst it has made a recommendation for the insertion of a provision concerning interpretation of the Constitution generally in a manner that takes account of the principles in the Preamble (see Chapter 1, Section 2), it would be useful to also provide for rules of interpretation relating specifically to the protection of rights and freedoms in Part II. The Commission recommends that a new provision be inserted in Part II that sets out principles of interpretation for Part II. The Commission also recommends the deletion of the definition of “public property” in Article 15, as a consequence of the recommendation that the exception relating to protection of public property be deleted from Article 4.

The Commission recommends that Article 15 be amended as follows:

Interpretation

15. (1) When interpreting this Part, a court must promote the values that underlie a democratic society based on freedom and equality and must, if relevant, have regard to public international law applicable to the protection of the rights and freedoms set out in this Part.

(2) The provisions of this Part are not to be construed as denying or limiting other rights and freedoms that are not specified in this Part but that are recognised or conferred by common law, customary law or legislation to the extent that they are not inconsistent with this Part.

(3) The rights and freedoms protected in this Part may only be limited in accordance with the exceptions provided for in this Part. In determining whether a law that limits rights is reasonably required for a prescribed purpose, the Court must take into account the relation between the limitation and its purpose, and any less restrictive means to achieve the purpose.

(4) In this Part, unless the context otherwise requires-

"contravention", in relation to any requirement, includes a failure to comply with that requirement, and cognate expressions shall be construed accordingly;

"disciplined force" means-

(a) the Police Force; or

(b) any other body established by law for the purposes of defence or maintaining public safety or public order;

"legal representative" means a person entitled to be in or to enter Nauru and entitled by law to appear in proceedings before a court on behalf of a party to those proceedings;

"member", in relation to a disciplined force, includes a person who, under the law regulating the discipline of that force, is subject to that discipline;

~~"public property" includes property of a body corporate established by law for public purposes.~~

Section 9 – Compliance

A written submission by Ms Julie Olsson recommended that an Office of Human Rights ought to be provided for in the Constitution and established for the purpose of promoting and protecting human rights. The CHRI submission discussed examples of human rights commissions in other countries, but ultimately recommended that in view of Nauru's small population and resource base, Nauru should establish an Ombudsman's office which would also have a mandate for subject-specific oversight, such as human rights and police complaints. The Commission's recommendations in relation to an Ombudsman are set out in Chapter 12.

The Commission notes that Human Rights Commissions elsewhere, particularly in Fiji, are important and effective institutions. However the Commission is of the view that the establishment of a Human Rights Commission in Nauru is not feasible due to resource constraints, and that if the Commissions recommendations in relation to other parts of the Constitution are adopted, a Human Rights Commission would not be necessary as similar ends would be achieved by other means. The Commission notes that a major factor in the effectiveness of human rights is education. If people know their rights, they are much less likely to be denied or infringed. The Commission has recommended in Chapter 1, Section 4 that it be compulsory to include the Constitution in the school curriculum and to raise public awareness about the Constitution. The Commission has also recommended that access to the Court for alleged infringement of rights and freedoms be widened (Section 6 of this Chapter) and has recommended a Leadership Code to improve the performance and accountability of holders of public offices and the establishment of an Ombudsman to receive and investigate complaints about government administration (Chapter 12).

The Commission therefore does not recommend the establishment of a Human Rights Commission.

Chapter 3: President and Cabinet, and their relationship with Parliament

Issues and Questions

The public consultations and written submissions considered by the Commission have raised many issues relating to this Part III of the Constitution. Those items which seem to the Commission to require examination, including those which have attracted the most public interest, are dealt with in the following Sections of this Report:

PRESIDENT

1. the ways in which the President is described in the Constitution, including whether the functions and powers of the President should be listed briefly, and whether a new President should be required to take a separate oath
2. the method of selecting the President
3. the number of terms of office of a President

CABINET

4. the way in which Cabinet is described in the Constitution, and ministerial duties are allocated
5. the relationship of Cabinet and Parliament – the principle of collective responsibility
6. whether the powers and duties of the Cabinet and its Ministers should be stated in broad terms in the Constitution
7. whether the power to enter into treaties with other countries should be specified in the Constitution, and, if so, should the power be defined and / or limited
8. whether there should be provision for a Clerk to Cabinet
9. motions of no-confidence in Cabinet
10. ‘offices of profit’, and Ministers and members of Parliament

DEPUTY/ACTING PRESIDENT

11. vacancy or incapacity in the office of President, and the functions of Acting President, and/or an office of Deputy President

In the Sections that follow, some background will be provided where it seems appropriate. In some cases, it draws upon material which has already been distributed in the Background and Discussion Paper, but it is offered here in order to make this Report more comprehensive and, hopefully, more useful.

PRESIDENT

Section 1 – Description of the President

Description of the office of President in Article 16

Article 16 states that the President of Nauru must be a Member of Parliament, and is to be elected by Parliament. It also sets out the times or circumstances in which the Parliament must elect a President. Any Member of Parliament, other than the Speaker and the Deputy Speaker, is eligible to be elected President. The President may resign his office by writing under his hand delivered to the Speaker, may be removed by a vote of no confidence (see discussion of Article 24 under Section 9 below) or may lose office by virtue of ceasing to be a Member of Parliament. This Article also attempts to ensure that there is never a gap in executive authority by providing that the President holds office until the election of another person as President (however, this is not entirely successful in the case of the death of a President - see discussion of the vacuum of executive power upon the death of a President - Peter MacSporran, *The Annotated Constitution of Nauru*, pp35 and 42-43).

Although Article 16 creates the office of President, it does not spell out the role of the President. It is provided later, in Articles 17, 18 and 19, that executive power is vested in Cabinet which includes the President and is appointed by the President. But nowhere is it stated that the President has the dual role of Head of State and Head of Government. This is inferred from the absence of any other contender for Head of State, from some of the functions allocated to the President (such as the power to grant pardons under Article 80 – see Chapter 11) and from the fact that it was understood at the time of drafting in 1968 that this was the case.

This is clearly unsatisfactory. Most constitutions identify who is Head of State. The Constitution of Marshall Islands provides that the President is “the Head of State” (Art. V, s. 3), while the Constitution of Kiribati declares that the Beretitenti is “the Head of State and Head of Government” (S. 30 (2)). Indeed, the Presidents of all three countries have much the same powers and functions. It would be appropriate for Article 16 of the Nauru Constitution to be amended to clarify the position.

At present, the Article says –

The President

16. (1.) There shall be a President of Nauru, who shall be elected by Parliament.

The Commission recommends that Article 16 should include reference to the two roles, and, if the proposal for election by the people is adopted, there will be a change in Art. 16 (1). In that case, Art.16 (1) and (1A) should read –

The President

16. (1.) There shall be a President of Nauru, who shall be elected by ~~Parliament~~ the people of Nauru in accordance with Article 16A.

(1A.) The President shall be the Head of State and Head of Government.

List of functions and powers of President

The principle that the executive authority of Nauru is vested in Cabinet (Art. 17) means that the President cannot exercise executive authority in his own right unless authority is conferred upon him in some way. Except where certain powers are stated in the Constitution, the President may act only with Cabinet's authority, or where Cabinet's power is given to him under statute, or by express delegation by Cabinet.

Broadly speaking, it is the President's role in Cabinet that defines his position in government. The President is dependant upon Cabinet for most of his authority, and, in turn, may exercise considerable influence within it. This influence lies primarily in the President's powers of appointment and dismissal of Ministers, and allocation to them of their responsibilities, accompanied by his right and duty to preside over Cabinet meetings.

Those functions and powers of the President which are exercisable by him alone are spread throughout the Constitution. In order to encourage familiarity with the workings of the Constitution, it seems useful to identify the functions and powers and list them in Article 16, with directions as to where to find the substantive Articles. Some of these functions will be the subject of further discussion later in this Report. Also, similar recommendations in relation to Cabinet itself are made in Sections 6 to 9 below.

The Commission recommends that the following new clause be added to Article 16.

(3A.) The functions and powers of the President are vested in him by this Constitution, and include the following –

- to appoint Ministers to Cabinet – Art. 19;
- to assign to Ministers responsibility for government departments – Art. 23;
- to preside at meetings of Cabinet – Art. 22;
- to prorogue Parliament – Arts. 41(1);
- to determine the date of election after dissolution – Art. 39;
- to determine the date of beginning of parliamentary sessions – Art. 40. (1);
- to initiate the process of dissolution of Parliament – Art. 41(2);
- to appoint judges and acting judges – Arts 49(2) and 53;
- to appoint the Director of Public Prosecutions and the Ombudsman – Art. 57B, 57D
- to declare and revoke a state of emergency – Art. 77;
- to make emergency orders during a state of emergency – Art. 78; and
- to exercise the prerogative of mercy – Art. 80.

President's oath of office

It is noticeable that the President is not at present required to take an oath as President when he assumes that office. From the public discussions, it is clear that many people on Nauru attach real significance to the taking of oaths of office by high-level office-holders.

In view of the responsibilities of the President that are additional to those of a member of Parliament, the Commission recommends that the President be required to take a separate oath designed to reflect to the full the obligations which he/she undertakes on behalf of Nauru. The Commission recommends that a new clause be added to Article 16 as follows:

(3B.) A person assuming the office of President shall, before entering upon the duties of that office, take and subscribe before the Chief Justice or the Speaker an oath in the form set out in Schedule [7] to this Constitution.

A related question for consideration is whether the oaths of office of President, Deputy President, Speaker and Cabinet members should be taken and subscribed before the Chief Justice, as a way of emphasising the fact that all three branches of government (executive, legislative and judiciary) are together subject to the Constitution. It is the Supreme Court which has the role of ensuring that the Constitution is complied with. The oaths of members of Parliament, who meet immediately after the general election, should be taken and subscribed before the Speaker, as soon as that person is elected. That is a matter for the legislature alone. The Commission recommends that the Chief Justice be involved in the swearing in of the President and Cabinet, but that, in the absence of the Chief Justice, the oath should be taken before the Speaker.

Section 2 – the method of selecting the President

The election of President by Parliament, as currently provided for under Article 16, is supported by a significant number of people, but it seems that a considerably larger proportion of those who expressed opinions at the public meetings would like to see the President elected directly by the people. If appropriate changes are made to the Constitution, it may be possible for the problem of instability caused by the present parliamentary election of the President, and frequent motions of no confidence, to be addressed, at least to some extent, by direct elections. The issue of motions of no confidence is discussed in more detail below under Section 9.

Direct or indirect election of President

But what is meant by popular election? At present, the people of Nauru can only vote for members of Parliament for their constituency, and have no direct say in which Member of Parliament will be elected President. In many other systems where voters do have *some* say in who will become their head of government, the head of government is not *directly* elected by the

people. For example, in the United States (where, it must be noted, presidential government is very different to the Nauruan system of parliamentary presidential government) people do not vote for the President directly, but rather they elect representatives from each state to sit in an electoral college, and it is the electoral college that elects the President.

In Australia, New Zealand and most Pacific Island states, the Prime Minister is not elected by the votes of members of Parliament, but nor is he directly elected. By convention, the Head of State will appoint as Prime Minister the parliamentary leader of whichever party has a majority in the House of Representatives. The Prime Minister is indirectly chosen by the people because of the strength of the party system, which means that, even though the voters are empowered only to vote for their local member of parliament, they know that voting for a particular party is effectively the same as voting for one prime ministerial candidate or the other. The Prime Minister is therefore indirectly elected by a sufficient number of voters choosing to vote for his/her political party in their own electorates, such that the party is able to form a majority in the House of Representatives.

In the Marshall Islands the President is elected by the Nitijela (Parliament) – as in Nauru – while the Kiribati Constitution provides for popular election of the Beretitenti (President), an idea which many people on Nauru have supported as a way forward.

If, as has been suggested, the President of Nauru is to be popularly elected rather than elected by Parliament, how will this be arranged? It should be noted that there was no significant demand from the public consultations for a US-style Presidential system where the executive is completely separate from Parliament. It is also recorded that the people spoke in favour of the Kiribati system of direct election when it was explained to them, rather than the indirect method applied in a large number of countries described above, where party systems are strong and the winning party's leader becomes Prime Minister. A further point to be noted is that, although the Background Discussion Paper explained in some detail the option open to Nauru to divide the offices of Head of State and Head of Government and appoint different people to those positions, there were no submissions from the public that suggested that this option should be pursued. It seems that people today recognise, as did members of the 1968 Convention, that a system should be chosen which is suited to Nauru's size and means.

It seems appropriate for this Report to discuss the advantages and disadvantages of the direct popular election model so that the Nauru Constitutional Convention can decide whether to adopt it, or to retain the existing provisions.

Arguments in favour of a system whereby the President retains the dual role he currently holds and is popularly elected directly by the people of Nauru rather than the Parliament include:

- the likelihood that removing from Parliament the power to elect a President (and likely attendant amendments such as instant dissolution upon a motion of no confidence) would enhance stability in government; and
- that democracy would be enhanced (and the legitimacy of government) by enabling people to choose their head of government and head of state directly.

Arguments against such changes include;

- the possibility that a popularly elected President might not be able to secure majority support for his government within Parliament, and would therefore have difficulty passing legislation to implement government policies, passing budgets etc; and
- that it is more cumbersome to have two rounds of general elections (a parliamentary election followed soon after by a separate Presidential election) than to have only one.

After considering all the factors involved, the Commission recommends that the Constitution be amended to provide for a popularly elected President, and that the various changes mentioned in this Report that flow from that recommendation also be made.

Suggestions for direct election of President

It is worthwhile looking at the Kiribati method of direct election. The Constitution of Kiribati came into force in 1979 when Kiribati became independent, eleven years after Nauru. To summarise – the Constitution provides for a Parliament of 42 members and for the election of the Beretitenti as soon as practicable after a general parliamentary election. Before proceeding on any bill, the Maneaba (Assembly) must nominate from amongst its members not less than three nor more than four candidates for election as Beretitenti, and no other person may be a candidate. This is done by the Maneaba members electing the candidates. A presidential election is then held in which all people qualified to vote in a general parliamentary election are eligible to vote. The successful presidential candidate remains a member of Parliament. A person may serve no more than three (3) terms as Beretitenti (see Section 3 below for discussion of this issue). As in Nauru, the Kiribati Beretitenti is both Head of State and Head of Government. He appoints a Vice-President, whom the President may authorise to exercise the functions of President when necessary, as well as other Ministers of Cabinet (see Section 10 below for treatment of this aspect). Although the President is popularly elected, he may be dismissed by the Parliament in a vote of no confidence (and this issue is discussed in Section 9 below, relating to Article 24).

Electing the candidates in Parliament

The method of electing the four candidates in the House is straightforward in Kiribati, and can be readily modified to suit Nauru's smaller Parliament.

When the Parliament of Kiribati has to elect candidates for the presidential election, it uses the Borda count – almost identical to the electoral system used in Nauru for general parliamentary elections. Unlike a general election in Nauru, where voters must number every box, in the parliamentary vote for presidential candidates in Kiribati, each member of parliament casts 4 votes (regardless of whether there are 5 candidates or 8, etc) in order of preference. Four points are allocated for a first preference vote, 3 points for a second preference, 2 for third and 1 for fourth. 'The points are then tallied and the four candidates with the greatest number of points are declared nominated'. (Benjamin Reilly, 'Social Choice in the South Seas: Electoral Innovation and the Borda Count in the Pacific Island Countries' (2002) 23 *International Political Science Review* 355, 367).

Although the Borda count is thought to be an efficient system for electing the most widely accepted candidate in a multi-candidate contest, it is open to strategic manipulation when employed on a small scale (such as election of presidential candidates within Parliament) which does not present a problem when it is applied on a larger scale (such as general elections in Nauru). Reilly cites an example of the 1991 nomination contest in Kiribati, in which there were eight nominations for Presidential candidates, representing four different groups. Two of the four groups secretly agreed to vote strategically and swap preferences, in order to ensure that the other two groups (which included two popular politicians) would not win places as candidates, and to ensure that the leaders of their own groups would be assured of candidacy. This meant that the people of Kiribati did not have the opportunity to vote for a candidate from the two excluded groups, and that the four presidential candidates came from two groups, so in effect there were only two real candidates: the leaders of the two groups. The other two candidates did not even campaign. (Reilly 367- 68)

If Nauru decides to amend the Constitution to provide for a popularly elected President, and for the candidates for President to be drawn from the Parliament in accordance with amended Standing Orders, consideration should be given as to whether the Borda count is the best way to choose candidates, or whether some other voting method should be employed in order to avoid the kind of manipulation referred to above. One alternative model would be to hold multiple ballots, in which at the end of each ballot the person with the lowest number of votes is eliminated and another ballot held until the requisite number of candidates remain. If members could cast only one vote (ie, their first preference) in each ballot, the scope for making behind the scenes preference deals in order to exclude certain candidates would be diminished. Another alternative is to use the modified Borda count already used in Nauru for general elections, in which the value attached to preferences after the first preference is relatively less than in the pure Borda count employed in Kiribati. Therefore, rather than preferences being valued at 4, 3, 2 and 1 points respectively, they could be valued at 1, 0.5, 0.33, 0.25 – or 4, 2, 1 and 0.5. This would reduce the impact of preference deals, because second, third and fourth preferences would be of less value. There are other alternative voting systems that could be considered, but electoral methods generally are not matters for the Constitution.

The Commission recommends that, before the Constitution is amended, the Constitutional Convention should be provided with details of a relatively simple and effective method of selecting candidates within Parliament. As members of Parliament will be familiar with the Borda system, it is recommended that a variation of that system should be provided for by suitable legislation and Standing Orders.

Limit on the number of presidential candidates nominated by Parliament

Does there need to be a limit on the number of Presidential candidates selected by Parliament? *Arguments for* placing a limit on the number of candidates include reducing the likelihood of ‘dummy’ candidates being nominated in an attempt to detract votes from one’s opponents. One *argument against* a limit, and for permitting an unlimited number of candidates from Parliament, is that people would have a wider choice, depending only upon the willingness of members to nominate candidates.

On balance, the Commission recommends caution, and that a limit of three candidates should be nominated by Parliament.

Popular electoral system for the President

Once the candidates have been chosen and nominated under amended Standing Orders, how should the President be elected? The most likely scenario is that the President would be directly elected by all eligible voters voting as one electorate, as is the case in Kiribati. But the important question of electoral system remains. The President could be elected by Borda vote, whereby, as in a general Parliamentary election, voters must indicate all preferences and each preference vote is accorded a value and then tallied.

Alternatively, the voting method currently used to fill a vacancy in Parliament could be used, which is a simple first-past-the-post vote. In the latter system, voters might be required to indicate preferences, with preferences being distributed as whole votes as the lowest ranking candidates are eliminated (known as the single transferable vote). As there will be a maximum of three candidates to choose from, the Commission favours the simpler first-past-the-post vote method, and suggests the preferential single transferable vote (SVT) as the most appropriate version of such method.

However, as the method of popular election is not a constitutional matter, and further electoral legislation and Parliament's Standing Orders will be necessary in order to implement the proposed amendments to the Constitution, there will be opportunities for further consideration of the alternative methods of election after the Constitutional Convention has decided on the principal question of whether to adopt direct election for the President.

Section 3 – Number of terms of office of a President

Does there need to be a limit on the number of terms that a popularly elected President may hold? In parliamentary systems in which there is a President serving as Head of State and a Prime Minister (or equivalent) in Parliament as the Head of Government, it is common for there to be a limit on the number of terms served by the President, but no limit of terms for the Prime Minister. For example, in Fiji, East Timor and Croatia, a President is limited to two five-year terms.

In hybrid systems similar to Nauru, in which the President sits in Parliament and is both Head of State and Head of Government, there are arguments both for and against limiting terms, as the President wields a great deal of executive power, but also resembles in many respects a Prime Minister. In Kiribati, the Beretitenti may serve no more than three terms of four years. However, in the Marshall Islands, where the President is elected from the members of Parliament and serves as both Head of State and Head of Government, there is no limit on presidential terms. Placing a limit on presidential terms is a means of ensuring that executive power is not concentrated in the hands of one individual for too long, and therefore also ensures political change or renewal. Whether or not there is a limit on presidential terms, a President can lose office by failure to be re-elected, or by losing the confidence of the Parliament or other means that a Constitution may provide. This also means that, for example, a limit of three terms

may be reached within as short a time as one year, if there are two successful motions of no confidence and dissolutions within a short period.

On Nauru, where extended family ties are strong, there is a danger that one or more dominant families might secure election for their candidate and keep him there for successive terms. Appendix 6 at the end of this Report shows the number and length of terms of the Presidents of Nauru since independence.

The Commission recommends a limit of three consecutive terms for a President who is elected by popular vote. This means that a President may serve no more than three terms *in a row*, but may serve more than three terms in total. This is provided for in proposed clause (5) of proposed new Article 16A, below.

For the reasons given in Sections 1 to 3 above, the Commission recommends that consideration be given by the Constitutional Convention to changing provision for the election of President in the following manner. First, the existing wording relating to election by Parliament should be removed – such as is found in the existing Art. 16 (1) and (5), and Art. 24 (1) and (2). If direct popular election is approved, Art 16 may be adapted to provide for it. There will be a new Article 16A.

The Commission recommends that the clauses set out in Section 1 above be incorporated with the clauses recommended in Sections 2 and 3 – together with existing clauses – as follows:

The President

16. (1.) There shall be a President of Nauru, who shall be elected by Parliament the people of Nauru in accordance with Article 16A.

(1A.) The President shall be the Head of State and Head of Government.

(2.) A person is not qualified to be elected President unless he is a member of Parliament.

(3.) The Speaker and the Deputy Speaker are not qualified to be elected President.

[note: reference to the Speaker will be deleted from clause (3) if he is to be chosen from outside parliament as recommended in Chapter 4 Section 10 below]

(3A.) The functions and powers of the President are vested in him by this Constitution, and include the following –

- to appoint Ministers to Cabinet – Art. 19;
- to assign to Ministers responsibility for government departments – Art. 23;
- to preside at meetings of Cabinet – Art. 22;
- to prorogue Parliament – Arts. 41(1);
- to determine the date of election after dissolution – Art. 39;
- to determine the date of beginning of parliamentary sessions – Art. 40. (1);

- to initiate the process of dissolution of Parliament – Art. 41(2);
- to appoint judges and acting judges – Arts 49(2) and 53;
- to appoint the Director of Public Prosecutions and the Ombudsman – Art. 57B, 57D;
- to declare and revoke a state of emergency – Art. 77;
- to make emergency orders during a state of emergency – Art. 78; and
- to exercise the prerogative of mercy – Art. 80.

(3B.) A person assuming the office of President shall, before entering upon the duties of that office, take and subscribe before the Chief Justice or the Speaker an oath in the form set out in Schedule [7] to this Constitution.

(4.) Except as otherwise provided in the Constitution, the President holds office until the election of another person as President.

~~(5.) Parliament shall elect a President
(a) whenever...~~

Election of President

16A. (1.) Nomination for and an election to the office of President must be held in such manner as is prescribed by this Article and, subject thereto, by an Act of Parliament and Standing Orders of Parliament –

(a) as soon as practicable at the first sitting of Parliament next following a general election and before proceeding on any Bill; and

(b) whenever the office of President is vacant.

(2.) After the election of the Speaker (*see Chapter 4 Section 10 below*), Parliament must nominate, from among members of Parliament, not fewer than two (2) nor more than three (3) candidates for election as President, and no other person may be a candidate.

(3.) Every person who is entitled to vote in a general election is entitled to vote in an election of President.

(4.) A person elected to the office of President under this Article assumes that office on the day upon which he is declared elected.

(5.) A person may assume office as President after election on not more than three consecutive occasions.

As indicated above, amendments to electoral legislation and Parliament's Standing Orders will be necessary to establish the nomination and electoral systems to be used for the election of President.

Further questions concerning the Presidency such as 'acting' and 'deputy' functions, vacancy, removal and motions of no confidence are dealt with below. The question whether a temporary

body such as a ‘Council of State’ is needed to ensure continuity of the executive function of government following a dissolution of Parliament is discussed under Section 9, below.

CABINET

Section 4 – Cabinet and allocation of ministerial duties

The Nauruan Cabinet is described in the following way –

Executive Authority vests in the Cabinet

17.-(1.) The executive authority of Nauru is vested in a Cabinet constituted as provided by this Part and the Cabinet has the general direction and control of the government of Nauru.

This clear statement of the principle that executive power is vested in Cabinet also adopted in both Kiribati and Marshall Islands. Again, the Nauru Constitution is cryptic, and has little to say about how Cabinet should govern the country in the course of exercising its executive authority. In the consultations across the island, there was a strong sense that people would like government to be made more specifically accountable in terms of precise powers and duties. On the other hand, in a complex world where Nauru is vulnerable and may be exposed to unexpected influences, government needs a fairly free hand to do all things necessary to advance the best interests of the country as a whole.

Constitutions typically require the Head of Government to allocate government departments to Ministers. Nauru does this in Art. 23 as follows –

Appointment of Ministers to Departments

23. The President may assign to himself or to a Minister responsibility for any business of the government of Nauru and may revoke or vary an assignment made under this Article.

This puts the Minister into a relationship with the head of each of the allocated departments.

The Commission recommends that this should be amplified (as does section 47 of the Kiribati Constitution) by adding a new clause to Article 23 as follows –

(2) Where any Minister has been charged with responsibility for the administration of any department of government, he shall exercise direction and control over that department and, subject to such direction and control, the department shall be under the supervision of the head of the department, whose office shall be a public office.

Some concern has been expressed in submissions that Cabinet, and the President and individual Ministers, should not be able to delegate executive authority to bodies or persons without express *statutory* authority (in the case of Cabinet), and express *Cabinet* authority (in the case of the President and Ministers). Even if Ministers do delegate their authority, no delegations can absolve Cabinet of full responsibility for government of the country.

The Commission recommends that the following new clause be added to Article 23. The clause would sit equally well in Article 17 where the collective responsibility of Cabinet is mentioned, and the connection between the two Articles should be noted.

(3) Subject to any law made by Parliament, the Cabinet may exercise elements of its executive authority directly, or through its individual members, and through other officers responsible to the Cabinet; but neither the provisions of any such law, nor any delegation of elements of the Cabinet's executive authority shall have the effect of diminishing the responsibility of the Cabinet and of each of its members to Parliament for the direction and implementation of executive policies.

Section 5 – Collective responsibility

The idea of the collective responsibility of Cabinet to Parliament lies at the heart of a parliamentary system of government in which Cabinet members are chosen from among the elected members of Parliament and Parliament makes Cabinet accountable to the people for managing the country and its resources. Successful government may be said to depend *both* upon the skills, experience and integrity of the President and Ministers *and* upon the determination of all members of Parliament to make laws and require accountability in the interests of the people as a whole.

In the public consultations, there seemed to be some concern that individual Ministers should be able to be called to account. However, it would clearly be unworkable to substitute the individual responsibility of Ministers for the collective responsibility of Cabinet. Each Minister would be called to account for the operation of the one, two or three departments in the assigned portfolio, without consideration of the policies and workings of government as a whole. In these days of global influences and local complexities, a cohesive integrated team of Ministers seems essential. It is also worthwhile noting that, historically, Parliaments in both small and large countries have maintained the principle of government by Cabinet as a single entity, politically and legally.

The Nauru Constitution is very clear on this point. Art. 17.(2) states –

17.-(2.) The Cabinet is collectively responsible to Parliament.

In effect, each Minister is responsible to a Cabinet comprising the President and the other Ministers, and Cabinet as a political institution stands or falls, as such. Under the British system (which applies in Australia), the tradition is that Ministers derive their authority individually from the Crown and owe loyalty to the Head of State as well as to Parliament. Not only are they collectively responsible to Parliament (meaning they must speak as one in relation to Cabinet

decisions), but they are also individually responsible for their departments. The theory is that a Minister will resign if there is lack of confidence in the administration of his/her department, but the reality is that Ministers seldom if ever do. In Nauru, the Constitution of Nauru requires only that Cabinet Ministers are collectively responsible to Parliament. This means that Parliament has no effective means of removing a Minister in whom it has lost confidence, without deposing the whole Cabinet.

Standing Order 97 which deals with motions of ‘censure’ and ‘no confidence’ is unsatisfactory in that it fails to make the distinction between Cabinet and Ministerial responsibility. MacSporran observes, “While there is certainly no reason why Parliament cannot censure an individual Minister, such censure has no effect unless the Minister takes the vote as such that in conscience he should resign. Indeed Standing Order 97 provides for such motions. But it is because the Constitution provides a specific means [only one means] to dismiss a President and his Ministers that there is no basis for suggesting that there exists a convention that a Minister should resign if he, individually, loses the confidence of the House.” (Peter MacSporran *The Annotated Constitution of Nauru*, p73)

If the Nauruan Parliament expresses loss of confidence in a Minister, a President may ‘re-shuffle’ portfolio responsibilities or dismiss the Minister, but dismissal might be fraught with practical difficulties on Nauru, not the least of which is a desire to maintain a majority in Parliament.

It would be possible to amend the Constitution to provide for individual ministerial responsibility in addition to collective responsibility to Parliament, but such a change would seem likely to undermine the prospects of improving stability in the Nauru political scene. As will be seen below under the discussion of motions of no confidence, certain measures can be taken that are designed to limit the frequency or effect of such motions, but the concern remains that it is difficult to predict the consequences of allowing motions of no confidence in individual Ministers. Furthermore, unless there is clear evidence that lack of individual responsibility is causing problems that its introduction will cure, it is perhaps unwise for Nauru to depart from the fundamental constitutional principle of the collective responsibility of Cabinet.

Is there a difference between censure and no confidence when addressed to an individual Minister? A motion of either can bring pressure to bear on a Minister to resign and on the President to take action, but neither can have the effect of forcing resignation or bringing down the government. As to the meaning of the words involved, a motion of censure (or ‘severe disapproval’) has the effect of publicly attaching to a named Minister the blame for alleged failures, while a motion of no confidence seems clearly to be a call to the Minister to resign (with which he/she may, or may not, comply). It would be helpful if Standing Orders were brought into line to reflect the constitutional principle of collective responsibility.

The Commission recommends that whatever changes may be adopted in relation to the Executive and the Legislature of Nauru, priority should always be given to preserving the principle of Cabinet’s collective responsibility to Parliament.

Section 6 – Statement of the powers and duties of Cabinet

As the President has discretion to re-allocate work amongst the Ministers, and to call and preside over Cabinet meetings as and when he/she wishes, there is a heavy onus on the President to hold Cabinet together and, in effect, to “steer the ship”. However, the Constitution at present sets no goals for Cabinet and the government which it controls, nor does it offer guidelines for carrying out its tasks collectively. A set of ‘powers, functions, duties and responsibilities’ declared in the Marshall Islands Constitution (Art. V s. (1) (3)), which also reinforce the collective nature of Cabinet’s functions, is worth considering.

The Commission recommends the following adaptation for the Convention’s consideration, as a new clause (3) in Article 17:

17.(3) The executive authority so vested in the Cabinet shall include but shall not be limited to the following powers, functions, duties and responsibilities:

(a) the Cabinet shall have the general direction and control of the government of Nauru;

(b) the Cabinet shall recommend to Parliament such legislative proposals as it considers necessary or desirable to implement its policies and decisions; and, in particular, the Cabinet, taking into account the provisions of Part VI (Finance), shall recommend to Parliament proposals for the raising of revenue and for the expenditure of public money;

(c) the Cabinet shall be accountable to Parliament for all public expenditure and for relating such expenditure to the appropriations made by Parliament or to other authority conferred by this Constitution or by Act;

(d) the Cabinet shall be responsible for conducting the foreign affairs of Nauru, whether by treaty or otherwise; provided that Cabinet shall, upon ratifying any treaty, table the treaty in Parliament:

(e) the Cabinet shall be responsible for making such provision as may be reasonable and necessary for the security of Nauru;

(f) the Cabinet shall be responsible for establishing and maintaining such hospitals and other institutions and for providing such other services as may be reasonable and necessary for the public health;

(g) the Cabinet shall be responsible for making such provision as may be reasonable and necessary to provide educational opportunities for the people of Nauru;

(h) the Cabinet shall be responsible for establishing and maintaining such other institutions and services and for making such other provision as may be reasonable and necessary to achieve an adequate standard of living for the people of Nauru, to enable them to enjoy their legal rights, and to serve their economic, social and cultural welfare;

(i) in the exercise of its responsibilities, the Cabinet may make such contracts and other instruments on behalf of the Government of Nauru as it considers necessary.

These broadly stated responsibilities are not readily enforceable against the government in Court but are an indication of the priorities set by the people and may be taken into account in the application of the Leadership Code and the jurisdiction of the Ombudsman (see Chapter 12). The above responsibilities may be read as an outline and summary of what the people of Nauru expect of their elected representatives.

Section 7 – Treaty making power

At present, the Constitution and statutes appear to make no provision for entering into relations with foreign states and international obligations such as treaties, conventions and other types of agreement. There is a general understanding that the power to do so on behalf of Nauru flows from the executive function of Cabinet, and that Cabinet could delegate power to the President from time to time. Submissions and discussion have raised the question whether these powers should be defined and have asked what role Parliament should play in this area.

It is accepted international and constitutional law that treaties, and all obligations entered into with foreign states, have no effect within a country unless they are deliberately made part of the law of that country. In other words, a treaty might impose *international* obligations on a country, but does not automatically have any legal effect *domestically* unless provided for by Parliament.

The Commission considers that it would be helpful for the public to be able to see where responsibilities lie in this area. As suggested above in Section 6, it should be stated that the responsibility for conducting the foreign affairs of Nauru, whether by treaty or otherwise, rests with Cabinet, and that it is up to Parliament to decide whether to make a treaty or an agreement apply as part of the law of Nauru.

The Commission recommends that a further clause should be added to Article 17 to provide –

(4.) No treaty or other international agreement which is finally accepted by or on behalf of the Republic of Nauru shall, of itself, have the force of law in the Republic.

Section 8 – Clerk to Cabinet

A further aspect of the functioning of Cabinet concerns its internal arrangements and the manner in which the President and Ministers will present matters and deal with questions in Parliament. Parliamentary procedure is governed by Standing Orders, but these do not govern the steps and processes that are followed within Cabinet itself in preparation for the discharge by Cabinet of its responsibilities to the House. Art. 22 (2) makes it clear that Cabinet may regulate its own procedure, and experience in other countries indicates that this is best accomplished by the adoption of a Cabinet Manual that would deal with the functions and duties of the President and the Ministers and also provide a guide to the conduct of Ministers in Parliament.

Some constitutions provide for the office of ‘Secretary’ or ‘Clerk’ to Cabinet. This gives appropriate status to the person or persons responsible for administering the running of Cabinet, and helps to maintain clear lines of responsibility between Cabinet and the Public Service.

The Commission recommends that a new clause (3) be inserted in Article 22 as follows –

(3.) There shall be a Clerk of Cabinet who is responsible, in accordance with such instructions as may be given to him by the Cabinet, for arranging the business for, and keeping the minutes of, the Cabinet and for conveying the decisions of the Cabinet to the appropriate person or authority, and shall have such other functions as the Cabinet or the President may direct.

Section 9 – Motions of no confidence in Cabinet

Background

Article 24 of the Constitution empowers the Parliament to remove a President and Cabinet by a vote of no confidence passed by at least 9 members of Parliament. Article does not require a *majority* vote, but simply one half of the total members.

The Standing Orders prescribe additional requirements for motions of no confidence. Standing Order 97 provides that a motion of no confidence may only be entertained if it is supported by four Members, including the proposer, rising in their places and indicating their approval. Notice of a motion of no confidence has to be given one sitting day in advance, however if the opposition has the numbers to pass such motion, they will also have the numbers to suspend Standing Order 111 in relation to notice.

By using motions of no confidence, Parliament can vote to change the President and Cabinet provided it does so within seven days. After seven days has elapsed without a new President being chosen in Parliament, Parliament is automatically dissolved and a general election must be held. Thus governments can be changed frequently within Parliament, and have been, without the people being consulted.

Article 24 has been frequently used, and has resulted in considerable instability in government, in the sense that it is very unusual for a government to survive the full three-year parliamentary term (There have been 16 Parliaments but 35 changes of government in the 39 years since independence – see Appendix 6). Members of Parliament have often ‘crossed the floor’ to form new alliances and remove governments. There is no formal political party system to constrain Members from swapping sides. In a Parliament of only eighteen Members, and in which numbers have often been almost evenly divided, a shift of one or two Members can sometimes suffice to change government using Article 24.

Since 1977, motions of no confidence in the government have been moved in Parliament twenty-nine times. Twelve of those motions have been passed, nine of them in the last 10 years.

A constitutional balance between legislature and executive

It is a primary function of the Constitution to find the right balance between two fundamental public interests which are naturally in tension:

1. The public's interest in responsible transparent government where the executive (Cabinet and Public Service) are called to account for their policies and administration – and are responsible to a Parliament of the elected representatives;
2. The public's interest in the development by their government of short and long term policies for the welfare of the country and effective implementation over time – objectives which require stability and consistent leadership.

Both of these interests can be served if responsible leadership is shown on the part of Cabinet and non-government members in the course of vigorous parliamentary politics. However, the balance can be tipped too far either way. For example, where demands made by political opposition on the floor of Parliament go beyond reasonable and legitimate calls for accountability – when the desire to bring the government down is clothed in the rhetoric of 'good governance' – the public's interest in achieving its objectives is frustrated. Conversely, a secretive government which breaches constitutional rules should not be able to remain in power for a full term.

In considering whether or not to amend Article 24, it is necessary to decide what is the appropriate balance between making government accountable to Parliament and promoting some stability in government. The defining feature of parliamentary responsible government is that the executive sits in and is responsible to Parliament. Parliament holds government to account in a number of ways, including requiring government to answer questions, and debating and voting on motions and legislation introduced by government. Government must have the confidence of the Parliament in order to be able to govern, and there must be a mechanism to deal with the situation in which government loses the confidence of the Parliament.

In the context of Nauru may be desirable to readjust the balance to a degree, in an effort to curtail frequent and opportunistic use of motions of no confidence.

At the public consultation meetings, a number of discussion points were raised in relation to Article 24. The response from members of the public was varied, with 420 people suggesting that Article 24 should be amended, but with some variation as to which amendments (or combination of amendments) were most favoured. Some people said the Article should be amended to provide for an exemption period of 12 months at the start of each new Parliamentary term during which motions of no confidence cannot be moved, and a few people preferred an 18 month or 14 month exemption period. A significant number of people supported the idea of increasing the votes required for a motion of no confidence from 9 to 10, making it a majority of the total number of Members rather than half, and a few people suggested such motions should require 12 votes (two thirds of the total number of Members). A large number of people wanted a requirement that reasons for the motion be stated, and some even suggested that the reasons for the loss of confidence should be investigated and/or that evidence of any alleged wrongdoing by the government be provided, which would make the Article akin to impeachment provisions. It has been said that it is already the case that reasons for the motion are provided during debate on the motion, but it may be the case that requiring reasons for the loss of confidence to be clearly summarised in the motion itself would make some difference, as the debate would then need to stick closely to the motion, and would be clearer to the public.

A large number of people supported the option of Parliament being dissolved immediately after the passage of a motion of no confidence, and many made suggestions as to how this should be done: some people desired such an amendment regardless of whether the method of electing the President remains as it is or is changed to popular election, because it would mean that Members would only move such motions when they had serious grounds for loss of confidence, and would not be so inclined to play numbers games. Others wanted such amendment only if the method of electing the President is changed to direct election by the people of Nauru. Some people suggested that Parliament should be dissolved whenever a motion of no confidence is successfully passed, but others suggested that only on the second or third occasion in a parliamentary term when such motion is passed should Parliament be dissolved. One person suggested that if the President is popularly elected and a motion of no confidence is successfully passed, Parliament should not be dissolved but rather should wait until the people elect a new President. Some people suggested that if the President is directly elected by the people, Parliament should only be able to move a motion of no confidence upon receipt of a petition or written request by a certain number of voters.

Article 24 was raised in fourteen of the forty written submissions received by the Commission. One submission recommended that Article 24 be amended to provide that not more than one motion of no confidence may be put to Parliament in any period of six months. The written submission of Barry Connell recommended that Article 24 be amended to provide that a motion of no confidence may not be moved during the first 6 or 12 months of a new Parliament, and explained the reasons recommendation as follows:

Other states have instituted this to advance stability of government and to prevent the immediacy of political bribery to draw away support. It assists, following an election, a government to implement policy and prevents, for an initial period, moves calculated simply by political expediency.

One written submission recommended a 12 month exemption period, but that during that initial 12 months a government may be removed from office by a recall petition supported by a majority of Parliament and sixty percent of qualified voters. This submission also recommended that new provisions be inserted in the Constitution for recall and impeachment, not only of government but also any Member of Parliament, and any judge. The submission suggested that recall be initiated by petition, signed by a prescribed number of voters, and stating the ground for recall. A special recall election would then be held.

Five written submissions suggested that Parliament should stand dissolved after a successful motion of no confidence (tied with the submission that the President be directly elected by the people), and one of these also recommended that a majority should be required to pass the motion (10 votes). One submission recommended that there be a limit of two motions of no confidence in any term of Parliament, and that if a second motion is moved and passed within one term, Parliament be dissolved and fresh elections held. Another submission recommended that (because there should be a popularly elected President) a President and cabinet can only be removed by three quarters of the total number of Members of Parliament calling for a popular vote on the question, and on the voters approving such removal.

Two written submissions suggested that Article 24 be amended to require the support of two thirds of the total number of Members of Parliament in order to be successfully passed, and one of these submissions also recommended that the grounds for loss of confidence must be specified and proven (akin to impeachment). One submission stated that there should be

guidelines on how to use Article 24, for example ‘there should be medical evidence that the President is too sick to carry out his duty’ (submission of Cecelia Giouba).

It was raised but not expressly recommended in one submission that Article 24 could be amended to provide that if within 6 months after a general election a motion of no confidence is moved but fails to pass, Parliament be prevented from moving another such motion for a period of 12 months. The submission states that ‘this can provide stability, but it can also grant protection to an irresponsible government’ (submission of the Justice Department).

The submission of the Nauru Law Society recommended that the use of Article 24 be curtailed perhaps along the lines of what takes place in PNG (18 month exemption period) or Kiribati (Parliament is dissolved after a successful motion of no confidence). The Law Society also commented on the instability that has been caused by Article 24, and wrote that although motions of no confidence are an important feature of parliamentary systems,

it is a feature that troubles a lot of legislatures in the Pacific because it has roots in the party system of government that prevails in most of the Commonwealth of nations. It fits into the notion of political supremacy and partisan advantage. It does not sit well with emerging and new states.

Minimum requirements

A comparative survey of other constitutions within the Pacific region reveals that Nauru is unique in requiring only half of the total number of Members of Parliament to pass a motion of no confidence. In most other countries in the region that provide for motions of no confidence, the minimum requirement is an absolute majority of the total number of Members of Parliament (that is, at least half plus one). Some countries (particularly those with large legislatures) require half of those present and voting. The Commission believes there is merit in requiring the votes of a majority of the total number of Members in order to pass a motion of no confidence, as this is one way in which the opportunistic use of such motions might be reduced, and stability enhanced.

The Commission has also considered the suggestion from the public that motions of no confidence ought to state or summarise the reasons for the loss of confidence in the motion itself, in order to keep the debate on the motion to the subject of the relevant grounds, and to provide the public with a clearer understanding of what is transpiring and why. The Commission is not aware of any constitution that includes such requirement, but considers nonetheless that it is a feasible and quite sensible proposal (It should be noted that in Nauru some motions of no confidence in the past have stated grounds for the loss of confidence, although it is not required; see N Mehra, p71).

Modifying the effect of a motion

One of the ways in which Article 24 could be amended is to modify the effect of a motion of no confidence. At present, the consequence or result of a successful motion of no confidence is that the President and Cabinet are removed from office and a new election for President is held. If a new President has not been elected within 7 days, Parliament is dissolved. It would be possible to provide instead that the effect of a motion of no confidence being passed is that the President is deemed to have tendered his resignation, or that the President ought to resign, or to provide

that if a motion of no confidence is passed, Parliament is immediately and automatically dissolved.

The Constitution of Kiribati provides that if a motion of no confidence is passed Parliament is automatically dissolved.¹ This means that unlike the present situation in Nauru where Parliament proceeds to elect a new President from amongst its own Members if the Cabinet has been removed by a motion of no confidence, in Kiribati a successful motion of no confidence means that the term of Parliament is over and new general elections must be held. The reason for this provision in the Constitution of Kiribati is that it is thought to be an appropriate feature of a system in which the people elect the President directly. Because the people chose the President, if Parliament removes the President it is not able to simply elect a new one, but rather the people must be asked to vote again. The threat of dissolution is of course a powerful disincentive to move a motion of no confidence, and such motions have seldom been moved in Kiribati. This means the system is more stable, but may also have the effect of diminishing accountability.

Limiting use of the motion

The main reason that motions of no confidence arise so infrequently in most western parliamentary systems is that the party system is so entrenched that the numbers on either side of the House do not change within the term of Parliament, but rather are stable throughout because of party loyalty. This Report will not consider the idea of mandating the creation of formal political parties and compulsory adherence to political parties because the Commission is of the view that such system is not yet feasible in Nauru. People with common objectives are forming groups in Nauru, whether they be pressure groups or informal parties, and this is to be encouraged. However the Commission believes it would be inappropriate to formalise a party system and compel candidates to participate in it. The Commission also notes that the imposition of a formal party system was not recommended in any of the submissions from the public.

Other means by which the use of motions of no confidence can be limited include placing constitutional limits on the number of no confidence motions that may be moved within a term (see East Timor), setting intervals between such motions (see Marshall Islands), and setting exemption periods at the beginning of a parliamentary term (see Papua New Guinea).

It may not be advisable to constrain the ability of Parliament to hold government to account by giving the government periods of exemption from motions of no confidence. On the other hand, providing an initial exemption period, as is done in PNG and suggested by some members of the public, is an effective way to give a new government the opportunity to establish itself and begin to implement policies. Intervals between motions or limits on the number of motions would also enable a government to concentrate on governing by removing the constant threat of removal. On balance, the Commission is of the view that a lengthy initial exemption period for motions of no confidence (such as the 18 month exemption in PNG) would be unwise because it is open to abuse, but that requiring a minimum 4 month interval between motions (if moved and unsuccessful) would be an improvement to the current system.

Impeachment

A further suggestion made at some public consultation meetings is to provide for the impeachment of a President. Impeachment involves bringing specific charges against a President, which charges are then tried by Parliament. It is a procedure that is used only in countries that have a clear separation of powers, with a popularly elected President who is not a Member of Parliament but is head of an executive that is completely separate from Parliament.

However as some of the submissions from the public recommended that impeachment provisions be included in the Constitution, this concept is discussed briefly here.

Impeachment provisions can be found in the Constitutions of the United States and the Federated States of Micronesia. In both countries, impeachment requires the votes of two-thirds of the relevant house of Parliament, and a President can only be impeached on the grounds of treason, bribery or other serious crimes.

In the case of Nauru, some members of the public appeared to be suggesting that impeachment could be an alternative to Article 24 motions of no confidence, thereby making it more difficult for Parliament to remove a President (and making it necessary to state that if the President is impeached the whole of cabinet loses office). However as discussed above, it is necessary (for reasons of accountability as well as practicality) for Parliament to have some mechanism for removing a government when government no longer holds the confidence of the Parliament. It would be unwise in a parliamentary system to restrict the power of Parliament to remove a government only to cases where they can prove that the President has committed treason or bribery.

It is important to note that motions of no confidence and trials for impeachment serve different purposes, and also that impeachment provisions are unnecessary in a system of parliamentary government where the executive sits in and is accountable to the House.

In the view of the Commission, impeachment provisions would not be appropriate for Nauru. Impeachment essentially amounts to a trial by Parliament for criminal conduct, and is targeted at one individual office-holder and his/her integrity, it is not directed at cabinet as a whole. At present in Nauru, any Member of Parliament can be tried for an offence before the courts, and will vacate his seat if convicted of an offence punishable by imprisonment for one year or longer. Further, if the Commission's recommendation that a Leadership Code be introduced is accepted, substantially the same ends would be achieved but in a more comprehensive manner – that is, any Leader who was found to have breached the Code (including by the commission of bribery or other forms of corruption) could be removed from office (See Chapter 12 of this Report).

Conclusion

The Commission considered and rejected the option of recommending that Article 24 simply remain as it is. The Commission has taken into consideration that the majority of the public views expressed to the Commission are in favour of some amendment to Article 24. The Commission also notes that motions of no confidence are one of the primary sources of instability in Nauru, and that concern over this instability is one of the key reasons for the initiation of the constitutional review. The principal options considered by the Commission were:

- To increase the number of votes required to successfully pass a motion of no confidence from 9 to 10 (from half of the total to a majority of the total); and/or
- To introduce an exemption period such as the first six or twelve or eighteen months of the Parliamentary term, during which it would not be possible to move a motion of no confidence; and/or
- To require reasons for loss of confidence to be expressed clearly in the motion; and/or

- To place a limit on the number of times per year or per parliamentary term that a motion may be moved or passed; and/or
- To provide that if a motion of no confidence is passed, Parliament is dissolved and new elections held.

In terms of the possibility of increasing the number of votes required to pass a motion of no confidence, the Commission considers that the present requirement of half of the total number of members (9 votes) is too low a threshold to oust a government. If the number of Members of Parliament was to remain 18, the Commission recommends that the number required to pass a motion of no confidence be increased to 10 (a majority of the total number) – this is regardless of whether the Speaker remains a Member of Parliament or whether the recommendation that the Speaker be a non-Member is accepted (see Chapter 4 Section 11); If the Speaker remains a Member of Parliament, the Constitution should expressly provide that the Speaker has a deliberative vote on questions of confidence. If the number of Members of Parliament is increased to 19 (see Chapter 4 Sections 2 and 3), and the Speaker is a non-Member, the Commission recommends that 10 votes be required to pass a motion of no confidence. If the number of Members is 19 and the Speaker is a Member, the Speaker should exercise a deliberative vote on questions of no confidence.

The Commission does not favour the option of providing for an exemption period at the beginning of a parliamentary term during which motions of no confidence cannot be moved, such as is done in Papua New Guinea. This is because there can be a destabilising tendency for the expiry of the exemption period to be regarded as the date in which a motion of no confidence *shall* be moved no matter what. And further because the Commission is reluctant to recommend such a constraint on the power of Parliament to hold government to account, for fear that such an exemption period may be abused by government, and it may be detrimental to the public interest in some circumstances to constrain the ability of Parliament to challenge a government.

The Commission recommends that provisions be added to Article 24 to provide that if a motion of no confidence is moved and fails to pass, no further such motion shall be permitted until 4 calendar months (expressed as 120 days) have passed since the first motion was moved. The Commission believes such amendment would strike the requisite balance between enhancing stability in government, and keeping government accountable to Parliament.

The Commission also favours the option raised in the public submissions of requiring reasons or grounds for loss of confidence to be expressed in the motion, and recommends that such requirement be added to Article 24. Although a standard wording of reasons may develop over time, such amendment should have the effect of requiring the mover of such motion to state publicly the principal ground or grounds for loss of confidence, and should ensure that the debate on the motion sticks more closely to the relevant grounds expressed in the motion than might otherwise be the case.

The option of providing that if a motion of no confidence is passed, Parliament is automatically dissolved, was supported by a substantial number of people. Some of the people that favoured such an amendment saw it as a necessary part of a package of amendments that would flow from amending the system of electing the President, and others appeared to favour such amendment regardless of whether the President is elected by Parliament or elected directly by the people. The views of some of these people appear to be motivated by a desire to minimise political game-playing. People are aware that making provision for the dissolution of Parliament upon the

passage of a motion of no confidence would be a major disincentive for Members to move such motions, even when they might have good grounds for loss of confidence. Many people also hold the view that if the President is to be popularly elected, then there can be no scope for Parliament to elect a replacement President after a successful motion of no confidence.

The Commission recommends that, if the Commission's recommendations in relation to the direct election of the President are *accepted*, then Article 24 be amended to provide that if a motion of no confidence is passed, Parliament shall be dissolved. The Commission further recommends that if the recommendations in relation to the election of the President are *rejected*, and the election of President is to remain as it is now, then Article 24 be amended to provide that if a second motion of no confidence is passed within a single term of Parliament, Parliament shall be dissolved.

The Commission recommends that, if the recommendations in relation to the popular election of the President contained in Section 2 of this Chapter are accepted by the Constitutional Convention and by Parliament and by a referendum, Article 24 should be amended as follows:

Vote Motion of no confidence

24.-(1.) Where Parliament on a ~~resolution~~ motion approved by ~~at least one-half an~~ absolute majority of the total number of members of Parliament resolves that the President and Ministers be removed from office on the grounds that it has no confidence in the Cabinet, ~~an election of a President shall be held~~ the President and Ministers shall cease to hold office and Parliament shall stand dissolved.

(2.) ~~Where a President has not been elected before the expiration of a period of seven days after the day on which a resolution under clause (1.) of this Article is approved~~ Parliament shall stand dissolved. A motion for the purposes of clause (1) shall include in express terms a summary of the grounds for loss of confidence in the Cabinet.

(3.) Where Parliament votes on a motion of no confidence and such motion is not approved in accordance with clause (1), no such motion shall again be placed on notice or moved in Parliament until the expiration of 120 days after the date on which the motion failed to be approved.

However if the recommendations in relation to the election of President are rejected by the Convention and/or by Parliament or the referendum, and the election of President therefore remains as it is, then the Commission recommends that Article 24 be amended as follows:

Vote Motion of no confidence

24.-(1.) Subject to clause (4) of this Article, where Parliament on a resolution motion approved by at least one-half an absolute majority of the total number of members of Parliament resolves that the President and Ministers be removed from office on the grounds that it has no confidence in the Cabinet, an election of a President shall be held.

(2.) Where a President has not been elected before the expiration of a period of seven days after the day on which a ~~resolution~~ motion under clause (1.) of this Article is approved Parliament shall stand dissolved.

(3.) A motion for the purposes of clause (1) shall include in express terms a summary of the grounds for loss of confidence in the Cabinet.

(4.) Where Parliament for the second time during one term of Parliament approves a motion referred to in clause (1), Parliament shall stand dissolved.

(5.) Where Parliament votes on a motion of no confidence and such motion is not approved in accordance with clause (1), no such motion shall again be placed on notice or moved in Parliament until the expiration of 120 days after the date on which the motion failed to be approved.

The Commission recommends that, if the Commission's recommendations in relation to the Speaker contained in Chapter 4 Section 11 are rejected, then the following amendment should be made to Article 46:

Voting

46(1.) Except as otherwise provided by this Constitution, a question before Parliament shall be decided by a majority of the votes of its members present and voting.

(2.) The Speaker or other member presiding in Parliament shall not vote on a question unless except:

(a) on a question where the votes are equally divided in which case he has and shall exercise a casting vote; and

(b) on a motion of no confidence moved in accordance with Article 24, in which case he has and shall exercise a deliberative vote but shall not in addition exercise a casting vote.

The Commission recommends that the Constitution should provide for a Council of State (comprising the Chair of the Public Service Commission, the Chief Justice and the Speaker) to perform the functions of the President and Cabinet following removal of the President and Cabinet by motion of no confidence or failure to pass the appropriation law within three months after the start of the financial year (See Chapter 6, Section 3), because the deposed Cabinet should not be authorised to continue to govern in the interim until the election of a new President. Proposed Article 21B to give effect to the Council of State is set out below.

Section 10 – Offices of profit

Conflicts of interest are difficult to avoid in a small society, but there should be clarity as to the rules that apply so that there can be a common understanding of the limits of acceptable conduct. A person elected to represent the people in Parliament and a member of Parliament appointed as Minister have high duties in the public sphere which they should be able to discharge without being influenced by association with organisations, boards or other employers, particularly those of the Government and its entities. Conversely, a Government official (whether board chairman, senior public servant or more junior employee) should not be in a position where the discharge of his official duties may be influenced by the high status and power he has as an MP or Minister.

Unfortunately, the law is complicated by uncertainty surrounding meanings of words in the Constitution and the failure of Parliament to pass a law which would help to clarify the issues.

Art. 18 (3) says – *‘A member of the Cabinet shall not hold an office of profit in the service of Nauru or of a statutory corporation.’*

Art. 31 says – *‘No person is qualified to be elected to be a member of Parliament if he –*

...

(e) holds an office of profit in the service of Nauru or of a statutory corporation, being an office prescribed by law for the purpose of this paragraph.’

It is important to note that the use of the words ‘office of profit in the service of Nauru or of a statutory corporation’ in relation to Ministers in the first Article has a different outcome or effect from their use concerning members of Parliament generally in the second one. The latter use is, as yet, inoperative and inapplicable to members because it can apply only to offices that have been prescribed by law – and no such law has been passed. This means that, in the meantime, there is nothing in the Constitution to prevent –

- a ‘public officer’ (defined as any person holding or acting in a ‘public office’ which in turn means an ‘office of emolument in the ‘public service’, that is to say, ‘the service of the Republic of Nauru’ – Art. 81(1)), or
- a person in the service of any employer,

from entering Parliament. The only apparent restriction applies to a person who is already a ‘public servant’ under the *Public Service Act* (s.69) and who, for that reason, cannot have outside business interests – a restriction which remains while the person is in Parliament.

However, if a member of Parliament is offered a ministerial position, Art. 18 (3) will apply and the person must *either* resign from any office of profit held in the service of Nauru or of a statutory corporation *or* decline the offer.

For both Ministers and members of Parliament, this area of potential conflict of interests – which has the capacity to do serious harm to the confidence that people have in their government – needs to be addressed in a comprehensive manner. The Commission will deal with the proposal for a Leadership Code later in this Report (Chapter 12), and some implications of a Code for this Part of the Constitution are mentioned here.

The Commission makes three recommendations in relation to these matters:

(a) Neither a public servant, nor a manager or board member of a statutory corporation, should be eligible to take a seat in Parliament or a ministerial position in Cabinet, and no Member of Parliament should hold an office of profit in the service of Nauru or a statutory corporation (see proposed amendment to Art.31(e) below).

(b) Greater emphasis should be placed on the seriousness of the conflict of interests that arise, or are perceived to arise (which is often just as important), when a Minister accepts any reward other than the established payments and allowances of ministerial office. Art. 18(3) forbids it, but provides no consequences (see proposed amendment to Art.20, below).

(c) A Leadership Code should provide for prohibitions and limitations on Ministers and members of Parliament holding positions of reward of any sort in the public service, corporations or other entities (statutory or otherwise) which are owned directly or indirectly by the Republic of Nauru. In conjunction with this, the *Parliament of Nauru (Register of Members' Interests) Act 2004* should be looked at from the point of view of expanding the 'register of interests' concept to other persons defined as 'leaders'.

The Commission recommends the following amendments:

Vacation of office

20. A Minister ceases to hold office -(a)...(b) ...(c) ...(d)

(e) upon commencing to hold an office of profit in the service of Nauru or of a statutory corporation.

Disqualifications for membership of Parliament

31. No person is qualified to be elected a member of Parliament if he –

...

(e) holds an office of profit in the service of Nauru or of a statutory corporation, ~~being an office prescribed by law for the purposes of this paragraph.~~

DEPUTY/ACTING PRESIDENT

Section 11 – Vacancy or incapacity in the office of President

Submissions received by the Commission indicate that there have been difficulties under the present Constitution when a President dies or is unable to act. Consideration of 'acting' and/or 'deputy' roles has been requested by many people.

At this point it may be useful to review the particular circumstances in which it becomes necessary to fill the office of President. The following summary applies whether the President is elected by Parliament, as at present, or by the people, as recommended.

There must be an election for a new President –

- if the office of President is vacant (as in the case of the death of the sitting President);
- if a President resigns;
- if a President ceases to be a member of Parliament;
- if a resolution for removal from office is approved; and
- if popularly elected, *after* the first sitting of Parliament following a general election; or if elected by Parliament, *at* the first sitting of Parliament after a general election

Removal from office (listed as (d) in Art. 16 (5)) has been dealt with in the preceding section 9. on no confidence motions (and see also proposed Art.61A in Chapter 6). Proposed Article 21B(1) providing for a Council of State following removal from office is set out below.

In all of the situations listed in Art. 16 (5) except vacancy (a), the executive authority of the government of Nauru remains intact by virtue of Art 15 (4) under which the sitting President remains in office until a new person is elected President.

Then there are those occasions when the present President is still ‘in office’ but is unable to act. Article 21 authorises Cabinet-

...to appoint a Minister to perform the duties and exercise the functions of the President during any period during which the President is unable to act owing to illness, absence from Nauru or any other cause.

The Commission considers that this provision is inadequate to deal with many circumstances that might arise (and, in some cases, have arisen), and makes several observations. Generally speaking, an ‘*Acting President*’ role would authorise the person concerned to carry out all – or certain specified – functions of the President for a stated period, such as during absence, or incapacity due to illness or accident. The Acting President is standing in for the elected President. The Acting President is acting on behalf of the President and there is no separate office of Acting President. If the President were to die in office, that office would become vacant and cease to function. Article 21 cannot apply because there would be simply no President. There would be no person on behalf of whom the Acting President could act. To deal with the case of death in office, a constitutional office of ‘*Deputy President*’ or ‘*Vice President*’ is needed.

One possibility is for Parliament to elect a Deputy President who would be a member of Cabinet and also carry out ministerial functions in the ordinary way. Alternatively, after a President is elected, the President could be required to appoint one of the Ministers to be Deputy President. The Commission recommends that the latter course be adopted, as otherwise the President might be forced to have in Cabinet a member of Parliament who does not share the President’s objectives.

If the Constitutional Convention decides to adopt the popular election of President, should the Deputy President also be elected in a general election from amongst candidates nominated by Parliament? Again, the question is whether, in order for this to be conducive to an efficient Cabinet, the President and Deputy President should stand together as compatible ‘running

mates'. If two people were elected who simply could not work together the prospect of effective government would be diminished. It is preferable that the selection of all Cabinet members, including a Deputy President, should remain the prerogative of the President.

The office of Deputy President could also be defined so that the Deputy President would act in an 'Acting President' role in certain circumstances. Just what those circumstances are, or should be, has also been a subject of concern in submissions received by the Commission. Article 21 has been set out above. It has been pointed out that a President overseas on Nauruan state business may be able to keep sufficiently closely in touch with Nauru to continue to function as President. Alternatively, it may be possible for the President to delegate some, but not all, of the presidential functions – as when an important Cabinet meeting is to be held on Nauru at which the Deputy President could preside while the President is attending a Head of State function overseas. It is also noted that it would be preferable, where circumstances permitted it, if the appointment of a person to an acting role could be made in anticipation of absence.

The office which has been provided for in the Constitution of Kiribati (Chapter IV) should be considered, although considerable adaptation to Nauru's circumstances is needed. Provision has been suggested for an oath for the office of Deputy President, in line with the recommendation made in Section 1 above, in relation to the office of President.

The Commission recommends that an office of Deputy President be created by constitutional amendment. The provisions for Deputy President would replace Art. 21 and there would also be other consequential changes (see proposed Art.21, below).

It is recommended in Section 2 above that the Constitutional Convention should give consideration to the proposal that the Constitution be amended to provide for the direct popular election of the President. Several other matters have been raised and discussed, such as the office of Deputy President, that are affected by the method of selection of the President. The proposed amendments set out here have been drafted with that change in mind. However, if it is decided not to change the method of electing the President, most of the other proposals can still be implemented, with adjustments to the amendments.

The Articles here should be read together with the draft changes set out in the Sections above, and a consolidation of all the recommended changes is attached at the end of this Report.

The Commission recommends the insertion of the following new Articles 16B, 16C, 16D, amendment to Articles 19 and 21 and the insertion of new Article 21A:

Tenure of office

16B.(1) The President, unless he ceases to be President by virtue of this Article or the next following Article, shall continue in office until the person elected at the next election of President after a general election assumes office.

(2) The President shall vacate his office as President-

(a) if he resigns his office, by notice in writing addressed to the Speaker;

- (b) if a motion of no confidence in the President or the Government is passed in accordance with Article 24;
- (c) if Parliament is dissolved pursuant to Article 61A;
- (d) if, in respect of any matter before Parliament, the President notifies the Speaker that a vote on that matter raises an issue of confidence, and in a subsequent vote on that matter it is rejected by a majority of all the members of Parliament;
- (e) if he ceases to be a member of Parliament otherwise than by reason of a dissolution of Parliament; or
- (f) If he is removed in accordance with Article 16C.

Removal from office on grounds of incapacity

16C.(1) If Parliament resolves, upon a motion supported by the votes of a majority of all the members thereof (other than the President), that the question of the mental or physical capacity of the President to discharge the functions of his office ought to be investigated, the Speaker shall notify the Chief Justice who shall appoint a Medical Board consisting of not less than two persons who are qualified as medical practitioners under the law of Nauru or under the law of any other country in the Commonwealth, and the Board shall inquire into the matter and shall report to Parliament stating the opinion of the Board whether or not the President is, by reason of any infirmity of body or mind, incapable of discharging the functions of his office.

(2) If Parliament, having received the report of the Medical Board, resolves by a majority of all the members of Parliament (other than the President) that the President is, by reason of infirmity of body or mind, incapable of discharging the functions of his office the President shall cease to hold office forthwith.

Vacancy in the office of President

16D.(1) If the office of President becomes vacant by reason of the President ceasing to hold office by virtue of Article 24 or Article 61A of this Constitution, the Council of State shall perform the functions of President until the person elected at the next election of President following a general election assumes office.

(2) If the office of President becomes vacant for any other reason, the Deputy-President shall assume the office of President.

(3) A person assuming the office of President under the preceding clause shall, at the next following meeting of the Parliament, propose a motion for a resolution confirming his assumption of the office of President, and the motion shall be debated and decided at that meeting.

(4) If the assumption of the office of President by the Deputy-President is not confirmed by the Parliament, an election to the office of President shall be held before proceeding on any Bill and as soon as practicable in accordance with Article 16A of this Constitution.

(5) If the office of President becomes vacant during any period when the office of Deputy-President is also vacant, the Cabinet shall elect one of the Ministers to assume

the office of President under clause (2) of this Article, and the provisions of clauses (2), (3) and (4) of this Article shall apply to that person as if he had been Deputy-President.

Appointment of Ministers and Deputy President

19.-(1.) Whenever a President is elected, he shall as soon as practicable appoint ~~four or five a Member of Parliament to be Deputy President and Minister, and three or four further~~ members of Parliament to be Ministers of the Cabinet.

(2.) Whenever there are less than four Ministers the President shall appoint a member of Parliament to be a Minister but if Parliament is dissolved the President shall appoint a person who was a member immediately before the dissolution of Parliament.

(3.) Whenever there are four but not five Ministers the President may appoint a member of Parliament to be a Minister.

~~Provision for a Minister to act as President~~

~~21. The Cabinet may appoint a Minister to perform the duties and exercise the functions of President during any period during which the President is unable to act owing to illness, absence from Nauru or any other cause.~~

Discharge of functions of President during absence, illness, etc.

21.(1) Whenever the President is absent or considers it desirable so to do by reason of illness or accident he may, by directions in writing, authorise the Deputy-President to discharge such of the functions of the office of President as he may specify and the Deputy-President shall discharge those functions until his authority is revoked by the President.

(2) If the President is incapable by reason of illness or accident of discharging the functions of his office and the infirmity is of such a nature that the President is unable to authorise another person under this Article to discharge those functions, the Deputy-President shall discharge the functions of the office of President.

(3) Any person discharging the functions of the office of President by virtue of the preceding clause shall cease to discharge those functions if he is notified by the President that the President is about to resume those functions.

The Deputy President

21A.(1) There shall be a Deputy President of Nauru.

(2) The President shall, as soon as practicable after assuming that office, appoint a Deputy President from among the Ministers.

(3) The Deputy President shall, before entering upon the duties of his office, take and subscribe before the Chief Justice or the Speaker an oath in the form set out in Schedule [8] to this Constitution.

(4) The Deputy-President shall cease to be Deputy-President-

- (a) if he resigns his office, by notice in writing addressed to the President;
- (b) if he ceases to be a member of Parliament otherwise than by reason of a dissolution of Parliament;
- (c) if he is removed from office by the President;
- (d) when the President who appointed him as Deputy-President ceases to hold office as President.

(5) If the Deputy-President dies, is absent from Nauru or is unable by reason of illness or any other cause to discharge the functions of his office, the President shall appoint one of the other Ministers to perform the functions of the office of Deputy-President and any person so appointed shall discharge those functions accordingly until-

- (a) his appointment is revoked by the President;
- (b) he ceases to be a Minister; or
- (c) any person assumes the office of President.

(6) Where the Deputy-President is performing the functions of the office of President in accordance with Article 21 of this Constitution he may appoint one of the other Ministers to perform the functions of the office of Deputy-President and any person so appointed may discharge those functions accordingly until-

- (a) his appointment is revoked by the Deputy-President;
- (b) he ceases to be a Minister; or
- (c) the Deputy-President ceases to perform the functions of the office of President.

(7) During any period when, while the functions of the office of President are required under Article 21 of this Constitution to be discharged by the Deputy-President, there is no Deputy-President or the Deputy-President is absent from Nauru or is incapable by reason of illness or accident of discharging the functions of his office and there is no subsisting appointment under the preceding clause, the functions of the office of President shall be performed by such Minister as the Cabinet shall appoint; Provided that any person performing the functions of the office of President under this clause shall not exercise the power of the President to remove the Deputy-President from office.

Council of State

21B(1) There shall be a Council of State which shall consist of the persons for the time being holding or acting in the offices of Chairperson of the Public Service Commission, who shall be Chairman, Chief Justice (or, if the Chief Justice is not available, the Resident Magistrate) and Speaker.

[if the proposal for popular election of President is accepted, clause (2) of Article 21B would read as follows]

(2) In the event of the dissolution of Parliament in the circumstances specified in clause (1) of Article 24 or the circumstances specified in clause (1) of Article 61A of this Constitution, the Council of State shall perform the functions of the President and the

other executive functions of the Government until the person elected at the next election of President following a general election assumes office.

[if the proposal for popular election of President is rejected and the election method remains as it is, clause (2) of Article 21B would read as follows]

(2) In the event of the dissolution of Parliament in the circumstances specified in clause (2) of Article 24 or the circumstances specified in clause (1) of Article 61A of this Constitution, the Council of State shall perform the functions of the President and the other executive functions of the Government until the person elected at the next election of President following a general election assumes office.

Chapter 4: Parliament

Introduction

The legislative branch of government, called the Parliament of Nauru, is created by Article 26, and vested with legislative power by Article 27.

Several issues in relation to Parliament have been raised in the public consultations and written submissions. Some issues are able to be dealt with by Act of Parliament without amending the Constitution, but are discussed here because of public interest in the topics, which are often believed to be constitutional matters.

Issues and Questions

The issues are discussed here in roughly the order in which they appear in the Constitution, but some re-ordering has been done to bring related matters together.

The issues in this Report relating specifically to the legislature are dealt with in the following Sections –

1. Whether the role of Parliament as a branch of government, and its functions, should be mentioned briefly in the Constitution
2. Whether the number of members of Parliament should be increased – Art 28 (1)
3. Whether the constituencies, and/or the number of members of Parliament to be returned by each, should be altered – Art. 28 (3)
4. Residence, birth or ‘substantial connection’: qualification of electors and members of Parliament based on constituencies – Arts. 28, 29 & 31 (d). Does it matter what connection an elector or a member of Parliament has with his/her constituency?
5. Women in Parliament: whether the desirability of facilitating the entry of women to Parliament should be reflected in the Constitution
6. Whether the minimum age for voting in elections for Parliament should be altered from 20 years or left to Parliament to decide – Arts 29 and 30
7. Whether holding dual citizenship, or becoming citizen of another country by one’s own act should disqualify a person from being a member of Parliament – Arts 30 (a) and 32 (1) (e)
8. The consequences for a candidate for Parliament or a member of Parliament being convicted of a criminal offence

9. Absence of a member of Parliament without leave – Art. 32 (1) (d)
10. Whether the provisions for Clerk of Parliament such as constitutional status, appointment, supervision and removal should be reviewed, and if so, in what manner – Art. 33
11. Whether the Speaker should be appointed from outside Parliament, and if so, in what manner, and what should the constitutional status and provisions for removal be – Art. 34
12. Definitions and calling meetings: the meanings of ‘session’, ‘sitting’ and ‘meeting’ of Parliament (Arts 40 – 42 and 81 (1)) and the ‘prorogation’ of Parliament (Art. 41)
13. Whether the term of Parliament should be extended from 3 years to 4 years – Art. 41 (7)
14. Certification of laws: whether the Speaker should have discretion not to certify laws – Art 47
15. Oaths and affirmations – Schedules 1, 3 and 4, and Art. 81 (7)

Section 1 – Role and function of Parliament

In introducing the topic of the legislature, it is worthwhile noting that the power vested in the Parliament of Nauru to make laws ‘for the peace, order and good government of Nauru’ is expressly stated to be ‘subject to this Constitution’ (Art. 27). The Parliament of Nauru is not sovereign, in the sense that the British Parliament at Westminster, which has no written constitution, is said to enjoy ‘parliamentary sovereignty’, and the relationship between the three branches of government – legislative, executive and judiciary – is a little different in countries like Nauru where the Supreme Court can be called upon to give decisions that ensure that the Constitution is complied with. (This function of the judiciary, and the limits upon it, will be discussed below in Chapter 5.)

The separation of the three branches of government is emphasised by the fact that while Parliament may legislate in a way that affects the exercise of executive or judicial power by the other branches of government, provided such laws are not inconsistent with the Constitution, Parliament cannot exercise or usurp executive or judicial power. Some countries describe the role and functions of the legislature in their constitution, and some wordings used in the Constitution of South Africa have assisted the Commission.

The Commission takes the view that it is helpful for a constitution to provide guidance as to the established roles and functions of the institutions of government and as to the relationships between them under the constitution. In this Report, Sections on the Executive, Legislature and Judiciary are presented with this approach in mind.

The Commission recommends that the following Article 27A be inserted after Article 27.

The role and functions of Parliament

27A.-(1) Parliament is elected to represent the people of Nauru and to ensure government by the people under the Constitution. It does this by providing a forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action.

(2) When exercising its legislative authority, Parliament is bound only by the Constitution of Nauru, and must act in accordance with, and within the limits of, the Constitution.

(3) Parliament must provide for mechanisms -

(a) to ensure that all executive organs of the government of Nauru are accountable to it; and

(b) to maintain oversight of the exercise of executive authority, including the implementation of legislation.

(4) Parliament must facilitate public involvement in its legislative and other processes such as its committees; conduct its business in an open manner; and hold its sittings and those of its committees in public;

Provided that reasonable measures may be taken to regulate public access, including access of the media, to Parliament and its committees; and to provide for the search of any person and, where appropriate, the refusal of entry or the removal of any person.

Section 2 – Number of members

While there was much public discussion of the representation of constituencies, which will be dealt with in subsequent Sections, little was said about the total number of members of Parliament. Under Article 28 (1) the number is 18 unless increased by statute. There is no suggestion that a Parliament of around 18, or so, members is inappropriate for a country of about 10,000 people of whom around half are adults. Tuvalu, also very small, has a minimum of twelve members of Parliament, while Kiribati has 35. A more important consideration may be the principles or rules which have determined the manner in which the country has been divided into electoral constituencies, and perhaps the total of 18 happens to suit the traditional configuration. Whether this consideration (and whether some constituencies should be given more seats because of their size) should be reviewed is discussed below.

Another and more immediate consideration might be whether the total number of members should be an odd or an even number. For example, what bearing would a proposal to elect the Speaker from outside Parliament have on this issue? At present, the Speaker is one of the 18 and unable to vote unless there is a tie (which there cannot be if all of the remaining 17 are present and voting). Appointing an unelected non-member Speaker from outside would increase the number of effective members from 17 to 18, as it would not be necessary for one of the elected members to preside in Parliament, and so all 18 would be on the floor of Parliament. If the Constitution is amended to provide for a Speaker who is not a member of Parliament (as recommended in Section 11 of this Chapter), that person would *not* exercise a vote within

Parliament as the current Speaker can because it is clearly undesirable for a person not chosen by the people to have such power (especially when it comes to passing budgets and motions of no confidence, etc). Therefore, in order to avoid ‘hung’ Parliaments (when the 18 effective members are evenly divided on an issue), the proposal for an outside Speaker would probably require that the total number of members of Parliament be increased to an odd number. It is perhaps more important to take this step for Nauru’s very small Parliament where the likelihood of a tie is greater.

The Commission recommends:

If a constitutional amendment is passed for the Speaker to be a non-member of Parliament, the number of members of Parliament should be increased by legislation to 19, which would occur if the further seat referred to in Section 3, below, is approved. In the interests of stable government, an odd number is clearly desirable.

Section 3 – Constituencies

Article 28 (2) and (3) leaves it to Parliament to pass laws dealing with the constituencies (including the number of them and how the boundaries are drawn) and the number of members to represent each. Schedule 2 of the Constitution sets out the position at Independence which was that 18 members represented seven 2-member constituencies and one 4-member constituency. Each constituency consists of the traditional tribal districts into which Nauru has been divided for as long as people can remember. However, as is almost universal under constitutions generally, electoral details such as these are dealt with in comprehensive Acts of Parliament dealing with elections. It is recognised that the numbers of people living in different parts of a country will shift and change and that their representation in Parliament will require adjustment from time to time without having to amend the country’s constitution.

In the case of several countries, particularly those with established *traditional* political systems (such as Samoa, Cook Islands and Nauru), there was also the concern at the time of Independence that the chosen method of electing members to Parliament might need to be reviewed in the light of changed circumstances. Rather than require a cumbersome constitutional amendment procedure, it was felt that these matters should be able to be kept up-to-date – in accordance with the current wishes of the people – by means of Parliament passing laws in the simplest way.

It seems fundamental to Nauru’s electoral system – and therefore has consequences for how politics operate in Parliament and Cabinet – that political allegiance is heavily affected by loyalty to one’s traditional ancestral group, clan or extended family, especially where there are shared interests in land and its benefits. This is not to say that this allegiance is the only one, as political platforms based upon common policies for governing the country are becoming stronger. The question is whether, as part of a concern to make government more accountable, the people of Nauru wish to take steps away from the traditional basis for choosing that government.

Certainly, countries in the Pacific Island region have accepted that it is desirable to move towards the established principles of electoral apportionment: that as far as possible each citizen’s vote should carry the same weight. Solomon Islands, Marshall Islands, Tuvalu and

Kiribati started by recognising traditional boundaries to some degree, and adopted constitutional requirements that, subject to exceptions, constituency boundaries and numbers of seats should be re-examined with a view to working towards the concept that the ratio of voting citizens to representatives is roughly the same in each constituency. Of course, in some cases, that outcome can be achieved by simply increasing the numbers of seats here and there, while retaining traditional boundaries, but in the small states and for remote island constituencies, equity cannot be achieved in this way. Review of these issues is required every ten years in Solomon Islands (s.54(2)) and Marshall Islands (Art.IV s.2(4)), and every four years in Kiribati (s.63(3)).

Views from the public regarding how many members should represent each constituency focused on the inequity seen to be developing where certain constituencies have been growing faster than others. One submission calculated the ‘number of registered voters per member of Parliament’ ratio for 2004 and concluded that, while the ratio was 165 for Yaren, it was more than twice as high, namely 359.5, for Meneng. On the other hand, there was a remarkable consistency between Aiwo, Anabar, Anetan, Boe and Ubenide, which fell within the range 233 to 240. The remaining constituency, Buada, had a ratio of 159.5. On these figures, a third seat for Meneng would have moved its ratio to 240 – also within that same range. The significance of such an increase of one seat for the balancing of members’ votes within Parliament has been mentioned in Section 2 above.

The Commission recommends:

Parliament should increase the number of seats for Meneng by one.

To return to the question of the traditional base of Nauru’s constituencies, this was not discussed in public consultations. Two written submissions (not by Nauruans) expressed the view that the present use of traditional districts as electoral constituencies seemed to fail to meet Nauru’s needs today, but no elaboration was offered. For its part, the Commission merely notes that the existing system, which Nauru has had since Independence, helps to preserve family loyalties at a time when Nauru needs more than ever to develop a strong sense of service to the whole community and common goals, and to recognise the importance of subordinating private gain to the national interest.

Two suggestions have been made –

- to create one single general electorate for the country in which all voters would select 18 (or 19) names from a single list of candidates; or
- to split the number of seats roughly in half, allocating half to the traditional constituencies (perhaps halving the existing number of seats per constituency) and half to a general list for the country.

Under the second suggestion, on polling day there would be two ballot papers for each voter, one for candidates within his/her constituency and one for the island-wide general list.

The idea behind a ‘general list’ electorate is that it would attract candidates who have a broader appeal, not limited to clan interests, and that this might promote the growth of greater political dialogue where national policy becomes an issue. Further, under a system of popular voting for President, a candidate who is particularly successful in the general list might be considered as a candidate for the Presidency.

However, the Commission notes the often repeated concerns of people who say that the larger traditional clans have greater power and influence due to their size, and careful thought needs to be given to the possibility that a general list (whether for the whole election or half of it) might enable such clans to dominate in a manner that the present constituency system prevents.

On this topic, as the full implications of changing the electoral system have not yet been canvassed with the public, the Commission believes that the Constitutional Convention will be in a better position to reach a decision.

The Commission recommends:

Parliament should review the *Electoral Act* in the near future having regard to the method of defining constituencies and numbers of seats.

There is also the question whether the traditional system is working as intended – as noted in the next Section.

Section 4 – Residence, birth of ‘substantial connection’

Does it matter what connection a voter or a member of Parliament has with his/her constituency?

Apart from the question whether it is better to retain the traditional system of constituencies, it should be pointed out that there is evidence that that system, also, is open to abuse. The Commission is aware that voters can readily transfer from one constituency to another at the ‘last minute’ before elections without time for objections to be heard.

It is a widely acceptable principle, based on common sense, that, where there are multiple constituencies, there should be a significant connection between a member of Parliament and the constituency which he/she represents. The same obviously applies to all candidates for the election and to the voters. It is an assumption behind the word ‘representative’ that the member in Parliament has listened to what his/her voters say are the priorities for their constituency and that the best interests of that constituency will be represented by that member. In order that a two-way relationship of support and trust can bind member and voters, that relationship requires a substantial degree of permanency. In other words, both member and voters should have been on the same roll for some time.

The Constitution assumes that Parliament will ensure that Nauru has electoral laws which give effect to the principle of representative government. Articles 28 and 29 require that Parliament shall consist of members who will be returned by constituencies of citizens, and Art. 31(d) introduces the ideas of ‘residence’ and ‘domicile’. The *Electoral Act* (ss 6, 9, 10 and 16) relating to electoral rolls makes it clear that residence, place of birth, or other listed grounds of ‘substantial connection’ in the district where one is a candidate or a voter is a key element of the electoral system.

However, the reality is that the ease with which people can transfer from one constituency roll to another under the provisions of the *Electoral Act* (ss 9 and 10), without the opportunity for

others to complain or appeal before the election takes place, seems to make a mockery of the above concept. The procedure for transfer seems open to abuse, while no effective remedy is provided by which the ‘last minute’ recruiting of electors from one constituency to another can be challenged before the election occurs.

The Commission recommends:

Parliament should review that aspect of the *Electoral Act* that provides for the registration and transfer of electors on district rolls.

Section 5 – Women in Parliament

Two written submissions recommended that there should be a quota of seats reserved for women, in order to ensure that there are women in Parliament. At four public consultation meetings, a total of eighteen participants suggested that there should be seats in Parliament reserved for women, most of these participants recommending 6 seats.

While no-one has questioned the desirability of facilitating the entry of women into Parliament, it is difficult to devise a method of doing so which could feasibly be incorporated in the Constitution. Under the present system of traditional constituencies, a simple reform would be to require that one representative from each must be a woman. If a general list were to be introduced (whether for the whole country, or half the seats – see Section 2. above), it would be possible to reserve a certain number of seats in Parliament for women. A hybrid method was suggested which would add four seats to Parliament, all to be held by women elected on a general list. For the reasons given above (Section 3), this suggestion could begin a trend towards giving priority to national issues.

Study of how this issue is being dealt with in other countries reveals only one constitutional precedent in the region. In Bougainville, which has its own Constitution as an autonomous region within Papua New Guinea, there are three seats in Parliament reserved for women.

Because the reservation of seats for women would require the support of a significant proportion of the population, it is preferable to think of reform in this direction as being developmental and therefore best handled through community-based initiatives and in Parliament by legislation that can be amended from time to time. It appears to the Commission based on input from the public that there is not yet widespread support for such a measure. The Constitutional Convention may wish to debate this question and could consider adding to the Preamble a statement about gender equality and the desirability of women taking on leadership roles.

The Commission has no recommendation to make on this subject.

Section 6 – Voting age

The Constitution requires a minimum age of 20 years for both voters and members of Parliament (Arts 29 and 30). Fiji requires 21 years for both (ss 55 & 58). Nauru and Fiji are unusual in the Pacific in this respect as most countries nominate two ages – one for election to Parliament and a lower age for voting. For example, Marshall Islands, Papua New Guinea, Solomon Islands, Kiribati, Vanuatu and Tuvalu all prescribe a minimum age for voting of 18 years (and all prescribe 21 for eligibility to stand for Parliament, except Papua New Guinea and Vanuatu where the member's age is 25).

In short, at least six Pacific countries, including Nauru's neighbours, require a voting age of 18 years. However, the few who raised this issue in the public consultations revealed opinions against lowering the voting age in Nauru below 20. The Commission received two written submissions suggesting the age should be 18, while none opposed.

The Commission notes the fact that in most countries 18 year-olds are considered sufficiently mature to vote, and suggests that, if in Nauru the age is to be maintained at 20, the reasons why young Nauruans are not considered ready to take on this responsibility should perhaps be looked at. There is much to be said for encouraging young people to participate in public affairs as early as possible in order that they will learn to take responsibility and understand the significance of citizenship. If 18 year-old Nauruans are considered to be not yet ready for this responsibility, consideration should be given to including in the school curriculum recent socio-political history and local civic education generally, in addition to the inclusion of the Constitution in the curriculum which the Commission has recommended should become a constitutional requirement (see Chapter 1 Section 4, proposed Article 2B). For students educated overseas and young adults, materials should be available for short-course programs. Civic activities, such as public forums and workshops, and 'visiting speaker' series (perhaps through the University of the South Pacific Centre) can be designed to attract younger audiences. For Nauru's small concentrated population, successful curriculum development and educational outcomes should be much easier to achieve than in most parts of the Pacific.

In anticipation that Parliament may wish at some stage in the future to reduce the voting age without the need to amend the Constitution, the Commission recommends that Article 29 of the Constitution be amended as follows:

Electors for Parliament

29. Members of Parliament shall be elected in such manner as is prescribed by law, by Nauruan citizens who have attained the age of twenty years, or such other age as may be prescribed by law.

Section 7 – Dual citizenship

The Constitution requires that members of Parliament be citizens of Nauru (Arts 30 (a) and 32 (1) (e)), and that they swear an oath of allegiance (Art.43 & Third Schedule). That is all that the Constitution has to say about it. However, recent controversy raised the question whether the law should be changed so that the holder of dual citizenship would be disqualified from being a member of Parliament. That would involve inserting a further category of disqualification into Article 31. A further aspect of the discussion concerned whether the person's age, state of mind or intentions at the time of acquiring a second citizenship could or should make any difference. In other words, if a Nauruan citizen had been born with the right to citizenship in another country, or had rights regarding another country conferred on him/her without asking for them, should that person be disqualified from standing for Parliament in Nauru, and be forced to renounce all interest in the other country before becoming eligible to stand for Parliament in Nauru? And what would be the situation if, as a matter of law in the other country, a person could not actually divest him/herself of those rights? (that is to say – if the other country does not legally recognise renunciation).

During the public consultations, most of the 700 participants did not express a view on the issue of dual citizenship of members of Parliament, but of those who did, approximately 80 people said that dual citizens should be disqualified from running for Parliament. Approximately 30 people said that it should be permissible for a dual citizen to run for Parliament, provided that he travels on his Nauruan passport, not the foreign passport. Those who considered the issue stressed the importance of loyalty on the part of members of Parliament. The written submissions were fairly evenly divided on the issue. Only two or three people went into sufficient detail to make the distinction between voluntary and involuntary acquisition of foreign citizenship. However, the Commission notes that many countries make that distinction, and it seems that there are good reasons for doing so.

The requirement that a person must be a citizen to be eligible to enter public service, including service as a member of Parliament, is commonly mentioned in constitutions. Nauru followed Samoa in requiring citizenship but saying no more on the subject. Others such as Vanuatu deal with the matter entirely by legislation.

A review of Pacific countries shows that all require citizenship in order to qualify for Parliament, and no country prohibits dual citizenship outright. Instead, countries have chosen between two approaches to the subject.

1). One approach is to say that taking on the citizenship of a second country – ie having dual citizenship – is permissible provided the second citizenship was not acquired intentionally. In other words, if a person actually applied for citizenship in a second country, he/she would be unable to stand for Parliament in the first country. But if a person acquired the second citizenship automatically (for example, by birth) or without any intentional act, he/she would not be disqualified. The Kiribati Constitution (s.56) makes the distinction between –

- a). merely possessing another citizenship, and
- b). being in a position where '[he] is *by virtue of his own act*, under any acknowledgement of allegiance, obedience or adherence to a foreign power or state'.

Only in the second case b). is the person disqualified from entering Parliament. In this regard, it is not clear whether the act of applying for a passport might fall within this provision.

Solomon Islands (s.49) and Tuvalu (s.95) use a similar formula. A person is not qualified to enter Parliament if – ‘he is, by virtue of his own act, under an acknowledgement of allegiance, obedience or adherence to a country other than Solomon Islands [Tuvalu]’.

Fiji requires citizenship for membership of Parliament, but (in s.14) actually deprives a person of existing Fijian citizenship (not merely membership of Parliament) –

- a). ‘if he voluntarily acquires the citizenship or nationality of another country’; or
- b). if, having acquired foreign citizenship as a minor, he fails to renounce that citizenship ‘after reaching the age of 21 and before reaching the age of 22’.

However, an adult who involuntarily acquires the citizenship of another country does not forfeit his citizenship of Fiji unless he fails to renounce the other citizenship within 12 months of becoming aware of it, or of being required by the Minister to renounce it, whichever occurs first.

It is interesting that Fiji provides for ‘renouncing’ the second citizenship. This concept, together with the wording used in Kiribati, Solomon Islands and Tuvalu, recognises that a person may be unable actually to divest him/herself of the second citizenship. So Fiji merely requires an attempt – by ‘renouncing’ the citizenship – which the second country may or may not acknowledge. The other countries make no such requirement – but make a distinction between voluntary and involuntary acquisition of the second citizenship because they are aware that it may not be possible to remove the person’s name from the records of the second state.

It is apparent that governments recognise that it is unfair and discriminatory to deprive a person of rights in the country in which they are living and working and already hold citizenship simply because of an accident of birth or decision by parents over which the person had no control.

2). The second approach is that taken by countries like Samoa and Vanuatu – and by Nauru to date – which do not forbid dual citizenship in these circumstances, and do not disqualify the holder of dual citizenship from entering Parliament. Both Samoa and Nauru do, however, require an oath of allegiance (The oath is the same in both countries, but Samoa entitles the oath ‘Oath of Allegiance’.)

This can be an emotive issue, in which citizenship becomes symbolic of allegiance to one’s people. However, it seems that a person might be unduly discriminated against if the foreign citizenship was acquired involuntarily, and could not be readily disposed of. Where this applies, a person might nevertheless be able to demonstrate that he/she has the necessary loyalty and connection to Nauru to earn the trust of a constituency and represent the people of that constituency in Parliament.

The Commission agrees that dual citizenship without further inquiry should not be an automatic bar to membership of Parliament. However, having regard to the two approaches discussed, the Commission considers that there is insufficient evidence available as to the likely or possible effects of choosing one approach over the other. The matter is considered in Chapter 8 Section 2 below, where several aspects of dual citizenship are brought together.

The Commission recommends no change to the Constitution in relation to dual citizenship of Members of Parliament, and refers to Chapter 8 of this Report for further discussion.

Section 8 – Criminal conviction

The consequences for a candidate for Parliament or a member of Parliament being convicted of a criminal offence appears to have two aspects to it – the first is concerned with problems related to initial disqualification or vacation of seat, while the second asks whether disqualification should continue so as to prevent the person from contesting the same or another seat. These issues are raised as questions.

8. a). Should the seriousness of the actual circumstances of the offence be the test for determining whether a person should be in Parliament rather than the present arbitrary rule based on the category of offence? And should conviction of an offence in terms of Art. 31 (c) automatically deprive a member of his/her seat under Art. 32 (1) (b) – at the very moment that the court pronounces the conviction? – or should a short period be allowed during which the person concerned can seek to review or appeal the decision?

Under Art. 31 (c),

*No person is qualified to be elected a member of Parliament if he –
... (c) 'has been **convicted** and is under sentence **or is subject to be sentenced** for an offence punishable according to law by death or by imprisonment for one year or longer'*
(emphasis added)

Further, under Art.32 (1.),

*A member of Parliament vacates his seat-
... (b) '**upon becoming disqualified** under Article 31 to be elected a member of Parliament'.*

At the outset, a preliminary matter is the reference to the death penalty in Art. 31 (c). In a country where there is no such penalty, it is inappropriate to refer to it in this Article. This question has been dealt with in connection with Art. 4 on the right to life, discussed in Chapter 2 section 1 above. The Commission's recommendation is logically the same for both references.

The first point for discussion here is what the test should be for deciding whether a person's criminal behaviour was serious enough to justify being disqualified from entering Parliament or, if already a member, to justify losing the seat. In Art. 31 (c), the offence committed need only be 'punishable', in the words of the relevant criminal statute, by a term of one year or more. Further, the Nauruan parliamentary disqualifications do not require sentencing by the court to have taken place, because the Article says that it is sufficient if the member is 'subject to be sentenced'. At that point in time, the court may not have formed a view as to the seriousness of the actual behaviour that led to the conviction.

The offence referred to in Article 31(c) need only be 'punishable' by a term of one year or more. That means the *maximum possible* punishment. It makes no difference under this Article that the conviction might be for a very minor/technical breach of the statute in question – the sort of breach which might earn a light fine and no imprisonment at all. The courts commonly dispense justice without imposing the maximum penalty, or anything approaching it. There are a large number and range of offences in respect of which the maximum penalty the court can impose is one year imprisonment. Nauru appears to be the only country in the region which uses the

punishable maximum sentence as the test of seriousness for deciding whether a member should lose his/her seat. Such a test seems inaccurate and inappropriate. Surely, the only test which the court system can offer is the court's assessment of the seriousness of the offence – and that is reflected in the *actual* sentence imposed, not the maximum sentence that *could* be imposed.

Another issue of equal concern is the sudden and automatic loss of the seat at the point in time that a conviction is entered against a member's name in court, which does not allow for possibilities such as that the conviction was entered –

- in error,
- in the absence of the member (perhaps overseas), or
- in circumstances which would give good grounds for successful review or appeal.

This rather draconian possibility of loss of seat on conviction without exercise of ordinary due process of law is not found anywhere else in the Pacific. It is avoided in most countries –

- by providing that there is a period of 'grace' during which review or appeal may occur,
- by saying that the loss of the seat does not occur in the first place until the member has been both convicted and sentenced for the offence, or has actually started to serve the sentence,
- by providing a combination of both of these.

For example, in Fiji (ss 55 (8) and 58), a member is disqualified only if he/she is actually serving a sentence of imprisonment of 12 months or longer. In Solomon Islands (s. 51), the disqualification operates if a sentence of 6 months or more has been imposed (although not necessarily started), as in Tuvalu and Kiribati, where the sentence is 12 months. Also, in Kiribati (s. 58), once a member actually begins to serve a prison term, that is sufficient ground for disqualification regardless of the length of sentence imposed by the court. Marshall Islands disqualifies a member if serving a prison term.

Several countries regard imprisonment for serious offences in Commonwealth countries on the same footing as serving sentences at home.

A period of 'grace' is provided for in Solomon Islands, Tuvalu and Kiribati during which the offender may not perform the functions of member of Parliament but vacation of the seat is delayed for 30 days – and for such further period up to 150 days that the Speaker may allow, and for further extensions by resolution of Parliament – to enable the member to pursue a review or appeal in respect of his conviction or sentence. Such a period is essential to ensure that justice is done before the seat is vacated.

The same three constitutions go on to say that, if at any time before the member vacates his seat he is granted a free pardon or his conviction is set aside or his sentence is reduced to a term of imprisonment of less than the stipulated period or a punishment other than imprisonment is substituted, his seat in Parliament shall not become vacant, and he may again perform his function as a member of Parliament.

It is suggested that the appropriate test for present purposes is whether the person is actually serving a prison sentence. If not, it is likely that the circumstances of the offence were considered by the court as less than serious. On the other hand, if the person is in fact in prison, the court has probably taken a serious view of the actual circumstances, then the member's seat should be vacated, and it is not necessary to know how long the sentence is.

New clauses are needed in Articles 31 and 32 to include provision for both disqualification for membership of Parliament and vacation of seat where a criminal offence has been committed and a person is serving a prison term. A period of grace should be provided similar to that which is available in the Solomon Islands.

The Commission recommends the following amendments:

Disqualifications for membership of Parliament

31. No person is qualified to be elected a member of Parliament if he-

...

(c) has been convicted and is under sentence or is subject to be sentenced for an offence punishable according to law by death or by imprisonment for one year or longer is serving a sentence of imprisonment imposed by a court in Nauru or in any other part of the Commonwealth;

Vacation of seats by members of Parliament

32.-(1.) A member of Parliament vacates his seat-

...

(b) subject to clauses (2) and (3) of this Article, upon becoming disqualified under Article 31 to be elected a member of Parliament;

...

(d) if he is absent without leave of Parliament on every day on which a meeting of Parliament is held during a period of two months sitting day over three consecutive sessions of Parliament; or

...

(2) Subject to the provisions of this Article, if a member of Parliament is sentenced by a court in Nauru or in any other part of the Commonwealth to imprisonment, and serves any part of such a sentence of imprisonment, he shall forthwith cease to discharge his functions as a member of Parliament, and his seat in Parliament shall become vacant at the expiration of a period of 30 days thereafter:

Provided that the Speaker may, at the request of the member, from time to time extend that period of 30 days to enable the member to pursue any review or appeal in respect of his conviction or sentence, so, however, that extensions of time exceeding in the aggregate 150 days shall not be granted without the approval of Parliament signified by resolution.

(3) If at any time before the member vacates his seat his conviction is set aside or a punishment other than imprisonment is substituted, his seat in Parliament shall not become vacant under the preceding subsection and he may again discharge his functions as a member of Parliament.

(24.) In the event of the occurrence of a vacancy in the office of a member of Parliament, an election shall be held in the manner prescribed by law of a member to fill the vacant office.

8. b). Should there be a minimum period of disqualification after conviction and sentence for a serious breach of the law, before a person can stand for election to Parliament?

In the administration of justice, the general proposition is that a person who has served the sentence for an offence is entitled to resume their normal place in society. In the case of parliamentary elections, it is up to the voters to decide whether to place their trust in a person with a criminal record.

One written submission argues that members of Parliament or candidates who have been disqualified following the commission of serious offences should be barred from standing again for, say, 12 months. This would be a new concept for Nauru. The only neighbouring country in the Pacific which provides for a period of disqualification is Tuvalu, where (s.95) says in effect that a person who has served a term of more than a year in prison must wait three years after that before being eligible to enter Parliament. No distinction is made between different types of offences.

As Nauru is proposing to introduce a Leadership Code which will address issues such as offences in the public law field, and which will include provisions for prohibiting leaders who have committed serious breaches of the Code from holding a position of leadership for a prescribed period, the Commission makes no recommendation on this disqualification question.

Section 9 – Absence from Parliament

Absence of a member of Parliament without leave has caused difficulty due to definitions of key words. The constitutional requirements, particularly Article 32 (1) (d), should be looked at in light of Parliament's practice and the public interest.

In most countries, absence from Parliament is not dealt with constitutionally, or, as in Kiribati (s.57), the Constitution declares it to be a matter for the House, under the direction of the Speaker according to Standing Orders. Also, in Tuvalu (s.96), the member's seat is vacated if 'he is absent from the sittings of Parliament for such period and in such circumstances as are prescribed in the Rules of Procedure of Parliament'.

Constitutional supervision of the issue is introduced in Nauru by Art. 32 (1) (d).

32.--(1) A member of Parliament vacates his seat-

... (d) if he is absent without leave of Parliament on every day on which a meeting of Parliament is held during a period of two months.

Standing Orders, SO 22 and SO 20 provide –

22 Leave of Absence

Leave of Absence may be given by the House to any Member on Motion without notice, stating the cause and period of absence; and such Motion shall have priority over all other business.

20 Record of Attendance

The attendance of Members at each Sitting of the House shall be recorded in the Votes and Proceedings (kept by the Clerk of Parliament under SO 25)

The Supreme Court has twice been asked to review the Speaker's interpretation of the Article, and it seems that the meaning of the Article is sufficiently ambiguous and unclear as to require attention by this Commission. Mr MacSporran's analysis of the cases has been most helpful.

It should be noted that the constitutional definition of 'sitting' in Art. 81 (1) is particularly unhelpful. It is said to mean 'a period during which Parliament is sitting without adjournment'. Parliament's Standing Orders, together with discussion in Chapter 13 of Mehra's *Practice and Procedure of the Parliament of Nauru* (pp 34 and 104-5) make it quite clear that a 'sitting' is not a period of days but a single day, from the hour of commencement of business to the hour when the House adjourns to another sitting day.

How many days' absence without leave should warrant losing the seat? Mr MacSporran suggests three. The Solomon Islands Constitution requires only two, but adds that the loss of the seat will not occur if the absence was due to causes beyond the member's control (s.50 (e)). In the case of Fiji, absence without leave 'for two consecutive meetings' causes the member to lose the seat (s. 71).

It seems that the practical difficulty for Nauru is to weigh up two considerations. On the one hand, the national interest requires that Parliament should sit whenever there is business to attend to, and every member of Parliament has a public duty to participate in all sittings. On the other hand, Ministers and ordinary members on committees sometimes have official engagements or urgent personal matters to attend to overseas. On occasion, it may be very hard for an individual to predict exactly how long a proposed absence overseas will take, and there can be transport or related problems beyond the member's control which prevent him/her from returning to Nauru on time.

Four points concerning *Standing Orders* seem relevant:

- 1). It is not clear in *Standing Orders* whether a member must move a motion for leave in person.
- 2). There is also no express prohibition on the House considering a motion for leave in retrospect – that is to say, after the absence has occurred (although presumably only a member who was confident of sufficient support from the rest of the House would run the risk of losing his/her seat in this way!).
- 3). There is no reference to whether absence may or must be excused on proof of sufficient evidence of factors clearly beyond the member's control.
- 4). *Standing Orders* do not seem to require that, at the conclusion of a period of sitting days (for discussion of 'session' see Section 12 below), a date should be fixed and announced for the beginning of the next period of sittings. Nor is there any requirement for a minimum number of days' notice to be given to members of that date. *Standing Orders* provide for Parliament to sit every Tuesday and Thursday (SO 28) and imply that the House will sit on these days continuously for a 'session'. Instead, the practice has been for the House to remain continuously 'in session', but to sit for days here and there when government has business to be dealt with.

It is not for this Commission to comment on the practice and procedure of Parliament unless matters directly related to the Constitution are involved. On the evidence available so far, it

seems that Art. 31. (2) (d) which renders a member's seat vacant for absence is not workable in its present terms and under the current Standing Orders. One possibility would be for the matter to be omitted from the Constitution and left to Parliament to resolve. Certainly, Standing Orders seem seriously in need of review in this respect. However, the Commission is also conscious of the public interest referred to above, namely to encourage constant participation in the business of Nauru on the part of all members of Parliament, and that therefore the question of attendance should be a matter for constitutional supervision.

In Section 12 below, the Commission recommends how the definitional problems surrounding the terms 'session' and 'sitting' of Parliament are best dealt with in a package of amendments. If this advice is adopted, then it is possible to formulate a sensible constitutional requirement for members of Parliament to adhere to. A 'session' is to be defined as a period comprising one or more sitting days followed by seven days during which Parliament has not sat (a total minimum period of eight days). On this basis, a reasonable formula for loss of seat can be proposed. The Commission recommends that a member who is absent without leave for three consecutive sessions should lose his seat.

The Commission recommends the following amendment to Article 32 (1) (d):

Vacation of seats by members of Parliament

32.-(1) A member of Parliament vacates his seat-

...

(d) if he is absent without leave of Parliament on every sitting day ~~on which a meeting of Parliament is held during a period of two months.~~ for three consecutive sessions.

The Commission adds that it is for Parliament to amend Standing Orders to ensure that, as far as possible, this constitutional requirement is implemented in an appropriate manner.

Section 10 – the Clerk of Parliament

Introduction

Article 33 provides for the position of the Clerk of Parliament. It says –

33.-(1.) There shall be a Clerk of Parliament, who shall be appointed by the Speaker.

(2.) A member of Parliament is not qualified to be appointed Clerk of Parliament.

(3.) The Clerk of Parliament may at any time resign his office by writing under his hand delivered to the Speaker and may be removed from office by the Speaker at any time.

(4.) Before or during the absence of the Clerk of Parliament, the Speaker may appoint a person who is not a member of Parliament to perform the functions of the Clerk during his absence.

The Clerk of Parliament is a key position within the legislature. As his appointment is not dependent on parliamentary elections and terms, he is able to build up knowledge and experience that is very valuable for the Speaker and other members. The present Clerk is conversant with parliamentary procedures, precedents and conventions, inter-parliamentary matters and communications as well as having a good grasp of staffing issues. Pacific constitutions usually include some brief provision for the Clerk.

Some written submissions and views received from public discussions raised the issues of appointment, removal and discipline of the Clerk. Related issues discussed by the Commission include independence of the Clerk and an Office of Parliament. In summary, the issues are:

1. Establishment of an Office of Parliament
2. Appointment, Removal and Discipline of the Clerk
3. Duties of the Clerk

Establishment of an Office of Parliament

The Clerk is the top permanent officer of Parliament. He is neither a member of Parliament nor a member of the public service. He is a constitutional officer and in practice regarded as a public service officer.

An Office of Parliament would help to establish the constitutional demarcation between the executive and the legislature. Such an Office would ensure that the independence and integrity of the Parliament is confirmed and assured against other government institutions and other persons of authority. The Office would be headed by the Speaker with the Clerk of Parliament as the chief executive officer running its daily business. It would also bring the Clerk's office onto an equal level with the manager of the public service (Chief Secretary).

The Commission recommends the establishment of the Office of Parliament under the administration and control of the Clerk, with the following addition to Article 33

Office and Clerk of Parliament

33(1.) There shall be an Office of Parliament under the administration of the a Clerk of Parliament, ~~who shall be appointed by the Speaker.~~

Appointment, removal and discipline of the Clerk

The current constitutional practice is for the Speaker to appoint and remove the Clerk. In the history of the position of the Clerk there has never been any problem concerning his appointment and removal. Written submissions received by the Commission suggested that the appointment and removal of the Clerk should not be at the sole discretion or whim of the Speaker as this does not give the Clerk any redress for removal and that the Parliament should approve the Clerk's appointment and dismissal by a two thirds resolution. The involvement of the Parliament in the appointment and removal of the Clerk appeals to the Commission.

One proposal that came from the public consultations is that the Clerk should be subject to public service discipline. This is inconsistent with the Clerk's status as a constitutional officer responsible directly to the Speaker for execution of his functions. It is also contrary to the notion that Parliament is separate and independent from the public service and the executive branch of the government. The Commission is not inclined to adopt this recommendation.

An interesting thought put to the Commission in one written submission is that the Clerk should hold office until a new Speaker is elected at the first meeting of Parliament following a general election. This idea seems to be based on an assumption that the Clerk's position is somewhat similar to that of the Speaker or President, and for this reason the Commission cannot accept it.

Subject to the requirement that the Clerk may not be removed except by a resolution of two thirds of the members of Parliament, the Commission recommends that the appointment, removal and discipline of the Clerk are the responsibility of Parliament and the Speaker. The following amendments to Article 33 are recommended:

Office and Clerk of Parliament

33(1)...

(1A) There shall a Clerk of Parliament, who shall be appointed by the Speaker in accordance with a resolution of the Parliament.

(2.) A member of Parliament is not qualified to be appointed Clerk of Parliament.

(3.) The Clerk of Parliament may at any time resign his office by writing under his hand delivered to the Speaker and may be removed from office by the Speaker at any time following a resolution supported by not less than two thirds of the total number of members of Parliament and may be disciplined by the Speaker in consultation with Parliament.

(4.) Before or during the absence of the Clerk of Parliament, the Speaker may appoint a person who is not a member of Parliament to perform the functions of the Clerk during his absence.

Independence of the Clerk

The independence of the Clerk's office is important to the discharge of his duties to Parliament. In this respect the Clerk of Parliament should not receive any direction from the Cabinet or any other person or authority except the Speaker or Parliament in the discharge of his duties.

The Commission recommends that the independence of the Clerk be protected by adding the following new clause (5) to Article 33:

(5.) In the exercise of his duties and functions, the Clerk of Parliament shall not receive any direction from the Cabinet or any other person or authority except the Speaker or Parliament by resolution.

Duties of the Clerk

The duties of the Clerk include a number of tasks which it is useful to list. The Marshall Islands Constitution (Art IV s 14) succinctly consolidates the Clerk's duties and is drawn upon here.

The Commission recommends that the duties and functions of the Clerk be stated in new clause (6) of Article 33 as follows:

(6) The Clerk of Parliament shall be responsible for-

- (a) arranging the business and keeping the records of the proceedings Parliament;
- (b) arranging for the signing of documents and issuing of certificates by the Speaker, whenever any signature or certification by the Speaker is required pursuant to this Constitution or any law, and keeping the records of all documents and certificates so signed or issued;
- (c) performing with respect to the Speaker, members of Parliament and Parliamentary Committees such secretarial and other functions as may be required; and
- (d) performing such other duties and functions as the Speaker or Parliament by resolution may direct.

Section 11 – the Speaker of Parliament

Introduction

Article 34 concerns the election of the Speaker which was one of the key issues for consideration by the Commission. Article 34 provides that Parliament must before it proceeds to do any other business, elect one of its members to be Speaker and cannot transact any business other than the election of Speaker whenever the office of Speaker is vacant. The Speaker must be a member of Parliament but cannot be a member of Cabinet. The Speaker loses office if he resigns, becomes a member of Cabinet, ceases to be a member of Parliament for any reason other than the dissolution of Parliament, at the first meeting of a new Parliament or upon a resolution of Parliament for his removal. The main problem identified by the Background and Discussion Paper and in the public discussions and written submissions received is the inability of Parliament to elect a Speaker in a reasonably short period following an election or vacancy in the Speaker's office. There have been occasions in the past when members elected to the

Speaker's office have resigned soon after the President is elected, which has forced Parliament to interrupt its business and elect a new Speaker. In recent times, due to the equal numbers on each side, the Clerk has had difficulties in receiving nominations for Speaker at the first meeting following an election or vacancy, as neither side has been prepared to 'give up' one of its members to be Speaker because of the implications it has for the numbers on the floor. In these instances, Parliament has for a protracted period been unable or unwilling to elect a Speaker, which has resulted in an impasse in which Parliament was therefore unable to transact any business. The discussions on this issue include looking at alternatives to the present system of electing a Speaker.

Issues

Issues identified by the Commission from the various written submissions received and in public discussions are briefly as follows:

1. Election of the Speaker from outside Parliament
2. Failure to elect a Speaker
3. The tenure of the Speaker
4. Impartiality of the Speaker
5. Consolidation of Speaker's powers and duties

Election of the Speaker from outside Parliament

The current system of electing the Speaker from the members of Parliament has been the cause of difficulties. Many of the public oral and written views received by the Commission suggest the Speaker should be elected from outside of Parliament, as this may solve the problems associated with the failure to elect a Speaker under the current arrangements, and may also result in greater impartiality. The idea of electing a Speaker from outside of Parliament is not novel and it merits consideration if it would bring about stability in the affairs of Parliament. Pacific models for electing a Speaker from outside Parliament include Fiji, Kiribati, Niue and Solomon Islands. An important aspect of the Speaker coming from outside of Parliament is that the person must have the same qualifications required for election to Parliament – he or she must be a voter and not disqualified under the Constitution from standing for Parliament. In each of these countries, the Speaker is someone who is not a member of Parliament and is elected by Parliament. Whilst in Nauru the Speaker can exercise a casting vote in the event of an even number of votes, in these countries the Speaker cannot vote on any matter. The Speaker presides and chairs the debates, but only the elected members of Parliament can vote.

A small number of people suggested that the Speaker from outside Parliament should be popularly elected. The Commission is of the view that it would be inconsistent with the parliamentary role of Speaker to elect him by popular vote, and is not aware of any system in the world that has a general popular election for the Speaker of Parliament.

There are several reasons for this. The first is that the Speaker's role does not require a popular mandate. The primary function of the Speaker is not to govern the country or even (while he is sitting in the Speaker's chair) to represent a group of constituents, but rather to preside over

debates in Parliament and maintain order in the House. It makes sense therefore for the people to choose those who will represent them in Parliament, and for Parliament to choose who will chair their proceedings. Further, the popular election of the Speaker would result in potentially irresolvable and certainly unnecessary tension between the Speaker and the President. If the current system of electing the President within Parliament was to remain, but a change be effected to have a popularly elected Speaker, the Speaker would have a greater popular mandate than the President, in spite of the fact that his role is to preside in Parliament and not to fill the shoes of the President as the Head of State and Head of Government. If the system was changed to provide for a popularly elected President (as recommended by the Commission in Chapter 3) and in addition there was also a popularly elected Speaker, there would then be two people elected from the same electoral base, with the same degree of popular mandate, who are however supposed to perform entirely different roles and to cooperate in the performance of their roles. It is likely that this would result in power struggles between the Speaker and President, and further exacerbate instability in Government. *The Commission strongly recommends therefore that this option not be pursued.*

Some of the advantages of moving from the current arrangements where one of the members of Parliament serves as Speaker, to a system where the Speaker is not a member of Parliament include: the likelihood that the difficulties of attracting nominations will be overcome, because the selection of Speaker will have no effect on the numbers on either side of the House (and therefore delays in election and in proceeding with the business of Parliament can be avoided); the likelihood that the Speaker will exercise his functions with greater impartiality as he is not a sitting member and will not exercise a vote; and the fact that because Parliament can select a Speaker from outside it will be able to select someone with appropriate knowledge and experience.

The Commission has examined the models for election of the Speaker elsewhere in the Pacific as referred to above, and considers that provision for a Speaker to be chosen by Parliament from among persons who are not members of Parliament and who cannot vote in Parliament would be appropriate for Nauru, and may alleviate some of the problems that have occurred in the past in relation to the election of a Speaker. The details of nomination and election are matters for the Standing Orders of Parliament.

The Commission recommends that Articles 34 and 46 be amended as follows to provide for a Speaker who is not a member of Parliament:

Speaker of Parliament

~~34.-(1) Parliament shall, before it proceeds to the despatch of any other business, elect one of its members to be Speaker and, whenever the office of Speaker is vacant, shall not transact any business other than the election of one of its members to fill that office.~~

Parliament shall, at its first sitting following a general election and whenever the office of Speaker is vacant, elect as Speaker a person who is not a member of Parliament but who is qualified to be a member of Parliament.

~~(2.) A member of the Cabinet is not qualified to be elected Speaker.~~[see new (2.) below]

(3.) The Speaker ceases to hold office-

- (a) when Parliament first meets after a dissolution;
- (b) upon ceasing to be qualified to be a member of Parliament ~~otherwise than by reason of its dissolution~~;
- (c) upon becoming a member of ~~the Cabinet~~ Parliament;
- (d) upon being removed from office by a resolution of supported by at least two thirds of the total number of members of Parliament; or
- (e) upon resigning his office by writing under his hand delivered to the Clerk of Parliament.

[note: Article 35 relating to the Deputy Speaker would remain unchanged]

Voting

46.-(1.) Except as otherwise provided by this Constitution, a question before Parliament shall be decided by a majority of the votes of its members present and voting.

~~(2.) The Speaker or other member presiding in Parliament shall not vote unless on a question the votes are equally divided in which case he has and shall exercise a casting vote.~~

If there is an equality of votes, the person presiding does not have a casting vote and the question concerned is deemed to be lost.

(3.) If the Deputy Speaker is performing the functions of Speaker, he shall continue to have a deliberative vote as a member of Parliament but shall not in addition have a casting vote.

Failure to elect a Speaker

The failure to elect a Speaker within a reasonable time (whether following a general election or a vacancy) was addressed in public discussions and in written submissions received by the Commission. Many people were of the view that if within a certain period the Parliament fails to elect a Speaker then Parliament should stand dissolved. The time limits for election of Speaker suggested by the public at consultation meetings ranged from 2 hours to 28 days. On occasions in 2003 the Parliament was unable to elect a Speaker for about two weeks and this may be the reason for the concerns of the people. Pacific constitutions make no provision for the dissolution of Parliament if a Speaker is not elected within a reasonable or set time following an election or vacancy, but this may be because in many Pacific countries the Speaker is not a member of Parliament and so the election of Speaker does not cause delays, and also because most Pacific constitutions use language that is more flexible than the provision in Art 34 that Parliament shall elect a Speaker 'before it proceeds to dispatch of any other business', by for example providing that Parliament must elect a Speaker 'as soon as practicable' whenever the office is vacant. It should be noted that if the recommendation above for a Speaker who is not a member of Parliament is accepted, then delays in the election of Speaker are less likely to occur. However it may still be sensible to provide for the contingency that there may be unreasonable delays in the election of a Speaker, by providing for a time limit, after which Parliament would be dissolved if it had failed to elect a Speaker.

The inability to elect a Speaker impacts directly on the national agenda of the executive and the legislature, creating an impasse during which nothing can be achieved. The option of placing a time limit on Parliament to elect a Speaker would appear to the Commission to be a practical way to solve the problem, and should provide an incentive for Parliament to appoint a Speaker without delay. If the recommendation that the Speaker should be someone who is not a member of Parliament is rejected by the Convention, then this recommendation in relation to the imposition of a time limit becomes even more important.

The Commission recommends that there be a time limit of 21 days for Parliament to elect a Speaker, after which Parliament would be dissolved if it had failed to elect a Speaker, by adding to Article 34 the following new clause:

(2.) If Parliament has within 21 days following its first sitting after a general election or within 21 days following any vacancy in the office of Speaker failed to elect a Speaker in accordance with clause (1) of this Article, Parliament shall stand dissolved.

Tenure of the Speaker

Nauru is the only state in the Pacific that can remove the Speaker on a simple majority on a motion that is couched in language such as “that the Speaker vacates the chair” or something similar, in reliance on clause 3(d) of Article 34. The removal of the Speaker from office on a two thirds resolution of Parliament has been suggested in one of the written submissions. Pacific Constitutions such as Cook Islands, Fiji, Kiribati, Marshall Islands, Solomon Islands, and Tuvalu require a two thirds majority resolution for the removal of the Speaker. Although the Speaker is elected by a simple majority in Parliament, removal is made more difficult in order to enhance stability and minimise the politicisation of the office of Speaker. The Commission sees merit in making such provision in the Nauru Constitution, regardless of whether the Speaker remains a member of Parliament or is a person chosen by Parliament from persons who are not members.

The Commission recommends that the Speaker be removed from office by a resolution passed by at least two thirds of the total number of members of Parliament, and that Article 34 therefore be amended as follows [already set out above]:

(3.) The Speaker ceases to hold office-

- (a) when Parliament first meets after a dissolution;
- (b) upon ceasing to be qualified to be a member of Parliament ~~otherwise than by reason of its dissolution~~;
- (c) upon becoming a member of ~~the Cabinet~~ Parliament;
- (d) upon being removed from office by a resolution of ~~of~~ supported by at least two thirds of the total number of members of Parliament; or
- (e) upon resigning his office by writing under his hand delivered to the Clerk of Parliament.

Functions and responsibilities of the Speaker

The impartiality and fairness in the exercise of the Speaker's functions and duties is crucial since it bears upon the legitimacy of the proceedings of Parliament, the transparency of the process of law making and the integrity of the Speaker's office.

It was submitted in public consultations that the Speaker must exercise his duties fairly and impartially, that he should be faithful to the duties of office and should be answerable to a leadership code. The Commission notes that the recommendation above that the Speaker be someone who is not a member of Parliament should enhance the impartiality of the Speaker.

The Commission considered experience within the region and beyond, and found that the Constitution of the Marshall Islands most closely addressed the issue. Consistently with recommendations relating to clear statements of the functions and responsibilities of various constitutional offices elsewhere in this Report, the Commission recommends that provision should be expressly made for the impartial exercise of the Speaker's functions, as well as for the enumeration of the Speaker's powers and duties.

The Commission recommends that Article 44 be amended and that new Article 44A be inserted as follows:

Speaker to preside

44(1.) The Speaker shall preside at a sitting of Parliament.

(2.) As presiding officer, the Speaker shall be responsible for ensuring that the business of Parliament is conducted in compliance with this Constitution and the Standing Orders of Parliament and shall exercise his functions impartially and fairly.

Duties of the Speaker

44 A. The duties of the Speaker include:

- (a) presiding over the proceedings of Parliament;
- (b) convening sessions or sittings of Parliament as required under the Constitution;
- (c) proroguing or dissolving Parliament;
- (d) issuing of writs for elections;
- (e) appointing the Clerk of Parliament on the approval of the Parliament;
- (f) disciplining or removing the Clerk of Parliament in consultation with Parliament;
- (g) administering and controlling Parliament and its precincts including all staff and other employees in the service of Parliament; and
- (h) such other duties as prescribed by law or Standing Orders of Parliament.

Section 12 – Definitions, and calling meetings

In this Section, the Commission looks at an area which has been causing considerable difficulty. It seems that, over the years, the practice whereby Parliament begins and ends its routine work in sessions and sittings has grown ‘out of step’ with the original intentions and terminology of the Constitution and is also no longer accurately reflected in its Standing Orders. Members of Parliament have been uncertain about the meanings of terms such as ‘session’, ‘sitting’ and ‘meeting’, and the Supreme Court has wrestled with questions put to it. Former Chief Justice Barry Connell, Peter MacSporran and others have strongly recommended that these terms be re-examined in the course of constitutional review.

Among other indications of concern about definitions of words, such as the issue over ‘absence without leave’ discussed in Section 9 above, there is the view very widely and firmly expressed in the public consultations that, if there are legal difficulties interfering with the opportunity for members of Parliament to call a session to discuss important business at a time when government appears reluctant to do so, then those legal obstacles should be removed.

This Section will begin by considering briefly the immediate issue raised by this public concern, namely how Article 42 is interpreted, then go on to consider some broader issues surrounding parliamentary practice, the national interest and the reconciling of relevant terms. The Section will conclude with recommendations as to changes that might be made to the law.

Article 42 provides:

Sessions of Parliament at request of one-third of members

42.-(1.) Where-

- (a) Parliament is not in session; and*
- (b) there is delivered to the Speaker a request that complies with clause (2.) of this Article for the holding of a session,*

the Speaker shall appoint a time for the holding of a session of Parliament, being a time before the expiration of fourteen days after the request is delivered.

(2.) A request referred to in clause (1.) of this Article-

- (a) shall be in writing;*
- (b) shall be signed by a member of Parliament for each of at least three constituencies and by a number of members of Parliament which is at least one-third of the total number of members of Parliament; and*
- (c) shall set out particulars of the business proposed to be dealt with at the session of Parliament.*

This Article is intended to provide a means for members of Parliament to call a session of Parliament, thereby enabling Parliament to hold government to account when government refuses to call a session of Parliament. It provides that where Parliament is not in session, and a written request for the holding of a session signed by members for at least three constituencies and a total of one third of the members of Parliament (six members) which sets out the business

proposed to be dealt with at the session is delivered to the Speaker, the Speaker must appoint a time for the holding of a session of Parliament, being a time within fourteen days after the request. Article 42 is ineffective in practice for the following reasons.

The issue of what is a 'session' is the main obstacle to the efficacy of Article 42. Cabinet has, at times in the past, refused to allow the Speaker to call a session of Parliament on the requisition of members under Article 42, arguing that the government has the prerogative to determine the business of the House. This argument is clearly contrary to the Constitution in the special circumstances of Article 42 under which the Speaker must call a session and the government cannot prevent it. However, Cabinet has in the past been able to block attempts by members by using a further argument that members cannot request a sitting under Article 42 when Parliament is *in session* (see 42. (1) (a)) and that Parliament is always *in session*.

The problem is that the Constitution and the Standing Orders differ on the meaning of the word 'session', and the meaning of 'sitting' is also relevant. Art. 81 (1) says –

Interpretation

81.-(1.) In this Constitution, unless the context otherwise requires:-

"Session" means the period beginning when the Legislative Assembly of Nauru first met on Independence Day or after Parliament has at any time been prorogued or dissolved and ending when next Parliament is prorogued or dissolved;

"Sitting" means a period during which Parliament is sitting without adjournment;

To 'prorogue' means to formally end a session of Parliament without dissolving the Parliament. The definition of 'session' seems badly drafted and appears to mean that a session begins when Parliament has been prorogued or dissolved, which does not make sense. Certainly, the meaning has been ignored by Parliament, both in Standing Orders and in general practice. The general view is that, because Parliament is never formally prorogued, it is 'in session' from the time it first meets after a general election until it is dissolved. Rulings of the Supreme Court since 1988 support this view. Peter MacSporran wrote:

The general approach in Nauru has, historically, been for Parliament to be called immediately after a general election and not to formally prorogue itself in so many words but to continue until dissolution prior to general elections (2006 p 122).

Parliament has been obliged to try to work with the constitutional definition, and so Article 42 has had no effect.

Prorogation means that the existing Parliament ceases to operate for a period, and all current work is brought to an end. For example, all notices and items of unfinished business lapse and cease to have effect. During the public consultations, many people were unhappy about retaining the word in the Constitution if it was not understood or the practice of proroguing Parliament was not being observed. However the removal of references to prorogation would have implications for Articles 40 and 41 which rely on the term for their meaning.

Before examining the Nauruan law in detail, there seem to be certain underlying considerations to take into account in relation to the calling and controlling of Parliamentary sessions generally. To begin with, there is the question of how Parliament's work for the year will be organised, and

by whom. To what extent should the Constitution provide for parliamentary sessions, and their commencement and ending, and how much should be left to Parliament to organise for itself in its Standing Orders? The general principle is that Parliament's working year is divided into sessions. In some countries these are determined in advance by government, but in most countries, after the first session meets following an election, the sessions will end (will be prorogued) and start again as decided from time to time by the Head of Government. There are requirements as to how long the interval between sessions may be. The maximum interval between sessions is 12 months in most countries (Nauru, Kiribati, Samoa, Tuvalu, Solomon Islands) but 6 months in Fiji. This process of starting and ending sessions is generally the prerogative of the executive, and the conduct of the business of the House while it is in session is controlled by the President/Prime Minister/Cabinet.

The general authority of the government of the day - the executive – to control the business of Parliament is weighed against the importance of allowing non-government members of Parliament the opportunity to call a meeting to discuss business nominated by them, particularly if some considerable time has elapsed since the last session, or if there is urgent new business requiring, in their view, urgent attention. Here, another balancing of interests comes into play, between the authority of the Head of Government (President/Prime Minister) on the one hand and the authority of the Speaker on the other, to make necessary decisions. It is generally accepted that the Speaker has an obligation to attend to the needs of the group desiring a meeting, and should not be able to refuse to call a meeting of Parliament when requested by such a group, regardless of the wishes of the President.

What is the practice in the region? In order to afford Parliament the opportunity to consider fresh matters raised by those of its members who are not in government, some constitutions provide a procedure for them (a number or percentage) to request the President/Prime Minister, and sometimes the Speaker, to call a session of Parliament at a time when Parliament is not in session. Other countries offer no such opportunity at all. Variations in the constitutional detail of some provisions may reflect local considerations such as the amount of notice needed for members on distant islands and the cost of bringing them to the capital. In Nauru, the calling together of Members of Parliament is not such a time or cost issue. In fact, the relative ease with which members of Parliament on Nauru can be notified and can attend Parliament would seem to be significant for the shaping of the relevant law. The need to consider members who might be overseas is part of the picture (see Section 9, above).

In Kiribati, (s.77) the Speaker has wide authority to decide in his own right when members will be called, but must act on the advice of the President *or* one third of the Members if they require him to summons the Maneaba. In Vanuatu (s.21) there are only two parliamentary sessions a year, but an extraordinary session may be called by the Speaker, the Prime Minister or a majority of Members. In Tuvalu (s.116) the Speaker may call a meeting if 12 months has elapsed since the last session, but otherwise there is no right to call a meeting between sessions.

Fiji has the most comprehensive provisions (s.68), empowering the President, acting in his own judgment, to summon Parliament (if not in session) at the request of at least 18 members (out of a total of 71 members; roughly 25%) who have a matter of public importance to discuss. Alternatively if Parliament is in session but more than two months have elapsed since the last sitting, it is the Speaker who is empowered to call a sitting within two weeks.

What is the best way to overcome the difficulties in Nauru caused by the constitutional definitions of ‘session’ and ‘sitting’, and court rulings on it since 1988? The Commission’s approach is to see to what extent the gap between law and practice can be closed, and, in the process, to address the issue of the ineffectiveness of Article 42.

As far as it is possible to do so, it makes sense to preserve the existing practice and procedure of the House of Parliament, which is based on general parliamentary principles, and merely change the words used where necessary. The main stumbling block is the constitutional definition of ‘session’ set out above. Because it refers to ‘proroguing’ Parliament and because in practice Parliament is not ‘prorogued’, that definition has forced Parliament to say that it is always in session, when in fact it is not fully in session. The definition means that a session ends when Parliament is ‘prorogued’ - that is to say - when the daily sittings of a session come to an end and the President proclaims in the Gazette that Parliament is prorogued. A prorogued Parliament is one which has finished a session and gone into recess until it is called again to another session. It has been pointed out that prorogation terminates all current business. In order for Parliament to carry out its business efficiently, there may seem to be advantages in keeping unfinished business alive and not proroguing Parliament.

In Nauru, in fact the daily sittings are grouped in short periods which look like sessions, and are treated as if they are, except that current business is kept alive between one session and the next. Parliament’s *Standing Orders* define ‘sitting’ and ‘session’:

“A Sitting” means the daily meeting of the Parliament from the ringing of the bells at the appointed time until the adjournment of the Parliament.

“A Session” means any series of sitting days during which the Parliament does not adjourn for a period longer than seven days.

Although Parliament’s *Standing Orders* do not prescribe the procedure, Mehra gives an account of the usual practice in his book, particularly pp 30-39. At the end of a period of sittings, the President usually moves a motion that Parliament will adjourn until a time and date to be fixed by the Speaker or will adjourn *sine die* (without fixing a date for the next sitting or period of sitting). It should be noted that if a period of sittings ends without the next sitting day being fixed, the risk of a member being absent without leave would seem to be increased (see Section 9 above).

The effect of the definition of ‘session’ in the *Standing Orders* is this: If at the end of a period of sittings the date fixed for the beginning of the next sitting is more than seven days in the future or if Parliament is adjourned *sine die* and in fact does not resume for more than seven days, the *Standing Orders* mean that the original period of sittings becomes a session which has ended - without being prorogued. As to the proposal that use of the term ‘prorogue’ be eliminated from the Constitution, the recommended changes should be adequate to remedy the situation, and attempts to make further changes in relation to the prorogation of Parliament could create more difficulties than they might solve.

The Commission recommends that efficacy should be given to the definitions in Standing Orders and current practice by constitutional amendments. The ‘package’ of amendments begins with the definitions in Art. 81(1), as follows:

Interpretation

81.-(1.) In this Constitution, unless the context otherwise requires:-

"Session" means ~~the period beginning when the Legislative Assembly of Nauru first met on Independence Day or after Parliament has at any time been prorogued or dissolved and ending when next Parliament is prorogued or dissolved~~ a series of sitting days held in accordance with Article 40.

"Sitting" means ~~a period during which Parliament is sitting without adjournment~~ the daily meeting of Parliament from the time of commencement of business until the adjournment of Parliament.

The Commission recommends that Article 40 should be amended as follows:

Sessions of Parliament

40.-(1.) Each session of Parliament shall be held at such place and shall begin at such time, not being later than twelve months after the end of the preceding session if Parliament has been prorogued, or twenty-one days after the last day on which a candidate at a general election is declared elected if Parliament has been dissolved, as the Speaker in accordance with the advice of the President appoints.

(2.) Subject to the provisions of clause (1.) of this Article, the sittings of Parliament shall be held at such times and places as it, by its rules of procedure or otherwise, determines.

(3.) A session of Parliament ends when it is prorogued in accordance with Article 41 (1) or on the expiry of seven clear days during which Parliament has not held sittings.

(4.) Unless Parliament is prorogued, the ending of a session does not have the effect of causing the business of Parliament pending at the end of the session to lapse.

The original concept of Article 42 can be put into effect with minor amendments. However, it is necessary to decide what period of time should have elapsed after the end of the previous session before it is reasonable to allow a group of members to require the Speaker to call a new session. Too short a time would allow frequent meetings against the wishes of Cabinet, and defeat the general principle that Cabinet is responsible for organising sessions in order to achieve its legislative program. Fiji, the only country with a comprehensive approach to the issue, requires that a period of two months must have elapsed before the members can insist on a meeting (s.68). It is not an easy matter for the Commission to recommend a period, but, having regard to the information before it, the Commission considers that, on balance, a period of 28 days would be appropriate (to which is added the 7 days during which Parliament did not sit; see revised Art. 40 above).

The Commission recommends that Article 42 should be given effect by amendment as follows:

Sessions of Parliament at request of one-third of members

42.-(1.) Where-

(a) ~~Parliament is not in session~~ twenty-eight days have elapsed since Parliament was in session; and

(b) there is delivered to the Speaker a request that complies with clause (2.) of this Article for the holding of a session,

the Speaker shall appoint a time for the holding of a session of Parliament, being a time before the expiration of fourteen days after the request is delivered.

(2.) A request referred to in clause (1.) of this Article-

(a) shall be in writing;

(b) shall be signed by a member of Parliament for each of at least three constituencies and by a number of members of Parliament which is at least one-third of the total number of members of Parliament; and

(c) shall set out particulars of the business proposed to be dealt with at the session of Parliament.

Section 13 – Term of Parliament

Article 41(7) provides for a three-year maximum term of Parliament, from the date of the first sitting of Parliament after a dissolution. During the consultations, the general opinion of the public, with only a few expressing different views, was that no change should be made to the present three-year term. This is understandable having regard to the failure of past successive governments to account for how they have governed Nauru.

The Commission has examined the issue and feels obliged to place a different point of view before the Constitutional Convention, so that the Convention can have regard to this as well to public opinion.

History shows that Nauru has suffered considerably from instability of government. In looking at measures which might encourage stability, the Commission must consider the length of term of Parliament. When a new Cabinet is chosen after a general election, it develops an agenda of policies to be applied during its term of office, and hopefully beyond. This takes time, to which is added the need to prepare the Public Service to put the policies into effect. The preparation of amendments and new laws is also a lengthy process, from consultation to drafting, and debate in Parliament. The general implementation of programs may not get underway for two years or so. Ideally, a government would have four years in which to carry through its policies, particularly in an Island state with fewer resources than the larger metropolitan countries.

The Constitutional Convention debates of 1968 show that, while the Convention was discussing what the length of the term of Parliament should be, it was told by its constitutional adviser that more countries with which Nauru had contact had decided on a three year term (Debates, 6th day, 10th January 1968, p.28). Professor Davidson must have had Australia and New Zealand in mind, and, of course, at that time, there was only one other island constitution in place, that of Samoa (which, in 1991, amended its constitution to increase the term of Parliament from three years to five).

A survey of the region by Levine and Roberts (2005) shows that Nauru is one of only three Island states which have a three-year term – out of a total of 16. Seven states have a four-year term and six have five years.

3 years	4 years	5 years
Nauru	Cook Islands	Fiji
Niue	Kiribati	French Polynesia
Tonga	Marshall Islands	New Caledonia
	Palau	Papua New Guinea
	Solomon Islands	Samoa
	Tuvalu	Wallis & Futuna
	Vanuatu	

A change to increase the term of Parliament to four years would not benefit the government in the present term of Parliament which expires in October 2007. The Commission notes that, if any change is decided upon by the Convention, time requirements for the process of constitutional amendment are such that no change to the Constitution could come into effect until *after* the next election, and probably until some time after that. It should also be noted that the term of Parliament under Article 41(7) can only be changed if approved by referendum. This means that even if the Convention decides in favour of a four year term it will only occur if at least two thirds of the people voting in a referendum are sufficiently convinced of the arguments in favour of four year terms to vote in support of such change.

The Commission recommends that the public opinion in favour of no change to the parliamentary term should be noted. However, the Commission's view that a four-year term would be in the best interests of Nauru should be given careful consideration.

Section 14 – Certification of laws

Research into literature on the Nauru Constitution has revealed concerns expressed independently by two people who have studied the making and operation of the Constitution that there have been difficulties caused by the occasional refusal of the Speaker to certify that a law has been passed by Parliament. The court has held that the Speaker has no authority to be concerned with whether a proposed law is in breach of the Constitution (McDowell 1986 and MacSporran 2006). Article 47 provides –

Enactment of laws

47. *A proposed law becomes law on the date when the Speaker certifies that it has been passed by Parliament.*

On the ordinary meaning of the words, the Commission considers that the only certificate that the Speaker is required to sign is one which certifies as to the fact of the passing of the proposed law by Parliament. This view is supported by the form of certificate provided in Parliament's *Practice and Procedure* book (Mehra 1990, 138) which reads –

Pursuant to Article 47 of the Constitution, I, Speaker of Parliament, hereby certify that the Act has been passed by the Parliament of Nauru.

Speaker

Date

Prior to certification by the Speaker, five copies of the Bill passed by Parliament have to be made and certified as true copies by the Clerk. After certification, a certified copy is sent to the Department of Justice for printing in the form of an Act. There is no mention of this process in *Standing Orders*.

The only indication in the Constitution that certification has any other function relates to amending the Constitution when, in terms of Article 84, the Speaker is expressly required to certify that certain prescribed procedures have taken place.

If the Speaker refuses to perform the task of certifying that a law has been passed, it is a matter for Parliament to deal with. The Speaker has no constitutional duty to certify, and it would be inappropriate for a constitution to require it – just as it would be inappropriate to require a speaker to certify that the law was not in breach of the constitution.

Under Article 84, a proposed law becomes law on the date when the Speaker certifies that it has been passed by Parliament, and the certificate relates only to parliamentary procedure. The Speaker has no authority to be concerned with constitutional issues, and if he purports to determine whether a proposed law is in breach of the Constitution, he may be restrained by the courts. If the Speaker refuses to certify a proposed law, that is a matter for Parliament.

The Commission recommends that there is no need to amend the Constitution. However, Parliament should consider amending its *Standing Orders* to lay down rules for the certification process.

Section 15 – Oaths of Office

In the public discussions, the importance of requiring key office-holders to swear an oath that they will properly carry out their duties was mentioned several times. It is clear that many people attach some significance to this declaration of commitment made in public at the time the person concerned is about to take up his/her position.

It should be noted that a person has the option, if they wish, ‘to make and subscribe an affirmation’ instead of an oath (Art. 81 (7)). For convenience in this discussion, only the term ‘oath’ will be used.

The oaths prescribed by the Constitution are for the following –

- Member of Cabinet (Art.18) First Schedule
- Member of Parliament and Speaker (Art.43) Third Schedule
- Judge (Art.52) Fourth Schedule

As an example, the member’s oath reads as follows –

I, swear by Almighty God that I will be faithful and bear true allegiance to the Republic of Nauru and that I will justly and faithfully carry out my duties as a member of Parliament of Nauru. So help me God!

and the Minister’s oath –

I, swear by Almighty God that I will faithfully carry out my duties as a member of the Cabinet and that I will not improperly reveal any matters of which I have become aware by reason of my membership of the Cabinet. So help me God!

Having regard to onerous nature of the duties of a Minister of Cabinet, the oath required of Ministers in Fiji is very instructive -

I,..... being appointed Prime Minister/Attorney-General/Minister/Assistant Minister, do swear that I will to the best of my judgment, at all times when so required, freely give my counsel and advice to the President for the good management of the public affairs of Fiji, and I do further swear that I will not on any account, at any time whatsoever disclose the counsel, advice, opinion or vote of any particular Minister and that I will not, except with the authority of the Cabinet and to such extent as may be required for the good management of the affairs of Fiji, directly or indirectly reveal the business or proceedings of the Cabinet and that in all things I will be a true and faithful Prime Minister/Attorney General Minister/Assistant Minister. So help me God!

In light of the distinct and separate duties imposed by the Constitution, and recommended by the Commission for other key office-holders, and for the reasons given below, consideration should be given by Government to reviewing this aspect of public offices and functions. In addition to the three mentioned above, offices for which oaths would be appropriate include the following -

- Office of President (especially if the President is to be elected by the people)
- Deputy President (as proposed)
- Speaker (proposed to be elected from outside Parliament)
- Deputy Speaker
- Clerk of Parliament
- Director of Audit (proposed to be an ‘Officer of Parliament’)
- Judge of the Court of Appeal (as proposed)
- Magistrate
- Registrar of the Supreme Court
- Member of Committee on the Prerogative of Mercy

It is obviously not suggested that distinct oaths should be written for each of these. Adopting an idea from Fiji, oaths may be reduced to four or five basic models and the various offices can be grouped according to function. There should be five models and groups in Nauru:

- Oath for due execution of office of President (and Deputy President)
- Oath of allegiance by Members of Parliament
- Oath for due execution of office of Minister
- Oath for due execution of Judicial Office
- Oath for due execution of office by Officer of Parliament

Five model oaths should be drafted, perhaps with more explicit statements of the obligations being undertaken.

Further aspects of taking oaths should be considered. There is little point in requiring that an oath of office be taken unless it is part of a 'swearing in' ceremony of some sort, in public, and administered by an appropriate dignitary. The ceremony should be a suitably solemn occasion the importance of which, together with the words of the oath, are imprinted on the mind of the person being sworn in.

At present, the Constitution of Nauru does not specify who should administer the oath in each case. This failure is unusual in constitutions (compare the constitutions of Fiji, Solomon Islands and Kiribati), although it is understandable that some flexibility of choice may be needed. The normal procedure would be for the President, Deputy President and Cabinet Ministers to be sworn in by the Chief Justice. It might be necessary to provide that the Registrar of the Supreme Court or some other person designated by the Chief Justice may perform that function in the absence of the Chief Justice. It would be usual for the Chief Justice and other judges (for example judges sitting on appeals – see Chapter 5) and the Registrar (having regard to his judicial powers), to make their oaths of office before the President.

The Commission recommends that Parliament should legislate for a set of oaths and identify who should administer the oaths in each case.

The Constitution should require oaths to be taken for certain named offices, specifically – President, Deputy President, Speaker, Deputy Speaker, Clerk of Parliament, Director of Audit, and Chief Justice – and should lay upon Parliament the responsibility of providing the wording in each case. Unless the Constitution does so, the legislation should also designate the dignitary (or his delegate) before whom the swearing-in will take place.

Chapter 5: Judiciary and Legal System

Introduction

Part V of the Constitution covers the arrangements for the Judiciary on such matters as the establishment of the Supreme Court and other subordinate courts, jurisdiction of the courts, appointment of judges and acting judges, vacation of office and appeals from the Supreme Court. In places, the Constitution is not as clear and explicit as it might be, and, as is often the case, a great deal of the important law on the subject is, or should be, contained in legislation.

Issues that the Commission drew from the various written submissions received and from the public consultations were spread over a wide range. Implied in all of them, and stated in some, is a concern for the status and independence of the judiciary. Public discussion focused on such matters as the appropriate ages for appointment and retirement of judges, and security of tenure, while other discussion, and the written submissions, dealt with further issues such as the lack of a resident Judge, the need for expertise in cases involving customs and land, the special jurisdictions of the Supreme Court, provision for appeals, and an office of director of public prosecutions.

Review of this Part of the Constitution must also take into account the role of the courts and the public's access to justice in Nauru at a time when the laws and institutions of the country are being strengthened. Some of the steps being taken, and some that are recommended in this Report, will provide people with legal grounds to seek the assistance of the courts in order to obtain decisions and rulings, and sometimes the redress of wrongs. Prosecution and penalties may be laid down for new offences. Greater demands may be made on the expertise and time of the courts, and the need for more professionally qualified personnel in different roles – public and private – in the administration of justice is growing. Accordingly, in formulating its recommendations, the Commission is aware of the fact that the Chief Justice does not reside in Nauru and that the shortage of legally qualified people may limit the public's effective access to rights and remedies until the situation can be improved.

In making these observations, the Commission notes that other recommendations made in this Report – such as proposals for an Ombudsman and enforcement of a Leadership Code – will, if adopted, enable people to seek redress of certain matters without having to go to court.

Many of the issues have required the Commission to explore further, to carry out research and so to direct the Constitutional Convention's attention to broader needs for changes in the law, and their implications.

Issues and Questions

In this Chapter, the Commission will address the issues under the following Sections:

1. Judicial Power and the Independence of the Judiciary
2. Appointment of Judges
3. Age on Appointment and Retirement

4. Security of Tenure and Removal from Office
5. Lack of Resident Judge
6. Customs and Land Matters
7. Special Jurisdictions of the Court
8. Enforcement of the Constitution
9. Appeals
10. Office of the Director of Public Prosecutions

Section 1 – Judicial Power and the Independence of the Judiciary

The ways in which the courts are described in the Constitution, including the amount of emphasis placed on their status and the protection given to their tenure, are all measures of how much independence the people want their judicial system to have.

Article 48(1) is a modest statement –

Supreme Court of Nauru

48.-(1.) There shall be a Supreme Court of Nauru, which shall be a superior court of record.

The Commission believes that the status and independence of the Supreme Court are best recognised by amendments to this Article which will use the language of the ‘vesting’ of judicial powers and provide clear statements regarding respect for the Court’s independence.

The three branches of government should be seen to be on equal terms under the Constitution. The executive authority of the state is ‘vested’ in Cabinet (Art 17(1)), while the Commission is recommending that the legislative power of the Republic be ‘vested’ in Parliament (Chapter 3). Constitutions in the region such as Fiji and the Micronesian states use this language for their courts.

The Judiciary cannot be effective as upholder of the Constitution unless its independence from the Executive and Legislative branches of government is protected, both in terms of the Constitution and in by practical measures. This separation of powers is essential for the Rule of Law under the Constitution, and underpins the clear concern expressed in public consultations that the people expect to be able to use the courts to ensure that the Constitution is complied with.

All three arms of the Republic are subject to the Constitution in the exercise of their respective powers. There is concern on the part of the public that there should be no interference with or pressure upon the courts, or individual judges or magistrates.

Strongly worded statements declaring the independence of the judiciary may be found in several constitutions, including those of Fiji, Marshall Islands and South Africa.

The Commission will recommend in Section 9 of this Chapter that the Supreme Court be divided into three divisions as an economical way of providing an effective appeals system.

The Commission recommends that the Article 48 be revised and added to as follows:

Supreme Court of Nauru

48.-(1.) There shall be a Supreme Court of Nauru, which shall be a superior court of record. The judicial power of Nauru shall vest in the Supreme Court, and in such other courts as Parliament may from time to time establish by law.

(2.) The Supreme Court shall be a superior court of record and shall have, in addition to the jurisdiction conferred on it by this Constitution, such jurisdiction as is prescribed by law.

(3.) The Supreme Court consists of a trial division, a constitutional division and an appellate division.

(4.) The Chief Justice may make and publish and may amend rules governing the Supreme Court and its divisions and other courts established by law.

(5.) An order or decision issued by a court binds all persons to whom it applies including the Republic.

(6.) The Supreme Court and other courts are independent and subject only to the Constitution and the law.

(7.) Neither the Republic nor any person must interfere with the functioning of the courts.

(8.) The Republic, through legislative and other measures, must assist and protect the Supreme Court and other courts to ensure their independence, impartiality, dignity, accessibility and effectiveness.

Section 2 – Appointment of Judges

Article 49 provides for the appointment of judges by the President and the required qualification for appointment which is at least five years' entitlement to practice as a barrister and solicitor in Nauru. The public's views varied from retaining the current system of appointment to proposals that would involve the Speaker or Cabinet in judicial appointments. At one of the public consultations a view was expressed that the Chief Justice should not be appointed by the President because he might feel a sense of loyalty or obligation to the President that could impair his impartiality. Other suggestions were that the appointments or recommendations for appointment should be made by Cabinet, or by an appointments Board. Some members of the public would like to see the Parliament (through the Speaker) make judicial appointments.

The appointment of judges in other countries of the region is different to that practiced in Nauru. Most have a judicial services commission that makes or recommends appointments of judges. In the Marshall Islands, judges are appointed by Cabinet on the recommendation of the judicial services commission. In Kiribati the Beretitenti appoints the Chief Justice on advice of Cabinet after consulting the public service commission. In Tuvalu, the Chief Justice is appointed by the Head of State on Cabinet's advice and the other judges on Cabinet's advice after consulting the Chief Justice. In other words, a consultative process is the norm.

It can safely be assumed that it would be unusual for the President not to consult his colleagues in Cabinet on judicial appointments. The appointment of the Resident Magistrate under the *Courts Act* is made by the President in consultation with the Chief Justice. Similarly, a provision in the Constitution requiring the President to consult Cabinet before appointing a Judge would be more transparent and add integrity to the system of judicial appointments.

The Commission recommends that clause 2 of Article 49 be amended as follows:

(2.) The judges of the Supreme Court appointed under this Article and Article 53 shall be appointed by the President after consultation with the Cabinet.

More needs to be said about judicial appointments. The current practice of appointing Chief Justices under Article 53 in an acting capacity in order to avoid the retirement age restriction is not satisfactory, and is discussed further in the next Section.

Section 3 –Retirement age

During the public consultations, the ages of the Chief Justices attracted some attention. One view was that the Chief Justice should be at least 60 years on appointment. As to retirement, opinions varied on the compulsory retiring age, from the current 65 years to 75 years. Another suggestion was for judges to have regular medical checks to ensure that they remain alert and healthy. Article 50 (1.) says:

Vacation of office

50-(1.) A judge of the Supreme Court ceases to hold office on attaining the age of sixty-five years or, if a greater age is prescribed by law for the purposes of this Article, on attaining that greater age.

No greater age has been prescribed.

A review of constitutions of the region indicates that, normally, there is no specification of age on appointment and that practice is divided on the subject of compulsory age of retirement between those countries which specify an age of in the vicinity of 70 years, and those which stipulate no retirement age at all. It is a well known fact that there are a number of judges serving in the Pacific who, when they retire from active legal practice, have several working years left in their lives. They are able to make a useful contribution, especially in the many countries where the local legal profession is small.

Chief Justices have regularly been persons over 65 years old or likely to become so during their term of office. The Chief Justices appointed since independence have all resided overseas and have visited Nauru four or more times a year for sittings of the Court. The current Chief Justice resides in Kiribati.

The shortage of suitably qualified persons resident on Nauru, and the non-availability of expatriates of a suitable age under 65 years, have caused the appointment of expatriate judges in an acting capacity under Article 53, which is designed for acting appointments which are exceptions to the general rule of appointment under Articles 49 and 50(1). Clauses (2) and (3) of Article 53 empower the President to make an appointment to the office of Judge or Chief Justice when there is a vacancy, when the incumbent is unable to perform his duties, or if the state of business of the Court requires it, even if the person to be appointed is over 65 years.

The Commission considers that the regular use of the ‘acting’ provisions of the Constitution for substantive appointments is inappropriate, and that whenever possible appointments to judicial office in the Supreme Court should be made under Article 49.

The Commission sees no reason to impose a limitation as to age on *appointment*, but in relation to *retirement*, the Commission recommends that the regular retiring age be increased to 70 years.

The Commission recommends that Art.50(1) be amended to read:

Vacation of office

50-(1.) A judge of the Supreme Court ceases to hold office on attaining the age of ~~sixty-five~~ seventy years or if a greater age is prescribed by law for the purposes of this Article, on attaining that greater age.

Section 4 – Security of Tenure and Removal from Office

Security of tenure of office and removal from office are interrelated and are important to the question of the independence of the judiciary. Security of tenure involves a ‘bundle’ of terms and conditions of appointment including remuneration, and it is noted that these are not to be altered to the disadvantage of a judge during the term of his appointment (Article 65(3)). Since 1968, the judges have been appointed under contractual terms and, as discussed in the previous Section, most have been of a greater age than 65 (as ‘acting’ judges under Article 53). Suggestions received by the Commission from public discussion and written submissions indicate the view that, in the interests of security of tenure of office, appointments of judges should be for terms and not subject to removal except through established procedures. This view is endorsed by the Commission.

Article 51(1) of the Constitution provides that a judge of the Supreme Court may not be removed from office except on a resolution of Parliament approved by not less than two-thirds of the total number of members of Parliament praying for his removal from office *on the ground of proved incapacity or misconduct* (emphasis added).

Most Pacific constitutions secure the appointment of judges until they reach retiring age. A judge's term of office may only be shortened as a result of misconduct or incapacity (and, in some cases, criminal conviction or incompetence). It is the legislature which makes the decision, but only after an inquiry has been carried out in order to establish the facts and determine whether the charges against the judge in question have been proved.

In Kiribati (s 83) a judge may be removed for misbehaviour or inability to discharge his/her office on a resolution of the Maneaba ni Maungatabu – but this can only occur on the recommendation of the tribunal established for the purpose. The Solomon Islands (s 80) has a similar requirement for a tribunal. A judge in Fiji (s 138) may be removed from office for inability to perform his functions or for misbehaviour but the President may remove the judge only on the advice of a tribunal (for misbehaviour) or a medical board (for inability to perform his office). During investigation the judge is suspended from office. In some countries such as Vanuatu and Marshall Islands, the decision is in the hands of the legislature but the constitution is silent as to how the charges against a judge are to be established.

It would be entirely inappropriate for a legislature to try to transform itself into a court or tribunal in order to put senior office bearers such as judges on trial. The nature of charges like misconduct, misbehaviour, incompetence and incapacity is that they are normally proved beyond reasonable doubt in a court of law presided over by a judge where witnesses are called to give evidence on oath and the parties have lawyers conducting arguments over facts and law. Could a judge be appointed to preside in a parliamentary trial where lawyers would appear in Parliament? Kiribati, Solomon Islands and Fiji do not think so.

Some jurisdictions such as New South Wales in Australia have set up separate permanent commission to deal with complaints against members of the judiciary at all levels, but that would be beyond Nauru's means.

It is clear that a tribunal, panel or person is needed to conduct the necessary inquiry to establish whether allegations against a judge are proved. If the allegations are proven, and if the legislature passes the necessary resolution, then, the person who is responsible for making the appointments, such as the President in Nauru, would remove the judge from office. Such a mechanism could be provided for by statute, to be appointed only when a particular case arises to be dealt with by the tribunal. In the meantime, Nauru does not appear to have the legal framework in place to enable it to remove a judge from office.

An added complication for Nauru is that it has only one Supreme Court judge, the Chief Justice, and if action is to be taken to remove him, another judge will need to be appointed first in order that the latter may preside over the tribunal hearing. In an emergency, the next most senior judicial officer, the Registrar, could be appointed.

In order to remedy this deficiency in the law of Nauru, legislation is essential.

The Commission recommends that laws be made for the establishment of a tribunal presided over by a judicial officer to which evidence supporting a case for removal of a Supreme Court judge may be presented, for hearing, determination and report to Parliament. Such laws could be drafted so as to support Article 51(1) without the need for constitutional amendment.

Section 5 – Lack of Resident Judge

Over the years, Nauru has managed with one Judge, the Chief Justice, and, due to the absence of any suitably qualified Nauruan, the office has been held by an experienced lawyer (usually retired from judicial office or private practice) from Australia or New Zealand. The Chief Justices have not been employed full-time by Nauru, and have sometimes held judicial office in one or more countries in addition to Nauru. They have not been permanently resident on Nauru. The present Chief Justice of Nauru, Hon. Robin Millhouse QC, is an Australian resident in Kiribati, where he is also Chief Justice of that country. His practice is to visit Nauru four or more times a year, depending on demand. Generally speaking, these arrangements have served Nauru reasonably well in terms of securing experienced and competent people, particularly during times when air services to and from Nauru were frequent.

As indicated in the Introduction to this Chapter, and as is apparent from discussion in several places in this Report, the situation today and in the foreseeable future is that greater demands are being placed upon the judicial system. Need for access to a judge on Nauru was mentioned in several submissions to the Commission and at the public consultations, as also was the concern that a Nauruan national should be appointed.

Currently, there are few legally qualified lawyers on Nauru, with few, if any, prospects of increasing the local pool. Those lawyers possessing judicial authority, and who meet the five-years of practice qualification (Article 49(3)) to be a judge, are the Registrar of the Supreme Court and the Magistrate presiding in the District Court. The Registrar has limited powers under Rules of Court to exercise a judge's authority 'in chambers' (ie not in the public court) and he typically deals with procedural matters, referring decisions to the Chief Justice. He has no jurisdiction in constitutional matters. The Magistrate has no authority to exercise powers of the Supreme Court.

There is no clear constitutional basis for dealing with urgent applications and cases which may arise when the Chief Justice is not on Nauru. Article 53, which has been discussed above, is designed to authorise the President (after consultation with Cabinet) to appoint an acting judge when the person holding the office is unable to perform his duties or if the state of business of the Supreme Court so requires. It would be preferable for certain officers to have appropriate powers conferred initially as part of their standing responsibilities, to be exercised as and when required, without waiting for the President and Cabinet to act.

In some countries such as Solomon Islands, Cook Islands, Kiribati and Niue, the office of 'Commissioner of the High/Supreme Court' has been created so that certain powers can be exercised during the absence of the Chief Justice. For example, under the Kiribati Constitution (s.84), the President, on the advice of the Chief Justice, may appoint a person qualified to practise law in Kiribati –

“to perform:

- (a) all or any of the functions of a judge of the High Court either generally or in respect of any particular case or class of cases; or*
- (b) such functions of a judge of the High Court as it shall appear to the person appointed under this section are required to be performed without delay,*
subject to such limitations and conditions, if any, as may be specified in the instrument of appointment.

A person appointed under this section shall be called a Commissioner of the High Court, and all things done by him in accordance with the terms of his appointment shall have the same validity and effect as if they had been done by a judge of the High Court and in respect thereof he shall have the same powers and enjoy the same immunities as if he had been a judge of the High Court.”

The Commission regards the issue of the shortage of judicial authority as an important one for the full implementation of the Constitution and the effective administration of justice in this country generally.

The Commission recommends that, as a matter of some urgency, Government should give attention to measures directed to improving Nauru’s judicial capacity, including –

- conferring certain additional powers on the offices of Registrar and Magistrate, as mentioned above;**
- creating the office of Commissioner of the Supreme Court, which may be performed in addition to other responsibilities such as those of Registrar and Magistrate, or by a legally qualified member of the private legal profession; and**
- empowering the Chief Justice to supervise more complex proceedings from a distance, provided electronic, and ideally, audio-visual, communications can be established and relied upon.**

Section 6 – Customs and Land Matters, and Juveniles

The Chief Justice handles many land appeals and applications to revisit certain land decisions by the District Court or the Nauru Land Committee. Some decisions of the Supreme Court are criticised for lack of understanding of land matters and customary practices related to land. This leaves a number of litigants dissatisfied or feeling left out by such decisions. The public discussions and submissions received have proposed that persons with expertise and knowledge of customs and land practices should preside over these cases. The notion is that the expatriate judge is not familiar with Nauruan customs and practices and may import alien principles into the customary system of land tenure. Perhaps the basis of the submission is that an expatriate judge might have difficulty applying principles of Nauruan customs on land because he is steeped in the English common law concepts of real property.

Previous Chief Justices have developed in a short time an appreciation of the intricacies of Nauruan land customs and traditions and this is reflected in the judgments handed down by the court. For some other countries it is not the case. Nauru is not the only country that has to grapple with the place of customs and traditions as against statutory and received law. The requirement for a judge to be conversant in customs and land matters is addressed in the various Pacific jurisdictions through the establishment of special lands and titles courts (Samoa), traditional rights courts (Marshall Islands), recognition of traditional leaders role (FSM and Palau), and village or island courts (PNG and Vanuatu). In Vanuatu, Parliament may provide for persons knowledgeable in custom to sit with the judges of the Supreme Court or the Court of Appeal and take part in its proceedings. These Pacific models could be considered for Nauru but, as noted by the Commission in Chapter 9 of this Report, this is a matter that is best

addressed in a separate review of land tenure and administration. The issue could be addressed by ensuring the judge to be appointed does have some background in dealing with land issues. The region has now developed much national judicial expertise that could be drawn upon when making appointments. Alternative means of dispute resolution may also be considered.

Juvenile Delinquency

An issue that came up in the public discussion on the Constitution is the problem of dealing with juvenile delinquency. There is an expressed desire to establish a Children's Court under the Constitution to deal with children of 16 years and under. Another idea is the establishment of a children's detention centre. These matters may be relevant to Nauru's international obligations under the *Convention on the Rights of the Child*. They appear to be important for the welfare and proper up-bringing of young people. They concern government policy and the involvement of the community, but not the Constitution for the purposes of this review.

Section 7 – Special Jurisdictions of the Court

In addition to its inherent powers as a court of superior record, the Supreme Court has specific jurisdictions under the Constitution over the following constitutional matters, which may be called special jurisdictions. In summary they are:

1. Determining questions arising under or involving interpretation or effect of a provision of the Constitution – Article 54(1)
2. Determining such questions removed from other courts to the Supreme Court – Article 54(2)
3. Giving opinion on any question concerning interpretation or effect of a provision of the Constitution sought by the President or Minister with Cabinet's approval – Article 55
4. Enforcing a person's rights under Part II of the Constitution at the suit of a person having an interest in their enforcement – Article 14(1)
5. Determining questions concerning a person's right to be or to remain a member of Parliament – Article 36

The Supreme Court's jurisdiction listed in all of the above is either stated to be 'original and exclusive' (Art 54(1)), or is expressly conferred on that Court with the implication that no other court may exercise any of these powers.

If the recommendations of this Report are adopted and become law, there will be three further tasks for the Court, the Chief Justice or a Judge, which will be special in the sense that they concern the working and effect of the Constitution. They are -

- a). Enforcing a person's right or entitlement under any provision of the Constitution (see Section 8, below)
- b). Reviewing the validity of declarations of emergency and emergency Orders (see Chapter 10, Section 5, proposed clause 78(6.)); and

- c). Enforcing the Leadership Code (see Chapter 12; although the proposed provisions on the Leadership Code do not expressly vest jurisdiction in the Supreme Court, it is envisaged that Parliament would provide for appeals from the Leadership Tribunal to the Supreme Court)

The Commission is aware of the undesirability of overburdening the judicial capabilities of Nauru by introducing new causes of action and jurisdictions, and does not make these further recommendations lightly. However, in the Commission's view, the Government has an obligation to provide judicial support for the important reforms recommended in this Report. The previous Section 5 has indicated ways in which this might be done.

The Commission recommends that, despite concerns about resources, legislative and administrative effect should be given to implementation by the Court of proposals relating to enforcement of the Constitution and the Leadership Code.

Section 8 – Enforcement of the Constitution

Enforcement of the Constitution by the Supreme Court for breaches of constitutional provisions is seen as an important element in its role as the guardian of the Rule of Law and protector of the people's rights. Claims that breaches of the Constitution have occurred may require the Court to review the validity of laws or rules, or any executive or administrative action and where justified make the appropriate declarations and/or orders.

The Supreme Court already has inherent authority under common law to exercise 'judicial review' but there are significant hurdles, jurisdictional and procedural, for potential claimants to overcome. The common law was developed under the English constitutional system where there was no written constitution and Parliament was regarded as 'sovereign' having originally derived its authority from the 'crown'. As constitutional law developed around the world, particularly following upon revolutions against monarchies, and international agreement on independent statehood under written constitutions, it became accepted that the constitution was 'supreme' because it derived its authority from the people. That was the position in the USA, Canada, Africa and India, and it has been followed in the Pacific ever since Samoa and Nauru became independent in the 1960s. Accordingly, the Court may be required to test all government activity (President, Cabinet and public service) and all law-making activity (Parliament) against the precise words of the Constitution which the people have adopted as their highest law.

However, old ways of thinking die hard, and trying to use common law procedures to enforce constitutions is often an expensive and uncertain process. Problems also arise when there is lack of clarity as to how apply the 'constitution test', and when people have difficulty in accepting the consequences of doing something, or making a law, which is in conflict with the Constitution. The short answer is that actions and laws which are in breach of, or are inconsistent with, a provision of the Constitution are done or made 'beyond the power to do so' or, as lawyers put it, *ultra vires*. The consequence is that they are invalid – as if they were never done or made.

There have been three recent examples in Nauru. In 2003, the Supreme Court ruled that the Speaker cannot use his authority to override the provisions of the Constitution that require a vote of a majority of members of Parliament in order to remove the President from office (*Constitutional Reference No. 1 of 2003*). In the 2004 *Emergency Case*, the Supreme Court was asked to rule whether, in constitutional terms, the President had validly exercised his powers when he dissolved Parliament during the 2004 state of emergency. The Court decided that he had. Thirdly, in the so-called *Grass Roots Case* decided in 2006, the Supreme Court ruled that certain sections of an Act of Parliament were inconsistent with the Constitution and that therefore Parliament had exceeded its power in passing them into law. The Commission understands that there was considerable doubt and confusion surrounding these cases, on the part of the parties involved as well as the public.

At the public consultations and in written submissions leading to this Review, there was a clear call for greater enforcement of the Constitution. Failure to maintain constitutional standards in the past was seen as the root of many problems. The Commission proposes that new provisions be written into the Constitution that are designed to provide access to the courts for ordinary citizens who are affected by breaches of the Constitution.

It is now recognised in some countries that it is more straightforward for the Constitution to provide a simple right of action against a person, corporate body or government that breaches the Constitution. Also, a distinction is made between complaints to the Supreme Court to enforce a human right and applications to the Court for a remedy for a breach of any provision of the Constitution. Nauru has the former, for which see discussion of Article 14 in Chapter 2. Some countries have both. For examples of the latter more general type of application, which Nauru lacks, one may turn to the Marshall Islands, Solomon Islands and Kiribati.

The Marshall Islands provision (Article I s 4) is useful for its broadly expressed terms. Under the heading ‘Enforcement of this Constitution’ it says, in effect, that any person directly affected by an alleged violation of a provision of the Constitution, whether by private individuals or public officials, has standing to complain of the violation in a case or controversy that is the subject of court proceedings, and that any court which is dealing with the case or controversy has the power ‘to make all orders necessary and appropriate to secure full compliance with the provision and full enjoyment of its benefits’.

The High Court of Solomon Islands (s 83) and the High Court of Kiribati (s 88) may hear an allegation by any person affected by a contravention of a provision of the Constitution, may declare whether a contravention has occurred and may grant any remedy the Court thinks appropriate.

The Commission has drafted wording for the Nauru Constitution, drawing on the Solomon Islands and Kiribati Constitutions, which the Constitutional Convention may find acceptable.

The Commission recommends that the following clauses be added to Article 54.

(4.) Subject to this Constitution, if any person alleges that any provision of this Constitution (other than Part II) has been contravened and that his interests are being or are likely to be affected by such contravention, that person may apply to the Supreme Court for a declaration and for relief under this section. An application under this clause is without prejudice to any other action with respect to the same matter which is lawfully available.

(5.) The Supreme Court shall have jurisdiction, in any application made by any person in pursuance of clause (4) or in any other proceedings lawfully brought before the Court, to determine whether any provision of this Constitution (other than Part II) has been contravened and to make a declaration accordingly;

Provided that the Supreme Court shall not make a declaration in pursuance of the jurisdiction conferred by this clause unless it is satisfied that the interests of the person by whom the application under clause (4) is made or, in the case of other proceedings before the Court, a party to those proceedings, are being or are likely to be affected.

(6.) Where the Supreme Court makes a declaration in pursuance of clause (4) that any provision of the Constitution has been contravened and the person by whom the application under clause (4) was made or, in the case of other proceedings before the Court, the party in those proceedings in respect of whom the declaration is made, seeks relief, the Supreme Court may grant to that person such remedy including compensation, being a remedy available against any person in any proceedings in the Supreme Court under any law in force in Nauru as the Court considers appropriate.

There is a further matter to be dealt with, namely a statutory obstacle to taking action in court against the Republic, or any part of the government's operations.

During the public consultations phase, many people expressed concerns about a provision in the *Republic Proceedings Act 1972* (section 3) which precludes a person from bringing an action against the Republic without the consent of Cabinet. This outdated law which has blocked the enforcement of rights risks undermining the integrity of the legal system. The public's clearly stated view is that a person who has suffered harm caused by the Republic should not be prevented from taking action in court against it. As the legislature has not taken action to amend the *Republic Proceedings Act* despite concerns voiced for some years, the Commission recommends clarification in the Constitution itself, in the manner set out in two places in this Report. Both the right to bring an action against the Republic, and the right to enforce any resulting order or decision of the court are needed. The right to bring an action is dealt with in Chapter 2 Section 1, where a new clause 9A is recommended for Article 10. Enforcement should be addressed in the terms set out below.

Nevertheless, it is noted that, after the requirement for Cabinet consent in section 3 has been dealt with, some other provisions of the Act should be looked at by government. These further provisions appear to protect the Republic from liability or enforcement in certain situations that may be normal in international practice, but they should be examined with a view to ensuring that they remain standard, necessary in today's conditions, and acceptable to the people.

The Commission recommends that the following new clause be inserted in Article 48:

(5) An order or decision issued by a court binds all persons to whom it applies, including the Republic.

Issues remain with regard to a person's right to have access to justice generally through the court system, itself a fundamental right. In addition to being able to use the law as the legal foundation of a claim in court, access to justice involves access to professional legal services, an expeditious determination process, simple court procedures, reasonable costs and charges, financial assistance where required, and ease of enforcement of judgments, decrees or court

orders. These matters are best dealt with by legislation, and the Commission recommends that, in addition to providing a basic right to access to justice (see Article 10 in Chapter 2 Section 1 referred to) the government should give consideration to reviewing Nauru's capacity to serve its citizens adequately in this area, as indicated in the Introduction to this Chapter and Sections 5 and 7.

Section 9 – Appeals, and Divisions of the Supreme Court

Another aspect of the Commission's consideration of Part V of the Constitution relates to the current appeals system. Nauru has no 'Court of Appeal' as such and there is no constitutional authority for one. Currently appeals from the Supreme Court go straight to the High Court of Australia in certain cases, under Article 57(2) treaty arrangements between Nauru and Australia. This has the tendency to discourage appellants from appealing beyond the Supreme Court because of distance and costs. Under Article 57(1) Parliament can provide for appeals from one judge to two in the Supreme Court, but has not done so. Parliament also has the power under Articles 48(2) and 56 to make laws for appeals from the District Court to the Supreme Court, which it has done in the *Appeals Act 1972*.

Two written submissions raise the issue of appeals to the High Court of Australia. One contended that this is an expensive and difficult process and suggested that appeals may perhaps be made to a regional court with a title 'Pacific Appeals Court'. The other submission referred to a regional panel of appeal judges. This is, in effect, what each of the smaller countries already has – its own list of judges in the region from which it can call on those it needs to visit once or twice during the year to sit on its appeal court. There is no need for a separate 'Pacific' court. As far as Nauru is concerned, there appear to be no cost or other advantages in an established regional system, and the Commission does not recommend further consideration of it.

The Commission finds that in most Pacific constitutions there is an independent appeals system each with a hierarchy of courts (from three levels in Fiji to one appeal level in Kiribati, Marshall Islands and Solomon Islands). In the Micronesian states, use is made of an appellate jurisdiction of the Supreme Court (FSM and Palau).

Nauru needs an economical and easy-to-use appeal system. The current lack of such a system is contrary to the principles of natural justice which require that an appeal should always be available from the judicial officer who conducted the initial trial of facts and law. The Commission proposes that the Micronesian concept of splitting the Supreme Court into divisions be adapted for Nauru, as the simplest and the least expensive and most resource-effective way of proceeding.

An amendment to Article 48 is the suggested method of establishing an appeals mechanism. The separation of the Supreme Court into three divisions – a trial division, a constitutional division and an appellate division – is proposed. The same single judge, namely the Chief Justice, would sit alone in the trial and constitutional divisions, while additional judges would only be needed for the appellate division. The existing Registrar, Supreme Court buildings and infrastructure would administer the three divisions, with very little, if any, additional demands upon them as a result of the splitting of the Court.

The appellate division of the Supreme Court would be the final appeal court for Nauru, and Nauru's highest court. It would hold sittings on Nauru as and when required, and would

comprise only two judges (neither of whom could have been involved in the case being appealed from) instead of the more common number of three – on grounds of cost – and the two would be chosen by Cabinet in consultation with the Chief Justice from a list which is compiled and kept by them, to visit Nauru as and when required (which might be only once or twice a year). Appeals from the trial division (constituted by one judge) would lie to the appellate division in criminal matters as of right, and appeals in other matters in the trial division, or in the constitutional division would lie by leave of the division appealed from or by special leave of the appellate division.

The appellate division would also function as a final appeal court from the lower courts in certain circumstances. Appeals from the District Court would go to the trial division, and only on to the appellate division on points of law or public importance. The *Courts Act 1972* and the *Appeals Act 1972* would need to be amended to take account of the proposed new constitutional arrangements.

Appeals from the Nauru Lands Committee now go up to the Supreme Court (constituted by one judge) by way of a full rehearing of the evidence before the Court. These arrangements should continue in the trial division. As at present, no further appeal is envisaged in land matters.

The Commission recommends that the Supreme Court be re-constituted into three divisions, namely a trial division, constitutional division and appellate division. The appellate division would provide all the appeal court needs of Nauru, utilising two judges selected when needed from a list of suitable judges in the region. Appeals to the High Court of Australia would be abolished.

Following upon mention of the three divisions in Section 1 above, the Commission recommends that Article 57 be deleted and replaced with the following:

Appellate Division of the Supreme Court

57. (1.) The Appellate Division of the Supreme Court has such jurisdiction and powers to hear and determine appeals from the Trial and Constitutional Divisions of the Supreme Court and other lower courts as may be conferred on it by this Constitution and as prescribed by law.

(2.) The Appellate Division shall be constituted by two or more judges.

(3.)(a) Appeals in criminal matters lie as of right.

b) Appeals in civil matters and other causes shall be by leave of the Trial or Constitutional Division, as the case may be, or by special leave of the Appellate Division.

Jurisdiction concerning the Constitution

57 A. (1.) The Constitutional Division and, on appeal, the Appellate Division of the Supreme Court, shall have jurisdiction to determine constitutional matters under Articles 14(1), 36, 54(1) and (2) and 55 of the Constitution and under such other provision as may be made by this Constitution or by law.

(2.) Appeals to the Appellate Division of the Supreme Court to which this clause applies shall be by leave of the Constitutional Division or by special leave of the Appellate Division.

Section 10 – Office of the Director of Public Prosecutions

At a time when good governance, transparency and accountability are being stressed, there is sound reason, and, in fact, clear need, to examine the role and status of the Director of Public Prosecutions (DPP). There is no separate office of the DPP. The DPP is a public officer who is appointed by the President under the provisions of the *Criminal Procedure Act 1972*.

A Director of Public Prosecutions is a lawyer who is employed by the state to supervise the prosecution of offences. In all cases other than minor offences, he reads reports from the police on their investigations including witnesses' statements and reviews both the facts that can be proven and the relevant law. His task is to pursue offenders and uphold the law through the prosecution of alleged offenders, while ensuring that the process is applied fairly and impartially to all citizens. He provides support for members of the police force who have the same objectives. For these reasons, the DPP is usually established as an independent office over which no Minister, member of Parliament, government official or department, or member of the public should have any influence.

In public discussion, people expressed concern that there have been cases where the prosecution of cases on Nauru has not been fair – either not pursued at all, or proceeded with unfairly. The Law Society's submission proposed that the revised Constitution refer to the DPP's office as a separate and independent office. The Secretary for Justice followed the same line of reasoning but added that when the DPP is away the Secretary for Justice should step in to act as DPP. The situation in Nauru is that the DPP's position has traditionally been occupied by the Secretary for Justice (the head of the Department of Justice). This not a satisfactory state of affairs, but the reality of Nauru's shortage of qualified personnel must be faced.

The Commission does not propose to change the concurrent appointment of the Secretary for Justice as DPP due to institutional and personnel constraints in Nauru. The provision of adequate resources to the office of the DPP such as trained and skilled staff, offices, office equipment, and legal materials suitable for the discharge of the functions of the DPP are vital to the issue of independence and should be addressed as part of the on-going strengthening of law and order in Nauru.

Several Pacific constitutions refer to the independent Office of the DPP. In preparing the following provisions, the Commission has been assisted by the Constitutions of Fiji (s 114) and Solomon Islands (s 91(3)).

The Commission believes it is important to lay down guidelines in the Constitution. The option favoured by the Commission is to stress the independence of the DPP, qualifications for appointment, and the control of prosecutions. It recommends that a new Article be inserted in Part V as follows -

Director of Public Prosecutions

57B.-(1.) There shall be a Director of Public Prosecutions, who is appointed by the President.

(2.) The Director of Public Prosecutions shall be a person who is qualified to be appointed as a judge.

(3.) The Director of Public Prosecutions may:

- (a) institute and conduct criminal proceedings;
- (b) take over criminal proceedings that have been instituted by another person or authority; and
- (c) discontinue, at any stage before judgment is delivered, criminal proceedings instituted or conducted by himself or another person or authority.

(4.) The powers conferred on the Director of Public Prosecutions by paragraphs (a) and (b) of clause (3) of this section shall be vested in him to the exclusion of any other person or authority: Provided that where any other person or authority has instituted criminal proceedings, that person or authority may withdraw those proceedings with the leave of the Director of Public Prosecutions.

(5)(a) In exercising his responsibilities under this Article or any law in force in Nauru, the Director of Public Prosecutions shall act independently and shall not receive any direction from the Cabinet or any other person or authority.

(b) He may exercise these responsibilities either in person or through subordinates or other suitably qualified persons acting under and in accordance with his general or special instructions.

(6.) During any period when the office of Director of Public Prosecutions is vacant or the holder of that office is for any reason unable to perform the functions of his office those functions shall be performed by a suitably qualified public officer.

(7.) The Director of Public Prosecutions shall not be removed from office except for gross misconduct, incapacity or professional incompetence.

(8.) In this Article, "proceedings" include any appeal from any judgment in any criminal proceedings before any court, or any case stated or question of law reserved for the purpose of any such proceedings to the Trial or Appellate Division of the Supreme Court.

Chapter 6: Finance

Introduction

One of the loudest and clearest messages coming from the public consultations and written submissions – perhaps in fact the loudest of all – is the public’s concern over the failure of successive governments to account for money held by them on behalf of the people of Nauru. It has not been this Commission’s function to investigate the fate of funds or complaints about moneys not accounted for. However, summaries of historical background and widely known situations in the finance area, together with scrutiny of the relevant legislation, have provided the Commission with a sufficiently clear picture of Nauru’s financial system for the Commission to be able to reach some conclusions for the purpose of its recommendations.

By way of preliminary observation, the Commission notes that the serious weaknesses in the finance and accounting area appear to have as much to do with failure to obey the existing law and observe established procedures as they do with inadequacies in the law itself, and the rules of the system.

As to the institutions of government themselves, a perceptive assessment of the direction Nauru might take towards financial recovery is offered by the Pacific economist Teuea Toatu, who wrote in 2004:

The challenging questions... are which institutions to reform and in what order? The massive loss of trust funds over a long period and the budgetary crises of recent years are central to all other problems in which the nation is embroiled and suggest that the strengthening of institutions governing the management of public finances is of first-order importance. A crucial constituent of these institutions is the Director of Audit, given the important watchdog responsibilities that this office carries in the proper management of public funds. However, in Nauru the powers of the Director of audit are vague. Moreover, its independence is not guaranteed by the Constitution. For instance, in the Constitution there is no mandatory requirement for the Director of Audit to audit public accounts and to table audit reports in Parliament. Neither is there specific mention that the Director of Audit will not be subject to the direction or control of any other person or body in the execution of its duties.

Several key areas within the financial system are governed ultimately by the Constitution and legislation made under it, and the Commission believes that considerable improvement can be gained long-term by addressing these areas. Once the legal framework has been strengthened in the manner to be suggested, it seems essentially a matter of providing all those who handle money with clear guidance, resourcing the public finance sector with the necessary expertise, and *enforcing the law* across the sector.

Issues and Questions

1. Is it necessary to make any amendments or new provisions in relation to Articles 58 and 59 concerning the Treasury Fund?
2. Are any amendments necessary in relation to Article 60 (Tax) or related matters (such as the transparency of delegated legislation?)

3. Is it necessary to make any amendments in relation to the budget, appropriation and supply?
4. Should there be a constitutional requirement for the annual preparation, audit and tabling in Parliament of all public accounts?
5. Are any amendments necessary in order to improve the effectiveness of the office of Director of Audit?
6. Should any amendments be made to Article 62 or any new provisions in relation to trust funds be inserted?

Section 1 – Treasury Fund

Article 58 provides that all revenues and other moneys raised or received by Nauru, not being revenues or other moneys payable by law into another fund established for a specific purpose, shall be paid into and form a Treasury Fund.

Article 59 requires any withdrawal of moneys from the Treasury Fund or any other fund referred to in Article 58 to be approved by Parliament. Clause (3) of Article 59 requires any law for expenditure to be recommended to Parliament by Cabinet before it can become law. Clause (4) requires the Cabinet, at least 21 days before the commencement of each financial year, to lay before Parliament estimates of the revenues and expenditures of Nauru for that year (a budget). Parliament may resolve that estimates may be presented at a later date in respect of a particular financial year.

At one of the public consultation meetings concern was raised that moneys from donor countries for specific programs are not always properly accounted for, and it was suggested that specific funds should be established for such programs and that Ministers should have to apply (by submitting a bill pursuant to Article 59(2) and (3)) if the money is to be utilised for the purpose it was meant for, and accounts should be submitted for expenditure. Some people expressed the view that if donor moneys are not more carefully spent and accounted for, Nauru's reputation will be damaged, and in the long run assistance may be withdrawn. Somehow means of compliance and enforcement should be considered. One written submission said that there is unfair distribution of aid and recommended that aid money should be used for communities in a transparent way, and all communities should receive equal consideration and priority in the distribution of funds.

At the public consultations, the public strongly indicated mistrust in their leaders' handling of public funds and raised a number of suggestions on how funds should be handled. These suggestions included the following:

- People to be informed if Government wishes to use any public fund (21 people)
- Landowners to invest their own money (6 people)
- Parliament to report to the public any withdrawals (11 people)
- Management of public funds to be transferred from Nauruan entity to professional investment managers overseas (3 people, but significantly more in relation to Article 62)
- Money received as a gift by MPs (ie 'grassroots funds') should be paid into the Treasury Fund (33 people)

Parliament should be prevented from passing laws that can erode specific funds created for specific purposes (ie to prevent a repeat of what happened to the Long Term Investment Fund which was eroded through the *Ronfin Act* without actually amending the statutory laws that govern the funds. Though this enabling section 30 of the *Ronfin Act* has been repealed, it has been suggested that provision should be inserted into the Constitution to prevent repetition in the future). More is said about this in Section 6, below.

It was also suggested that government use of Workers' Superannuation Fund in payment of government loans should be investigated to prevent future abuse of peoples' rights regarding finance.

As mentioned in the introduction to this Chapter, most of the problems relating to misuse of public funds have resulted from failure to comply with existing constitutional provisions and other laws, not from major deficiencies in those laws themselves. The Commission makes recommendations elsewhere in this Report for the improvement of ethics and fulfilment of government responsibilities, and for improved accountability mechanisms (see especially Chapter 12). The Commission is of the view that Articles 58 and 59, in so far as they relate to payment of moneys into and withdrawal of moneys from the Treasury Fund, are satisfactory in their current form if they are complied with. The Commission makes further reference to Article 59 and makes recommendations for the addition of new provisions in Article 59 relating to the preparation and tabling of accounts, in Section 4 of this Chapter.

Section 2 – Taxation

Article 60 provides that 'No tax shall be raised except as prescribed by law and a proposed law for the imposition of a tax shall not receive the certificate of the Speaker under Article 47 unless the imposition of the tax has been recommended to Parliament by the Cabinet'. This means Parliament must approve the imposition of any tax, and that the tax must be recommended to Parliament by the executive government (Cabinet). This is a common constitutional provision, empowering government to raise tax so that it has public revenue to fund public services, and insisting that no tax can be imposed without the approval of a law passed by Parliament.

There is no income tax in Nauru, which is the major tax burden on the population of most other countries. There are minor taxes such as departure tax and hotel/bed tax. This Article therefore did not generate much discussion at public consultation meetings, and was raised in only two written submissions, which recommended that there should be no tax in Nauru because the indirect tax in the form of government earning revenue from phosphate is sufficient and people are already suffering. One of these submissions said that the suggested prohibition of tax should be an Article included in the 5th schedule. One of the only concerns that was raised in relation to tax at public consultation meetings was the issue of price rises, duties imposed, licence fees levied, etc without public knowledge – or an opportunity to object – until after payment is made. This is sometimes called government by decree (or by stealth).

Subsidiary or delegated legislation (such as regulations, rules, schedules of fees, lists of charges) is made by a Minister or Cabinet pursuant to an Act which sets out a basic structure and authorises the executive to deal with the detail. Accountability principles require that such regulations, fees, etc, should be tabled in Parliament and exposed to the scrutiny of the members. The *Interpretation Act 1971* (as amended) requires all subsidiary legislation to be published in the Gazette (s.26) and provides that all regulations must be laid before Parliament within 6

sitting days from the day of publication in the Gazette (s.29(1)). If regulations are not tabled in Parliament in accordance with this requirement, or if Parliament passes a resolution disallowing regulations, such regulations will cease to have effect (s29.(2)).

Delegated legislation which goes beyond the authority given to a Minister in the relevant Act is void and of no effect, and the court has power to strike it down.

Parliament's *Standing Orders* require it to have a Standing Committee called the Subsidiary Legislation Committee ('SLC'). SO 15 requires all regulations, rules, by-laws and orders made or given under an Act to be laid on the Table of the House, and the SLC must consider and report on them. The SLC has the power to summons persons, papers and records, and take action in the House on its report.

The Commission is of the view that Article 60, as well as the existing laws in relation to subsidiary legislation, are appropriate and do not require amendment. It is important that the legal requirements relating to subsidiary legislation are known and complied with.

Section 3 – Budget estimates, appropriation and supply

Article 61 enables Cabinet to seek short term supply of revenue from the Parliament in the event that the appropriation law in respect of a financial year has not received the certificate of the Speaker on or before the twenty-first day before the beginning of that financial year. An appropriation law is the law that gives effect to the budget, by authorising the withdrawal from the Treasury Fund of the revenue set out in the budget. If the appropriation law is not passed at least 21 days before the beginning of the financial year, under Article 61 the Cabinet may recommend to Parliament a proposed law authorising the withdrawal of moneys from the Treasury Fund to meet expenditure necessary to carry on the services of Nauru after the beginning of the financial year for a period of three months or until the appropriation law comes into effect, whichever is earlier. Clause (4) provides that where Cabinet has recommended such a law and neither that law nor the appropriation law has come into operation by the start of the financial year, Cabinet may authorise the withdrawal of moneys in accordance with that proposed law (but not exceeding one quarter of the amount withdrawn under the appropriation laws in the preceding year).

At most of the public consultation meetings, the issue of supply under Article 61 was discussed, and in particular the fact that in the past it was possible to pass more than one supply bill within a financial year (ie if the budget and appropriation law failed to pass, a government could continue to pass consecutive Supply laws) but that since the passage of the *Treasury Fund Protection Act 2004*, a government is limited to one supply law. Views of the people at public consultations favoured that governments should be limited to only one supply bill for a financial year. The people also suggested that if a government fails to get its appropriation law passed before the Supply Act expires, then Parliament should be dissolved and new elections held.

The written submission of Peter MacSporran recommend a new clause (5) be added to Article (61), providing that if the both the appropriation bill and proposed supply bill fail to pass within 90 days after the end of the previous financial year Parliament shall stand dissolved, and providing for revenue to be withdrawn from the Treasury Fund to cover the period between dissolution and the meeting of the new Parliament. The Law Society of Nauru made a similar submission, recommending that Article 61 be amended to provide that failure to pass the appropriation law within three months after the start of the financial year will result in the

dissolution of Parliament. This would ‘avoid the passing of 2 or 3 supply laws’ and avoid stalemates.

In the view of some people the provisions of Article 61 give an inefficient government too much leeway, and it may therefore be necessary to further tighten the requirements and make it more difficult to get away with late estimates of revenue, expenditure and appropriation bills. The written submission of Barry Connell suggested that clause (4) of Article 61 be repealed.

The Commission notes that there have been occasions in the past in Nauru where several supply bills have been passed within a financial year, in lieu of passing an annual budget. This practice is unsatisfactory, and is no longer possible due to the restrictions imposed by the *Treasury Fund Protection Act 2004*. However the Commission sees merit in clarifying the constitutional provisions in relation to supply, rather than leaving it to legislation (which may be readily repealed) and in adopting the suggestion made by the Nauru Law Society and Mr Macsporrán. Under this model, a government would still be able to seek up to three months supply from Parliament if it fails to pass the budget by the 21st day before the start of the financial year, but if a government still failed to get its appropriation law passed three months after the start of the financial year, then Parliament would be dissolved.

This is an effective way to resolve deadlocks in Parliament, and an appropriately drastic way in view of the significance of supply. A government that is unable to pass its appropriation law has effectively lost the confidence of the Parliament, as supply is necessary in order to govern. Parliament’s confidence in the Government is expressed through granting supply, and withholding of supply is an expression of loss of confidence. If the Commission’s recommendations in Chapter 3 in relation to the popular election of President are accepted, then a motion of no confidence or failure to pass the appropriation law within three months would both have the same effect: dissolution of Parliament. However if Article 24 relating to motions of no confidence is *not* amended to provide for dissolution after successful passage of such a motion, then the effects would be different: a successful motion of no confidence would result in Cabinet losing office and Parliament seeking to elect a new President within 7 days (and dissolution if a new President has not been elected within 7 days) as is currently the case, whereas failure to pass a budget within three months would result in the dissolution of Parliament. In this latter scenario, it is therefore likely that Parliament would never get to the point of failing to pass a budget within three months, because it would simply pass a motion of no confidence first in order to avoid dissolution. The recommendations below in relation to Article 61 are therefore more meaningful if adopted in conjunction with the recommendations in relation to Articles 16 and 24 and related Articles concerning executive government, covered in Chapter 3 of this Report.

The Commission recommends that Article 61 be amended as follows:

Withdrawal of moneys in advance of appropriation law

61.-(1.) Subject to clause (2), if the appropriation law in respect of a financial year has not received the certificate of the Speaker under Article 47 on or before the twenty-first day before the commencement of that financial year, the Cabinet may, in accordance with clause (2.) of this Article, recommend to Parliament a proposed law authorising the withdrawal of moneys from the Treasury Fund for the purpose of meeting expenditure necessary to carry on the services of the Republic of Nauru after the commencement of

that financial year until the expiration of three months or the coming into operation of the appropriation law, whichever is the earlier.

(1A) There shall be no more than one proposed law under clause (1) of this Article in any financial year.

(2.) A recommendation by the Cabinet referred to in clause (1.) of this Article shall be in writing delivered to the Speaker not later than the fourteenth day before the commencement of the financial year and the Speaker shall, on receiving the recommendation, lay it before Parliament as soon as practicable.

(3.) For the purposes of clause (2.) of this Article and notwithstanding Article 40, the Speaker shall, if necessary, appoint a time for the beginning of a session, or for a sitting, of Parliament.

(4.) Subject to clause (5), where the Cabinet has recommended a proposed law under clause (1.) of this Article and neither the appropriation law nor that proposed law has come into operation on or before the commencement of that financial year, the Cabinet may authorise the withdrawal of moneys in accordance with that proposed law but the amount of moneys so withdrawn shall not exceed one-quarter of the amount withdrawn under the authority of the appropriation law or laws in respect of the preceding financial year.

(5) There shall be no more than one Cabinet authorised withdrawal of moneys under clause (4) in any financial year.

The Commission recommends that a new Article 61A be inserted as follows:

Dissolution upon failure to pass appropriation law

61A (1) Where neither the appropriation law under Article 59 nor a proposed law under Article 61(1) has come into operation within 90 days of the commencement of any financial year, the Parliament shall be dissolved by the Speaker and the President shall cease to hold office.

(2) When Parliament is dissolved pursuant to clause (1) of this Article, the Council of State may, if moneys withdrawn by the previous Cabinet under clause (4) of Article 61 have expired, authorise the withdrawal of moneys from the Treasury Fund for the purpose of meeting expenditure necessary to carry on the services of the Republic of Nauru until the new Cabinet is formed following the General Election and that Cabinet has passed its appropriation law but the amount withdrawn shall not exceed one-quarter of the amount withdrawn under the authority of the appropriation law or laws in respect of the preceding financial year.

(3) When the Council of State authorises the withdrawal of moneys from the Treasury Fund pursuant to clause (2) of this Article, a statement of the sums so authorised shall be laid before Parliament when it first meets following the general election and the aggregate sums shall be included, under the appropriate heads, in the next Appropriation Bill.

Section 4 – Annual preparation, audit and tabling of public accounts

The public's clearly expressed concern for greater accountability in government has raised questions about the tabling of accounts in Parliament so that the way in which government has handled the public's money for the financial year can be scrutinised. From the public consultations, written submissions and evidence gained in the course of its work, the Commission is obliged to make three assessments which indicate that a serious situation has existed for years, and that urgent measures are needed, including constitutional reform.

1. The first assessment is made in relation to the normal expectation of the citizens of any country that, in respect of each financial year, detailed statements will be prepared for examination of two types of accounts – namely statements of all income and expenditure of public money, and statements of the assets and liabilities of the nation. Such statements and the supporting accounts are the responsibility of accountants and accounting officers employed in the Public Service, or contracted by government to work on such accounts, all under the supervision of senior officials such as the heads of departments (designated as 'controlling officers' in legislation such as the *Audit Act 1973*).

Here it seems that over the years there has been widespread failure to comply with this expectation of citizens – on the part of government departments, government corporations and instrumentalities on Nauru and overseas, the managers of trust funds, and other handlers of Nauru money. Although the situation is improving, there is evidence that some government entities are still not complying.

2. The auditing of public accounts is a standard process well-understood by accountants and auditors, involving an independent review of the accounts by professionally qualified auditors. Because the people of Nauru rely on the Director of Audit to report adversely on poor accounting processes and lack of compliance, questions as to the how that is done, and the independence of the Director and his office, are important (and they are dealt with further in the next Section). However, it seems to the Commission that the Director of Audit's task of auditing Nauru's public accounts cannot be carried out unless the account books and other accounting records are prepared and made available to him and the auditing staff by the accounting officers throughout government departments, bodies and instrumentalities.

3. The Articles in Part VI of the Constitution dealing with government's responsibilities in the area of accounts and audit are markedly inadequate, and fail to give citizens the protection they should have in this area. This assessment can be explained in the following way.

Ultimately, the opportunity to scrutinise the annual accounts, duly audited, in Parliament reasonably soon after the end of the financial year is the method by which successive governments can be held accountable. Members of Parliament are the final guardians of the public interest. However, in the Nauru Constitution there is no obligation on government to prepare annual accounts, have them audited and laid on the table in Parliament. Indeed, it is likely that, as this is such a standard requirement in constitutions, it may have been omitted in Nauru's case by mistake.

The statutory provision regarding 'Yearly Statement of Accounts' (*Audit Act* s.10) sets out a hierarchy of obligations in relation to the preparation of statements showing both - a). 'the amounts actually received and expenditure incurred during the financial year' and b). 'the assets and liabilities at the end of that year'. Heads of Departments responsible for public moneys and

Public Officers in charge of trust funds are required to certify to the correctness of their parts of the annual statements, and the Minister of Finance, within three months after the end of the financial year, must certify and transmit them to the Director of Audit. Under s.11, the Director then has two months in which to report on his examination and audit of all accounts and send his report with certified copies of the annual statements to the Minister. Within two further weeks, the Minister must lay the report and statements on the table of Parliament. (The duties of the Director of Audit are elaborated in the next Section. In order to follow the sequence of events, the recommendation that the Director should submit his report with the statements direct to Parliament is set out here.)

Constitutional provisions concerning the tabling of public accounts appear in several constitutions including Marshall Islands (Art VIII s 5(4)) and Tuvalu (s 172). The Commission considers that the duties of the Executive and the Director of Audit with regard to the annual statements of accounts should become constitutional obligations.

The Commission recommends that requirements for the annual preparation and audit of public accounts and annual tabling in Parliament be inserted in Article 59 of the Constitution as follows:

(3A.) The Minister of Finance shall, as soon as practicable after the end of the financial year and not later than three months after that date or such longer period thereafter as Parliament may by resolution appoint, deliver or transmit to the Director of Audit the statements of accounts of the moneys of the Republic of Nauru comprising the revenues and expenditure for that year and the assets and liabilities at the end of that year.

(3B.) The Director of Audit shall, within two months after receiving from the Minister of Finance the statements of accounts for the financial year referred to in the preceding clause or such longer period thereafter as Parliament may by resolution appoint, submit to the Speaker a report on his examination and audit of all accounts relating to the moneys and assets of the Republic for the year, together with certified copies of the statements and accounts.

(3C.) The Speaker shall cause the report and statements to be laid on the table of Parliament as soon as practicable and send copies thereof to the President and Minister of Finance.

Section 5 – Director of Audit

To turn to the office of Director of Audit, its role and responsibilities, it is noticeable in the public consultations that, although some criticism was made of the Director, most blame was attributed to the system within which the Director is expected to operate. Members of the public pointed to the need for greater independence for the office, more powers of investigation and enforcement ('a watchdog with teeth!'), and, in particular, greatly increased resources in terms of experienced staff and operating funds.

The Commission has considered these key aspects of the Director of Audit's office. They are discussed here, but it will be seen that they also form part of broader consideration given to constitutional provisions in the finance area generally.

Status of the office of Director of Audit and its independence

It has been suggested that the Director of Audit become 'an Officer of Parliament'. This is a significant step to take, there are no such 'officers' in Nauru, and in order to achieve this objective, legislation and amendments to *Standing Orders* would be necessary. The Commission considers that such an office is worth creating, in order to ensure the independence of the Director of Audit from the executive and to demonstrate the Director's responsibilities to Parliament. Of course, it then becomes a matter for the appropriate parliamentary committee to take the matter in hand, and become involved in supporting the Director of Audit in relation to staffing, resources, and dealings with the executive and the public service. The appropriate committee may be the Public Accounts Committee, which is referred to below under 'Parliament's role' in relation to consideration and implementation of the Director's reports.

Removal of the Director of Audit from control of the public service and the *Public Service Act* means that the term 'office' should also be applied, in a different sense, to the Director of Audit and his staff. They constitute the Office of the Director of Audit. The staff could remain members of the public service.

Constitutional amendments in Article 66 should refer to 'Officer of Parliament', the role of the Speaker, and declare the Director of Audit's independence. Several Pacific constitutions provide for such independence for the Auditor, and those of Marshall Islands (Art.VII s.13) and Kiribati (s.114) have been drawn upon for the recommended provision for Nauru.

The Commission recommends that Article 66 be deleted and replaced with the following Article:

Director of Audit

66.-(1.) The Speaker shall nominate and, with the approval of Parliament, signified by resolution, the President shall appoint, a Director of Audit of Nauru who shall be an Officer of Parliament.

(2.) The Director of Audit shall hold office during good behaviour until he reaches the age of 70 years.

(3.) The Director of Audit may at any time resign his office by writing signed by him, addressed to the Speaker; but he shall not be removed from office except on the like grounds and in the like manner as a judge of the Supreme Court.

(4.) If the office of Director of Audit is vacant, or it appears that the Director of Audit is for any reason unable to perform the functions of his office, the Speaker shall nominate and the President shall appoint an Acting Director of Audit; and the Acting Director of Audit shall continue to perform those functions until a new Director of Audit is appointed

and assumes office, or, as the case may be, until the Director of Audit is again able to perform the functions of his office.

(5.) In the exercise of his functions, the Director of Audit shall act independently and shall not receive any direction from the Cabinet or from any other authority or person.

Responsibilities and powers of Director of Audit

Having provided in the preceding Section for constitutional responsibilities concerning tabling of annual accounts in Parliament, it is appropriate to set out the functions and powers of the Director of Audit as constitutional provisions which must be observed. Again, it has been helpful to draw on the constitutions of Marshall Islands and Kiribati, but the principal source is the Nauru *Audit Act*, key parts of which the Commission considers should have constitutional force.

At its fundamental level, auditing requires examination of the records kept by ‘accounting officers’ (all persons having the duty of collecting, receiving, disbursing or accounting for, any ‘public moneys’) whether in Nauru or overseas (ss 2, 6 and 7 *Audit Act*). The definition of ‘public moneys’ as all moneys, etc ‘raised, received or held, whether temporarily or otherwise, by or on account of the Republic’ (s.2) seems broad, but additional wording is needed in order to ensure that the Director of Audit includes within his jurisdiction the various statutory corporations and instrumentalities which are controlled directly or indirectly by the government of Nauru. The Commission suggests that, following ‘by or on account of the Republic of Nauru’ should be added ‘including statutory corporations and other instrumentalities controlled directly or indirectly by the Republic’.

Also, as some such statutory bodies have provision in their statutes permitting audit by an auditor other than the Director, it is desirable that all such private auditors be obliged to report to the Director. The *Audit Act* (s.7) which deals with statutory corporations appears to give powers to the Director only in respect of corporations the governing statute of which authorises the Director to carry out the audit.

The Commission is concerned that the Director should have full access to and responsibility for auditing the accounting records relating to public moneys, as broadly defined.

The Commission recommends that a brief statement of duties and powers be inserted as a new Article 66A, as follows:

Audit of Accounts

66A.-(1.) For the purposes of clauses (3A.), (3B.) and (3C.) of Article 59 and of this Article, “accounts of the moneys of the Republic of Nauru” includes the accounts of all departments or offices of the legislative, executive and judicial branches of government and of all statutory corporations and other instrumentalities directly or indirectly controlled by the Republic; and

“the moneys of the Republic of Nauru” includes all revenue, loan, trust, and other moneys and all stamps, bonds, debentures and other securities whatsoever raised,

received or held, whether temporarily or otherwise, by or on account of the Republic of Nauru and of all statutory corporations and other instrumentalities directly or indirectly controlled by the Republic.

(2.) The Director of Audit shall audit the accounts of the moneys of the Republic of Nauru, and, if provision is made by Act for audit by any other person of the accounts of a statutory corporation, such person shall report to the Director, who shall have access to such accounts.

(3.) The Director of Audit may exercise his responsibilities under clause (2) of this Article either in person or through appropriately qualified officers of the Public Service who are subordinate to him, acting in accordance with his general or special instructions.

(4.) For the purpose of carrying out his functions under this Article, the Director of Audit or any person authorised by him shall have full access to all public records, books, vouchers, documents, cash, stamps, securities, stores or other government property in the possession of any officer.

(5.) Nothing in this Article shall prevent the Director of Audit from –
 a). offering technical advice and assistance to any person or authority having a responsibility in relation to the public revenues and expenditure of Nauru; and
 b). performing other functions in relation to the supervision of expenditure from public funds.

The Audit

The *Audit Act* (s.6) provides a useful statement of the tests to be applied in the audit process, tests which should perhaps become more widely known and understood.

The Commission recommends that the following clause be added to Article 66A as clause (6.):

(6.) In performing the audit referred to in clause (2), the Director shall satisfy himself –

(a) that all reasonable precautions have been taken to safeguard the collection of the moneys of the Republic of Nauru and that laws, directions or instructions relating thereto have been duly observed; and

(b) that all moneys of the Republic of Nauru appropriated or otherwise disbursed have been expended and applied for the purpose or purposes for which the grants made by Parliament were intended to provide and that expenditure conforms to the authority which governs it.

Director's Reports

Constitutions typically require the independent Director of Audit to report to Parliament on the annual statements of accounts, which has been provided for in clauses (3B.) and (3C.) of Article 59 above. It is useful to add, as does the Constitution of Marshall Islands, that the Director is expected to point out any irregularities and troubling aspects of the statements. Further, however, as an Officer of Parliament, it would be the duty of the Director to inform Parliament at other times of such other matters that he believes Parliament should be aware of.

The Commission recommends that the following clauses be added to Article 66A as clauses (7.) and (8.):

(7.) The Director's report to Parliament referred to in clauses (3B.) and (3C.) of Article 59 shall –

- (a) draw attention to any irregularities in the accounts audited by him;
- (b) give consideration to the audit test prescribed in the preceding clause; and
- (c) report on the performance of the functions of the Office of Director of Audit for the relevant financial year.

(8.) The Director may, at any time, submit to the Speaker a special report on the performance of the functions of the Office of Director of Audit or on any matter of concern relating to the accounts of the Republic of Nauru, and the Speaker shall cause the special report to be laid on the table of Parliament as soon as practicable and send copies thereof to the President and Minister of Finance.

Parliament's role

The Public Accounts Committee, established under the *Public Accounts Committee Act 1992*, is charged with responsibility for examining the yearly financial statements transmitted to the Director of Audit under the *Audit Act* as well as the Director's reports to Parliament on those statements. If the Committee has any concerns, it has wide powers to inquire further and is responsible for reporting its findings and concerns to Parliament. For example, the Committee may –

- examine the financial affairs of any department or body which is required to have its accounts audited;
- inquire into any question in connection with the public accounts which is referred to it by Parliament; and
- summons witnesses and documents, and hear evidence.

The Commission recommends that the attention of members of Parliament be drawn to the importance of Parliament’s role in supporting the Director of Audit as an Officer of Parliament, independent of the Executive. Indeed, in order for the recommendations in this part of this Chapter relating to finance to have the desired effect in improving the standard of account-keeping, avoidance of corruption and observance of the law, it will be necessary for Parliament to function as the ultimate ‘watch-dog’, and report to the people of Nauru accordingly.

Enforcement

A suggestion was made to the Commission that serious and prolonged failure to comply with these provisions of the *Audit Act* should be made an offence and lead to possible prosecution. This may be a reasonable option available to Cabinet, by means of a statute passed by Parliament, if it becomes necessary to adopt a firmer policy in order to encourage the growth of a sense of responsibility for public money in the public service. However, the Commission hopes that leadership by experienced Ministers and senior officers, together with the training of accounting officers will be the first priority.

Under the *Public Finances (Control and Management) Act 1997* a surcharge may be imposed by the Minister (with a right of appeal to the District Court) on a public officer who has failed to collect or has paid out any moneys contrary to instructions, and any dishonesty in the handling of public money is already an offence. However, the concern here is with failure to follow procedures, and public service disciplinary proceedings may be more relevant.

The Commission recommends that, before introducing into the Constitution criminal penalties for failure to comply with provisions of the Constitution and the Audit Act, the government should approach the problem through offering leadership, training and discipline, at least in the first instance.

Section 6 – Trust Funds

There was a clear message from a large number of members of the public and in the written submissions that the trust fund containing landowners’ funds should not be available to Government as security and should not be used as collateral to borrow money. The fund containing landowner’s funds, and currently named the Nauruan Landowners Royalty Trust Fund, should be protected constitutionally by amendment to Article 63, which applies to that fund. The Commission understands that arrangements for the management of moneys held by Government are currently under review by Government and that new proposals will be available for discussion this year.

The Commission recommends that a third clause be added to Article 63 as follows -

Phosphate royalties

63... (3.) No moneys held in the Nauruan Landowners Royalty Trust Fund established under the Nauruan Royalty Trust (Payment and Investment) Act 1968 as amended, or held in any trust established for the same purpose, shall be lent to any entity nor may any moneys or assets held in the same fund or funds be mortgaged or charged as security for any borrowing for any purpose whatsoever.

Chapter 7: Public Service

Introduction

Part VII of the Constitution covers the public service. It is a very brief Part of the Constitution. Most of the detailed law relating to the public service is contained in the *Public Service Act 1998*. The public service comprises a number of government departments, which correspond to Ministerial portfolios, such as health and education. Although it is not specified in the Constitution, the primary function of the public service is to implement government policy, to deliver government services to the public, and generally run the administration of government. Senior public servants may also offer impartial advice to Cabinet Ministers, and make policy recommendations. The Nauru public service is the largest employer on the island.

The general concern of the people of Nauru for greater accountability and transparency in government applies not only to Cabinet, Parliament and heads of public companies and instrumentalities, but also to the public service, which is responsible for considerable expenditure of public revenue, and is responsible for service delivery to the public. A number of participants at public consultations and a number of written submissions made suggestions for improvement in relation to the public service, and these suggestions are considered below under the relevant section headings.

The head of the public service, the Chief Secretary, is created by Article 25 in Part II of the Constitution, and is given the power under Article 68 to appoint, dismiss and discipline officers of the public service (except police officers).

Article 69, which provides that Parliament *may* establish a Public Service Board and/or a Police Service Board, also makes reference to ‘the public officer in charge of the Nauru Police Force’ who has the power to appoint, dismiss and discipline police officers, subject to law. It is important to note that this Article gives Parliament the *option* of creating a Public Service Board, which would exercise the dismissal, appointment and discipline powers exercised by the Chief Secretary, but Parliament has *not* chosen to do so. Parliament *has* exercised its option to create a Police Service Board.

Article 70 provides for a Public Service Appeals Board, which can hear appeals from a decision to fire or discipline public officer. The Board is made up of the Chief Justice, who is Chairman, one person appointed by Cabinet, and one person elected from the public service by employees of the public service.

The Commission has made a number of recommendations for amendment to Part VII of the Constitution, which reflect the desire of the public for greater accountability in public administration. The rationales for these recommendations are detailed in the following sections, and the recommendations are grouped together at the end of the Chapter rather than separately at the end of each Section, so they can be viewed as a complete package.

Issues and Questions

The Commission identified the following key questions and issues for consideration in relation to Part VII of the Constitution, based on input from the public and from its own research and deliberations:

1. Should the provision creating the office of Chief Secretary (Article 25) be moved from Part III of the Constitution, which covers the President and Executive, to Part VII, which covers the Public Service?
2. Should the powers and functions of Chief Secretary under Article 68 be vested in a Public Service Board or Public Service Commission, rather than in the Chief Secretary alone? If so, should the remaining functions and duties of the Chief Secretary be detailed in the Constitution? And, if the power to appoint, dismiss and discipline public officers is to be vested in a Board or Commission rather than the Chief Secretary, how should such Board or Commission be composed?
3. Should the Constitution be amended to include basic values and principles for the public service, as part of a group of amendments that seek to improve accountability and transparency in government and public administration? If so, what should those values and principles be?
4. Should the Constitution be amended to insert more detailed provisions in relation to the Nauru Police Force?
5. If a Public Service Commission is created, is it necessary to retain the Public Service Appeals Board that is provided for in Article 70, or should the Public Service Appeals Board be abolished?

Each of these questions is addressed below, with reference to public opinion, comparative examples and the reasoning of the Commission. Recommended amendments to the Constitution are grouped together at the end of the Chapter.

Section 1 – Position of Article 25

The final Article in Part III of the Constitution is Article 25, which creates the position of Chief Secretary, who is appointed by Cabinet. The Article does not specify the powers or functions of the Chief Secretary, but says he/she shall have such powers as specified by the Constitution or by law. Under Article 68, the Chief Secretary is given the power to appoint, dismiss and discipline officers of the Public Service. The Chief Secretary is also given other powers under the *Public Service Act 1998*, for example to create and abolish temporary positions in the public service, and to grant leave to members of the public service.

In a PhD thesis written about the constitutional development of Nauru, it was suggested that Article 25 should not be part of Part III of the Constitution, which deals with the President and the Executive, but rather should be moved into Part VII of the Constitution, which covers the public service (McDowell, 1986). The rationale for this was that the Chief Secretary should not

be considered part of the Executive, but rather head of the public service. The same suggestion was made by some of the participants in the public consultation meetings.

The Commission has considered this suggestion and believes that there are sound reasons for Article 25 having been included in Part III, and thus for leaving Article 25 where it is. The Chief Secretary does function as the head of the public service, but may also perform other functions, and indeed has done so. The Chief Secretary has often served as Secretary to Cabinet. The Chief Secretary can also inform and advise Cabinet on matters of government administration.

Although the Commission does not recommend that Article 25 be moved into Part VII of the Constitution, the Commission does recommend changes in the functions and powers of the Chief Secretary, and thus amendments to Articles 25 and 68 (and related provisions), which are covered in Section 2, below.

Section 2 – Powers of appointment, dismissal and discipline

As explained in the introduction to this Chapter, the Chief Secretary has the power to appoint, dismiss and discipline officers of the public service. The Constitution contemplates the possibility of removing these powers from the Chief Secretary and instead vesting them in a Public Service Board, but it makes this optional and it has not been done. According to Article 69, such Board would be made up of the Chief Secretary, who would be the Chairperson, and at least two other people who are not members of Parliament.

Creation of a Board or Commission

The question of whether the powers of the Chief Secretary to appoint, dismiss and discipline officers of the public service should be vested in a Public Service Board was discussed at public consultation meetings. The powers of the Chief Secretary proved to be quite contentious, as many people feel that the exercise of such powers by a single individual can lead to biased decisions, and also that it enables Cabinet to readily interfere in the exercise of those powers. Some participants were of the view that although the Executive is not empowered by the Constitution to carry out the functions of hiring and firing public servants (except for heads of government departments, who are appointed by the Chief Secretary with the approval of Cabinet), Cabinet can and does take advantage of the fact that such powers are vested in one person alone by influencing the Chief Secretary to carry out his/her functions as Cabinet directs. A majority of those who expressed views on this issue had the strong conviction that the situation would improve greatly if these powers of the Chief Secretary were to be exercised by a Public Service Board, because a panel of people, rather than a single person would be less likely to be subject to interference by politicians and more likely to make fair decisions.

Participants also submitted the following ideas for consideration:

- Chief Secretary's powers should be investigated (33 people)
- Jobs should be awarded on the basis of qualifications and merit only (1 person)
- Workers' rights should not be violated (57 people)
- Departmental Heads should not be able to dismiss employees (4 people)
- Employees should have greater protection from dismissal, such as proper investigation and provision of evidence of grounds for dismissal, and a letter of warning prior to dismissal (19 people)

- Natural justice should be accorded to public servants prior to being terminated from employment (1 person)

Two people also expressed concerns that at times the advertising and recruitment processes are not sufficiently transparent, and suggestions were put forward that when there are vacancies within the public service, advertisements should be posted and circulated for at least three months prior to closing dates, and should be widely spread using all means of delivery such as:-

- Public declaration (ie notices in the *Bulletin* and the *Gazette*)
- Radio
- Local TV
- Public notice boards

At present the *Public Service Act* merely provides that ‘notice of the creation of a new office, the abolition of an office, or the variation of the classification or designation of an office under this section shall be published in the Gazette’ (s10(5)) and that where a vacancy exists which the Chief Secretary believes needs to be filled, the Chief Secretary *may* direct that a notification be published in the Gazette inviting applications for transfer, promotion or appointment and setting out the qualifications required for the office (s15(1)). Whilst such level of detail is not a matter for the Constitution, the Commission notes that these concerns were raised, in view of the significant role played by the public service and the fact that it is the major employer. The Commission’s recommendations in relation to basic values and principles governing public administration should go some way to meeting these concerns.

The written submission of Mr Peter MacSporran stated that the Chief Secretary’s post has had a marked adverse effect upon the creation of a relatively efficient public service. He recommended that the post should be abolished and the public service should be managed by a CEO. Mr MacSporran stated ‘it is... vital to get Cabinet interference out of the Public Service... and while it would make some sense to take the Chief Secretary out of the Constitution it makes no sense without comprehensive reform.’

The Commission notes that it is highly unusual for the powers of appointment and dismissal of public officers to be vested in one person alone, and that in almost every Constitution within the region there is provision for the mandatory establishment of a Public Service Commission. The Commission sees merit in the establishment of such body in Nauru, and for appropriate amendments to the Constitution to effect this. The question then is, if the power to appoint, dismiss and discipline public officers is to be vested in a Board or Commission rather than the Chief Secretary, how should such Board or Commission be composed?

Composition of the Commission

One option would be to simply take the provisions within Article 69 that relate to the possible creation of a Public Service Board, and make the creation of that body mandatory rather than optional, together with necessary amendments to Article 68. However the Commission is of the view that it would be preferable to create a Public Service Commission that does not include the Chief Secretary, and to spell out other responsibilities for the Chief Secretary, including the role as manager of the public service.

This is the approach taken in the Marshall Islands Constitution, which provides for a Chief Secretary who is the head of the Public Service and the chief administrative and advisory officer of the Government of the Marshall Islands (Article VII, section 2). The Chief Secretary is appointed by the Public Service Commission with the concurrence of Cabinet. The Public Service Commission comprises three members who are not employed in any other public office.

The Public Service Commission is appointed by Cabinet with the approval of Parliament, but (apart from the requirement that Cabinet concurs with the appointment of the Chief Secretary) in all matters concerning individual employees of the Public Service, the Public Service Commission ‘shall not receive any direction from Cabinet or from any other authority or person, but shall act independently’ (Article VII Sections 5 and 10(2)).

It is common for Public Service Commissions to comprise 3 members, including a chairperson, and for such members to be appointed for renewable terms of 3 years (see for example Samoa, Niue, Marshall Islands which have 3 members for 3 year terms, Solomon Islands has 3-5 members for 3 year terms; Tuvalu, Vanuatu and Kiribati also have 3 year terms for Commission Members, but have 4 or 5 Commissioners rather than 3). In most countries within the region, the Public Service Commission is the employing authority for the public service, responsible for the hiring, promotion, discipline and dismissal of public servants. In Kiribati these powers are vested in the President, who must act in accordance with the advice of the Public Service Commission. It is also standard to provide that Members of the Commission must be citizens and cannot be Members of Parliament or public servants, and that the Public Service Commission shall be independent.

The Commission recommends that a Public Service Commission be established, comprising three members appointed by Cabinet with the approval of Parliament. The recommendations of the Commission, which appear in the last Section of this Chapter, have in most respects drawn upon the provisions of the Marshall Islands Constitution on the Public Service Commission. One aspect of procedure has been borrowed from Niue, which provides that any decision that may be made by a meeting of the Commission can also be made by a minute signed by each Member, as this seems a sensible practical consideration in the event that one Commissioner is absent from the island.

Functions and duties of Chief Secretary

If the powers to appoint, dismiss and discipline public officers is to be transferred from the Chief Secretary to a Public Service Commission, should the remaining functions and duties of the Chief Secretary be detailed in the Constitution? Here again, the Commission believes that the approach adopted in the Marshall Islands would be appropriate for Nauru. The essence of these provisions was mentioned above. The Marshall Islands Constitution provides that the Chief Secretary is the head of the Public Service, chief administrative and advisory officer to the Government, and responsible to Cabinet for the general direction of the work of all Departments and offices of Government. The Chief Secretary may also exercise other powers and functions conferred on him/her by law. The Commission recommends that Article 25 of the Constitution of Nauru should be amended accordingly, and the recommended amendments are detailed in the last Section of this Chapter.

In the provisions that are proposed below, the Chief Secretary would be responsible for the day to day management of the public service, would be the chief administrative and advisory officer to the Government, and may perform such other functions as prescribed by law. The Chief Secretary would not be responsible for hiring and firing members of the public service, which would be the task of the Public Service Commission. The Public Service Commission would be responsible for oversight of the public service and reviewing the efficiency of the public service and would be responsible to Cabinet. The Chief Secretary and the Public Service Commission would thus have complementary roles in leading the Public Service: the Chief Secretary is

responsible for the day to day management, and the Public Service Commission is the employment authority and has a general oversight function.

Section 3 – Values and principles of the public service

The recommendations of the Commission in relation to amending the role of Chief Secretary and creating a Public Service Commission are part of a package of recommendations relating to all Parts of the Constitution, which aims to improve accountability and transparency in government and public administration. The Commission is of the view that another step towards realising this aim and meeting some of the concerns expressed by the public in relation to the public service, is to insert provisions for basic values and principles of the public service. Such provisions would serve as an important guide for members of the public service in terms of their responsibilities, and for the public at large in terms of what they should expect from the public service.

Section 195 of the Constitution of South Africa contains a list of basic values and principles governing public administration, which include requirements that public administration must be accountable, development oriented, must provide services impartially, fairly, equitably and without bias, and must employ people based on ability, objectivity, and fairness. The Commission believes that such principles, amended slightly for the context of Nauru, would be a useful addition to Part VII of the Constitution of Nauru. The Commission's recommended provision (new Article 68) is set out in the final Section of this Chapter.

Section 4 – Nauru Police Force

Only one written submission mentioned the Nauru Police Force, that of the Commonwealth Human Rights Initiative. The CHRI stated that 'stability in Nauru requires the police to have the confidence and backing of the people. Policing is an essential Public Service and it shall be done with the consent and co-operation of the public', and recommended that:

1. The Constitution should provide that it is a government responsibility to provide an accountable and responsive police service, where duty is to maintain law and order and respect the rights provided by the Constitution.
2. Police should also be accountable to the community.
3. The Constitution must set up the police service and provide its core mandate. The police are better protected from illegitimate political interference. It protects the community from the kinds of police misconduct that flows from illegitimate political interference.
4. The Constitution of Nauru must:-
 - Set out the basic political and operational responsibilities of various groups of people who are involved with the police (ensures transparency).
 - Set out the responsibility between a member of the government (policy) and office-in-charge of Police (for day to day operations).

Much of what CHRI has written on Police (and on other issues) is quite out of touch with Nauru, ie: the South African provisions that are extensively quoted are primarily concerned with the need to specify how policing is handled within a *federal system* and therefore have no relevance to Nauru. However the Commission notes that one useful aspect of the detailed submission in relation to the Police was the suggestion that the Constitution should set out the basic duties of the police force. The Commission recommends that such provision be inserted in the Constitution, and has formulated such a provision, below (see new Article 68E).

At present the Chief Secretary sits on the Police Service Board. The Commission recommends that Article 69 should be amended to provide that the Chair of the Public Service Commission (rather than the Chief Secretary) shall sit on the Police Service Board.

Section 5 – Appeals

Article 70 of the Constitution provides for a Public Service Appeals Board, comprising the Chief Justice, one person appointed by Cabinet and one person elected by public officers, which can hear appeals from a decision to remove a public officer or to exercise disciplinary control over a public officer. The Commission recommends that the Public Service Appeals Board be abolished, in view of the recommendation that a Public Service Commission be created, and that Article 70 be amended to provide that a public officer may appeal a decision of the Public Service Commission to the District Court or other subordinate court. This recommendation is based in part on the need to be conscious of human resources constraints in Nauru, and on the view that it is appropriate that appeals be dealt with by a subordinate court rather than another Board.

The Commission recommends the following amendments and new provisions in relation to the Chief Secretary and the Public Service:

Chief Secretary

25.-(1.) There shall be ~~a~~ an officer of the Public Service to be called the Chief Secretary of Nauru, who shall be appointed by the Cabinet the manager of the Public Service and the chief administrative and advisory officer of the Government of Nauru.

(2.) A Member of Parliament is not qualified to be appointed Chief Secretary.

(3.) The Chief Secretary may resign his office by writing under his hand delivered to the President and may be removed from office by the Public Service Commission acting with the concurrence of Cabinet.

(4.) ~~The Chief Secretary has such~~ In addition to other powers and functions as the Cabinet directs and as are conferred on him by this Constitution or by law, the Chief Secretary shall be responsible for the general direction of the work of all Departments and offices of government. The head of any such Department or office shall account for the work of that Department or office to the Chief Secretary, as well as to the Minister primarily responsible for that Department or office.

(5.) Notwithstanding anything in clause (2) of Article 68D, the Public Service Commission shall consult and obtain the concurrence of Cabinet before it appoints any person to be the Chief Secretary.

(6.) No appeal by any employee of the Public Service shall lie against the promotion or appointment of any person to the office of Chief Secretary.

Article 68: Delete the existing provision and replace with:

Basic values and principles governing public administration

68. (1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

- a. A high standard of professional ethics must be promoted and maintained.
- b. Efficient, economic and effective use of resources must be promoted.
- c. Public administration must be development oriented.
- d. Services must be provided impartially, fairly, equitably and without bias.
- e. People's needs must be responded to, and the public must be encouraged to participate in policy-making.
- f. Public administration must be accountable.
- g. Transparency must be fostered by providing the public with timely, accessible and accurate information.
- h. Good human-resource management and career-development practices, to maximise human potential, must be cultivated.
- i. Public administration must be broadly representative of the Nauruan people, with employment and personnel management practices based on ability, objectivity and fairness.

(2) The above principles must apply to –

- a. the public service;
- b. statutory corporations; and
- c. government instrumentalities

Public Service Commission

68A.-(1.) There shall be a Public Service Commission of Nauru consisting of a Chairperson and 2 other members.

(2.) The Chairman and other members of the Public Service Commission shall be appointed by Cabinet, acting with the approval of Parliament, signified by resolution.

(3.) At any one time, at least 2 members of the Public Service Commission shall be citizens of Nauru.

(4.) No person shall be appointed to be nor shall remain a member of the Public Service Commission if he is or becomes a Member of Parliament or a holder of any office in the Public Service.

(5.) A member of the Public Service Commission shall be appointed to hold office for a term of not more than 3 years, but shall be eligible for reappointment.

(6.) In making appointments under this Article, and in fixing the terms of office of appointees, account shall be taken of the need to ensure that there is reasonable continuity in the membership of the Public Service Commission and that the terms of individual members will not expire at the same time.

(7.) A member of the Public Service Commission may at any time resign his office in writing signed by him, addressed to the President; but he shall not be removed from office except on the like grounds and in the like manner as a judge of the Supreme Court.

(8.) The compensation of members of the Public Service Commission shall be prescribed by Act of Parliament.

Procedure of the Public Service Commission

68B.(1) At least 2 members of the Public Service Commission shall concur in any decision of the Commission.

(2) Any matter which may be decided by the Commission at a meeting may also be decided by a minute of the Commission signed by all the members.

(3) The Commission shall have the power to invite such other persons as it thinks fit to assist in its deliberations, but such other persons shall not exercise the powers of a member of the Commission.

(4) No proceeding of the Public Service Commission shall be questioned on the ground that a person who acted as a member of the Commission in relation to that proceeding was not qualified to so act.

(5) Subject to this Article and to any Act, the Public Service Commission shall determine its own procedure.

Functions and Powers of the Public Service Commission

68C(1.) In exercising its powers and functions, the Public Service Commission shall promote the values and principles governing public administration set out in Article 68.

(2.) The Public Service Commission shall be the employing authority for the Public Service and shall have the general oversight of its organisation and management and shall be responsible for reviewing the efficiency and economy of all Departments and offices of government.

(3.) Subject to any law, the Public Service Commission may prescribe and determine the conditions of employment of employees of the Public Service and shall have such other functions and powers as may be conferred on it by law.

(4.) Except as provided in clause (2) of Article 68D, the Public Service Commission shall be responsible to the Cabinet for the carrying out of its duties and the exercise of its functions and powers, and the Commission shall, as necessary, inform and advise the Cabinet in relation to any matter affecting the Public Service.

(5.) Without prejudice to clause (4) of this Article, the Public Service Commission shall, as soon as practicable after the end of each calendar year, furnish to the Cabinet a

report on the state of the efficiency and economy of the Public Service and on the work of the Commission for that calendar year. A copy of that report shall be laid before Parliament at its next session.

Appointments within the Public Service

68D.-(1) All employees of the Public Service, except members of the Nauru Police Force, shall be appointed by or under the authority of the Public Service Commission and, subject to any law, shall hold office on such conditions as may from time to time be prescribed or determined by the Commission.

(2) In all matters relating to decisions about individual employees (whether they relate to the appointment, promotion, demotion, transfer, disciplining or cessation of employment of any employee or any other matter) the Public Service Commission shall not receive any direction from the Cabinet or from any other authority or person, and shall act independently and in accord with criteria relating only to the individual's ability to perform his duties.

Nauru Police Force

68E.-(1) There shall be a Nauru Police Force.

(2) The functions and responsibilities of the Nauru Police Force are to prevent, combat and investigate crime, to maintain public order, to protect and secure the people of Nauru and their property, and to uphold and enforce the law.

~~Power of Parliament to establish Public Service Board and to make special provisions regarding police~~

Police Service Board

~~69.-(1.) Parliament may make provision for either or both of the following:-~~

~~(a) vesting the powers and functions of the Chief Secretary under clauses (1.) and (2.) of Article 68 in a Public Service Board consisting of the Chief Secretary, who shall be Chairman, and not less than two other persons who are not members of Parliament; and~~

~~(b) subject to clause (2.) of this Article, vesting in the public officer in charge of the Nauru Police Force the powers and functions of the Chief Secretary under clause (1.) of Article 68, in so far as they apply to or in respect of public officers in the Nauru Police Force.~~

~~(2.) Where Parliament makes provision under paragraph (b) of clause (1.) of this Article (a) it shall also make provision for establishing a There shall be a Police Service Board consisting of not less than three persons, who are not members of Parliament, of whom one shall be the Chief Justice, who shall be Chairman, one shall be the Chair of the Public Service Commission ~~Chief Secretary~~, and one shall be a person elected by members of the Nauru Police Force in such manner and for such terms as are prescribed by law;~~

~~(b) the power of the~~ The public officer in charge of the Nauru Police Force shall have the power to appoint persons to hold or act in offices in the Nauru Police Force, and to discipline or dismiss such officers, shall be subject to such consent, if any, of the Police Service Board as is required by law; and

~~(c) the Chief Secretary or, where Parliament has made provision for a Public Service Board, the Public Service Board, shall not exercise the powers or perform the functions under clauses (1.) and (2.) of Article 68 in so far as they apply to or in respect of public officers in the Nauru Police Force.~~

(3.) An appeal lies to the Police Service Board from a decision of the public officer in charge of the Nauru Police Force under this Article to remove a public officer from office or to exercise disciplinary control over a public officer at the instance of the public officer in respect of whom the decision is made.

(4.) The Police Service Board shall exercise such other powers and functions as are conferred on it by law and shall, subject to this Article and any law, regulate its own procedure.

(5.) Except as otherwise provided by law, no appeal lies from a decision of the Police Service Board.

Public Service Appeals Board

~~70. (1.) There shall be a Public Service Appeals Board which shall consist of the Chief Justice, who shall be Chairman, one person appointed by the Cabinet and one person elected by public officers as prescribed by law.~~

~~(2.) A member of Parliament is not qualified to be a member of the Public Service Appeals Board.~~

~~(3.) A member of the Public Service Appeals Board ceases to hold office—~~

~~(a) upon being elected a member of Parliament;~~

~~(b) if he was appointed by the Cabinet, upon being removed from office by the Cabinet or upon resigning his office by writing under his hand delivered to the President; or~~

~~(c) if he was elected by public officers, upon the expiration of the term for which he was elected, upon being removed from office in the manner prescribed by law or upon resigning his office by writing under his hand delivered to the Chief Secretary.~~

~~(4.) Whenever a member of the Public Service Appeals Board, other than the Chief Justice, is unable for any reason or ineligible under clause (5.) of this Article to perform the duties of his office, the Cabinet may—~~

~~(a) if the member was appointed by it, appoint a person who is not a member of Parliament; or~~

~~(b) if the member was elected by public officers, appoint, subject to such conditions, if any, as are prescribed by law, a person,~~

~~to act as a member of the Public Service Appeals Board during the period of the inability or ineligibility of the member.~~

~~(5.) Parliament may provide that a member of the Public Service Appeals Board, other than the Chief Justice, is ineligible to act in relation to such matters as are prescribed by law.~~

~~(6.) Except where an appeal lies to the Police Service Board under Article 69, an appeal lies to the Public Service Appeals Board District Court or other subordinate court from a decision to remove a public officer or to exercise disciplinary control over a public officer at the instance of the public officer in respect of whom the decision is made.~~

~~(7.) The Public Service Appeals Board shall exercise and perform such other powers and functions as are conferred on it by law and shall, subject to this Constitution and any law, regulate its own procedure.~~

~~(8.) Except as otherwise provided by law, no appeal lies from a decision of the Public Service Appeals Board.~~

Chapter 8: Citizenship

Introduction

Part VIII of the Constitution covers citizenship. In essence, what this Part does is guarantee citizenship to certain categories of people, and empower Parliament to pass laws relating to citizenship.

Article 71 provides that anyone who was a member of the Nauruan Community before independence becomes a citizen of Nauru upon independence and thereby replaces the concept of membership of the Nauruan Community with the legal status of citizenship. Article 72 provides that a person born after Independence is a Nauruan citizen if his parents are Nauruan citizens or if he is born of a marriage between a Nauruan citizen and a Pacific Islander. Parliament has broadened the category of children entitled to Nauruan citizenship by providing that ‘a child of a Nauruan’ is a citizen – meaning that one Nauruan parent is enough to entitle a child to Nauruan citizenship. Article 73 provides Nauruan citizenship to a child born in Nauru who would not, but for this provision, have the citizenship of any country. Article 74 provides for the citizenship of a non-Nauruan woman married to a man who is a Nauruan citizen.

Article 75 provides that Parliament can make laws granting citizenship to persons who are not already eligible under the Constitution, and can make laws for the renunciation of Nauruan citizenship and for depriving a person of his Nauruan citizenship, except that it cannot take away the citizenship of any citizen covered by Article 71 (member of the Nauruan Community before Independence) or 72 (a person born of Nauruan parents or to a Nauruan and a Pacific Islander).

The citizenship entitlements provided in the Constitution cannot be *removed or restricted* except by amending the Constitution, but they can be *added to or expanded* by legislation. Article 75 enables Parliament to broaden or expand these entitlements, and to give citizenship rights to people who would not otherwise be citizens under the Constitution. Parliament has used the power granted by Article 75 to pass the *Naoero Citizenship Act 2005*. The Act provides that a child with one Nauruan parent is a Nauruan citizen; it enables any person married to a Nauruan for more than ten years who has lived in Nauru for a continuous period of at least three years to apply for Nauruan citizenship; it provides that Nauruan citizens may hold the citizenship of one or more countries other than Nauru; and it abolishes the category of ‘citizen investor’ (a person can no longer apply under this category, but those who acquired such citizenship prior to the Act are entitled to retain their citizenship, subject to the *Citizenship Act* provisions for deprivation of citizenship). The Act also makes provision for the renunciation and deprivation of citizenship.

This Act does not have the effect of changing the Constitution, but rather it is a supplement to the existing constitutional provisions in relation to citizenship. This means that in order to know the laws of citizenship in Nauru, one needs to read Part VIII of the Constitution, which gives some people a *constitutional entitlement* to citizenship, and also to read the *Citizenship Act*, which adds to the law of citizenship some new *legislative entitlements* to citizenship, as well as providing rules for taking citizenship away from some categories of citizen under certain circumstances, and for a person to renounce their citizenship.

Issues and Questions

The Commission has considered two general questions in relation to citizenship:

1. Should there be any amendments to the provisions of Part VIII of the Constitution?
2. Should the Constitution make any provision that either expressly permits or prohibits dual citizenship, in relation to members of Parliament or in relation to Nauruan citizens generally?

These questions are addressed below, with reference to public opinion and comparative material. Section 2 attempts to bring together discussion in other Chapters on the issue of dual citizenship.

Section 1 – Existing provisions of Part VIII

At the public consultations only two people gave views on article 72. One person said that a person born of a marriage between a Nauruan and a foreigner should not hold a prominent position and should not be eligible to stand for Parliament. Another person stated that a child born of a marriage between a Nauruan and a foreigner should not be entitled to be a Nauruan citizen.

Nine people suggested that a child born in Nauru whose parents are both foreigners should not be eligible for Nauruan citizenship (in other words, suggesting an amendment to Article 73). An additional five people expressly said that a stateless child should not be qualified to become a Nauruan citizen. One person said a child born to foreign parents who has stayed in Nauru for at least 20 years should be eligible to apply to be considered for citizenship. Four people suggested that a non-Nauruan child raised by Nauruans should not be entitled to scholarships.

Thirty-one participants said that Article 74 should not be confined to foreign women who marry men, but that any foreigner who marries a Nauruan should be eligible to apply for citizenship (effectively suggesting that the Constitution should say what the Nauru *Citizenship Act* says).

One person said they would not like granting of citizenship to foreigners just so they can vote at elections. Eighteen people suggested that the *Naoero Citizenship Act* be repealed. Seven people suggested the adoption of i-Kiribati laws on citizenship. Eight people said that, if holders of dual citizenship reside overseas for 10 years, they should forfeit all Nauruan entitlements.

A number of people raised the issue of dual citizenship of Members of Parliament, and whether or not holders of dual citizenship should be disqualified from running for Parliament unless they renounce their foreign citizenship. This issue is dealt with in Chapter 4, Section 7 of this Report.

Written submission 18 (anonymous) suggested that Nauruan citizenship may be granted to foreign businessmen who wish to run a business on Nauru in partnership with local businessmen or landowners, to foreign professionals and tradesmen whose skill is needed in Nauru and who wish to make a living in Nauru, and to people who are citizens of another country but have lived in Nauru continuously for over ten years.

Two written submissions suggested that the Constitution should prohibit dual citizenship for all Nauruan citizens. Three written submissions referred to the *Naoero Citizenship Act* with disapproval: one said the Act ‘contradicts what being Nauruan is all about’, another said ‘I think the *Naoero Citizenship Act* is not valid’, and the other said the Act is unconstitutional.

One written submission recommended that Article 74 be amended to include foreign men who marry Nauruan women. Another written submission recommended that Article 73 be amended to include conditions on the granting of citizenship to a child who would otherwise be stateless, such as requiring such child to apply for Nauruan citizenship when they reach the age of 20. The NIANGO submission recommended that a new Article be added to Part VIII ‘which allows a citizen of Nauru to question the rights and entitlement over person(s) who acquire Nauruan citizenship’. The Nauru Law Society recommended that the provisions of Part VIII should remain as they are.

As some people suggested that Nauru adopt Kiribati laws on citizenship, the Commission has considered the citizenship provisions of the Kiribati Constitution. Citizenship is granted to any person of i-Kiribati descent, and this is defined as having at least one ancestor born in Kiribati before 1900. Citizenship is also granted to other categories of persons, including women married to men who are citizens of Kiribati. Section 28 of the Constitution of Kiribati is very similar to Article 75 of the Constitution of Nauru providing that Parliament may make certain laws concerning citizenship. This section also states that Parliament may provide for the maintenance of a register of citizens of Kiribati who are also citizens of other countries. The Commission believes that the existing provisions of Part VIII are more appropriate for Nauru than the provisions of the Kiribati Constitution.

A relatively small number of people made recommendations for amendment to Part VIII of the Constitution. Because people’s views were so varied, and because the Commission has not identified any obvious flaws in the current constitutional provisions relating to citizenship, the Commission can find no basis for recommending amendments to this Part. The Commission is of the view that the current constitutional provisions relating to citizenship are satisfactory, and they reflect the middle ground or balance in terms of the range of views held by members of the public. The current provisions provide a suitable combination of constitutionally entrenched entitlement to citizenship and flexibility for Parliament to expand the categories of citizenship and adapt to changing circumstances.

The Commission recommends no amendment to this Part of the Constitution.

Section 2 – Dual citizenship

The concerns of the public about acquiring and losing Nauruan citizenship in different circumstances were connected with dual citizenship – namely, being a citizen of two countries at the same time. In order to avoid confusion, it should be pointed out here that a passport is a travel document which is evidence that the holder owes some allegiance to the head of another state, but many citizens of a particular country do not hold a passport for it.

Dual citizenship confers on a person the opportunity to make choices about where to live, work, have children, and die. When examined more closely, for example in relation to Nauru, these choices can confer on dual citizens great advantages over Nauruans who possess only one citizenship. The advantages can discriminate in favour of dual citizens, who, as individuals and in families, may enjoy advantages in economic terms, including employment, health services

and education. Over time, the single/dual citizenship distinction may have the effect of significantly and progressively differentiating between Nauruans along economic and social lines.

In the course of this review, the issue of dual citizenship has arisen specifically in relation to membership of Parliament and land rights. In both cases, public opinion and submissions have been divided as to how the issue should be dealt with. In Chapter 4 Section 7, the Commission's research into the constitutions of other states regarding eligibility for Parliament of persons holding dual citizenship indicated several possible ways of proceeding, but the Commission felt that it had insufficient evidence of the likely effect of recommending one or other of the options.

In Chapter 9, on the subject of land rights, the Commission noted public suggestions concerning the acquisition and loss of land rights by dual citizens. These issues, as part of the larger area of land policy, rights of tenure and administration, could be considered in a major review of the area, as recommended by the Commission in that Chapter.

The Commission found that public opinion was divided on many issues of citizenship, and also that any amendment in relation to citizenship should only be made if there is evidence about the real effect that amendment will have. The Commission has therefore made no recommendation for amendment, but notes that if the Government or Parliament believe these matters require more attention, an inquiry could be initiated, perhaps on the basis of survey and research, which could determine the scope of issue of dual citizenship, including how many Nauru citizens are dual citizens, how many hold passports of other countries and whether demographic patterns can be established regarding investments, residency and overseas business. Such inquiry might then examine the public's thinking about the implications of dual citizenship from the point of view not only of loyalty to Nauru for Parliamentary purposes but also of the considerations mentioned above as employment, health and education.

The Commission makes no recommendation in relation dual citizenship.

Chapter 9: Land

Introduction

The Commission's analysis and assessment of the issues raised in written and oral submissions on land revealed an interesting aspect of the independence *Constitution*. It contains only two references to land (found in Articles 63(2) and 83(2)) and very few references to property (Articles, 8, 9 and 15, and in Article 81). This poor reflection of land and property is explained to some extent by the response made to a question posed during the 1968 Constitutional Convention as to why the draft constitution did not have any reference to the Nauruan customs and land. The response was simply that matters concerning land and the customs pertaining to them would be addressed by executive acts and legislation and should not be included in the Constitution. (*Record of Proceedings of Constitutional Convention* 4 January 1968 p24).

Two pieces of legislation which resulted from the deliberate constitutional policy to exclude land from the Constitution are the *Customs and Adopted Laws Act 1971* as amended and the *Lands Act 1976*. These laws are the basic instruments that provide for the recognition of Nauruan customs with respect to land matters and provide protection to landowners. These laws appear to provide reasonable protection, but there is today a widely held concern that a number of issues require closer attention by government. Land matters were raised during the public consultation phase, but there was no context in which to consider them, as discussion was based on the Constitution and, as indicated, that document has little to say on land.

This Chapter will look at two matters from the consultations which are relevant for this review, then consider very briefly the above concern that a broadly-based inquiry is called for into land issues.

Several of the written submissions identified problems with Article 8 regarding the right to protection from deprivation of property, also discussed in Chapter 2 Section 1. One of these strongly favoured the constitutional recognition of land rights and customs and the non alienation of land.

Issues and Questions

The principal issues identified by the Commission in relation to land, and discussed in this Chapter are:

1. Definitions of property and land
2. Recognition of customary land rights
3. Matters raised for a land review

Section 1 – Definitions of Property and Land

The Commission, in Chapter 2 of the Report, referred to the written submissions of the Secretary for Justice and the Law Society suggesting that Article 8 be amended to better define ‘public purpose’, ‘property’ and ‘just terms’.

Article 81(1) defines "Property" to include ‘a right, title or interest in or over property’. As far as land is concerned, the definition of property in Article 81(1) may seem inadequate. Property is a broad term and include intangibles such as a chose in action or an intellectual right. A reference to land in Article 8 would make the term property clearer to the people and confirm that it includes their rights, title or interest in the land. These are words that are more easily understood. The definition in Art 81 should be amended to include ‘land’ as proposed in the written submissions.

The Commission recommends that the definition in Art 81 (1) be amended as follows –

Art 81(1)... "Property" includes land and a right, title or interest in or over land or any other property.

Section 2 – Recognition of customary land rights

The Law Society made a firm submission on the inclusion of a discrete land provision in the Constitution and suggested a text that includes the recognition of customs regarding land and a ban on alienation of land to non Nauruans. As to the former, attention is drawn to the recommendation in Chapter 1 Section 3 that a new clause be inserted in Article 2 which recognizes customary law as a source of law. This recognition is binding on the courts, and it gives constitutional weight to what has been in an Act of Parliament for 35 years, namely section 3 of the *Customs and Adopted Laws Act 1971*, which places customary law below only the Constitution and Acts of Parliament. Customary law is high in the hierarchy of sources of law that apply in Nauru. The order is as follows –

1. The Constitution
2. Statutes enacted by Parliament
3. Customary law
4. Adopted or applied statutes of the Commonwealth of Australia, State of Queensland, Territory of Papua or the Territory of New Guinea
5. Adopted English statutes
6. Nauruan common law and English common law and the principles and rules of equity in force in England as at 31 January 1968

In fact, customary law and the customs relating to land are reasonably well protected as far as the law itself is concerned. The enforcement and due practice of customary law is for citizens to pursue when they consider their interests are threatened.

Section 3 – Matters raised for a land review

The Commission notes from the submissions received that there is an underlying current of concern by the people of losing control and title to their land. The matters discussed in the submissions (oral and written) raised a number of issues. Some of these issues are touched on in other Chapters of this Report. A summary here offers some information that might be helpful for planning a review, or other type of consideration of land policies and the issues that arise under them.

Republic's right to take land for public purposes

In Chapter 2, the Commission has discussed Article 8 and the associated definitional problems of words used such as *public purpose* and *just terms*. The definition of “public purpose” was addressed by a number of written submissions and in public consultations, and it was suggested that the term should be defined more clearly. None of the constitutions studied by the Commission had a clear meaning of public purpose. In one jurisdiction, the Marshall Islands, the constitution provides that a use of land for commercial purposes is not a public use. Similarly, the words ‘just terms’ are difficult to apply when not defined in the Constitution. It is suggested that land should be commercially valued in order to ascertain its true value when property is acquired for public purposes. An Act of Parliament would be required for such a development and that is a matter for the executive and the legislature to consider. The Commission’s position is already stated in Chapter 2.

Limitation of land rights to citizens

The limitation of land rights to Nauruan citizens is provided under the *Lands Act* but it is subject to change by the normal process of Parliament. Some people seek protection in the Constitution as an entrenched provision. Some say that when a person loses his citizenship or when he is absent from Nauru for an extended period, then he should automatically lose his rights to his land (see Chapter 8 for more discussion of citizenship). This is a serious issue, and seems not to be dealt with in Pacific constitutions. Resolution of this and other issues would require an extensive examination of public opinion and policy considerations on matters relating specifically to land tenure and development, and thus a fair and comprehensive analysis of these matters is beyond the scope of this Report.

Phosphate royalties

Adoption of fair and equitable share of royalties and other moneys paid to the Republic in respect of the Republic’s right to extract minerals from land and seabed is a current and major topic on Nauru. It has wide policy implications with a long and protracted history. There are major legal issues connected with it and it is certainly beyond the terms of reference of this Commission.

The surrender and return of worked out phosphate lands

This issue is extracted from concerns expressed about the rights to the phosphate and other minerals, and in the context of secondary mining of phosphate. The *Lands Act* requires that worked out phosphate lands are return to the landowners. Lands mined out during the pre-independence days have been returned but since secondary mining of phosphate is about to

commence, there appears to have been a stop to the return of the lands. The issue is integral to the issue discussed immediately above and is beyond the Commission's mandate.

Rehabilitation

This issue is also closely linked to the previous issues and to the notion of deprivation of property under Article 8. A number of submissions said there should be a constitutional right to rehabilitation. The Commission has dealt with this concern to some extent in the suggested inclusion of environmental rights in Part II (see Chapter 2). Phosphate land that has been mined and returned to the landowner has no value at all unless it has been restored to its previous state. The dispute between Nauru and Australia over the rehabilitation of lands mined prior to July 1967 and the establishment of the Nauru Rehabilitation Corporation has focused people's attention on the restoration of their phosphate lands. This appears to be another major issue for review by government.

Conclusion

This Section has summarised some of the main issues that are of concern to the public in relation to land. The Commission's conclusion on these issues is that they are beyond its terms of reference and the resources available to it, but, more importantly, they have wider implications for national policy-making and strategies for sustainable development.

The Commission recommends that consideration be given to the establishment of an inquiry into land matters that would undertake an in depth examination of the issues raised in this Section and related matters, and of public opinion and policy considerations in relation thereto.

Chapter 10: Emergency Powers

Introduction

A declaration of a state of emergency is a State's rapid response to a disaster in order to protect its existence, lives and property. A state of emergency ordinarily raises the spectre of tsunamis, cyclones and other natural disasters, war, national or area riots, insurgencies, and other economic and social upheavals. In some countries when civil war threatens or rages an emergency is declared. In others, political instability may bring about an emergency. Every country makes some provision in its laws, usually in its constitution, which will empower the head of the executive to act very quickly and decisively in the interests of the state, its people and their livelihood when they are directly and immediately threatened. At the same time, it is recognised that there need to be limitations on this executive power, and procedures need to be laid down to protect persons who are caught up in the state's response to the emergency.

The provisions of Part IX of Nauru's Constitution are designed to cover the introduction, control and ending of a state of emergency.

Issues and Questions

The Commission extracted the following issues from the written submissions received and the results of the public consultations. These are considered under the following Section headings:

1. Should 'emergency' be defined?
2. Who declares and how?
3. Role of Parliament
4. Threats to the Constitution and fundamental rights
5. Role of the Court

Section 1 – Should 'emergency' be defined?

In the Commission's view, it is impossible to define in advance what sort of emergency is sufficient to justify invoking Part IX of the Constitution. Most countries make little or no attempt to define an 'emergency', as obviously, a major reason for having emergency powers is that emergencies are unpredictable. Nauru is a good example of a state where a grave emergency may be 'physical' or 'non-physical', 'natural' or 'man-made' – and due to any one of a number of causes. The current provision is as follows:

Declaration of an emergency

77.-(1.) If the President is satisfied that a grave emergency exists whereby the security or economy of Nauru is threatened he may, by public proclamation, declare that a state of emergency exists.

The emergency provisions have been invoked only once in Nauru, in late 2004. Arising out of that situation and the related court case, there was a general concern during the public consultations that there should be limits and restraints on the President's use of the emergency powers. The public were clearly concerned to avoid the possibility of a President abusing emergency powers for personal advantage, acting without reference to Cabinet and Parliament, and to avoid breaches of the fundamental rights of the people, such as suspension of a person's right of access to the Court.

In 'the Emergency Case' (*Kinza Clodumar & Ors v Ludwig Scotty*, Civil Action No. 12 of 2004), the President had made an emergency order that suspended a person's right of access to the Court. The President had declared a state of emergency on the ground of Government's failure to pass any budget laws to enable Government to pay wages and keep the country running. This was an emergency situation which should not arise again if the Commission's recommendations in this Report are accepted with regard to dissolution of Parliament in the event of failure to pass supply (see Chapter 6 Section 3).

There is no obvious way of defining 'emergency', or the grounds for declaring a state of emergency, which would exclude crises of a political nature or created for political ends. After all, that is how critical financial ruin that directly impoverishes Nauruan families might start. Equally, it is not possible to draw a line between physical and economic disaster because drastic steps may need to be taken to deal with the consequences of a disaster that is causing serious damage to a critical sector of the economy.

The Commission considers that there is little point in providing for emergency powers if attempts are made to prescribe too tightly the circumstances in which they may be used, and that the focus should be on steps which should be taken to address the matters dealt with in the rest of this Chapter.

The Commission recommends that the broadly stated grounds for declaring a state of emergency in Article 77(1) do not require amendment provided adequate attention is paid to limiting, monitoring and controlling the use of powers exercised pursuant to the state of emergency.

One point of view recorded in public consultations was that Nauru does not need to have constitutional provision for a state of emergency. It is true that Parliament could pass laws setting up machinery for coordinating rescue, relief and physical protection measures, but the risk would remain that there would be a need to take action that involved overriding individual rights, such as requisitioning vehicles. It is preferable for questions such as these to be managed under constitutional rules.

Another suggestion was to the effect that when a state of civil unrest occurs in Nauru it should be referred to Pacific Islands Forum. This may or may not be a good idea, but if it suggests that Nauru should modify its Constitution to grant powers of crisis control to a regional authority, the Commission would pass that issue to Government for further investigation and attention.

A further suggestion was that the setting of the basic wage below a certain standard of living qualified for a state of emergency. It is not for the Commission to comment on whether this would be so.

Section 2 – Who declares and how?

The President has extensive powers under Part IX that he may exercise in the event that the nation is threatened by crisis or emergency circumstances. Article 77 of the Constitution places limits and restraints upon the President in his exercise of emergency powers and the length and frequency of periods during which a state of emergency exists. However, these fall short of the concerns of the people expressed in written submissions and public consultations.

The further clauses of Article 77 are as follows:

Declaration of an emergency

...

(2.) A declaration of emergency lapses-

(a) if the declaration is made when Parliament is sitting, at the expiration of seven days after the date of publication of the declaration; or

(b) in any other case, at the expiration of twenty-one days after the date of publication of the declaration,

unless it has in the meantime been approved by a resolution of Parliament approved by a majority of the members of Parliament present and voting.

(3.) The President may at any time revoke a declaration of emergency by public proclamation.

(4.) A declaration of emergency that has been approved by a resolution of Parliament under clause (2.) of this Article remains, subject to the provisions of clause (3.) of this Article, in force for twelve months or such shorter period as is specified in the resolution.

(5.) A provision of this Article that a declaration of emergency lapses or ceases to be in force at a particular time does not prevent the making of a further such declaration whether before or after that time.

The public views and written submissions reveal a very strong and negative reaction to the President exercising his powers in his own personal judgment. Suggestions made that would curtail the President's powers are that:

- a) the President should consult and/or act on the advice of Cabinet and/or Parliament;
- b) Cabinet should review the President's declaration;
- c) no appointment of Ministers should occur during an emergency;
- d) the President must seek Parliament's approval for a declaration to continue beyond 21 days;
- e) the Parliament may revoke a declaration or orders; and
- f) the Court may review a declaration or orders.

Consulting Cabinet

The President of Nauru is not required to consult Cabinet before declaring a state of emergency (see Section 1 above). Nauru and Tuvalu appear to be the only Pacific Island countries using the cabinet system of government that do not require either consultation with, or consent of Cabinet. The Constitution of Samoa does require such consultation, while in Fiji, Kiribati and Vanuatu, the President must act on the advice of Cabinet. In Marshall Islands, Cabinet has sole authority in this area.

The Commission considers it unlikely that the President of Nauru would declare an emergency without consulting or taking the advice of Cabinet. The principle of collective responsibility of Cabinet would probably ensure that the Cabinet and the parliamentary caucus would have been consulted.

However, the Commission recommends that Article 77 be revised to *expressly require* that the President consults the Cabinet before making an emergency proclamation.

The Commission recommends that Article 77 be amended as follows to require the President to consult cabinet before declaring a state of emergency:

Declaration of an emergency

77.-(1.) If the President is satisfied, after consulting Cabinet, that a grave emergency exists whereby the security or economy of Nauru is threatened he may, by public proclamation, declare that a state of emergency exists.

Further and Successive Declarations by the President

Under Article 77(5), where a declaration is about to lapse or cease, further and successive declarations may be made by the President before or after it lapses or ceases without reference to Cabinet or Parliament. There appear to be no other Pacific constitutions which similarly enable the President unilaterally to make another declaration before the current one lapses. This power is far-reaching and ultimately could result in a continual state of emergency. In Pacific jurisdictions, no further and/or successive declarations can be made by the Head of State without the approval of Cabinet or Parliament. The recommendation above requiring consultation with Cabinet would go some way toward meeting the situation, but the Commission considers Article 77(5) to be unnecessary in light of the recommendations to be made below, and the clause should be repealed.

A suggestion made to the Commission to limit the number of times a declaration may be made by the President is impractical, and a misunderstanding of the dynamics of disasters and emergencies which may be inherently dangerous. Natural disasters are indiscriminate as to when, where or how many times they might strike a country, and it cannot be predicted for how long a single disaster may last. Terrorists attacks can be repeated without warning. Civil disturbances also involve elements of surprise. In short, the Commission does not think it desirable to limit the number of times a declaration may be made.

Penalty

A submission was received suggesting that the President or the person who made the declaration should be penalised if the declaration is proved to be unconstitutional. However, this would defeat the rationale and purpose of having emergency provisions in a constitution. A President should be able to assess a potential emergency, and perhaps take risks in the public interest, without fear of making honest mistakes. The roles of Cabinet and Parliament should be adequate to ensure that a President could not invoke the emergency powers at his will. He will run the risk of losing the confidence of the Parliament and could well be voted out of office if the declaration is unjustified.

Section 3 – Role of Parliament

Parliament has powers with regard to approval of a declaration of state of emergency under Article 77 (1) and (4), and revocation of a presidential order under Article 78(3). The Commission considers that Parliament should have greater involvement.

Suspension or Dissolution of Parliament during Emergency

Two views on the issue of suspension or dissolution of Parliament were put to the Commission. One argument favours the suspension or dissolution of Parliament if the reason for the emergency is of a political nature or a result of parliamentary stalemate. The opposite view is that Parliament can provide necessary checks and balances. The public have contended that they should have a say in relation to an emergency, and that Parliament should, therefore, not be suspended during a state of emergency.

Parliament's clear role under Article 77 is to decide, on a simple majority of members present and voting, whether to approve a declaration of emergency for a period of up to 12 months. What the Constitution does not provide for is the calling of Parliament by the President when it is not sitting or has been dissolved, in order that the declaration may be dealt with as provided for in clauses 77(2) and (4) (and also that orders may be considered under Article 78).

The Supreme Court, in the *Emergency Case* (see Section 1, above), referred to the absence in the Constitution of the need to recall Parliament if it is not sitting and drew a distinction between the Nauru Constitution and that of Samoa. Under the Samoan Constitution if the Legislative Assembly is sitting at the time of the Proclamation then it must forthwith be laid before the Legislative Assembly and if the Legislative Assembly is not sitting then the Head of State will appoint a time to sit, as soon as conditions make it practicable, and the Proclamation shall then be laid before the Legislative Assembly.

In the Fiji Constitution (s 188), upon the proclamation of emergency the President must summon Parliament to meet. If the proclamation is made during a period after dissolution of Parliament and before the holding of the next following general election of members of Parliament, the President must summon the members of the dissolved Parliament, and those members can exercise all the powers conferred on the House of Representatives. Despite the summoning of members of the dissolved Parliament the general election must proceed and the recalled Parliament again stands dissolved on the day immediately before the general election. Where Parliament's term expires during an emergency the President, on Cabinet's advice may

extend its term by proclamation but it must not be more than twelve months. Section 70(5) of Vanuatu's Constitution states that Parliament may not be dissolved during a state of emergency and if Parliament is dissolved when a state of emergency is declared the former members of that Parliament may meet for the purpose only of considering the state of emergency until the new Parliament first meets. The Constitution of Liberia states that the parliament cannot be suspended during an emergency. The Commission has considered whether aspects of these models could be adapted to suit Nauru's circumstances.

There are very good reasons for Parliament not to be suspended or dissolved, and if dissolved at any time during a state of emergency, for it to be convened to deal with the emergency. For instance, if Parliament is dissolved during an emergency the executive could use the state of public confusion to gain political control of the legislature. In the Commission's view, there is at present insufficient Parliamentary control over a state of emergency. In short, the roles envisaged for Parliament in Articles 77 and 78 cannot be performed if it is suspended or dissolved.

The Commission recommends that if Parliament is not sitting at the time of the declaration, it must be convened by the Speaker. In the case of dissolution, the members of the dissolved Parliament must be called into special session to consider the declaration and then dissolved again on the election of a new Parliament. A new clause 5 (to replace the one repealed, see below) is recommended as follows:

77 (5.) (a) Where a declaration of a state of emergency is made and Parliament is not sitting, it shall be convened by the Speaker immediately in special session and remain in session during the entire period of the state of emergency; provided that Parliament shall not remain in session beyond the end of the normal term of Parliament.

(b) Where a declaration of a state of emergency is made when Parliament has been dissolved, or when Parliament is dissolved during an emergency because the term of Parliament has ended, the members of the dissolved Parliament shall be called by the President to a special session and remain in session during the entire period of the state of emergency until the election of a new Parliament

Lapse, Approval and Revocation of a Declaration

Article 77 provides for the lapse of a declaration unless approved by Parliament. The Commission recommends the following provision as modification of 77(2) set out in Section 2 above.

The Commission recommends that clause (2.) of Article 77 be amended as follows:

77-(2.) A declaration of emergency lapses-

(a) if the declaration is made when Parliament is sitting, at the expiration of seven days after the date of publication of the declaration; or

(b) ~~in any other case, when parliament is not sitting,~~ at the expiration of ~~twenty-one~~ fourteen days after the date of publication of the declaration,

unless it has in the meantime been approved by a resolution of Parliament approved by a majority of the members of Parliament present and voting.

Article 77 does not confer on the Nauru Parliament any specific powers in relation to a current declaration of emergency.

Section 189(1) of the Fiji Constitution provides that the Parliament may, at any time, disallow a proclamation of a state of emergency. Article 88 of the Constitution of Liberia provides that the Legislature must within seventy-two hours of a proclamation decide by a two-thirds resolution whether it is justified and the measures are appropriate and, if the resolution is not obtained, the emergency is automatically revoked and the President must act accordingly and immediately carry out the decisions of the Legislature.

In order to expressly give Parliament the power to revoke a state of emergency or amend or revoke orders made under it, the Commission recommends further amendments to Article 77.

The Commission recommends that clause (5.) of Article 77 be repealed (and replaced with a new clause (5.), see above) and that a new clause (6.) be inserted as follows:

77...

~~(5.) A provision of this Article that a declaration of emergency lapses or ceases to be in force at a particular time does not prevent the making of a further such declaration whether before or after that time.~~

(6.) Parliament may at any time revoke a declaration of a state of emergency or amend or revoke orders made under Article 78 by resolution of a majority of members present and voting and the President shall act accordingly and immediately carry out the resolutions of Parliament.

Following upon the public view that it should be Parliament and not the President who makes any subsequent declarations of emergency, it has been suggested that parliamentary approval for the continuation of an emergency should be subjected to an escalating voting process (Bruce Ackerman 2004:1047-1049). The Constitution of South Africa contains a provision that reflects this suggestion. Under section 37(2)(b) of the South Africa Constitution a declaration lapses after 21 days unless extended by the Assembly. The first extension requires only a simple majority and the subsequent extension would require 60% approval by members of the Assembly. This is not a common feature in constitutions perused by the

Commission, but the Commission considers that an increased threshold for further and successive declarations would be advantageous in Nauru's case – as follows-

The Commission recommends that existing clause (3.) of Article 77 be renumbered to become clause (4.), and that a new clause (3.) be inserted in Article 77 as follows:

77 (3.) The Parliament may approve a declaration of a state of emergency for no more than three months at a time by a resolution approved by a majority of the members of the Parliament present and voting. Any successive continuation of a declaration of a state of emergency shall be by further resolution approved by a vote of no fewer than two thirds of the members of the Parliament present and voting.

(4.) The President may at any time revoke a declaration of emergency by public proclamation.

Section 4 – Threats to the Constitution and Fundamental Rights

The next issue concerns the possible threats to the Constitution and fundamental rights during an emergency. Under the existing provisions, decrees could be issued to suspend the Constitution or parts of it including fundamental rights. For instance, during the state of emergency in 2004, an Order under Article 78 was issued to *order and declare that all rights and obligations conferred upon the citizens of Nauru under the Constitution or any other law on Nauru, to refer to the Supreme Court any question regarding any Articles of the Constitution are revoked* (Presidential Order 9, 4th October, 2004). The order prevented a challenge to the validity of the declaration of emergency being brought before the court (see the *Emergency Case* referred to in Section 1 above).

There is a clear view from the public that the Constitution and the rights under Part II must not be threatened in any manner. There is also the opposite view that certain provisions of the Constitution should be suspended during an emergency. On the first issue, the Commission studied various constitutions and found examples of protecting the Constitution and fundamental rights. The Constitution of Liberia explicitly provides that emergency powers do not include the power to suspend or abrogate the Constitution, dissolve the Parliament or dismiss the Judiciary. The South African constitution goes further and provides that certain rights may be abrogated and others could not be suspended. Fiji under section 187 of its constitution follows the South African approach. Some European constitutions forbid the suspension of the constitutions during an emergency such as Hungary (Article 28A(1)) and Romania (Article 89(3)).

The second view states that certain provisions of the Constitution should be suspended during a state of emergency. The presence of a crisis must be dealt urgently. Occasions may arise when the executive must exert a broad discretion in meeting special exigencies for which Parliament provides no relief or the existing law has no necessary remedy. The power exercised in times of emergency is for the *public good* and suspension of the Constitution, and rights under it, is necessary in order to meet the extraordinary challenge to the crisis on hand. A President should have a right and duty to do anything that the needs of a country demand unless such action was forbidden by the Constitution or by the laws. Otherwise his undertaking to protect the nation from

physical and non physical crisis has no legitimacy or authority. There is merit in the proposition to support suspension of the Constitution to preserve the state, people and property. On balance, the two views could be accommodated and the Commission so recommends.

The Commission recommends that the Parts of the Constitution and certain fundamental rights under Part II should not be capable of suspension during an emergency, and recommends that Article 78 be amended as follows:

Emergency Powers

78. (1.) During the period during which a declaration of emergency is in force, the President may make such Emergency Orders as appear to him to be reasonably required for securing public safety, maintaining public order or safeguarding the interests or maintaining the welfare of the community.

(2.) An order made by the President under clause (1.) of this Article

~~(a) has effect notwithstanding anything in Part II of this Constitution or in Article 94;~~
~~(b) is not invalid in whole or in part by reason only that it provides for any matter for which provision is made under any law or because of inconsistency with any law; and~~
~~(c) lapses when the declaration of emergency lapses unless in the meantime the order is revoked by a resolution of Parliament approved by a majority of the members of Parliament present and voting.~~

(3.) Subject to clauses (4.) and (5.) of this Article, the revocation or lapsing of an order made by the President under clause (1.) of this Article does not affect the previous operation of that order, the validity of anything done or omitted to be done under it or any offence committed or penalty or punishment incurred.

(4.) Any legislation enacted in consequence of a declared state of emergency and any Emergency Order made under clause (1.) of this Article may derogate from the provisions of Part II of this Constitution (Protection of Fundamental Rights and Freedoms) only to the extent that –

(a) the derogation is strictly required by the emergency; and

(b) the legislation or Order –

i.) is consistent with Nauru's obligations under international law applicable to states of emergency;
 ii) conforms to clause (5.); and
 iii) is published in the *Gazette* as soon as reasonably possible after being enacted or declared.

(5.) No Declaration of Emergency or Act of Parliament that authorises a declaration of a state of emergency, and no Emergency Order or legislation enacted or other action taken in consequence of a declaration, may permit or authorise –

(a) indemnifying the government, or any person, in respect of any unlawful act;

- (b) any derogation from the Articles in this Part;
- (c) the dissolution of the Legislature prior to the normal expiry of the legislative term;
- (d) the suspension or dismissal of the judiciary;
- (e) any amendments to the Constitution; or
- (f) any derogation from an Article mentioned in column 1 of the Table of Non-Derogable Rights, to the extent indicated opposite that Article in column 3 of that table.

Table of Non-Derogable Rights:

Article Number	Article Title	Extent to which the right is protected
3	Right to equality	Clause 3(3) with respect to gender, race and colour only
4	Right to life	Entirely
5	Protection of personal liberty	With respect to clauses 5(2) and (4) only
7	Protection from inhuman treatment	Entirely
10	Provision to secure protection of law	With respect to clauses 10(1), (2) (in respect of a fair hearing by an independent and impartial court), (3), (4), (5), (6), (7) and (8) only

Article 79 is also relevant to the question of the protection of fundamental rights during an emergency. Some submissions were received that recommended that Article 79 should be repealed. Article 79 provides:

Restriction on detention

79.-(1.) For the purposes of this Article there shall be an advisory board consisting of the Chief Justice, one person nominated by the Chief Justice and one person nominated by the Cabinet.

(2.) A person detained under an order under Article 78 shall, as soon as practicable, be informed of the reasons for his detention and be brought before the advisory board and permitted to make representations against his detention.

(3.) No person shall be detained under an order under Article 78 for a period exceeding three months unless that person has been brought before the advisory board and any representations made by him have been considered by it and it has within that period determined that there is sufficient cause for the detention.

The Article is designed to ensure that no person is arbitrarily detained during an emergency without the opportunity to contest the detention and apply for release (in legal terms, to seek a writ of ‘habeas corpus’). Although the Article envisages that the normal court processes might

not be functioning during an emergency and that extraordinary detentions might be ordered under an Emergency Order, the purpose of the Article is provide protection for persons detained, and to create an Advisory Board to hear such matters during an emergency. The Commission notes also that under the table of non-derogable rights proposed as part of an amended Article 78, most of the rights of accused persons protected under Article 10 of the Constitution would be protected from abrogation during an emergency (with the exception of the ‘reasonable time’ requirements for being brought before a court) and some of the rights protected under Article 5 (protection of personal liberty) would also receive such protection. The Commission is therefore of the view that Article 79 is satisfactory in its present form and makes no recommendations for amendment.

Section 5 – Role of the Court

The Court is regarded as the ‘guardian’ of the Constitution, and the Rule of Law, and therefore has a role to play during a state of emergency. One role for the courts is to pronounce on the validity of a declaration of emergency or the promulgation of orders made under Article 78. The public’s concerns are focussed on the possible suspension of fundamental rights during an emergency. The possibility of suspending the Courts during an emergency period is real and if it is to have an active role during such periods then it should not be suspended under any circumstances.

The current provisions of Part IX do not expressly provide for a role for the Courts during an emergency. In the *Emergency Case*, the Supreme Court justified its non interference in the decision of the President to declare an emergency by reference to a statement of Professor de Smith that ‘in times of grave emergency the courts may decline to undertake any inquiry into the *reasonableness of the grounds* on which a responsible Minister, entrusted with the maintenance of national security, chooses to exercise powers vested in him, notwithstanding that he is required by statute to have had *reasonable cause* before exercising those powers’ (emphasis added).

There are models in Pacific constitutions such as Vanuatu that may be used as a reference point on this matter. Under Article 72 of Vanuatu’s constitution any citizen aggrieved by reason of regulations made by the Council of Ministers may complain to the Supreme Court which has jurisdiction to determine the validity of all or any of such regulations. Further, section 37(3) of the Constitution of South Africa specifically states that any competent court may decide on the validity of (a) a declaration of a state of emergency; (b) any extension of a declaration of a state of emergency; or (c) any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency.

The Court has the power to make declarations as to the validity of laws enacted by the Parliament and this power should apply equally to declarations and emergency orders. It seems to the Commission that a weakness of the current provisions of Part IX is the lack of express jurisdiction of the Court to hear a challenge to an alleged state of emergency. The President has wide powers under Part IX and these could be more easily abused than other ordinary constitutional powers. There is no doubt that the President should have considerable discretion in deciding whether or not a state of emergency exists but decisions to proclaim an emergency should at least be validly invoked on rational grounds. A further weakness is the Court’s lack of express jurisdiction to review an order issued under a declaration for reasons of validity. The Commission considers that if the Constitutional Convention decides that certain provisions of

the Constitution are not to be suspended during an emergency then the Court should have the power to consider the validity of a declaration and/or orders made.

The Commission recommends that the Supreme Court is not suspended during an emergency and that it is given powers to review emergency declarations or orders, for reasons of validity.

The Commission recommends that the Supreme Court be given express jurisdiction to review emergency declarations and Emergency orders and other legislation enacted for the purposes of an emergency, and therefore recommends that a new clause (6.) be inserted in Article 78 as follows:

(6.) The Supreme Court may determine the validity of

- (a) a declaration of a state of emergency;
- (b) any extension of a declaration of a state of emergency; or
- (c) any Emergency Order made under this Article and any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency.

Chapter 11: Prerogative of Mercy

Introduction

The prerogative of mercy, or the power to grant free pardons to persons convicted of criminal offences, is an ancient concept and a power originally vested in royal heads of state. In more recent times, it is a power often given to the head of executive government, sometimes with certain restrictions attached.

In the Constitution of Nauru, Article 80 gives the President the power to grant pardons. The pardon can be free, or subject to lawful conditions. The President may also delay the imposition of punishment for an offence, may substitute a less severe form of punishment for the one imposed by the court, or may reduce a sentence or reduce a fine.

Since independence, the President of Nauru has on occasion used the power under Article 80 to grant pardons to prisoners, including prisoners convicted of murder and manslaughter. On some occasions, the grant of pardon has been exercised as part of a celebration, for example to celebrate important national anniversaries. The power has on at least one occasion been exercised indiscriminately, that is, to release everyone from prison rather than to release a particular prisoner for reasons specific to that prisoner.

Issues and Questions

The issue raised by Article 80 is whether it is appropriate for the President to have such unfettered powers in the exercise of the prerogative of mercy, or whether the President should be required to act on the advice of a panel or committee especially established for the purpose, as required by many other constitutions.

Section 1 – Restriction of Presidential discretion

Article 80 generated considerable interest from the public at public consultation meetings. A significant number of people (around 177) suggested that Article 80 should be deleted, as they thought the President should not have the power to grant pardon, as this is an interference in the judicial process. Many of these people said that if a person has received a fair trial and has been convicted and sentenced, they should serve their sentence.

Some people suggested that the only way to have a sentence reduced should be by grant of parole, and that a parole board should be established. Some of these people further added that parole should only be considered for people who have been sentenced to 10-15 years imprisonment. Others in this group suggested that the Supreme Court be empowered to grant parole but only to persons serving a life sentence. Others said parole should only be granted towards the very end of a sentence.

Three people at different meetings suggested that it should be Parliament rather than the President that has the power to grant pardon. Eight people at one meeting held the view that it should be Cabinet rather than President alone that has the power to grant pardon.

Other views included the suggestion that a grant of pardon must be provided by close family members of the victim of crime; that pardon only be granted if the prisoner is suffering from a grave illness; that pardon only be granted to a person who has shown good behaviour and served at least half of his sentence; that pardon be made by the Chief Justice upon recommendation by a psychologist; that the President only be empowered to grant pardon upon the recommendation of a medical practitioner; and that pardon be permissible but not for serious offences.

Over sixty people suggested that the President should only be able to grant pardon upon the recommendation of a Board especially established for that purpose. Suggestions differed as to the composition of the Board, but included variously the ideas that the Board should include a social worker, medical practitioner, police officer, member of the community of the convicted person, and a member of the family of the convicted person. Some of those who favoured the establishment of a Board also suggested that the President should be required to state in Parliament the reasons for any pardon granted.

Article 80 was raised in nine of the forty written submissions. Written submission No.16 recommended that the Cabinet and Chief Justice together have the power to grant pardon, rather than the President, and added: 'No more interfering with justice. 1st degree murderers shall be imprisoned for life, with maybe, parole in 15 years. All other offenders shall serve their sentence as judged'.

The written submission from the Department of Justice suggested that grant of pardon should be granted only in accordance with a set of criteria that set out exceptional circumstances that qualify for pardon. 'A process should also be undertaken and preliminary assessments should be in place before the President grants a pardon.'

NIANGO recommended in its written submission that an additional clause (e) should be inserted in Art 80: that under no circumstances shall a person convicted on a murder charge be eligible to a grant of pardon. They also recommended that a grant of pardon should be considered before a panel of 3 members: 1 lawyer/community leader, 1 church pastor, and 1 woman (a leader of good standing).

Submission No.28 recommended that a death sentence may only be changed/reduced to life imprisonment by President, but all other sentences should be served by the offender.

Submission No.29 by Hon Mathew Batsiua MP stated: 'There must be limitations on this power as it has been used by past Presidents as a campaigning tool at the expense of justice. There is still a need for this power to exist because of the current provision that makes it possible for Parliament to legislate for the death penalty'.

One written submission signed by a number of citizens stated 'we strongly agree that this Article should be thrown out of this highly respected Supreme Law of Nauru'. Another submission stated in relation to Article 80, 'no man is above the law'.

Submission No. 38 (in connection with a suggestion about Members of Parliament being tried and imprisoned for Treason and Sedition) said 'no grant of pardon to be issued to such shameless and self-important persons'.

The Commission has examined a number of other constitutions in the Pacific region and elsewhere, and notes that in many countries, whilst the grant of pardon exists, it is limited and can only be exercised in prescribed circumstances, and often only on the advice of a panel or board.

In the Solomon Islands, the Governor-General may grant a pardon acting on the advice of the Committee on the Prerogative of Mercy (s.45). The Committee is made up of a Chairman, a doctor and a social worker, all appointed by the Governor-General, and a person nominated by the provincial assembly of the province in which the prisoner under review normally resides.

In Tuvalu, the Head of State can grant a pardon, acting on the advice of Cabinet (s.80). If a pardon is granted, the Prime Minister must present to Parliament a statement giving details of the exercise of the power and the reasons for it. In Kiribati, the President must also act on the advice of Cabinet in granting a pardon (s.50). In the Marshall Islands, the power to grant reprieve and pardon is vested in Cabinet (Article V s.1(3)(f)).

A Commission on the Prerogative of Mercy is established under the Constitution of the Fiji Islands, which comprises the Attorney-General who is Chairman, and 2 other people appointed by the President. The President of Fiji may grant pardon only acting on the advice of the Commission (s.115).

In the Federated States of Micronesia, as in Nauru, the President has the unfettered discretion to grant pardon, and the power is held concurrently with the chief executive of a state if a person is convicted of an offence under state law (Article X s.2(c)).

The Commission does not consider it a viable option to simply delete Article 80 as was suggested by some members of the public. It is common to give the head of state the prerogative of mercy, and whilst it is not a prerogative that should be exercised haphazardly or for political purposes, there may be occasions where there are compelling grounds for the granting of a pardon or for reducing the sentence of a prisoner. Such grounds for example might include grave illness, mental disorder or other compassionate grounds, in combination with considerations as to the severity of the crime committed and the portion of the sentence already served. The Commission also believes it is not a viable option to require Parliament to consider and debate whether the power should be exercised in particular cases, as this would politicise the issue of a particular prisoner, and because the argument for mercy might involve confidential information. The Commission sees merit in requiring the President to act on the advice of a specially constituted board or panel in the exercise of mercy, rather than acting entirely at his own discretion. The prerogative appears to have been misused in the past, and the public has expressed dissatisfaction with the use of the prerogative where there are no compelling reasons such as release from prison on medical or other compassionate grounds.

The Commission recommends that a Committee be established to advise the President on the exercise of the prerogative of mercy.

The Committee should comprise a medical practitioner, a community leader and a senior officer from the Department of Home Affairs, to be appointed by Cabinet.

The President must act on the advice of the Committee, and the Committee must submit a report to the President detailing the reasons for its recommendation in each case, as well as a shorter statement to be tabled in Parliament. The idea of requiring a statement to

Parliament is to provide public information about the exercise of mercy, however it is not proposed that the full report be tabled as it may contain confidential information for example relating to the medical condition of the prisoner in question.

Members of the Committee will not receive any payment for their service on the Committee, as it is likely that the Committee will only be convened occasionally, and it should not be permissible for positions on the Committee to be used as ‘perk jobs’.

The Commission recommends that Article 80 be amended as follows –

Grant of Pardon Prerogative of Mercy

80. (1) In exercising the Prerogative of Mercy the President may-

- (a) grant a pardon, either free or subject to lawful conditions, to a person convicted of an offence;
- (b) grant to a person a respite, either indefinite or for a specified period, of the execution of a punishment imposed on that person for an offence;
- (c) substitute a less severe form of punishment for any punishment imposed on a person for an offence; or
- (d) remit the whole or a part of a punishment imposed on a person for an offence or of a penalty or forfeiture on account of an offence.

(2) There shall be a Committee on the Prerogative of Mercy (in this Article referred to as "the Committee") which shall consist of a qualified medical practitioner who shall be Chairperson and two other persons, one of whom shall be a senior officer of the Department of Home Affairs or such other Government Department as Cabinet may prescribe and the other of whom shall be a community leader, appointed by Cabinet.

(3) Members of the Committee shall not be remunerated or receive any allowance for their service on the Committee.

(4) A member of the Committee appointed under clause (2) of this Article shall vacate his seat on the Committee-

(a) at the expiration of the term of his appointment (if any) specified in the instrument of his appointment; or

(b) if his appointment is revoked by Cabinet.

(5) Whenever the Committee advises the President that the Prerogative of Mercy should be exercised, the Committee must provide to the President a report which details the reasons for the recommendation, and a statement which summarises the reasons but which does not disclose any confidential information.

(6) In the exercise of the powers conferred upon him by clause (1) of this Article, the President shall act in accordance with the advice of the Committee.

(7) In any case in which the Prerogative of Mercy is exercised in accordance with clause (1), the President shall present to Parliament-

(a) if the power is exercised during a meeting of Parliament - during that session; or

(b) if the power is exercised at any other time - during the next session of Parliament,

the statement referred to in clause (5) giving details of the exercise of the power and a summary of the reasons for it.

(8) Parliament may make provision for criteria or guidelines to be followed by the Committee in exercising its functions under this Article, and for any other matter necessary or expedient to give effect to the provisions of this Article.

Chapter 12: Leadership Code and Ombudsman

Introduction

As one of the main aims of the constitutional review is to make public institutions more transparent and accountable, the suggestions raised during the public consultation phase that the Constitution ought to include a Leadership Code and an ombudsman warrant serious consideration by the Commission and by the Convention. Both devices are specifically designed to minimise corruption and to make public offices more accountable to the people they serve.

The government of Nauru is intending to introduce a Leadership Code, and has been working on the preparation of a draft Bill for several months. The Commission has been provided with a copy of the most recent draft Bill, which has not yet been introduced to Parliament.

Leadership Codes appear in a number of constitutions around the region, and in some countries are supplemented by more detailed legislation. Such codes set out the responsibilities of leadership and are designed to expressly prohibit conflicts of interest, and other conduct which might demean public offices or endanger the integrity of the government.

Many countries also have an office of ombudsman. An ombudsman is usually responsible for investigating complaints from the public regarding public administration or maladministration, and for reporting their findings. The ombudsman should enable the public service to lift its game and to properly cater to the needs of the public that it serves, by identifying and seeking to remedy errors and flaws in the operation of the administration.

Issues and Questions

1. Should the Constitution be amended to include a Leadership Code? If so, how detailed should such provisions be, and how much should be left to legislation?
2. Should the Constitution be amended to provide for an Ombudsman? If so, how detailed should those provisions be and how much should be left to legislation?

Section 1 – Leadership Code

At the public consultation meetings, a substantial number of people raised the subjects of a leadership code and an ombudsman. Over 250 people said they would like a leadership code to be inserted in the Constitution. Few people expanded on what they understood a leadership code to entail or what they think it should include. However some people went into detail and specified that the Leadership Code should include strict penalties for breach of the Code, and that any Member of Parliament who breaches the Code should automatically lose their seat. Some people said that the Leadership Code should apply to heads of government departments, and others said the Code should include abuse of government vehicles. One group wanted the Code to state that Members of Parliament shall not engage in any private business. Another group said that if a Member of Parliament is found to have breached the Leadership Code, he should not be eligible to stand for Parliament again in future. A substantial number of people

said that if a leadership code is introduced, it should be included in Schedule 5 to the Constitution, so that it is protected by the requirement for referendum if Parliament attempts to amend it.

Twelve of the forty written submissions referred to the idea of having a leadership code and/or an ombudsman. Submission No.3 speaks generally about the need to eliminate corruption and ensure transparency and good governance, as does submission 38. Submission No.16 recommended the insertion of a leadership code in the Constitution and that Article 20 should be amended to add breach of the Leadership Code to the list of circumstances in which a Minister will cease to hold office. Submission 23 put the recommendation for a leadership code and ombudsman in the following terms:

Had there been legal mechanisms in place appropriate to preventing most of the illegal activities for Nauru yesteryear and Nauru today, Nauru can be voided of its corrupt factions of officers. Such mechanisms as the Ombudsman Office, Leadership Code, provisions of the International Bill of Rights... It should be free from ambiguity. One should know its content outright. One should know what is expected from them. Penalties should be included so we are not ignorant.

The submission from NIANGO recommended that Parliament should ‘legislate a Code of Conduct for Parliamentarians and leaders to ensure transparency and accountability and good governance practices.’ Submission 27 also recommended a leadership code, and said it should be included in the 5th Schedule.

The submission of the Law Society of Nauru stated: ‘One of the rights that should be included in Part II is the right of the Nauruan people to be governed by a clean and incorruptible government. The experience with the nature of unethical and irresponsible government over the last 38 years suggest very strongly that such a right must be entrenched in the Bill of rights provisions of the Constitution.’ The Society recommended that a new provision be inserted which provides such right, and which also makes reference to ‘a Comprehensive Code of Ethical Conduct’ to which the government must adhere.

The Commission has considered examples from the Pacific region of constitutions that include for provision for a Leadership Code, which may be helpful for Nauru. The Constitution of the Solomon Islands includes a Leadership Code (Chapter VIII, section 93-95) which applies to the Governor-General, the Prime Minister and other Ministers, the Leader of the Opposition and Leader of the Independent Members, all other Members of Parliament, the Speaker, members of any Commission established by the Constitution, public officers, officers of Honiara city council and provincial assemblies, officers of statutory corporations and Government agencies and such other officers as Parliament may prescribe (s 93). The Code sets out the responsibilities of office as follows:

94.-(1) A person to whom this Chapter applies has a duty to conduct himself in such a way, both in his public or official life and his private life, and in his associations with other persons, as not-

(a) to place himself in a position in which he has or could have a conflict of interests or in which the fair exercise of his public or official duties might be compromised;

(b) to demean his office or position;

(c) to allow his integrity to be called into question; or

(d) to endanger or diminish respect for and confidence in the integrity of the government of Solomon Islands.

(2) In particular, a person to whom this Chapter applies shall not use his office for personal gain or enter into any transaction or engage in any enterprise or activity that might be expected to give rise to doubt in the public mind as to whether he is carrying out as carried out the duty imposed by the preceding subsection.

(3) It is the further duty of a person to whom this Chapter applies-

(a) to ensure, as far as is within his lawful power, that his spouse and children and any other persons for whom he is responsible, including nominees, trustees and agents, do not conduct themselves in a way that might be expected to give rise to doubt in the public mind as to his complying with his duties under this section; and

(b) if necessary, publicly to dissociate himself from any activity or enterprise of any of his associates, or of a person referred to in paragraph (a) of this subsection, that might be expected to give rise to such a doubt.

(4) A person to whom this Chapter applies who-

(a) is convicted of an offence in respect of his office or position or in relation to the performance of his functions or duties;

(b) fails to carry out the obligations imposed by the preceding subsections of this section; or

(c) commits any act or omission prescribed under section 95 of this Constitution as constituting misconduct in office,

is guilty of misconduct in office.

Section 95 of the Solomon Islands Constitution further provides that Parliament may make provision for the disclosure of incomes and financial affairs of a person to whom the Code applies and their families and associates, for disposal or control of assets of such persons, for acts which constitute misconduct in office and for penalties for offences. Further, Parliament must provide for the investigation of cases of alleged or suspected misconduct in office, for reference of such cases to independent courts or tribunals, and for the powers and procedure of courts and tribunals in such cases and for penalties in such cases.

The Solomon Islands constitutional Leadership Code has a number of interesting features: it has a very wide application in terms of who is defined as a 'leader', it requires leaders to adhere to principles of the Leadership Code not only in their public or official life but also in their private life, it requires a leader 'to ensure, as far as is within his lawful power, that his spouse and children and any other persons for whom he is responsible, including nominees, trustees and agents, do not conduct themselves in a way that might be expected to give rise to doubt in the public mind as to his complying with his duties under this section' (s94(3)(a)), and creates an offence of 'misconduct in office' (s94(4)).

By way of comparison, the Leadership Code in the Papua New Guinea Constitution (which preceded the Solomon Islands Constitution) is almost identical to the Solomon Islands Leadership Code in terms of duties, and the PNG Code applies to the same categories of Leader as set out in the Solomons Constitution as well as to the Commissioner or Police, the Commander of the Defence Force, all ambassadors and other senior diplomatic and consular officials, the personal staff of the Governor-General, Ministers and the Leaders of the Opposition, and executive officers of registered political parties.

The Constitution of Vanuatu includes a Leadership Code in broadly similar terms to that of the Solomon Islands, which also applies to leaders in both their public and private lives, but which does not include requirements for a leader to ensure that family members and associates conduct themselves in a particular way, and does not create any offences but rather simply provides ‘Parliament shall by law give effect to the principles of this Chapter’. The Vanuatu Code also has a narrower definition of Leader, being limited to the President, Prime Minister, Ministers and Members of Parliament and such other public servants, officers of Government agencies or other officers as may be prescribed by law. The Code thus has the potential to be widely applied if Parliament so provides, but the Constitution insists only upon its application to the President, Cabinet members and MPs.

The Fijian Constitution includes a Code of Conduct in similar terms to those already mentioned, proscribing: use of public office for private gain, conflicts between private interests and public duties, allowing the leader’s integrity to be called into question, etc. It applies only to the performance of public duties, not to the private lives of leaders, and does not include any offences or penalties. Section 156(3) provides that Parliament must, as soon as practicable after the commencement of the Constitution, make a law to implement more fully the conduct rules set out in the Constitution, to provide for monitoring of standards of conduct in relation to the performance of public duties, and ‘if the Parliament considers it appropriate, to make provision in relation to the investigation of alleged breaches of those standards and the enforcement of those standards.’

Overview of the existing draft Leadership Code for Nauru

The Government of Nauru has prepared a draft Leadership Code Bill, which has not yet been introduced to Parliament. If Nauru is to have a Leadership Code, it would make sense to follow the model of other constitutions whereby the essence of the Code is contained in the Constitution (and is therefore difficult to amend or abolish) whilst the detail is contained in legislation. It would therefore be sensible to determine what provisions will be included in the Constitution, prior to passing enabling legislation.

The draft legislative Code that has already been prepared would apply to Cabinet Members and MPs, judicial officers, the holder of any statutory office, the Head of a department in the Public Service, a director or a public or statutory corporation, the head of a civil society organization who has ex officio legal powers, the Ombudsman and members of the Leadership Tribunal, and former Leaders.

The draft Code sets out the responsibilities of Leaders, and requires them to submit annual statements of interest. It prohibits bribery, exercise of undue influence, multiple office holding, misuse of public assets and funds, abuse of defamation laws and conflicts of interest.

Leaders would be able seek advice from the Registrar of the Leadership Tribunal regarding whether certain conduct would constitute a breach of the Code, and could obtain a clearance from the Registrar.

The Leadership Tribunal would comprise a Chairperson who has the qualification necessary for appointment as a Supreme Court Judge, and two other people with understanding of the values and culture of Nauru, integrity and competence etc. Tribunal Members would be appointed by the President acting with the advice of the Chief Justice after consultation with the Speaker.

The draft Bill provides that any person may make a complaint to the Leadership Tribunal. The complaint is then investigated, unless the Registrar decides on prescribed grounds, to take no action in relation to the complaint. If after investigation the Registrar is of the opinion that there has been a breach of the Code, the Registrar must bring civil proceedings before the Tribunal against the relevant Leader, and may if there is sufficient evidence, also refer the matter to the DPP.

When proceedings are brought before the Tribunal, if the Tribunal is satisfied on the balance of probabilities that any action of the Leader is in breach of the Code, it may grant a number of remedies including a declaration that the Leader is in breach of the Code, an order restraining the Leader from continuing or repeating the breach, an order removing the person from his or her position as a Leader, and an order prohibiting the Leader from being a Leader for life if in the opinion of the Tribunal the breach of the Code is serious and the Leader is an elected Leader, or in any other case, for such other period not exceeding 4 years.

Interpretation and enforceability

The Commission notes that caution must be exercised in considering the constitutional and legislative provisions relating to a leadership code, as leadership codes are notoriously difficult to interpret and to enforce, due largely to the use of vague terminology and the use of subjective measures. One example is contained in s10(2)(b)(vii) of proposed draft Code, which provides that leaders must in the exercise of their powers ‘exercise authority and interact with the public in a manner that is open, transparent, accountable, participatory and decisive and that is fair and equitable’. It is difficult to know how a leader can ensure that he/she complies with the requirement to interact with the public in a manner that is ‘participatory and decisive’ and how an apparent breach of this requirement would be proven. The Commission urges that if the Leadership Code is to have any meaningful effect and to be capable of compliance and enforcement, care must be taken to formulate the principles and prohibitions carefully and in a manner such that leaders are able to know and comply with their duties and to avoid conduct that would constitute a breach of the Code, and also in such a way that if a leader does breach the code, the language is sufficiently precise for the breach to be proven.

Problems with current draft Leadership Code

The draft Leadership Code that has been prepared for Nauru is a detailed code that would be implemented via legislation, whilst some of the essential elements of the Code may be included in the Constitution. Ideally constitutional amendments to insert the basic outline of the Code will be made first, and the Leadership Code Bill would be passed by Parliament after constitutional change. Although the detailed provisions of the draft Code are not strictly a constitutional matter but rather a matter for Parliament, the Commission feels compelled to express some serious

concerns with certain provisions of the draft Code. It is important to ensure that the final version of the legislative code that is introduced to Parliament will be as effective as possible. It is also necessary to make sure that the Code is appropriately adapted for Nauru.

Section 14 of the draft provides for appointments to be made impartially and on merit. A leader who fails to comply with section 14 breaches the Code and may be subject to penalties. The Commission believes it will be very difficult to demonstrate compliance (or to prove breach) in a place such as Nauru where so many people are closely related to each other and there may be great scope for accusations of nepotism even in cases where appointment really has been made on merit. Another concern is the use of vague language in section 4 relating to criteria for appointment to the Leadership Tribunal, similar to the way in which the corresponding provisions in the Vanuatu Act are worded. Subsection 4(2) of the draft code provides:

- (2) *The Leadership Tribunal consists of:*
 - (a) *a Chairperson who has the qualification necessary for appointment as a judge of the Supreme Court; and*
 - (b) *two other persons each of whom must be a person who:*
 - (i) *has knowledge, understanding, and appreciation of the culture and values of Nauru;*
 - (ii) *is of high integrity and competence;*
 - (iii) *is capable of discharging his or her functions without fear or favour; and*
 - (iv) *is of high standing in the eyes of the community.*

How does one measure a subjective standard such as ‘high standing in the eyes of the community’ and ‘integrity and competence’?

The Commission also notes with concern that although there is no requirement for the Registrar to have any legal qualifications (or indeed any qualifications at all), sections 26 and 27 of the draft impose onerous legal functions on the Registrar, such as issuing rulings to clarify the meaning and effect of the Code, giving prior advice or clearance on potential breaches of the Code, and referring matters to the Tribunal where in his or her opinion there is evidence of a breach of the Code by a Leader. If in the opinion of the Registrar there has been no breach of the Code, a complaint will not be referred to the Tribunal.

The Commission recommends that consideration should also be given to the manner in which the existing *Parliament of Nauru (Register of Interests) Act 2004* (some provisions of which are now invalid as a result of a recent Supreme Court decision) and sections 11 and 22 of the draft Leadership Code impact on each other.

Section 20(1)(a) of the draft provides that a Leader ‘must not threaten or institute proceedings for defamation without pursuing the proceedings to court’, which would appear to preclude the Leader from settling the matter prior to the court hearing or withdrawing from the proceedings if he receives and is satisfied with an apology. The Commission recommends that the Code should not include any provision which compels a Leader to pursue legal proceedings to court without making provision for settlement or withdrawal.

The Commission notes that section 28 of the draft, which provides that one of the factors to which the Registrar must have regard when deciding whether or not to give a clearance on a possible breach of the Code is ‘the difficulty of explaining to the average person the justification for the clearance,’ is quite extraordinary and warrants reconsideration.

Efficacy of a Leadership Code

The Commission believes it is also important to point out that inclusion of a leadership code in the Constitution as well as in appropriate legislation is unlikely to be a ‘magic solution’ to problems of corruption, conflicts of interest, abuse of public office, and the like. If the Code is drafted appropriately and if every effort is made to ensure that enforcement mechanisms are effective, then there is a significant chance that the Leadership Code will have beneficial results, in terms both of Leaders knowing precisely what kind of conduct is prohibited, and hopefully striving to comply with the Code, as well as being able to hold those Leaders who breach the Code to account. However it appears that in other Pacific jurisdictions that already have Leadership Codes, the Codes do not eradicate corruption and nor is every Leader who breaches a Code properly called to account. It can be said that whilst corruption has continued in these countries, it might well have been a great deal worse in the absence of a Leadership Code. The Commission believes it is important to point this out, because the public appear to have a very high expectation in terms of what a Leadership Code can achieve.

Responsibility for monitoring and enforcement

Although there are Ombudsmen that are responsible for monitoring adherence to a leadership code and investigating alleged or suspected breaches of a code (ie Vanuatu), this is *not* the normal role of an Ombudsman, and there are good reasons for assigning such role to an officer or institution *other* than an Ombudsman. The office of Ombudsman is dealt with in more detail in Section 2, below, but for the purposes of explaining why it is not advisable to give responsibility for the Leadership Code to an ombudsman, the basic role of an ombudsman is briefly set out here.

An ombudsman is typically responsible for receiving and investigating complaints about government administration, and for reporting on instances of maladministration. An ombudsman should be on good terms with the public service, so that he or she can work with them to resolve complaints quickly. The ombudsman should have the trust of the citizens and the public service. If an Ombudsman is given responsibility for monitoring compliance with a leadership code and for pursuing breaches of the code, the office of ombudsman becomes politicised and this reduces the ability of the ombudsman to deal amicably with the public service and Leaders and to get results on behalf of the citizens. The ombudsman becomes someone of whom public servants and Leaders are scared and with whom they refuse to cooperate, and thus the ombudsman ceases to be effective.

It is therefore preferable to separate the role of ombudsman from the role of monitoring and enforcing the Leadership Code. The Leadership Code is better handled by a Leadership Code Commissioner or some other independent officer or body. The Commission notes that the current draft Leadership Code that has been prepared for Nauru proposes that investigation of breaches of the Code will be dealt with by a Registrar of the Leadership Tribunal, and proceedings in relation to breaches of the Code will be heard and determined by a Leadership Tribunal. The Commission welcomes this aspect of the draft (subject to appropriate improvements in the drafting).

As mentioned above, the draft Code provides that when proceedings are brought before the Tribunal, if the Tribunal is satisfied on the balance of probabilities that any action of the Leader

is in breach of the Code, it may make certain orders including a declaration that the Leader is in breach of the Code, an order removing the person from his or her position as a Leader, and an order prohibiting the Leader from being a Leader for life (if the breach of the Code is serious and the Leader is an elected Leader).

Recommendations

The Commission is of the view that the Constitution of Nauru should be amended to include provision for a Leadership Code. Such provision should be relatively brief, in the manner of the other Pacific constitutions referred to above, and the detail should be left to Parliament. The constitutional provisions will define who is a Leader, and set out the basic obligations of a Leader. The provisions will also introduce the offence of misconduct in office, and direct Parliament to make provision for the disclosure of interests, the investigation of alleged cases of misconduct in office, and the reference of such cases to an independent court or tribunal. The Commission believes that a Leadership Code may result in an improvement in the manner in which leaders conduct themselves in public office, and may also improve accountability. The Commission notes again the views of the public in support of such measures, and the fact that the Leadership Code sits together with other recommendations designed to improve transparency in public institutions.

The inadequacies of the current draft Leadership Code Bill are of concern to the Commission, which recommends that no further action be taken in respect of the draft Bill until it has been reviewed, and until consideration has also been given to drafting both the Bill and the constitutional provisions side by side so that they fit together in a harmonious manner.

The Commission recommends the insertion of a new Part V. (A) of the Constitution, called Leadership Code, as set out below. The recommended provisions are based largely on the Solomon Islands Constitution. Clause (2) of the proposed Article 57C attempts to narrow the definition of ‘conflict of interest’ to provide for the fact that situations that in other countries may look like a ‘conflict of interest’, such as employment of relatives, are very often unavoidable in Nauru.

The Commission recommends that following provisions be inserted in the Constitution:

PART V. (A) – LEADERSHIP CODE

Leadership Code

57C(1.) This Part applies to:

- (a) the President;
- (b) a Minister;
- (c) a Member of Parliament;
- (d) a judicial officer;
- (e) the holder of any constitutional or statutory office;
- (f) the head of a Department in the Public Service; and
- (g) such other persons or offices as may be prescribed by Parliament.

(2.) A person to whom this Part applies has a duty to conduct himself in such a way, both in his public or official life and his private life, and in his associations with other persons, as not-

(a) to place himself in a position in which he has a conflict of interests or in which the fair exercise of his public or official duties might be compromised;

(b) to demean his office or position or compromise his integrity; or

(c) to diminish respect for and confidence in the integrity of the government of Nauru,

provided that the duty imposed in paragraph (a) of this clause is to be interpreted in a manner that takes account of the circumstances of Nauru and its small population.

(3.) In particular, a person to whom this Part applies shall not use his office for personal gain.

(4.) A person to whom this Part applies who-

(a) is convicted of an offence in respect of his office or position or in relation to the performance of his functions or duties; or

(b) fails to carry out the obligations imposed by the preceding clauses of this Article;

is guilty of misconduct in office.

(5.) Subject to the provisions of this Constitution, for the purposes of this Part, Parliament must, as soon as practicable after the commencement of this Part:

(a) Make provision for the disclosure of the personal and business incomes and financial affairs of persons to whom this Part applies;

(b) Make provision for the investigation of cases of alleged or suspected misconduct in office;

(c) Provide for the reference of cases of alleged or suspected misconduct in office to such independent courts or tribunals as may be prescribed, and for the determination by such courts or tribunals of any such cases that may be referred to them in the manner prescribed.

(6.) Subject to the provisions of this Constitution, for the purposes of this Part, Parliament may:

(a) prescribe specific acts or omissions constituting misconduct in office;

(b) create offences (including offences by persons to whom this Part applies and offences by other persons) and prescribe penalties for such offences; and

(c) make other provision as may appear necessary or expedient for attaining the objects of this Part.

Section 2 – Ombudsman

A large number of people (over 100) at public consultation meetings submitted that an office of Ombudsman should be included in the Constitution, but people appeared to have different understandings of what the role of an ombudsman is or ought to be. Some people appeared to be suggesting the creation of an ombudsman with the usual role of receiving and investigating complaints from the public regarding the public service or other arms of government. But most people see the Ombudsman as the person who should be ‘guardian of the Constitution’. There seems to be a high expectation from the public that some person or body should be charged with ensuring the Constitution is not breached, and for taking action when it is breached, and ‘ombudsman’ is the term that people have used to express this wish. Some people said the ombudsman should monitor compliance with the Leadership Code, whilst others said he/she should monitor compliance with the Code and the Constitution generally. Some specified that the Ombudsman should be appointed by Parliament, and one group said that the Ombudsman must be a Nauruan and there should be no restriction of his/her duties.

Written submission number 2 simply recommended the creation of an ombudsman. Submission 13 recommended the creation of an Ombudsman, to be appointed by Parliament and to be removed only by a two thirds majority of the House. The submission from NIANGO recommended that an office of Ombudsman be established ‘to ensure good governance given the track record of governance’. Submission 28 suggested there should be an office of Ombudsman, and that his role should include the investigation of all MPs, the Chief Justice, the Chief Secretary and Director of Audit. Submission 32 also suggested that an Ombudsman be established.

The submission made by the Commonwealth Human Rights Initiative in New Delhi included a section on oversight mechanisms, and stated: ‘A key aspect of participatory governance is the use of oversight bodies to ensure transparency, enable community participation and enhance public trust in government and government agencies.’ The CHRI recommended that: ‘given Nauru’s small population and resource base... Nauru consider establishing an Ombudsman’s Office to ensure transparent, community-focussed governance and public participation in oversight. The Ombudsman should be granted wide powers of oversight over government activity, and also mandated with dealing with subject-specific oversight, such as human rights and police complaints.’ The submission also set out the minimum requirements for a successful oversight body, namely: independence, sufficient powers, adequate resources, and the power to follow up on recommendations.

The Commission notes that the public demand for enforcement of the Constitution and investigation of misconduct of Leaders is largely met by the Commission’s recommendations in Chapter 5 relating to the Judiciary and in Section 1 of this Chapter relating to the Leadership Code. As explained above, it is not the normal function of an ombudsman to be the guardian of the Constitution, nor to be responsible for monitoring compliance with a Leadership Code or dealing with breaches of such a code. Usually an ombudsman is responsible for receiving and investigating complaints from the public regarding the public service or other arms of government, and for reporting to Parliament on his or her findings in relation to such investigations.

The Constitutions of the Solomon Islands, Fiji and Vanuatu all provide for the position of Ombudsman. In each of these constitutions, the Ombudsman has a fixed period of tenure, and

may not hold any other public office. In Fiji and the Solomon Islands, the Ombudsman is also prohibited from engaging in any other paid occupation without the permission of the Prime Minister (in Fiji) or the Governor-General (in the Solomon Islands). In each case the Ombudsman is empowered to investigate administrative action, either upon receipt of a complaint or upon his or her own initiative. These constitutional provisions typically require the Ombudsman to make findings and to report on administrative decisions or actions that are found to be arbitrary, improper or unfair or contrary to law.

The Commission recommends that the Constitution should provide for an Ombudsman and for his/her appointment and functions. The Ombudsman should be responsible for receiving and investigating complaints about public administration, but not Leadership Code matters.

The Commission recommends that the following provisions be inserted in the Constitution:

PART V. (B) – OMBUDSMAN

Ombudsman

57D.(1) There shall be an Ombudsman, whose office shall be a public and independent office.

(2) The Ombudsman shall be appointed by the President, in consultation with the Speaker and the Chairman of the Public Service Commission.

(3) The Ombudsman shall not perform the functions of any other public office, and shall not, without the approval of the President in each particular case, hold any other office of emolument than the office of the Ombudsman or engage in any occupation for reward outside the duties of his office.

(5) Subject to clause (6) of this Article, the Ombudsman shall vacate his office at the expiration of five years from the date of his appointment.

(6) The Ombudsman may be removed from office only on the like grounds and in the like manner as a Judge of the Supreme Court.

Functions of Ombudsman

57E (1) The functions of the Ombudsman shall be:-

(a) upon receipt of a complaint from a member of the public or at his own initiative, to enquire into the conduct of any person to whom this Article applies in the exercise of his office or authority, or abuse thereof;

(b) to assist in the improvement of the practices and procedures of public bodies; and

(c) to ensure the elimination of arbitrary and unfair decisions.

(2) Parliament may confer additional functions on the Ombudsman.

(3) This Article applies to members of the public service, the Nauru Police Force, and such other offices, government instrumentalities or public agencies as may be prescribed by Parliament.

(4) Nothing in this Article or in any Act of Parliament enacted for the purposes of this Part shall confer on the Ombudsman any power to question or review any decision of any judge, magistrate or registrar in the exercise of his judicial functions or to investigate action taken by the President or a Minister.

Discharge of functions of Ombudsman

57F (1) In the discharge of his functions the Ombudsman shall not be subject to the direction or control of any other person or authority, but shall act independently, and no proceedings of the Ombudsman shall be called in question in any court of law.

(2) The Ombudsman shall not conduct an investigation in respect of any matter if he has been given notice by the President that the investigation of that matter would not be in the interests of the security of Nauru.

(3) The Ombudsman shall grant any person or body that is the subject of a complaint pursuant to paragraph 57E(1)(a) an opportunity to reply to the complaints made against them.

(4) Wherever, after due enquiry, the Ombudsman concludes that a complaint is unjustified, he shall so inform the complainant and the President and the head of the public department or authority concerned.

(5) Wherever, after due enquiry, the Ombudsman concludes that conduct was contrary to the law, based on error of law or of fact, delayed for unjustified reasons, or unjust or blatantly unreasonable and that, consequently, any decision taken should be annulled or changed or that any practice followed should be revised, he shall forward his findings to the President and to the head of the public authority or department directly concerned.

(6) The report of the Ombudsman shall be public unless he decides to keep the report, or parts of it, confidential to the President and the person in charge of the relevant public service, on the grounds of public security or public interest. The complainant shall in any case be told of the findings of the Ombudsman.

(7) The Ombudsman shall make an annual report and may make such additional reports to Parliament as he deems appropriate concerning the discharge of his functions, and may draw attention to any defects which appear to him to exist in the administration or any law.

Further provisions

57G. Parliament may make provision for such supplementary and ancillary matters as may appear necessary or expedient to give effect to the provisions of this Part.

Chapter 13: Amending The Constitution

Introduction

The procedure for amending the Constitution is provided for in Article 84 of the Constitution. It provides that a law to amend the Constitution must be passed by at least two thirds of the total number of members of Parliament (12 out of 18) and must sit for at least 90 days between its introduction and passage (to ensure that any changes to the Constitution are not rushed through Parliament). Certain key provisions of the Constitution that are enumerated in the 5th Schedule (including the Schedule) are further entrenched by the requirement that if a law is passed to amend these provisions, the law must be submitted to a referendum and receive the support of at least two thirds of the voters before it can receive the certificate of the Speaker. The Articles listed in Schedule 5 that cannot be amended unless approved by a referendum are:

- Both Articles in Part I, relating to the Republic of Nauru, and to the Constitution being the supreme law of Nauru;
- All Articles in Part II, Protection Fundamental Rights and Freedoms;
- Articles 16, 17 relating to the election of President and the executive power and collective responsibility of Cabinet;
- Articles 26 and 27 relating to the establishment of Parliament and its legislative power, and clause (7.) of Article 41 relating to three year terms of Parliament;
- Articles 58, 59 relating to the Treasury Fund, 60 relating to tax, 62 relating to the Protection of the Long Term Investment Fund, and Article 65 relating to the protection of salaries of Judges of the Supreme Court, the Clerk of Parliament and the Director of Audit;
- Article 71, and clause (1.) of Article 72 relating to citizenship of people who were members of the Nauruan Community before independence, or born after independence to Nauruan parents;
- Article 84 relating to amendment of the Constitution;
- Clauses (1.), (2.), (3.) and (5.) of Article 85 relating to the continued effect of laws in force before independence; and
- Article 93 on the Agreement of 14 November 1967 relating to the Phosphate Industry.

If the Constitutional Convention that is to be held in the first half of 2007 decides that there should be amendments to the Constitution and Parliament introduces a Bill to give effect to the decisions of the Convention, it will be the first time that the provisions of Article 84 will be activated.

Professor Davidson stated at the 1968 Constitution Convention that a constitution provides the main legal and constitutional framework for the ‘new state’ and that it is desirable that it shall contain those parts of the law that are unlikely to need changing at frequent intervals. He went to say that ‘it is desirable that the Constitution shall be a document to which people attach some sanctity and are only willing to consider changing when it is that circumstances have changed in such important degree that it is necessary to change the framework’. The supremacy of the constitution could not be assured if governments and the legislature they control could change the constitution in the same manner as ordinary laws are made or amended. On the other hand, if constitutional amendment is too difficult, the wishes of the majority of citizens and parliamentarians seeking reforms may be frustrated, the orderly development of the political and legal system may be stunted and eventually the constitution may cease to provide effective control and guidance for the real needs of the contemporary state (Powles 2005).

Issues

With these considerations in mind, the Commission has examined whether the procedures to amend the Constitution strike the right balance between rigidity and flexibility. The specific issues that are considered in this Chapter are:

1. Whether or not to retain the present arrangements under Article 84; and whether all proposed amendments to the Constitution should be subject to referendum, or additional Articles added to the list of entrenched provisions in Schedule 5; and
2. Whether the Constitution should be periodically reviewed and if so at what time intervals.

Section 1 – Procedure for amendment

It is standard for written constitutions to include rules about the method by which they can be amended, and for the procedural requirements for amendment to be more onerous than those for amending or passing normal legislation.

Some constitutions provide that the Constitution may be amended by a law passed by two thirds of the Members of Parliament, rather than the simple majority required for ordinary laws (see for example the Solomon Islands s.61 and Tuvalu s.7). Some other constitutions within the region resemble Nauru in their requirement for a special majority in Parliament as well as a referendum on certain specially entrenched provisions (see for example Kiribati s.69 which requires two thirds of Parliament, and for any amendment to the Bill of Rights also a referendum supported by two thirds of the voters; and Vanuatu ss.85-86 which requires two thirds of Parliament with a quorum of three quarters of the total number of Members, and for any amendments concerning language, the electoral system or the parliamentary system also a referendum supported by a majority of the voters).

The Federated States of Micronesia has the most onerous provisions within the region in terms of amendment to the Constitution, requiring the approval of $\frac{3}{4}$ of the votes cast in at least three out of the four states in order for a proposed amendment to become part of the Constitution (Article XIV Section 1). The FSM provisions are also quite novel in providing that an amendment to the Constitution may be proposed by popular initiative in a manner prescribed by law (or may be proposed by Congress or a constitutional convention).

A number of countries within the Pacific region that gained independence later than Nauru have already undertaken major reviews of their constitutions, including Tuvalu (1976), Marshall Islands (1990), and Fiji (1990 and 1997). The Solomon Islands has been in the process of attempting to introduce an entirely new (federal) constitution since 2001, and that process is still underway. Samoa has made minor amendments to its Constitution on a number of occasions.

The issue of the constitutional procedure for amending the Constitution was raised at public consultation meetings by almost fifty participants, and was touched upon in nine written submissions. At one of the public consultation meetings, 6 people suggested that Article 84 should be amended to make the various steps or phases of the current constitutional review process into constitutional requirements for any future amendments to the Constitution. Some written submissions support the view that the present provisions of Article 84 do not require any amendment. Others questioned the current review and said the process is being rushed and expressed reservations about whether the proposals from the public to amend the Constitution would receive serious treatment by those concerned with the process.

If the provisions of Article 84 were to be amended, such amendment could either *reduce* the requirements for amendments, thus making the Constitution *more flexible* (for example by removing Schedule 5 and requiring only 2/3 of Parliament to change and provision in the Constitution), or *increase* the requirements for amendment, thereby making the Constitution *more rigidly protected* and difficult to amend (for example by requiring every Article in the Constitution to be approved by referendum before it becomes law, instead of only those Articles listed in Schedule 5). Only the latter option was raised by some members of the public.

Ms Olsson, the Nauru Law Society, and NIANGO submitted that Article 84 should be amended so that amendment to any Article of the Constitution should require the support of a popular referendum before it can become law. The Law Society further submitted that Parliament should not be able to take the initiative to propose amendments to the Constitution or a review of the Constitution, without first gaining the support for such proposal in a referendum.

The Commission does not consider it advisable to increase the requirements that have to be met to effect amendment to the Constitution, as it considers that the existing provisions of Article 84 strike the requisite balance between flexibility and rigidity. Currently, those provisions of the Constitution that are regarded as most important, including all fundamental rights and freedoms, the basic elements of the executive and parliamentary system, and citizenship entitlements of indigenous Nauruans, are protected by the requirement for referendum. To go further and make all provisions of the Constitution subject to referendum if they are to be amended, would make the Constitution significantly more rigid.

The Commission is not inclined to adopt the suggestion that any proposal that the Constitution be amended or reviewed should be approved by a referendum first before it can proceed to be considered. Such requirement may have the effect of closing off discussion of the possibility of amendment before people have the necessary information to determine whether or not any amendment is necessary or desirable, and may unnecessarily hinder legitimate changes to the Constitution.

However the Commission fully supports the notion that constitutional review should be democratic and inclusive, and believes that this can be achieved without necessarily subjecting everything to referendum. The Commission notes that the first four steps in the current

constitutional review process are not required under Article 84, but have been included in the process in order to ensure that the public is able to participate and have their say prior to any proposed amendments being submitted to Parliament. The Commission is of the view that it would be advisable to make some provision to ensure that any future review is also conducted in an inclusive manner, without being too prescriptive about the procedural steps that must be taken. The Commission recommends that such provision be made in a new Article, and the recommended provision is set out in Section 2 below, as it is interrelated with the issue of whether there ought to be a periodic review of the Constitution.

The Commission recommends no change to the requirements for constitutional amendment currently provided for in Article 84.

Section 2 – Periodic review of the Constitution

The public consultations and written submissions revealed some support for a periodic review of the Constitution (over 40 people). The proposed period for review ranged from every 3 years to every 30 years. The opportunity of reviewing the constitution on a periodic basis is provided for in the Micronesian states of the FSM, the Marshall Islands and Palau. In Palau, every 15 years the people are asked whether there should be a convention to revise or amend the Constitution. The Nitijela of the Marshall Islands is duty bound under the Constitution to report every 10 years on the advisability of amending the Constitution. Every 10 years, the FSM Congress submits to the voters the question: "Shall there be a convention to revise or amend the Constitution?"

Providing people with the option of a periodic review of the Constitution enables them to respond to changing conditions, and to periodically assess whether there are any provisions of the Constitution or of the system established by the Constitution that require improvement, and whether the Constitution needs to make any new provision to cover new circumstances.

The Commission recommends that the Constitution should provide for a periodic review of the Constitution every 15 years. As mentioned in Section 1, the Commission also recommends that provision should be made for any review of the Constitution to be carried out in an inclusive and participatory manner.

The Commission recommends that a new Article be inserted in the Constitution immediately after Article 84, as follows:

Opportunity for periodic review and inclusive review process

84A.(1.) At least every 15 years, Parliament shall submit to a referendum the question 'do you think there should be a Constitutional Convention, to consider whether or not there should be any amendments to the Constitution?', and if the referendum is passed by a majority of the votes cast, Parliament shall establish a Constitutional Convention.

(2) Nothing in clause (1) shall prevent Parliament from initiating a review of the Constitution at any other time, and any such additional review shall not require a referendum prior to being commenced.

(3) If a Constitutional Convention is established pursuant to clause (1) or a process of constitutional review is initiated pursuant to clause (2) Parliament shall pass legislation setting out an inclusive process for review of the Constitution which ensures that people are able to participate in the process prior to a proposed law being introduced to Parliament pursuant to Article 84, and in the case of Convention under clause (1), prior to the establishment of the Convention.

Chapter 14: Transitional Provisions

Introduction

The Transitional Provisions are contained in Part XI of the Constitution, and were included to provide for the legal transition from foreign administration to independence. They provide for matters such as the continued application after independence of certain laws that were in place before independence; provisions relating to the first President and Cabinet; the first Parliament; transitional provisions relating to judges of the Supreme Court; existing legal proceedings; financial provisions up to 30 June 1968; provisions relating to Superannuation Board; and the vesting of property, etc of the departing colonial administration.

Most of these provisions are no longer operative and their continued presence in the Constitution has an historical value only. The Commission has examined these provisions with a view to ascertaining which provisions need to be retained and which could be removed from the Constitution in view of the fact that they no longer have any effect.

Issue

The Commission considered whether all or some of the provisions of Part XI need to be retained in the Constitution. If they are not to be retained then what is to be done to these provisions?

Section 1 – Treatment of spent provisions

One way to deal with constitutional provisions that are no longer operative is to put them together and place them in a footnote or end note at the end of the formal part of the Constitution. The current Marshall Islands Constitution has been amended and the changes are summarised at the end of the Constitution in a Note explaining what each of the amendments achieved or the nature of the amendment. For instance, in every part of the Constitution where the terms “Republic of the Marshall Islands” or “Republic” are used, a note is made that they now replace the term “Marshall Islands”. This is one method of handling provisions that are no longer required in the Constitution.

The preferred method of dealing with transitory provisions that are proposed to be removed is to place them in an Appendix to the Constitution under the title ‘List of Constitutional Enactments’ and to list details of the Article, the name and the date of enactment, amendment, substitution or insertion. A draft pro forma is suggested at the end of this Chapter.

Section 2 – Repeal of certain transitional provisions

Article 85

The Article provides for the continued application of laws that were in force at the time of independence. A number of these laws are still in place. For instance, the *Nauru Lands Committee Ordinance*, and the *Administration Order No. 3 of 1938* are still in force today. To remove Article 85(1) and (2) would place in doubt the validity and applicability of these laws

and anything done under them would lead to a void in the law regarding the subject matter of those provisions. Clause (5) should also remain.

Clauses (3), (4) and (6) are no longer in use and should be repealed, with an appropriate note explaining their removal.

Article 86

There are a few statutory laws of Australia such as the *Secret Commissions Act 1905* and the *Trade Marks Act 1955-1958* that are still in force in Nauru. In order that the terms used in these laws have a clear reference to an office or person in Nauru Article 86 should remain in the Constitution.

Article 87

This Article provides for certain officers and the office they occupied to continue after independence. For instance, the senior public officer of Nauru at the time of independence is known as the “Official Secretary”. The position was renamed “Principal Executive Officer” under the interim Constitution and subsequently “Chief Secretary” under the independence Constitution. It is clearly no longer required and the Article should be removed.

Article 88

At the time of independence the courts had a number of pending cases on their list, and this Article provides for such cases to remain on the list notwithstanding the change of administration. These cases would have been determined and disposed of soon after independence. The Article is no longer required and should be removed.

Article 89

The Article deals with provisions for the First Parliament of Nauru. That Parliament has since been replaced by subsequent Parliaments following general elections. The Article has no further use in the Constitution and should be removed.

Article 90

The powers, privileges and immunities of Parliament have been legislated for under the *Parliamentary Powers, Privileges and Immunities Act 1976* and Article 90 is no longer required. It should also be removed from the Constitution.

Article 91

This Article makes provisions for property and assets previously vested in the *Administrator of the Territory of Nauru* or in the *Administration of the Territory of Nauru* to vest in the Republic

of Nauru. It also passes on the rights, obligations and liabilities in the previous administration to the Republic. After forty years there should be no question as to the title of the Republic in such property or assets or over any rights, obligations and liabilities. The Commission therefore recommends the repeal of this Article.

Article 92

This Article relates to the 1968 Constitutional Convention and ceased to have any effect from May 1968 when the Convention was concluded. This Article should be repealed.

Article 93

The application of the phosphate agreement referred to in the Article has expired and therefore so has the operation of the Article. The Commission recommends that this Article be repealed.

Article 94 and the Sixth Schedule

This Article relates to financial and budget provisions for the period up to 30th June 1968 following independence. The Sixth Schedule lists the amounts to be allocated to various Funds in respect of each ton of phosphate shipped from Nauru between 31 January 1968 and 1st July 1968. The allocation of phosphate revenue to particular funds after July 1968 is dealt with under the *Nauru Phosphate Royalties (Payment and Investment) 1968*, as currently amended to 2005. Article 94 and *the Sixth Schedule ceased to have effect on 1 July 1968*, and should be repealed.

Articles 95 and 96

These Articles relate to judicial appointments and courts during the transitional phase and no longer have effect. These Articles should be repealed.

Articles 97 and 98

The provisions of these Articles, which relate to the first Director of Audit after independence and the Superannuation Board immediately after independence, are no longer required and should be removed.

Articles 99 and 100

The transitional arrangements for the President and Cabinet; and the Chief Secretary are no longer required and may be removed accordingly.

The Commission recommends that the following Articles and clauses in Part XI of the Constitution be repealed and thereafter be referred to in an Appendix as part of the Constitution that includes details of their enactment and repeal:

Clauses (3), (4) and (6) of Article 85; and Articles 87, 88, 89, 90, 91, 92, 93, 94 and the Sixth Schedule, 95, 96, 97, 98, 99 and 100.

A recommended format for reference to the repealed Articles in an Appendix is set out below.

Appendix 1

List of Constitutional Enactments Repealed on 2008/2009*

Article Number**	Name***	Date of Enactment****
89	The First Parliament	31.1.68 Substituted 17.5.68
94	Financial Provisions to 30 June 1968	31.1.68
97	Director of Audit	31.1.68 Amended 17.5.6
100	Transitional provisions relating to Chief Secretary	Inserted 17.5.68
Sixth Schedule		Amended 17.5.68

Notes:

*** delete which is not applicable.**

**** enter the number of the Article**

***** enter name of Article from the marginal note.**

****** enter date of enactment, substitution, amendment or insertion as shown above**

Bibliography

Books, Reports, Articles

- Ackerman, Bruce, 'The Emergency Constitution' (2004) 113 *Yale Law Journal* 1029
- Brown, Kenneth, 'The Language of Land: Look Before You Leap' (2000) 4 *Journal of South Pacific Law* Article 2 <http://www.paclii.org>
- Congressional Research Service (CRS), *Report for Congress – National Emergency Powers* (2006)
- Davidson, J W, 'The Republic of Nauru' (1968) 3 *Journal of Pacific History* 145
- Finn, Chris, 'The Justiciability of Administrative Decisions: A Redundant Concept?' [2002] *Fed. Rev* 9
- Gleeson, Murray, 'The Right to an Independent Judiciary', paper delivered at the 14th Commonwealth Law Conference London, September 2005
- Govender, Karthy, 'Assessing the constitutional protection of human rights in South Africa during the first decade of democracy' in *State of the Nation 2005-2006* (HSRC Press, South Africa 2006)
- International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility To Protect* [2001] www.dfait-maeci.gc.ca/iciss-ciise/pdf/commission-report.pdf at 3 July 2004
- Le Roy, Katy, *Nauru Constitutional Review Background and Discussion Paper* (UNDP 2006)
- Levine, S. & N. S. Roberts 'The Constitutional Structures and Electoral Systems of Pacific Island States' (2005) 43 *Journal of Commonwealth and Comparative Politics* 276
- MacSporran, Peter, *The Annotated Constitution of the Republic of Nauru* (2006, forthcoming)
- McDowell, Karen, *The Constitutional Development of Nauru* (PhD thesis, La Trobe University, 1986)
- Mehra, NN, *Practice and Procedure of the Parliament of Nauru* (1990)
- Monroe, P.A. 'Comment: Financial Barriers to Litigation: Attorney Fees and the Problem of Legal Access' (1981) 46 *Albany L. Rev.* 148
- Muroa, George S, 'The Extent of Constitutional Protection of Land Rights in Papua New Guinea' [1998] *Melanesian Law Journal* 4.
- Pacific Islands Forum *Communiqués*
- Paterson, Don, 'Legal challenges for small jurisdictions in relation to privacy, freedom of information and access to justice' (2000) 4 *Journal of South Pacific Law* Article 4

Powles, Guy, 'Options for Constitutional Change in the South Pacific: Some Thoughts on Approach and Method', Paper presented at the Pacific Islands Legal Officers' Meeting (PILOM), Port Vila, 21-23 September 2005 (paper available from the Office of the Attorney General of Vanuatu)

Record of Proceedings of Constitutional Convention (1968)

Reilly, Benjamin, 'Social Choice in the South Seas: Electoral Innovation and the Borda Count in the Pacific Island Countries' (2003) 23 *International Political Science Review* 355

de Smith, *Judicial Review of Administrative Action* (4th Edition, 1980)

Teuea Toatu, 'Keeping the Nauru Economy Afloat', (2004) 19 *Pacific Economic Bulletin* 123

Transcript of *Correspondents Report* Sunday 20 August 2006

Wedgwood, Camilla, 'Report on Research Work in Nauru Island', (1936) Vol VII *Oceania* 1

Weeramantry, Christopher, *Nauru – Environmental Damage under International Trusteeship*, Oxford University Press (1992)

Cases

Council of Civil Service Unions v Minister for Civil Service [1964] 3All ER 935

Dogabe Jeremiah v Nauru Local Government Council, Civil Action No.5/1970, Nauru Law Reports 1969-1982 Part A, 1

In the matter of Article 55 and a Resolution pursuant to Article 24(1) of the Constitution, Constitutional Reference No. 1 of 2003 Supreme Court of Nauru

In the matter of ss 11 and 12 of the Parliament of Nauru (Register of Interests) Act 2004 ('Grass Roots Case'), Miscellaneous cause No. 1 of 2006 Supreme Court of Nauru

Kinza Clodumar & Ors vs Ludwig Scotty ('Emergency Case'), Civil Action No. 12 of 2004

Lucy Ika and Another v Nauru Lands Committee & Ors (Civil Case No.2/1991, decision dated 21 August 1992) Supreme Court of Nauru

M.C. Mehta and Others v Shiriram Food and Fertilizer Industries and Union of India ('Oleum Gas Leak Case – III') AIR [1987] SC 1026

PNG Ready Mixed Concrete Pty Ltd v State of Papua New Guinea [1981] PNGLR 396

Russell Kun v Secretary for Justice & Anor, Civil Action No. 11 of 2004, Supreme Court of Nauru

S. P. Gupta v. Union of India, [1981] (Supp) SCC 8

Valente v The Queen [1985] 2 SCR 673

Legislation

Administration Order No. 3 of 1938

Appeals Act 1972

Audit Act 1971

Charter of Rights and Freedoms (Canada) (1982)

Constitution of the Cook Islands (1965)

Constitution of East Timor (2002)

Constitution of the Federated States of Micronesia (1979)

Constitution of Fiji Islands (1997)

Constitution of India (1950)

Constitution of Kiribati (1979)

Constitution of the Marshall Islands (1979)

Constitution of Niue (1974)

Constitution of Palau (1981)

Constitution of Papua New Guinea (1975)

Constitution of Samoa (1962)

Constitution of the Solomon Islands (1978)

Constitution of South Africa (1996)

Constitution of Tuvalu (1978)

Constitution of Uganda (1995)

Constitution of Vanuatu (1980)

Courts Act 1972

Criminal Procedure Act 1972

Customs and Adopted Laws Act 1971

Electoral Act 1965-1992

Government Loans Act 1972

Interpretation Act 1972 (and amendments)

Lands Act 1976

Naoero Citizenship Act 2005

Parliament of Nauru (Register of Interests) Act 2004

Parliamentary Powers, Privileges and Immunities Act 1976

Public Accounts Committee Act 1992

Public Finances (Control and Management) Act 1997

Public Service Act 1998

Republic of Nauru Finance Corporation Act 1972 (and Ronfin amendment Act 1998)

Republic Proceedings Act 1972

Treasury Fund Protection Act 2004

International Law

European Convention on Human Rights done at Rome 1950 (ECHR)

International Covenant on Civil and Political Rights 1966 (ICCPR)

International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR)

Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty 1989 (OPT2)

Universal Declaration of Human Rights 1948 (UNDHR)

Appendices

Appendix 1 - Constitutional Review Commission Terms of Reference

The 16th Parliament of Nauru has established the Standing Committee on Constitutional Review (CRC) under the *Constitutional Review Committee Act* (4 November 2004) to conduct a review of the Constitution of Nauru. The review provides an opportunity to improve and update the Constitution, and to remedy some of the problems that the last 38 years of experience have revealed. Certain parts of the Constitution appear to have facilitated the crises and instability that have plagued Nauru for several years. Reviews have been attempted several times in Nauru but have never been followed through to completion. The CRC is committed to completing an open and inclusive process of constitutional review. The Nauru Constitutional Review Commission is an essential part of this process. The Commission shall be provided with all written submissions received by the CRC, the report on the public consultation meetings, and the complete notes of all views expressed by members of the public at the public consultation meetings.

The Commission shall review the Constitution and in doing so shall:

- a. Scrutinise and consider the extent to which the Constitution meets the present and future constitutional needs of the people of Nauru;
- b. Pay particular regard to the views of the public that have been expressed in public consultations and written submissions;
- c. Avail itself of and consider any other material the Commission deems relevant;
- d. Take into account Nauru's international treaty obligations and internationally recognised principles and standards of rights and freedoms;
- e. Remain independent and carry out its duties impartially;
- f. Report to the Parliamentary Standing Committee on Constitutional Review no later than 28 February 2007; (which report shall be tabled in Parliament and provided to the Constitutional Convention, and made available to the public)
- g. Include in its report a fair account of the range of alternative views presented by members of the public; and
- h. Include in its report such recommendations for the amendment of the Constitution as the Commission, having reviewed the Constitution in accordance with its terms of reference, deems necessary and desirable and which are consistent with national unity and the economic and social well-being of all people on Nauru, and explain the rationale for each recommendation and the way in which the Commission arrived at its recommendations.

In undertaking its review the Commission may:

- Seek advice from legal counsel within the Commission Secretariat;
- Instruct legal counsel within the Commission Secretariat to prepare research or discussion papers on particular aspects of the Constitution;
- Solicit further submissions from specific persons or bodies;
- Issue public statements regarding its work; and/or
- Convene public meetings

Appendix 2 – Biographical details of Commissioners

Mrs Ruby Thoma, Chairperson

Ruby Thoma was born in Nauru and educated in Australia at St Anne's C.E.G.G.S in Sale, Victoria. After completing her university entrance, Ruby studied nursing and worked at both Epworth hospital in Richmond, Victoria, and at the Christchurch Women's Hospital in New Zealand. Ruby is the first and only Nauruan woman to have served in the Nauruan Parliament. She was the Member for Ewa/Anetan from 1986 to 1995 over four terms of Parliament, and during that time served variously as Deputy Speaker, Acting President, Minister for Finance and Minister for Health. Since 1998 Ruby has been Coordinator of the 'Healthy Island Program' and the Acting Director of Public Health. Since 1986 she has been a Deaconess in her District Parish.

Mr Leo D Keke, Commissioner

Leo D. Keke is a Nauruan now retired from the service of Nauru after 33 years and is currently practicing at the Nauru Bar where he has appeared in constitutional cases as recently as 2006. The first Nauruan to graduate in law (University of Tasmania-1972). He is admitted to practice law in the Supreme Court of Nauru and the High Court of Australia, the Federal Courts of Australia, the Supreme Courts of Victoria and the Australian Capital Territory. Mr. Keke practiced law with Blake and Riggall (now Blake Dawson Waldron) in Melbourne as a Solicitor in areas including corporate law, commercial litigation, estate planning, taxation and administrative law.

He was a member of Parliament of Nauru (3rd, 4th and 5th) and was a Cabinet Minister of Justice and Works and Community Services. He also held various senior positions in the Nauru public service – including Presidential Counsel, Chief Secretary, Secretary for External Affairs, Secretary for Justice/Director of Public Prosecutions and Resident Magistrate. His most recent appointment prior to retirement was Chairman of the Board of Air Nauru. He also spent 5 years with the South Pacific Bureau for Economic Cooperation (SPEC) (now the Pacific Islands Forum Secretariat) in the late nineteen eighties. He is an active member of the Executive Board of the Nauru Olympic Committee and the Commonwealth Games Association.

Dr Guy Powles, Commissioner

Dr Guy Powles, PhD (Australian National University) LLM (Victoria University of Wellington), is a New Zealander who has lived in several Pacific Island countries, practiced and taught law in the Pacific and held judicial office in two countries. He argued constitutional cases in the Nauru Supreme Court in 1977 and the mid 1980s. His research and writing has focused on constitutions, courts and legal systems, and included studies of the interaction of custom and law. He is partly retired living in Melbourne, and Honorary Associate of the Faculty of Law at Monash University.

Appendix 3 – Nauru Constitutional Review Process

STEP	PURPOSE	TIMING
STEP 1 Public Awareness	To raise community awareness about the review process, and to provide information on the existing Constitution and some options for change	July-Aug 2006
STEP 2 Public Consultation	To conduct wide public consultations and invite written submissions to ascertain the views and preferences of the people of Nauru on what changes, if any, they desire to their Constitution (and continued provision of information per step 1)	Oct-Nov 2006
STEP 3 Constitutional Commission	To conduct an independent review of the Constitution by an expert Commission comprising two eminent Nauruans and one expatriate expert, which takes account of the views expressed in step 2. Commission to produce report and recommendations.	Dec 2006-Feb 2007
STEP 4 Constitutional Convention	For an elected representative Convention to deliberate on the recommendations of the Commission and determine what, if any, amendments to the Constitution ought to be made. The decisions of the Convention to be presented to Parliament in the form of a draft Bill.	Elections March/April 2007 Sitting April/May 2007
STEP 5 Act of Parliament	As required by Article 84 of the Constitution, a Bill to be introduced to Parliament and to sit for 90 days between its introduction and passage. Bill requires the support of at least two thirds of the total number of Members of Parliament in order to be passed.	Introd May/June 2007 Passed c. August 2007
STEP 6 Referendum	As required by Article 84 of the Constitution, if any of the proposed amendments relate to the Articles listed in Schedule 5 of the Constitution, a referendum is to be held after the passage of the Act. Such amendments require the support of at least two thirds of the votes validly cast in the referendum in order to take effect. A public awareness campaign is to be conducted prior to the referendum to provide the public with information on the questions to be asked at referendum.	Awareness-raising c. September 2007 Referendum c. October 2007

Appendix 4 – Public Consultations Meeting Schedule

DATE	9:00-12:00	2:00-5:00	6:30-9:30
M 9.10.06	BOE ✓		BUADA ✓
T 10.10.06	DENIG ✓		
W 11.10.06			MENEN ✓
T 12.10.06	GOV DEPTS ✓		
F 13.10.06	GOV DEPTS ✓		
M 16.10.06	ANETAN ✓		ANIBARE ✓
T 17.10.06	IJUW ✓	NIBOK ✓	
W 18.10.06	UABOE ✓		ANABAR ✓
T 19.10.06	LOCATION ✓		YAREN ✓
F 20.10.06	BAITSI ✓	AIWO ✓	
M 23.10.06	GOV DEPTS ✓		BOE ✓
T 24.10.06	GOV DEPTS ✓	MENEN ✓	
W 25.10.06	GOV DEPTS ✓		DENIG ✓
T 26.10.06	ANGAM DAY		
F 27.10.06			EWA ✓
M 30.10.06	YAREN ✓		NIBOK ✓
T 31.10.06	ANABAR ✓	WOMEN ✗	
W 1.11.06	ANIBARE ✗	AIR NAURU ✓	ANETAN ✓
T 2.11.06	SPORT ORGS ✓		LOCATION ✓
F 3.11.06	BUADA ✓	EWA ✓	
S 4.11.06		NIANGO ✓	
M 6.11.06	MENEN HOTEL ✓		AIWO ✗
T 7.11.06	CIVIC OPEN ✓	YOUTH 🗑	IJUW ✓
W 8.11.06	CIVIC OPEN ✓	REHAB CORP ✓	BAITSI ✗
T 9.11.06	CIVIC OPEN ✓		UABOE ✓

- ✓ Indicates meetings that proceeded
 ✗ Indicates meetings that were scheduled but did not proceed because of poor attendance
 🗑 Indicates meetings that were cancelled in advance

Appendix 5 – List of Written Submissions

No.	Name of author	Date received
1	Peter MacSporran	22/12/04
2	Renos Agege	22/09/04
3	Rueben Kun	09/09/04
4	Barry Connell	24/01/05
5	HE Hon Ludwig Scotty MP, President	28/02/05
6	Hon Dogabe Jeremiah MP & Hon Sprent Dabwido MP	03/03/05
7	Knox Herman Tolenoa	21/03/05
8	Helen Hughes	21/03/05
9	Jared Heinrich	02/10/06
10	B. Poe	06/10/06
11	Anonymous	11/10/06
12	Elvin Brechterfield	11/10/06
13	Jared Heinrich	25/10/06
14	Anonymous	02/11/06
15	Anonymous	02/11/06
16	Anonymous	02/11/06
17	Douglas Kam & Lomax Baguga	04/11/06
18	Anonymous	07/11/06
19	Anonymous	07/11/06
20	Limay Uera	08/11/06
21	Fred Amoa, Secretary, Department of Justice	09/11/06
22	Faustina Kamtaura	10/11/06
23	John Daigon Akubor	10/11/06
24	Gemma Ebogorarouw Adam	13/11/06
25	NIANGO	13/11/06
26	Commonwealth Human Rights Initiative (CHRI)	17/11/06
27	Group of NIANGO Members	13/10/06

No.	Name of author	Date received
28	R. Tokaibure	30/10/06
29	Hon Mathew Batsiua MP	11/06
30	Four anonymous men c/- Chet Tatum	11/06
31	Henry Harris	17/11/06
32	Julie Olsson	17/11/06
33	Cecilia Giouba	17/11/06
34	Aloysius Amwano	17/11/06
35	Signed by numerous citizens	17/11/06
36	Julie Olsson	24/11/06
37	Cindy Kephass	11/06
38	Anonymous	24/11/06
39	Vinci Clodumar, President , Nauru Law Society	21/11/06
40	Commonwealth Human Rights Initiative (CHRI)	21/11/06

Appendix 6 – Presidents of Nauru

PRESIDENT	TERM	LENGTH	PARL'T
Hammer DeRoburt	17.5.68 - 26.1.71	2 years 8 months	1 st Parliament
Hammer DeRoburt	26.1.71 – 18.12.73	2 years 10.5 months	2 nd Parliament
Hammer DeRoburt	18.12.73 – 21.12.76	3 years	3 rd Parliament
Bernard Dowiyogo	21.12.76 – 15.11.77	10 months 3 weeks	4 th Parliament
Bernard Dowiyogo	15.11.77 – 31.12.77	1.5 months	5 th Parliament
Bernard Dowiyogo	31.12.77 – 19.4.78	3.5 months	
Lagumot Harris	19.4.78 – 11.5.78	3 weeks	
Hammer DeRoburt	11.5.78 – 7.12.78	7 months	
Hammer DeRoburt	7.12.78 – 12.4.79	4 months	
Hammer DeRoburt	12.4.79 – 9.12.80	1 year 8 months	
Hammer DeRoburt	9.12.80 – 6.12.83	3 years	6 th Parliament
Hammer DeRoburt	6.12.83 – 17.9.86	2 years 9 months	7 th Parliament
Kennan Adeang	17.9.86 – 30.9.86	2 weeks	
Hammer DeRoburt	30.9.86 – 9.12.86	2 months 1 week	
Kennan Adeang	9.12.86 – 19.12.86	10 days	8 th Parliament
Hammer DeRoburt	19.12.86 – 27.1.87	1 month 1 week	
Hammer DeRoburt	27.1.87 – 17.8.89	2 years 6 months 3 wks	9 th Parliament
Kenas Aroi	17.8.89 – 12.12.89	4 months	
Bernard Dowiyogo	12.12.89 – 18.11.92	2 years 11 months	10 th Parliam't
Bernard Dowiyogo	18.11.92 – 16.9.93	10 months	11 th Parliam't
Bernard Dowiyogo	16.9.93 – 21.11.95	2 years 2 months	
Lagumot Harris	21.11.95 – 11.11.96	11 months 3 weeks	12 th Parliam't
Bernard Dowiyogo	11.11.96 – 26.11.96	2 weeks	
Kennan Adeang	26.11.96 – 19.12.96	3 weeks	
Ruben Kun	19.12.96 – 12.2.97	2 months 3 weeks	
Kinza Clodumar	12.2.97 – 17.6.98	1 year 4 months	13 th Parliam't
Bernard Dowiyogo	17.6.98 – 27.4.99	10 months 1 week	
Rene Harris	27.4.99 – 19.4.00	11 months 3 weeks	
Bernard Dowiyogo	19.4.00 – 29.3.01	11 months 2 weeks	14 th Parliam't
Rene Harris	29.3.01 – 18.1.03	1 year 11 mths 1.5 wks	
Bernard Dowiyogo	18.1.03 – 20.3.03	2 months	
Derog Gioura	20.3.03 – 29.5.03	2 months 1 week	
Ludwig Scotty	29.5.03 – 8.8.03	2 months 1 week	15 th Parliam't
Rene Harris	8.8.03 – 22.6.04	10 months 2 weeks	
Ludwig Scotty	22.6.04 – 26.10.04	4 months	
Ludwig Scotty	26.10.04 -	-	16 th Parliam't
Total number of Presidents (terms)		35	
Average length of presidential term (in 39 years)		1 year one month one wk	
Number of Presidential terms less than 1 year		23	
Number of Presidential terms more than 2 years		9	
Number of Presidential terms less than 6 months		14	
Number of Presid'l terms more than 2.5 years		8	
Number of people who have served as president		10	

Appendix 7 – Consolidation of Proposed constitutional amendments

This Appendix is a consolidated version of all amendments recommended by the Commission, and is set out showing the place of each of the amendments within the Constitution, alongside existing provisions. Proposed deletions are shown with lines through the text, proposed new provisions are underlined. Existing provisions of the Constitution for which no amendment has been recommended appear as normal text with no strikethrough or underlining. This draft of the proposed amended Constitution does not contain the marginal notes that appear in the current Constitution and which would appear in an amended Constitution (the marginal notes show dates of amendment of particular provisions, and the heading title of each Article). New transitional provisions have not been drafted, as this would be done after the Convention and Parliament have decided which, if any, amendments they wish to adopt.

THE CONSTITUTION OF NAURU

~~WHEREAS we the people of Nauru acknowledge God as the almighty and everlasting Lord and the giver of all good things:~~

~~And Whereas we humbly place ourselves under the protection of His good providence and seek His blessing upon ourselves and upon our lives:~~

~~And Whereas we have declared that Nauru shall be a republic:~~

~~And Whereas a Constitutional Convention representing us has prepared a constitution for Nauru:~~

~~Now Therefore we the people of Nauru in our Constitutional Convention this twenty ninth day of January, One thousand nine hundred and sixty eight, do hereby adopt, enact and give to ourselves this Constitution to come into force on the thirty first day of January, One thousand nine hundred and sixty eight.~~

PREAMBLE

Whereas Nauru became a sovereign independent republic on the thirty-first day of January, One thousand nine hundred and sixty-eight under a Constitution adopted by a Constitutional Convention which held its final meeting on the seventeenth day of May One thousand nine hundred and sixty-eight; and whereas after forty years, we have reviewed our independence Constitution, and a Constitutional Convention representing us has prepared a revised Constitution for Nauru, we hereby introduce our revised Constitution:

WE, THE PEOPLE OF NAURU, acknowledge God as the almighty and everlasting Lord and the giver of all good things. We humbly place ourselves under the protection of His good providence and seek His blessing upon ourselves and upon our lives. We honour our history and declare our aspirations in this document.

We proudly acknowledge our ancestors, who travelled across the vast Pacific Ocean to make this beautiful and isolated island their home. Nauru, our beloved island and birthplace of our ancestors, our present and eternal home, is the living link between all generations of Nauruans. On this island we have built our own unique society.

Nauru has faced and survived many challenges, including foreign rule and the impact of foreign cultures, the devastation of war, and the destruction of much of the natural beauty of our island. We have been blessed with vast phosphate resources, which has been a mixed blessing for our island and our people. In the face of these challenges, our people have proven themselves to be resilient and adaptable.

We deeply respect and acknowledge the great leadership and achievements of our founding forefathers, who struggled for and won our independence, and enabled us to take our place in the modern family of

nations. We extend to other peoples and nations what we seek from them: peace, friendship, mutual understanding and respect for our common humanity and human dignity.

The expectations of Nauruan people for honest and accountable government since independence have not always been fulfilled and therefore we have reviewed our Constitution, striving to ensure that Nauru's future will be bright and that public institutions will serve the people with integrity.

The people of Nauru set out for themselves and for their governing institutions the following principles:

We strive for peace, justice, stability, welfare, progress and prosperity of the People;

Our institutions shall serve the people accountably and transparently and observe high ethical standards;

We affirm our commitment to democratic values and to the right of people to participate in their government;

We uphold respect for human dignity and the human rights of all people;

We seek to preserve the value of resolving matters of importance by consensus or compromise and recognise the need for courtesy and respect;

We recognise the importance of communities and the strength and support of the family;

We uphold the importance of sharing within the extended family and the community;

We affirm the matrilineal basis of our society and acknowledge the importance of kinship in matters concerning land;

We value highly verbal agreements and oral history;

We take pride in our traditions, culture, heritage and aspirations; respect for family life, tribes and kinship; and the preservation and unity of the People;

We acknowledge the need to be open to adapt to changing circumstances in the modern world and to not unnecessarily hamper the gradual development of changing values and priorities;

These principles, under the guidance of God, are solemnly adopted and affirmed as the basis of this Constitution, and as the guiding principles to be observed in its interpretation and application at all levels of government and organised life

AND WE DO HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION TO COME INTO FORCE ON THE THIRTY-FIRST DAY OF JANUARY, TWO THOUSAND AND EIGHT.

ARRANGEMENT OF PARTS

Part I.	The Republic of Nauru and the Supreme Law of Nauru (Articles I and 2 – 2D).
Part II.	Protection of Fundamental Rights and Freedoms (Articles 3-15).
Part III.	The President and the Executive (Articles 16-25).
Part IV.	The Legislature (Articles 26-47).
Part V.	The Judicature (Articles 48-57B).
Part V(A)	Leadership Code (Article 57C)
Part V(B)	Ombudsman (Articles 57D-57G)
Part VI.	Finance (Articles 58-67).
Part VII.	The Public Service (Articles 68-70).
Part VIII.	Citizenship (Articles 71-76).
Part IX.	Emergency Powers (Articles 77-79).

- Part X. General (Articles 80-84A).
 Part XI. Transitional Provisions (Articles 85-~~400~~ - 86).

PART I.

THE REPUBLIC OF NAURU AND THE SUPREME LAW OF NAURU

The Republic of Nauru

1. Nauru is an independent republic.

Supreme Law of Nauru

2. (1.) This Constitution is the supreme law of Nauru.
 (2.) A law inconsistent with this Constitution is, to the extent of the inconsistency, void.

Customary Law

2A(1.) Customary law shall continue to have effect as part of the law of Nauru, to the extent that such law is not repugnant to the Constitution or to any Act of Parliament.

(2.) Parliament may make provision for the proof and pleading of custom for any purpose

Promotion of awareness of the Constitution

2B(1.) The government shall make available, in the Nauruan and English languages, material including publications and audio and television broadcasts to promote public awareness of the Constitution and shall disseminate such material as widely as possible.

(2.) The government shall provide for the teaching of the Constitution in all educational institutions and police training programs.

Nauruan language

2C. The government must take positive and practical measures to preserve and advance the use of the Nauruan language.

Application

2D.(1) The provisions of this Part apply to all laws and bind the legislature, the executive, the judiciary, and all public officers.

(2) A provision in this Part binds natural and legal persons if, and to the extent that, it is applicable, taking into account the nature of the right and the duty imposed by the right.

PART II.

PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

Preamble Right to Equality

3.(1) All persons are equal under the law and are entitled to the equal protection of the laws.

3. Whereas every person in Nauru is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following freedoms, namely:-

- (a) life, liberty, security of the person, the enjoyment of property and the protection of the law;
- (b) freedom of conscience, of expression and of peaceful assembly and association; and
- (c) respect for his private and family life;

the subsequent provisions of this Part have effect for the purpose of affording protection to those rights and freedoms,

(2) Every person in Nauru is entitled to the protection of fundamental rights and freedoms set out in this Part, subject to such limitations of that protection as are contained in those provisions not inconsistent with the provisions of this Part, being limitations designed to ensure that the enjoyment of those rights and freedoms by a person does not prejudice the rights and freedoms of other persons or the public interest.

(3) No law and no executive or judicial action shall, either expressly, or in its practical application, discriminate against any person on the basis of gender, race, color, language, religion, political or other opinion, national or social origin, place of birth, age, disability, economic status, sexual orientation, family status or descent.

(4) A law is not inconsistent with clause (1), (2) or (3) on the ground that it:

- (a) appropriates revenues or other moneys for particular purposes;
 - (b) imposes a retirement age on a person who is the holder of a public office;
 - (c) imposes on persons who are not citizens a disability or restriction, not imposed on citizens;
 - (d) imposes a restriction on a person on the grounds of their opinions or beliefs if those opinions or beliefs involve harm to others or the diminution of the rights or freedoms of others;
 - (e) provides protection of indigenous land ownership to the exclusion of others; or
 - (f) provides for the protection or advancement of a class of persons who are disadvantaged;
- but only to the extent that the law is reasonable and justifiable in a free and democratic society.

Protection of right to life

4.-(1.) Everyone has the right to life. No person shall be deprived of his life intentionally, except in execution of a sentence of a court following his conviction of an offence for which the penalty of deprivation of life is prescribed by law.

(2.) Deprivation of the life of a person is not a contravention of the provisions of clause (1.) of this Article where it results from the use, to such an extent and in such circumstances as is permitted by law, of such force as is reasonably justifiable in the circumstances of the case-

- (a) for the defence of a person from violence;
- (b) for the defence of public property;
- (c) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or
- (d) for the purpose of suppressing a riot, insurrection or mutiny.

Protection of personal liberty

5.-(1.) No person shall be deprived of his personal liberty, except as authorised by law in any of the following cases:-

- (a) in execution of the sentence or order of a court in respect of an offence of which he has been convicted;
- (b) for the purpose of bringing him before a court in execution of the order of a court;
- (c) upon reasonable suspicion of his having committed, or being about to commit, an offence;
- (d) under the order of a court, for his education during any period ending not later than the thirty-first day of December after he attains the age of ~~eighteen~~ sixteen years;
- (e) under the order of a court, for his welfare during any period ending not later than the date on which he attains the age of ~~twenty~~ sixteen years;
- (f) for the purpose of preventing the spread of disease;
- (g) in the case of a person who is, or is reasonably suspected to be, of unsound mind or addicted to drugs or alcohol, for the purpose of his care or treatment or the protection of the community; and
- (h) for the purpose of preventing his unlawful entry into Nauru, or for the purpose of effecting his expulsion, extradition or other lawful removal from Nauru.

(2.) A person who is arrested or detained shall be informed promptly of the reasons for the arrest or detention and shall be permitted to consult in the place in which he is detained a legal representative of his own choice.

(3.) A person who has been arrested or detained in the circumstances referred to in paragraph (c) of clause (1.) of this Article and has not been released shall be brought before a judge or some other person holding judicial office within a period of twenty-four hours after the arrest or detention and shall not be further held in custody in connexion with that offence except by order of a judge or some other person holding judicial office.

(4.) Where a complaint is made to the Supreme Court or any subordinate court that a person is unlawfully detained, the Supreme Court or the subordinate court shall enquire into the complaint and, unless satisfied that the detention is lawful, shall order that person to be brought before it and shall release him.

Protection from forced labour

6.-(1.) No person shall be required to perform forced labour.

(2.) For the purposes of this Article, "forced labour" does not include-

- (a) labour required by the sentence or order of a court;
- (b) labour required of a person while he is lawfully detained, being labour that, though not required by the sentence or order of a court, is reasonably necessary for the purposes of hygiene or for the maintenance of the place at which he is detained;
- (c) labour required of a member of a disciplined force in pursuance of his duties as such a member; or
- (d) labour reasonably required as part of reasonable and normal communal or other civic obligations.

Protection from inhuman treatment

7. No person shall be subjected to torture or to treatment or punishment that is inhuman or degrading.

Protection from deprivation of property

8.-(1.) No person shall be deprived compulsorily of his property except in accordance with law for a public purpose and on just terms.

(1A) The just terms of compulsory acquisition of property shall be agreed between the relevant parties, or, if no agreement can be reached, shall be decided by a Court, having regard to all relevant factors, including:

- a.) the current use of the property;
- b.) the history of the acquisition and use of the property;
- c.) the importance of the public purpose for which the property is being acquired;
- d.) the interests of those affected; and
- e.) any hardship to the owner/s.

(2.) Nothing contained in or done under the authority of a law shall be held to be inconsistent with or in contravention of the provisions of clause (1.) of this Article to the extent that that law makes provision-

(a) for the taking of possession or acquisition of any property-

(i) in satisfaction of a tax;

(ii) by way of penalty for breach of the law or forfeiture in consequence of breach of the law;

(iii) as an incident of a lease, tenancy, mortgage, charge, bill of sale, pledge or contract;

(iv) in the execution of a judgment or order of a court in proceedings for the determination of civil rights or obligations;

(v) in circumstances where it is reasonably necessary so to do because the property is in a dangerous state or is injurious to the health of human beings, animals or plants; or

(vi) in consequence of any law with respect to the limitation of actions; or

(b) for the taking of possession or acquisition of any of the following property:-

(i) property of a deceased person, a person of unsound mind or a person who has not attained the age of twenty years, for the purpose of administering it for the benefit of the person entitled to the beneficial interest in that property;

(ii) property of a person adjudged bankrupt or insolvent or of a body corporate in liquidation, for the purpose of administering it for the benefit of the creditors of the bankrupt or insolvent or body corporate and, subject thereto, for the benefit of other persons entitled to the beneficial interest in the property;

(iii) property subject to a trust, for the purpose of vesting the property in persons appointed as trustees under the instrument creating the trust or by a court or, by order of a court, for the purpose of giving effect to the trust; and

(iv) property held by a body corporate established by law for public purposes.

Protection of person and property

9.-(1.) No person shall without his consent be subject to the search of his person or property or the entry on his premises by other persons, and nor shall the privacy of his communications be infringed.

(1A.) Evidence obtained pursuant to an invalid warrant, or obtained in a manner that in any other way contravenes this Article, cannot be used to support a criminal conviction.

(2.) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of the provisions of clause (1.) of this Article to the extent that that law makes provision-

(a) that is reasonably required in the interests of defence, public safety, public order, public morality, public health, the development or utilisation of natural resources or the development or utilisation of any property for a purpose beneficial to the community;

(b) that is reasonably required for protecting the rights or freedoms of other persons;

(c) that authorises an officer or agent of the Republic of Nauru or of a body corporate established by law for public purposes to enter, where reasonably necessary, on the premises of a person in order to inspect those premises or anything in or on them in relation to any tax or in order to carry out work connected with any property that is lawfully in or on those premises and belongs to the Republic or body corporate as the case may be; or

(d) that authorises, for the purpose of enforcing the judgment or order of a court, the search of a person or property by order of a court or entry upon any premises under such an order.

Provision to secure protection of law

10. (1.) No person shall be convicted of an offence which is not defined by law.

(2.) A person charged with an offence shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court.

(3.) A person charged with an offence-

(a) shall be presumed innocent until proved guilty according to law;

(b) shall be informed promptly in a language that he understands and in detail of the nature of the offence with which he is charged;

- (c) shall be given adequate time and facilities for the preparation of his defence;
- (d) shall be permitted to have without payment the assistance of an interpreter if he cannot understand or speak the language used at the trial of the charge;
- (e) shall be permitted to defend himself before the court in person or, at his own expense, by a legal representative of his own choice or to have a legal representative assigned to him in a case where the interests of justice so require and without payment by him in any such case if he does not, in the opinion of the court, have sufficient means to pay the costs incurred; and
- (f) shall be afforded facilities to examine in person or by his legal representative the witnesses called before the court by the prosecution, and to obtain the attendance and carry out the examination of witnesses and to testify before the court on his own behalf, on the same conditions as those applying to witnesses called by the prosecution,

and, except with his own consent, the trial shall not take place in his absence unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence.

(4.) No person shall be convicted of an offence on account of any act or omission that did not, at the time it took place, constitute such an offence and no penalty shall be imposed for an offence that is more severe in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed.

(5.) No person who shows that he has been tried by a competent court for an offence and either convicted or acquitted shall again be tried for that offence, except upon the order of a superior court made in the course of appeal or review proceedings relating to the conviction or acquittal.

(6.) No person shall be tried for an offence for which he has been pardoned.

(7.) No person who is tried for an offence shall be compelled to give evidence at the trial.

(8.) No person shall be compelled in the trial of an offence to be a witness against himself.

(9.) A determination of the existence or extent of a civil right or obligation shall not be made except by an independent and impartial court or other authority prescribed by law and proceedings for such a determination shall be fairly heard and within a reasonable time.

(9A.) No law shall prevent a citizen bringing civil action against the Republic or its instrumentalities.

(10.) Except with the agreement of the parties thereto, proceedings of a court and proceedings for the determination of the existence or extent of any civil right or obligation before any other authority, including the announcement of the decision of the court or other authority, shall be held in public.

(11.) Nothing in clause (10.) of this Article shall prevent the court or other authority from excluding from the hearing of the proceedings persons, other than the parties thereto and their legal representatives, to such extent as the court or other authority-

- (a) is by law empowered to do and considers necessary or expedient in the interests of public morality or in circumstances where publicity would prejudice the interests of justice, the welfare of persons under the age of twenty years or the protection of the private lives of persons concerned in the proceedings; or
- (b) is by law empowered or required to do in the interests of defence, public safety or public order.

(12.) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of the provisions

- (a) paragraph (a) of clause (3.) of this Article by reason that that law places upon a person charged with an offence the burden of proving particular matters; or
- (b) paragraph (f) of clause (3.) of this Article by reason that that law imposes reasonable conditions which must be satisfied if witnesses called to testify on behalf of a person charged with an offence are to be paid their expenses out of public funds.

Freedom of conscience

11.-(1.) A person has the right to freedom of conscience, thought and religion, including freedom to

change his religion or beliefs and freedom, either alone or in community with others and in public or private, to manifest and propagate his religion or beliefs in worship, teaching, practice and observance.

(2.) Except with his consent, no person shall be hindered in the enjoyment of a right or freedom referred to in clause (1.) of this Article.

(3.) Except with his consent or, if he is under the age of twenty years, the consent of his parent or guardian, no person attending a place of education is required to receive religious instruction or to take part in or attend a religious ceremony or observance if that instruction, ceremony or observance relates to a religion other than his own religion or belief.

(4.) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of the provisions of this Article to the extent that that law makes provision which is reasonably required-

- (a) in the interests of defence, public safety, public order, public morality or public health;
- (b) for protecting the rights and freedoms of other persons, including the right to observe and practise any religion without the unsolicited intervention of members of some other religion; or
- (c) for regulating the secular education provided in any place of education in the interests of the persons receiving instruction in that place.

Protection of freedom of expression

12.-(1.) A person has the right to freedom of expression.

(2.) Except with his consent, no person shall be hindered in the enjoyment of his right to freedom of expression.

(3.) Nothing contained in or done under the authority of any law shall be held to be inconsistent with, or in contravention of, the provisions of this Article to the extent that that law makes provision-

- (a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health;
- (b) that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence or maintaining the authority and independence of the courts;
- (c) that is reasonably required for the purpose of regulating the technical administration or technical operation of telephony, telegraphy, posts, wireless broadcasting or television or restricting the establishment or use of telephonic, telegraphic, wireless broadcasting or television equipment or of postal services; or
- (d) that regulates the use of information obtained by public officers in the course of their employment.

Protection of freedom of assembly and association

13.-(1.) Persons have the right to assemble and associate peaceably and to form or belong to trade unions or other associations.

(2.) Except with his consent, no person shall be hindered in the enjoyment of a right referred to in clause (1.) of this Article.

(3.) Nothing contained in or done under the authority of any law shall be held to be inconsistent with, or in contravention of, the provisions of this Article to the extent that that law makes provision that is reasonably required-

- (a) in the interests of defence, public safety, public order, public morality or public health; or
- (b) for protecting the rights and freedoms of other persons.

Protection of right to privacy and personal autonomy

13A. All persons shall be free from unreasonable interference in personal choices that do not injure others and from unreasonable intrusions into their privacy.

Right to information

13B.(1) Everyone has the right of access to information held by the government and its instrumentalities.

(2) As soon as practicable after the commencement of this Article, Parliament must enact legislation to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the government and to protect Cabinet confidentiality and sensitive information relating to foreign affairs or national security.

Right to health services

13C.(1) Everyone has the right to access basic health services, including maternity and related care for every woman.

(2) The government must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right, and to progressively improve the standard of health services.

Right to education

13D.(1) Every person has the right to primary and secondary education.

(2) The government must take reasonable measures to make education accessible and to progressively improve the standard of public education services and may provide support to private education services.

Environmental Protection

13E. Everyone has the right:

- a. to an environment that is not harmful to their health or well-being; and
- b. to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –
 - i. minimise pollution and environmental degradation;
 - ii. promote rehabilitation and conservation; and
 - iii. secure ecologically sustainable development and use of natural resources including marine resources while promoting justifiable economic and social development.

Employment rights

13F. (1) Every person has the right to fair labour practices.

(2) Every citizen has the right to choose their trade, occupation or profession freely.

(3) The practice of a trade, occupation or profession may be regulated by law.

Women's rights

13G. Every woman has the right to a reasonable period of maternity leave.

Children's rights

13H. Every child has the right:

- a. to a name and nationality from birth;
- b. to be cared for by parents, family or appropriate alternative care if removed from the family environment;
- c. to basic nutrition, shelter, and basic health care services;
- d. to be protected from maltreatment, neglect, abuse or degradation;
- e. to be protected from exploitative labour practices;

- f. not to be required or permitted to perform work or provide services that are inappropriate for a person of that child's age, or that place at risk the child's well-being, education, physical or mental health, or spiritual, moral or social development;
- g. not to be detained except as a measure of last resort, in which case, in addition to the rights the child enjoys under Articles 5 and 10, the child may be detained only for the shortest appropriate period of time, and has the right to be:
 - i. kept separately from detained persons over the age of 18 years; and
 - ii. treated in a manner, and kept in conditions, that take account of the child's age;
- h. to have a legal practitioner assigned to the child by the government, and at government expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
- i. not to be used directly in armed conflict, and to be protected in times of armed conflict.

Enforcement of fundamental rights and freedoms

14.-(1.) A right or freedom conferred by this Part is enforceable by the Supreme Court at the suit of:

- (a) a person having an interest in the enforcement of that right or freedom;
- (b) a person acting on behalf of another person who would be entitled to bring a suit under (a) but who cannot act in their own name; or
- (c) an association acting in the interest of its members

(2.) The Supreme Court may make all such orders and declarations as are necessary and appropriate for the purposes of clause (1.) of this Article.

Interpretation

15. (1) When interpreting this Part, a court must promote the values that underlie a democratic society based on freedom and equality and must, if relevant, have regard to public international law applicable to the protection of the rights and freedoms set out in this Part.

(2) The provisions of this Part are not to be construed as denying or limiting other rights and freedoms that are not specified in this Part but that are recognised or conferred by common law, customary law or legislation to the extent that they are not inconsistent with this Part.

(3) The rights and freedoms protected in this Part may only be limited in accordance with the exceptions provided for in this Part. In determining whether a law that limits rights is reasonably required for a prescribed purpose, the Court must take into account the relation between the limitation and its purpose, and any less restrictive means to achieve the purpose.

(4) In this Part, unless the context otherwise requires-

"contravention", in relation to any requirement, includes a failure to comply with that requirement, and cognate expressions shall be construed accordingly;

"disciplined force" means-

(a) the Police Force; or

(b) any other body established by law for the purposes of defence or maintaining public safety or public order;

"legal representative" means a person entitled to be in or to enter Nauru and entitled by law to appear in proceedings before a court on behalf of a party to those proceedings;

"member", in relation to a disciplined force, includes a person who, under the law regulating the discipline of that force, is subject to that discipline;

~~"public property" includes property of a body corporate established by law for public purposes.~~

PART III.

THE PRESIDENT AND THE EXECUTIVE

The President

16. (1.) There shall be a President of Nauru, who shall be elected by ~~Parliament~~ the people of Nauru in accordance with Article 16A.

(1A.) The President shall be the Head of State and Head of Government.

(2.) A person is not qualified to be elected President unless he is a member of Parliament.

(3.) ~~The Speaker and the Deputy Speaker are~~ is not qualified to be elected President.

(3A.) The functions and powers of the President are vested in him by this Constitution, and include the following –

- to appoint Ministers to Cabinet – Art. 19;
- to assign to Ministers responsibility for government departments – Art. 23;
- to preside at meetings of Cabinet – Art. 22;
- to prorogue Parliament – Arts. 41(1);
- to determine the date of election after dissolution – Art. 39;
- to determine the date of beginning of parliamentary sessions – Art. 40. (1);
- to initiate the process of dissolution of Parliament – Art. 41(2);
- to appoint judges and acting judges – Arts 49(2) and 53;
- to appoint the Director of Public Prosecutions and the Ombudsman – Art. 57B, 57D;
- to declare and revoke a state of emergency – Art. 77;
- to make emergency orders during a state of emergency – Art. 78; and
- to exercise the prerogative of mercy – Art. 80.

(3B.) A person assuming the office of President shall, before entering upon the duties of that office, take and subscribe before the Chief Justice or the Speaker an oath in the form set out in Schedule [7] to this Constitution.

(4.) Except as otherwise provided in the Constitution, the President holds office until the election of another person as President.

~~(5.) Parliament shall elect a President-~~

~~(a) whenever the office of President is vacant;~~

~~(b) at the first sitting of Parliament next following its dissolution; and~~

~~(c) whenever-~~

~~(i) the President tenders the resignation of his office by writing under his hand delivered to the Speaker;~~

~~(ii) a resolution for the removal from office of the President and Ministers is approved under Article 24; or~~

~~(iii) the President ceases to be a member of Parliament otherwise than by reason only of its dissolution.~~

Election of President

16A. (1.) Nomination for and an election to the office of President must be held in such manner as is prescribed by this Article and, subject thereto, by an Act of Parliament and Standing Orders of Parliament
=

(a) as soon as practicable at the first sitting of Parliament next following a general election and before proceeding on any Bill; and

(b) whenever the office of President is vacant.

(2.) After the election of the Speaker (see Chapter 4 Section 10 below), Parliament must nominate, from among members of Parliament, not fewer than two (2) nor more than three (3) candidates for election as President, and no other person may be a candidate.

(3.) Every person who is entitled to vote in a general election is entitled to vote in an election of President.

(4.) A person elected to the office of President under this Article assumes that office on the day upon which he is declared elected.

(5.) A person may assume office as President after election on not more than three consecutive occasions.

Tenure of office

16B.(1) The President, unless he ceases to be President by virtue of this Article or the next following Article, shall continue in office until the person elected at the next election of President after a general election assumes office.

(2) The President shall vacate his office as President-

(a) if he resigns his office, by notice in writing addressed to the Speaker;

(b) if a motion of no confidence in the President or the Government is passed in accordance with Article 24;

(c) if Parliament is dissolved pursuant to Article 61A;

(d) if, in respect of any matter before Parliament, the President notifies the Speaker that a vote on that matter raises an issue of confidence, and in a subsequent vote on that matter it is rejected by a majority of all the members of Parliament;

(e) if he ceases to be a member of Parliament otherwise than by reason of a dissolution of Parliament; or

(f) If he is removed in accordance with Article 16C.

Removal from office on grounds of incapacity

16C.(1) If Parliament resolves, upon a motion supported by the votes of a majority of all the members thereof (other than the President), that the question of the mental or physical capacity of the President to discharge the functions of his office ought to be investigated, the Speaker shall notify the Chief Justice who shall appoint a Medical Board consisting of not less than two persons who are qualified as medical practitioners under the law of Nauru or under the law of any other country in the Commonwealth, and the Board shall inquire into the matter and shall report to Parliament stating the opinion of the Board whether or not the President is, by reason of any infirmity of body or mind, incapable of discharging the functions of his office.

(2) If Parliament, having received the report of the Medical Board, resolves by a majority of all the members of Parliament (other than the President) that the President is, by reason of infirmity of body or mind, incapable of discharging the functions of his office the President shall cease to hold office forthwith.

Vacancy in the office of President

16D.(1) If the office of President becomes vacant by reason of the President ceasing to hold office by virtue of Article 24 or Article 61A of this Constitution, the Council of State shall perform the functions of President until the person elected at the next election of President following a general election assumes office.

(2) If the office of President becomes vacant for any other reason, the Deputy-President shall assume the office of President.

(3) A person assuming the office of President under the preceding clause shall, at the next following meeting of the Parliament, propose a motion for a resolution confirming his assumption of the office of President, and the motion shall be debated and decided at that meeting.

(4) If the assumption of the office of President by the Deputy-President is not confirmed by the Parliament, an election to the office of President shall be held before proceeding on any Bill and as soon as practicable in accordance with Article 16A of this Constitution.

(5) If the office of President becomes vacant during any period when the office of Deputy-President is also vacant, the Cabinet shall elect one of the Ministers to assume the office of President under clause (2) of this Article, and the provisions of clauses (2), (3) and (4) of this Article shall apply to that person as if he had been Deputy-President.

Executive Authority vests in the Cabinet

17.-(1.) The executive authority of Nauru is vested in a Cabinet constituted as provided by this Part and the Cabinet has the general direction and control of the government of Nauru.

(2.) The Cabinet is collectively responsible to Parliament.

(3) The executive authority so vested in the Cabinet shall include but shall not be limited to the following powers, functions, duties and responsibilities:

(a) the Cabinet shall have the general direction and control of the government of Nauru;

(b) the Cabinet shall recommend to Parliament such legislative proposals as it considers necessary or desirable to implement its policies and decisions; and, in particular, the Cabinet, taking into account the provisions of Part VI (Finance), shall recommend to Parliament proposals for the raising of revenue and for the expenditure of public money;

(c) the Cabinet shall be accountable to Parliament for all public expenditure and for relating such expenditure to the appropriations made by Parliament or to other authority conferred by this Constitution or by Act;

(d) the Cabinet shall be responsible for conducting the foreign affairs of Nauru, whether by treaty or otherwise; provided that Cabinet shall, upon ratifying any treaty, table the treaty in Parliament;

(e) the Cabinet shall be responsible for making such provision as may be reasonable and necessary for the security of Nauru;

(f) the Cabinet shall be responsible for establishing and maintaining such hospitals and other institutions and for providing such other services as may be reasonable and necessary for the public health;

(g) the Cabinet shall be responsible for making such provision as may be reasonable and necessary to provide educational opportunities for the people of Nauru;

(h) the Cabinet shall be responsible for establishing and maintaining such other institutions and services and for making such other provision as may be reasonable and necessary to achieve an adequate standard of living for the people of Nauru, to enable them to enjoy their legal rights, and to serve their economic, social and cultural welfare;

(i) in the exercise of its responsibilities, the Cabinet may make such contracts and other instruments on behalf of the Government of Nauru as it considers necessary.

(4.) No treaty or other international agreement which is finally accepted by or on behalf of the Republic of Nauru shall, of itself, have the force of law in the Republic.

The Cabinet

18.-(1.) The Cabinet consists of the President and the Ministers appointed under Article 19.

(2.) A member of the Cabinet shall, before entering upon the duties of his office, take and subscribe the oath set out in the First Schedule.

(3.) A member of the Cabinet shall not hold an office of profit in the service of Nauru or of a statutory corporation.

Appointment of Ministers

19.-(1.) Whenever a President is elected, he shall as soon as practicable appoint ~~four or five~~ a Member of Parliament to be Deputy President and Minister, and three or four further members of Parliament to be Ministers of the Cabinet.

(2.) Whenever there are less than four Ministers the President shall appoint a member of Parliament to be a Minister but if Parliament is dissolved the President shall appoint a person who was a member immediately before the dissolution of Parliament.

(3.) Whenever there are four but not five Ministers the President may appoint a member of Parliament to be a Minister.

Vacation of office

20. A Minister ceases to hold office-

- (a) upon the election of a President;
- (b) upon resigning his office by writing under his hand delivered to the President;
- (c) upon being removed from office by the President; or
- (d) upon ceasing to be a member of Parliament otherwise than by reason only of its dissolution.
- (e) upon commencing to hold an office of profit in the service of Nauru or of a statutory corporation.

~~Provision for Minister to act as President~~

~~21. The Cabinet may appoint a Minister to perform the duties and exercise the functions of the President during any period during which the President is unable to act owing to illness, absence from Nauru or any other cause.~~

Discharge of functions of President during absence, illness, etc.

21.(1) Whenever the President is absent or considers it desirable so to do by reason of illness or accident he may, by directions in writing, authorise the Deputy-President to discharge such of the functions of the office of President as he may specify and the Deputy-President shall discharge those functions until his authority is revoked by the President.

(2) If the President is incapable by reason of illness or accident of discharging the functions of his office and the infirmity is of such a nature that the President is unable to authorise another person under this Article to discharge those functions, the Deputy-President shall discharge the functions of the office of President.

(3) Any person discharging the functions of the office of President by virtue of the preceding clause shall cease to discharge those functions if he is notified by the President that the President is about to resume those functions.

The Deputy President

21A.(1) There shall be a Deputy President of Nauru.

(2) The President shall, as soon as practicable after assuming that office, appoint a Deputy President from among the Ministers.

(3) The Deputy President shall, before entering upon the duties of his office, take and subscribe before the Chief Justice or the Speaker an oath in the form set out in Schedule [8] to this Constitution.

(4) The Deputy-President shall cease to be Deputy-President-

- (a) if he resigns his office, by notice in writing addressed to the President;
- (b) if he ceases to be a member of Parliament otherwise than by reason of a dissolution of Parliament;
- (c) if he is removed from office by the President;
- (d) when the President who appointed him as Deputy-President ceases to hold office as President.

(5) If the Deputy-President dies, is absent from Nauru or is unable by reason of illness or any other cause to discharge the functions of his office, the President shall appoint one of the other Ministers to perform the functions of the office of Deputy-President and any person so appointed shall discharge those functions accordingly until-

(a) his appointment is revoked by the President;

(b) he ceases to be a Minister; or

(c) any person assumes the office of President.

(6) Where the Deputy-President is performing the functions of the office of President in accordance with Article 21 of this Constitution he may appoint one of the other Ministers to perform the functions of the office of Deputy-President and any person so appointed may discharge those functions accordingly until-

(a) his appointment is revoked by the Deputy-President;

(b) he ceases to be a Minister; or

(c) the Deputy-President ceases to perform the functions of the office of President.

(7) During any period when, while the functions of the office of President are required under Article 21 of this Constitution to be discharged by the Deputy-President, there is no Deputy-President or the Deputy-President is absent from Nauru or is incapable by reason of illness or accident of discharging the functions of his office and there is no subsisting appointment under the preceding clause, the functions of the office of President shall be performed by such Minister as the Cabinet shall appoint; Provided that any person performing the functions of the office of President under this clause shall not exercise the power of the President to remove the Deputy-President from office.

Council of State

21B(1) There shall be a Council of State which shall consist of the persons for the time being holding or acting in the offices of Chairperson of the Public Service Commission, who shall be Chairman, Chief Justice (or, if the Chief Justice is not available, the Resident Magistrate) and Speaker.

(2) In the event of the dissolution of Parliament in the circumstances specified in clause (1) of Article 24 or the circumstances specified in clause (1) of Article 61A of this Constitution, the Council of State shall perform the functions of the President and the other executive functions of the Government until the person elected at the next election of President following a general election assumes office.

Meetings of Cabinet

22.-(1.) The President shall preside at meetings of the Cabinet.

(2.) Subject to this Constitution, the Cabinet may regulate its own procedure.

(3.) There shall be a Clerk of Cabinet who is responsible, in accordance with such instructions as may be given to him by the Cabinet, for arranging the business for, and keeping the minutes of, the Cabinet and for conveying the decisions of the Cabinet to the appropriate person or authority, and shall have such other functions as the Cabinet or the President may direct.

Appointment of Ministers to Departments

23. (1) The President may assign to himself or to a Minister responsibility for any business of the government of Nauru and may revoke or vary an assignment made under this Article.

(2) Where any Minister has been charged with responsibility for the administration of any department of government, he shall exercise direction and control over that department and, subject to such direction and control, the department shall be under the supervision of the head of the department, whose office shall be a public office.

(3) Subject to any law made by Parliament, the Cabinet may exercise elements of its executive authority directly, or through its individual members, and through other officers responsible to the Cabinet; but neither the provisions of any such law, nor any delegation of elements of the Cabinet's executive authority shall have the effect of diminishing the responsibility of the Cabinet and of each of its members to Parliament for the direction and implementation of executive policies.

Vote Motion of no confidence

24.-(1.) Where Parliament on a ~~resolution~~ motion approved by ~~at least one-half an absolute majority~~ of the total number of members of Parliament resolves that the President and Ministers be removed from office on the grounds that it has no confidence in the Cabinet, ~~an election of a President shall be held the President and Ministers shall cease to hold office and Parliament shall stand dissolved.~~

(2.) ~~Where a President has not been elected before the expiration of a period of seven days after the day on which a resolution under clause (1.) of this Article is approved Parliament shall stand dissolved. A motion for the purposes of clause (1) shall include in express terms a summary of the grounds for loss of confidence in the Cabinet.~~

(3.) Where Parliament votes on a motion of no confidence and such motion is not approved in accordance with clause (1), no such motion shall again be placed on notice or moved in Parliament until the expiration of 120 days after the date on which the motion failed to be approved.

Chief Secretary

25.-(1.) There shall be ~~a an officer of the Public Service to be called the Chief Secretary of Nauru, who shall be appointed by the Cabinet the manager of the Public Service and the chief administrative and advisory officer of the Government of Nauru.~~

(2.) A Member of Parliament is not qualified to be appointed Chief Secretary.

(3.) The Chief Secretary may resign his office by writing under his hand delivered to the President and may be removed from office by the Public Service Commission acting with the concurrence of Cabinet.

(4.) ~~The Chief Secretary has such~~ In addition to other powers and functions as the Cabinet directs and as are conferred on him by this Constitution or by law, the Chief Secretary shall be responsible for the general direction of the work of all Departments and offices of government. The head of any such Department or office shall account for the work of that Department or office to the Chief Secretary, as well as to the Minister primarily responsible for that Department or office.

(5.) Notwithstanding anything in clause (2) of Article 68D, the Public Service Commission shall consult and obtain the concurrence of Cabinet before it appoints any person to be the Chief Secretary.

(6.) No appeal by any employee of the Public Service shall lie against the promotion or appointment of any person to the office of Chief Secretary.

PART IV.

THE LEGISLATURE

Establishment of legislature

26. There shall be a Parliament of Nauru.

Legislative powers of legislature

27. Subject to this Constitution, Parliament may make laws for the peace, order and good government of Nauru; laws so made may have effect outside as well as within Nauru.

The role and functions of Parliament

27A.-(1) Parliament is elected to represent the people of Nauru and to ensure government by the people under the Constitution. It does this by providing a forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action.

(2)When exercising its legislative authority, Parliament is bound only by the Constitution of Nauru, and must act in accordance with, and within the limits of, the Constitution.

(3) Parliament must provide for mechanisms -

(a) to ensure that all executive organs of the government of Nauru are accountable to it; and
(b) to maintain oversight of the exercise of executive authority, including the implementation of legislation.

(4) Parliament must facilitate public involvement in its legislative and other processes such as its committees; conduct its business in an open manner; and hold its sittings and those of its committees in public;

Provided that reasonable measures may be taken to regulate public access, including access of the media, to Parliament and its committees; and to provide for the search of any person and, where appropriate, the refusal of entry or the removal of any person.

The Parliament

28.-(1.) Parliament shall consist of eighteen members or such greater number as is prescribed by law.

(2.) For the purpose of the election of members of Parliament, Nauru shall be divided into constituencies.

(3.) Unless otherwise prescribed by law, the constituencies and the number of members of Parliament to be returned by each of the constituencies are those described in the Second Schedule.

(4.) A person shall not be at the same time a member of Parliament for more than one constituency.

Electors for Parliament

29. Members of Parliament shall be elected in such manner as is prescribed by law, by Nauruan citizens who have attained the age of twenty years, or such other age as may be prescribed by law.

Qualification for membership of Parliament

30. A person is qualified to be elected a member of Parliament if, and is not so qualified unless, he-

- (a) is a Nauruan citizen and has attained the age of twenty years; and
- (b) is not disqualified under this Constitution.

Disqualifications for membership of Parliament

31. No person is qualified to be elected a member of Parliament if he-

- (a) is an undischarged bankrupt or insolvent who has been declared bankrupt or insolvent according to law;
- (b) is a person certified to be insane or otherwise adjudged according to law to be mentally disordered;
- (c) ~~has been convicted and is under sentence or is subject to be sentenced for an offence punishable according to law by death or by imprisonment for one year or longer~~ is serving a sentence of imprisonment imposed by a court in Nauru or in any other part of the Commonwealth;
- (d) does not possess such qualifications relating to residence or domicile in Nauru as are prescribed by law; or
- (e) holds an office of profit in the service of Nauru or of a statutory corporation, ~~being an office prescribed by law for the purposes of this paragraph.~~

Vacation of seats by members of Parliament

32.-(1.) A member of Parliament vacates his seat-

- (a) upon the dissolution of Parliament next after his election;
- (b) subject to clauses (2) and (3) of this Article, upon becoming disqualified under Article 31 to be elected a member of Parliament;
- (c) upon resigning his seat by writing under his hand delivered, in the case of a member other than the Speaker, to the Speaker and, in the case of the Speaker, to the Clerk of Parliament;
- (d) if he is absent without leave of Parliament on every day on which a meeting of Parliament is held during a period of two months sitting day over three consecutive sessions of Parliament; or
- (e) upon ceasing to be a Nauruan citizen.

(2) Subject to the provisions of this Article, if a member of Parliament is sentenced by a court in Nauru or in any other part of the Commonwealth to imprisonment, and serves any part of such a sentence of imprisonment, he shall forthwith cease to discharge his functions as a member of Parliament, and his seat in Parliament shall become vacant at the expiration of a period of 30 days thereafter: Provided that the Speaker may, at the request of the member, from time to time extend that period of 30 days to enable the member to pursue any review or appeal in respect of his conviction or sentence, so, however, that extensions of time exceeding in the aggregate 150 days shall not be granted without the approval of Parliament signified by resolution.

(3) If at any time before the member vacates his seat his conviction is set aside or a punishment other than imprisonment is substituted, his seat in Parliament shall not become vacant under the preceding subsection and he may again discharge his functions as a member of Parliament.

(24.) In the event of the occurrence of a vacancy in the office of a member of Parliament, an election shall be held in the manner prescribed by law of a member to fill the vacant office.

Office and Clerk of Parliament

33(1.) There shall be an Office of Parliament under the administration of the a Clerk of Parliament, who shall be appointed by the Speaker.

(1A) There shall a Clerk of Parliament, who shall be appointed by the Speaker in accordance with a resolution of the Parliament.

(2.) A member of Parliament is not qualified to be appointed Clerk of Parliament.

(3.) The Clerk of Parliament may at any time resign his office by writing under his hand delivered to the Speaker and may be removed from office by the Speaker at any time following a resolution supported by not less than two thirds of the total number of members of Parliament and may be disciplined by the Speaker in consultation with Parliament.

(4.) Before or during the absence of the Clerk of Parliament, the Speaker may appoint a person who is not a member of Parliament to perform the functions of the Clerk during his absence.

(5.) In the exercise of his duties and functions, the Clerk of Parliament shall not receive any direction from the Cabinet or any other person or authority except the Speaker or Parliament by resolution.

(6) The Clerk of Parliament shall be responsible for-

- (a) arranging the business and keeping the records of the proceedings Parliament;
- (b) arranging for the signing of documents and issuing of certificates by the Speaker, whenever any signature or certification by the Speaker is required pursuant to this Constitution or any law, and keeping the records of all documents and certificates so signed or issued;
- (c) performing with respect to the Speaker, members of Parliament and Parliamentary Committees such secretarial and other functions as may be required; and
- (d) performing such other duties and functions as the Speaker or Parliament by resolution may direct

Speaker of Parliament

34.-(1) Parliament shall, before it proceeds to the despatch of any other business, elect one of its members to be Speaker and, whenever the office of Speaker is vacant, shall not transact any business other than the election of one of its members to fill that office.

Parliament shall, at its first sitting following a general election and whenever the office of Speaker is vacant, elect as Speaker a person who is not a member of Parliament but who is qualified to be a member of Parliament.

~~(2.) A member of the Cabinet is not qualified to be elected Speaker.~~

(2.) If Parliament has within 21 days following its first sitting after a general election or within 21 days following any vacancy in the office of Speaker failed to elect a Speaker in accordance with clause (1) of this Article, Parliament shall stand dissolved.

(3.) The Speaker ceases to hold office-

- (a) when Parliament first meets after a dissolution;
- (b) upon ceasing to be qualified to be a member of Parliament ~~otherwise than by reason of its dissolution~~;
- (c) upon becoming a member of ~~the Cabinet~~ Parliament;
- (d) upon being removed from office by a resolution of ~~of~~ supported by at least two thirds of the total number of members of Parliament; or
- (e) upon resigning his office by writing under his hand delivered to the Clerk of Parliament.

Deputy Speaker of Parliament

35.-(1.) Parliament shall, after the election of the Speaker and before it proceeds to the despatch of any other business, elect one of its members to be Deputy Speaker and, whenever the office of Deputy Speaker is vacant, shall, as soon as possible, elect one of its members to fill that office.

(2.) A member of the Cabinet is not qualified to be elected Deputy Speaker.

(3.) The Deputy Speaker ceases to hold office

- (a) when Parliament first meets after a dissolution;
- (b) upon ceasing to be a member of Parliament otherwise than by reason only of its dissolution;
- (c) upon becoming a member of the Cabinet;
- (d) upon being removed from office by a resolution of Parliament; or
- (e) upon resigning his office by writing under his hand delivered to the Clerk of Parliament.

(4.) The powers and functions conferred by this Constitution upon the Speaker shall, if there is no person holding the office of Speaker or if the Speaker is absent from a sitting of Parliament or is otherwise unable to exercise those powers and perform those functions, be exercised and performed by the Deputy Speaker and, if he is also absent or unable to exercise those powers and perform those functions, Parliament may elect one of its members to exercise those powers and perform those functions.

Determination on questions of membership of Parliament

36. Any question that arises concerning the right of a person to be of or to remain a member of Parliament shall be referred to and determined by the Supreme Court.

Powers privileges and immunities of Parliament

37. The powers, privileges and immunities of Parliament and of its members and committees are such as are declared by Parliament.

Procedure in Parliament

38.-(1.) Parliament may make, amend or repeal rules and orders with respect to-

- (a) the mode in which its powers, privileges and immunities may be exercised and upheld; and
- (b) the conduct of its business and proceedings.

(2.) Parliament may act notwithstanding a vacancy in its membership and the presence or participation of

a person not entitled to be present at, or to participate in, the proceedings of Parliament does not invalidate those proceedings.

General Elections for Parliament

39. A general election of members of Parliament shall be held at such time within two months after a dissolution of Parliament as the Speaker in accordance with the advice of the President appoints.

Sessions of Parliament

40.-(1.) Each session of Parliament shall be held at such place and shall begin at such time, not being later than twelve months after the end of the preceding session if ~~Parliament has been prorogued~~, or twenty-one days after the last day on which a candidate at a general election is declared elected if Parliament has been dissolved, as the Speaker in accordance with the advice of the President appoints.

(2.) Subject to the provisions of clause (1.) of this Article, the sittings of Parliament shall be held at such times and places as it, by its rules of procedure or otherwise, determines.

(3.) A session of Parliament ends when it is prorogued in accordance with Article 41 (1) or on the expiry of seven clear days during which Parliament has not held sittings.

(4.) Unless Parliament is prorogued, the ending of a session does not have the effect of causing the business of Parliament pending at the end of the session to lapse.

Prorogation and dissolution of Parliament

41.-(1.) The Speaker, in accordance with the advice of the President, may at any time prorogue Parliament.

(2.) The Speaker shall, if he is advised by the President to dissolve Parliament, refer the advice of the President to Parliament as soon as practicable and in any case before the expiration of fourteen days after his receipt of the advice.

(3.) For the purposes of clause (2.) of this Article, and notwithstanding Article 40, the Speaker shall, if necessary, appoint a time for the beginning of a session, or for a sitting, of Parliament.

(4.) Where the Speaker has, under clause (2.) of this Article, referred the advice of the President to Parliament, and no resolution for the removal from office of the President and Ministers under Article 24 is approved after the date on which the advice was so referred, he shall dissolve Parliament on the seventh day after that date.

(5.) The President may withdraw his advice at any time before the Speaker has dissolved Parliament and where the President so withdraws his advice, the Speaker shall not dissolve Parliament.

(6.) Notwithstanding the preceding provisions of this Article, where a resolution for the removal from office of the President and Ministers is approved under Article 24, the Speaker shall not-

- (a) prorogue Parliament; or
- (b) dissolve Parliament,

during the period of seven days after the day on which the resolution is approved.

(7.) Parliament shall, unless sooner dissolved, continue for a period of three years from and including the date of the first sitting of Parliament after any dissolution and shall then stand dissolved.

Sessions of Parliament at request of one-third of members

42.-(1.) Where-

- (a) ~~Parliament is not in session~~ twenty-eight days have elapsed since Parliament was in session; and

(b) there is delivered to the Speaker a request that complies with clause (2.) of this Article for the holding of a session,

the Speaker shall appoint a time for the holding of a session of Parliament, being a time before the expiration of fourteen days after the request is delivered.

(2.) A request referred to in clause (1.) of this Article

(a) shall be in writing;

(b) shall be signed by a member of Parliament for each of at least three constituencies and by a number of members of Parliament which is at least one-third of the total number of members of Parliament; and

(c) shall set out particulars of the business proposed to be dealt with at the session of Parliament.

Oath of members of Parliament

43.-(1.) A member of Parliament shall, before taking his seat, take and subscribe before Parliament the oath set out in the Third Schedule, but a member may before taking and subscribing that oath take part in electing the Speaker.

(2.) The Speaker shall, if he has not taken and subscribed the oath set out in the Third Schedule, take and subscribe that oath before entering upon the duties of his office.

Speaker to preside

44. (1.) The Speaker shall preside at a sitting of Parliament.

(2.) As presiding officer, the Speaker shall be responsible for ensuring that the business of Parliament is conducted in compliance with this Constitution and the Standing Orders of Parliament and shall exercise his functions impartially and fairly.

Duties of Speaker

44 A. The duties of the Speaker include:

(a) presiding over the proceedings of Parliament;

(b) convening sessions or sittings of Parliament as required under the Constitution;

(c) proroguing or dissolving Parliament;

(d) issuing of writs for elections;

(e) appointing the Clerk of Parliament on the approval of the Parliament;

(f) disciplining or removing the Clerk of Parliament in consultation with Parliament;

(g) administering and controlling Parliament and its precincts including all staff and other employees in the service of Parliament; and

(h) such other duties as prescribed by law or Standing Orders of Parliament.

Quorum

45. No business shall be transacted at a sitting of Parliament if the number of its members present, other than the person presiding at the sitting, is less than one-half of the total number of members of Parliament.

Voting

46.-(1.) Except as otherwise provided by this Constitution, a question before Parliament shall be decided by a majority of the votes of its members present and voting.

~~(2.) The Speaker or other member presiding in Parliament shall not vote unless on a question the votes are equally divided in which case he has and shall exercise a casting vote.~~

If there is an equality of votes, the person presiding does not have a casting vote and the question concerned is deemed to be lost.

(3.) If the Deputy Speaker is performing the functions of Speaker, he shall continue to have a deliberative vote as a member of Parliament but shall not in addition have a casting vote.

Enactment of laws

47. A proposed law becomes law on the date when the Speaker certifies that it has been passed by Parliament.

PART V.

THE JUDICATURE

Supreme Court of Nauru

48.-(1.) There shall be a Supreme Court of Nauru, which shall be a superior court of record. The judicial power of Nauru shall vest in the Supreme Court, and in such other courts as Parliament may from time to time establish by law.

(2.) The Supreme Court ~~has~~ shall be a superior court of record and shall have, in addition to the jurisdiction conferred on it by this Constitution, such jurisdiction as is prescribed by law.

(3.) The Supreme Court consists of a trial division, a constitutional division and an appellate division.

(4.) The Chief Justice may make and publish and may amend rules governing the Supreme Court and its divisions and other courts established by law.

(5.) An order or decision issued by a court binds all persons to whom it applies including the Republic.

(6.) The Supreme Court and other courts are independent and subject only to the Constitution and the law.

(7.) Neither the Republic nor any person must interfere with the functioning of the courts.

(8.) The Republic, through legislative and other measures, must assist and protect the Supreme Court and other courts to ensure their independence, impartiality, dignity, accessibility and effectiveness.

Chief Justice and Judges of Supreme Court

49.-(1.) The Supreme Court consists of a Chief Justice and such number, if any, of other judges as is prescribed by law.

(2.) The judges of the Supreme Court appointed under this Article and Article 53 shall be appointed by the President after consultation with Cabinet.

(3.) A person is not qualified to be appointed a judge of the Supreme Court unless he is entitled as prescribed by law to practise as a barrister or solicitor in Nauru and has been so entitled for not less than five years.

Vacation of office

50.-(1.) A judge of the Supreme Court ceases to hold office on attaining the age of ~~sixty-five~~ seventy years or, if a greater age is prescribed by law for the purposes of this Article, on attaining that greater age.

(2.) A law that prescribes a greater age for the purposes of this Article may provide that that law applies only to specified judges.

Removal from office and resignation

51.-(1.) A judge of the Supreme Court may not be removed from office except on a resolution of Parliament approved by not less than two-thirds of the total number of members of Parliament praying for his removal from office on the ground of proved incapacity or misconduct.

(2.) A judge of the Supreme Court may resign his office by writing under his hand delivered to the President.

Oath of office

52. A judge of the Supreme Court shall not enter upon the duties of his office unless he has taken and subscribed the oath set out in the Fourth Schedule.

Acting judges

53.-(1.) If the office of Chief Justice is vacant or if the Chief Justice is for any reason unable to perform the duties of his office then until a person has been appointed to and has assumed the duties of that office or until the person holding that office has resumed those duties, as the case may be, those duties shall be discharged by such one of the other judges of the Supreme Court as is designated by the President or, if there is no other judge of the Supreme Court, by a person designated by the President, being a person who is qualified to be appointed a judge of the Supreme Court.

(2.) If the office of a judge of the Supreme Court other than the office of the Chief Justice is vacant or if the person holding that office is for any reason unable to perform the duties of his office or if the state of business in the Supreme Court so requires, the President may appoint a person qualified to be appointed a judge of the Supreme Court to act as a judge of the Supreme Court and a person so appointed may act as a judge of the Supreme Court notwithstanding that he has attained the age of sixty five years or, if a greater age is prescribed by law for the purposes of Article 50, has attained that greater age.

(3.) The provisions of clause (2.) of this Article apply in respect of the office of Chief Justice if at a time when the office of the Chief Justice is vacant no other person holds office as a judge of the Supreme Court.

(4.) A person appointed under clause (2.) of this Article to act as a judge of the Supreme Court shall continue to act for the period of his appointment or, if no such period is specified, until his appointment is revoked by the President.

Matters concerning the Constitution

54.-(1.) The Supreme Court shall, to the exclusion of any other court, have original jurisdiction to determine any question arising under or involving the interpretation or effect of any provision of this Constitution.

(2.) Without prejudice to any appellate jurisdiction of the Supreme Court, where in any proceedings before another court a question arises involving the interpretation or effect of any provision of this Constitution, the cause shall be removed into the Supreme Court, which shall determine that question and either dispose of the case or remit it to that other court to be disposed of in accordance with the determination.

(3.) The Supreme Court shall interpret and apply the Constitution in a manner that takes into account the principles set out in the Preamble.

(4.) Subject to this Constitution, if any person alleges that any provision of this Constitution (other than Part II) has been contravened and that his interests are being or are likely to be affected by such contravention, that person may apply to the Supreme Court for a declaration and for relief under this section. An application under this clause is without prejudice to any other action with respect to the same matter which is lawfully available.

(5.) The Supreme Court shall have jurisdiction, in any application made by any person in pursuance of clause (4) or in any other proceedings lawfully brought before the Court, to determine whether any provision of this Constitution (other than Part II) has been contravened and to make a declaration

accordingly;

Provided that the Supreme Court shall not make a declaration in pursuance of the jurisdiction conferred by this clause unless it is satisfied that the interests of the person by whom the application under clause (4) is made or, in the case of other proceedings before the Court, a party to those proceedings, are being or are likely to be affected.

(6.) Where the Supreme Court makes a declaration in pursuance of clause (4) that any provision of the Constitution has been contravened and the person by whom the application under clause (4) was made or, in the case of other proceedings before the Court, the party in those proceedings in respect of whom the declaration is made, seeks relief, the Supreme Court may grant to that person such remedy including compensation, being a remedy available against any person in any proceedings in the Supreme Court under any law in force in Nauru as the Court considers appropriate.

The Cabinet may refer questions on Constitution to the Supreme Court

55. The President or a Minister may, in accordance with the approval of the Cabinet, refer to the Supreme Court for its opinion any question concerning the interpretation or effect of any provision of this Constitution which has arisen or appears to the Cabinet likely to arise, and the Supreme Court shall pronounce in open court its opinion on the question.

Subordinate courts

56. There shall be such subordinate courts as are established by law and those courts possess such jurisdiction and powers as are prescribed by law.

Appeals

~~57. (1.) Parliament may provide that an appeal lies as prescribed by law from a judgment, decree, order or sentence of the Supreme Court constituted by one judge to the Supreme Court constituted by not less than two judges.~~

~~(2.) Parliament may provide that an appeal lies as prescribed by law from a judgment, decree, order or sentence of the Supreme Court to a court of another country.~~

Appellate Division of the Supreme Court

57. (1.) The Appellate Division of the Supreme Court has such jurisdiction and powers to hear and determine appeals from the Trial and Constitutional Divisions of the Supreme Court and other lower courts as may be conferred on it by this Constitution and as prescribed by law.

(2.) The Appellate Division shall be constituted by two or more judges.

(3.)(a) Appeals in criminal matters lie as of right.

b) Appeals in civil matters and other causes shall be by leave of the Trial or Constitutional Division, as the case may be, or by special leave of the Appellate Division.

Jurisdiction concerning the Constitution

57 A. (1.) The Constitutional Division and, on appeal, the Appellate Division of the Supreme Court, shall have jurisdiction to determine constitutional matters under Articles 14(1), 36, 54(1) and (2) and 55 of the Constitution and under such other provision as may be made by this Constitution or by law.

(2.) Appeals to the Appellate Division of the Supreme Court to which this clause applies shall be by leave of the Constitutional Division or by special leave of the Appellate Division.

Director of Public Prosecutions

57B.-(1.) There shall be a Director of Public Prosecutions, who is appointed by the President.

(2.) The Director of Public Prosecutions shall be a person who is qualified to be appointed as a judge.

(3.) The Director of Public Prosecutions may:

(a) institute and conduct criminal proceedings;

(b) take over criminal proceedings that have been instituted by another person or authority; and

(c) discontinue, at any stage before judgment is delivered, criminal proceedings instituted or conducted by himself or another person or authority.

(4.) The powers conferred on the Director of Public Prosecutions by paragraphs (a) and (b) of clause (3) of this section shall be vested in him to the exclusion of any other person or authority: Provided that where any other person or authority has instituted criminal proceedings, that person or authority may withdraw those proceedings with the leave of the Director of Public Prosecutions.

(5)(a) In exercising his responsibilities under this Article or any law in force in Nauru, the Director of Public Prosecutions shall act independently and shall not receive any direction from the Cabinet or any other person or authority.

(b) He may exercise these responsibilities either in person or through subordinates or other suitably qualified persons acting under and in accordance with his general or special instructions.

(6.) During any period when the office of Director of Public Prosecutions is vacant or the holder of that office is for any reason unable to perform the functions of his office those functions shall be performed by a suitably qualified public officer.

(7.) The Director of Public Prosecutions shall not be removed from office except for gross misconduct, incapacity or professional incompetence.

(8.) In this Article, "proceedings" include any appeal from any judgment in any criminal proceedings before any court, or any case stated or question of law reserved for the purpose of any such proceedings to the Trial or Appellate Division of the Supreme Court.

PART V. (A)

LEADERSHIP CODE

Leadership Code

57C(1.) This Part applies to:

(a) the President;

(b) a Minister;

(c) a Member of Parliament;

(d) a judicial officer;

(e) the holder of any constitutional or statutory office;

(f) the head of a Department in the Public Service; and

(g) such other persons or offices as may be prescribed by Parliament.

(2.) A person to whom this Part applies has a duty to conduct himself in such a way, both in his public or official life and his private life, and in his associations with other persons, as not-

(a) to place himself in a position in which he has a conflict of interests or in which the fair exercise of his public or official duties might be compromised;

(b) to demean his office or position or compromise his integrity; or

(c) to diminish respect for and confidence in the integrity of the government of Nauru,

provided that the duty imposed in paragraph (a) of this clause is to be interpreted in a manner that takes account of the circumstances of Nauru and its small population.

(3.) In particular, a person to whom this Part applies shall not use his office for personal gain.

(4.) A person to whom this Part applies who-

(a) is convicted of an offence in respect of his office or position or in relation to the performance of his functions or duties; or

(b) fails to carry out the obligations imposed by the preceding clauses of this Article;
is guilty of misconduct in office.

(5.) Subject to the provisions of this Constitution, for the purposes of this Part, Parliament must, as soon as practicable after the commencement of this Part:

(a) Make provision for the disclosure of the personal and business incomes and financial affairs of persons to whom this Part applies;

(b) Make provision for the investigation of cases of alleged or suspected misconduct in office;

(c) Provide for the reference of cases of alleged or suspected misconduct in office to such independent courts or tribunals as may be prescribed, and for the determination by such courts or tribunals of any such cases that may be referred to them in the manner prescribed.

(6.) Subject to the provisions of this Constitution, for the purposes of this Part, Parliament may:

(a) prescribe specific acts or omissions constituting misconduct in office;

(b) create offences (including offences by persons to whom this Part applies and offences by other persons) and prescribe penalties for such offences; and

(c) make other provision as may appear necessary or expedient for attaining the objects of this Part.

PART V. (B)

OMBUDSMAN

Ombudsman

57D.(1) There shall be an Ombudsman, whose office shall be a public and independent office.

(2) The Ombudsman shall be appointed by the President, in consultation with the Speaker and the Chairman of the Public Service Commission.

(3) The Ombudsman shall not perform the functions of any other public office, and shall not, without the approval of the President in each particular case, hold any other office of emolument than the office of the Ombudsman or engage in any occupation for reward outside the duties of his office.

(4) Subject to clause (5) of this Article, the Ombudsman shall vacate his office at the expiration of five years from the date of his appointment.

(5) The Ombudsman may be removed from office only on the like grounds and in the like manner as a Judge of the Supreme Court.

Functions of Ombudsman

57E (1) The functions of the Ombudsman shall be:-

(a) upon receipt of a complaint from a member of the public or at his own initiative, to enquire into the conduct of any person to whom this Article applies in the exercise of his office or authority, or abuse thereof;

(b) to assist in the improvement of the practices and procedures of public bodies; and

(c) to ensure the elimination of arbitrary and unfair decisions.

(2) Parliament may confer additional functions on the Ombudsman.

(3) This Article applies to members of the public service, the Nauru Police Force, and such other offices, government instrumentalities or public agencies as may be prescribed by Parliament.

(4) Nothing in this Article or in any Act of Parliament enacted for the purposes of this Part shall confer on the Ombudsman any power to question or review any decision of any judge, magistrate or registrar in the exercise of his judicial functions or to investigate action taken by the President or a Minister.

Discharge of functions of Ombudsman

57F (1) In the discharge of his functions the Ombudsman shall not be subject to the direction or control of any other person or authority, but shall act independently, and no proceedings of the Ombudsman shall be called in question in any court of law.

(2) The Ombudsman shall not conduct an investigation in respect of any matter if he has been given notice by the President that the investigation of that matter would not be in the interests of the security of Nauru.

(3) The Ombudsman shall grant any person or body that is the subject of a complaint pursuant to paragraph 57E(1)(a) an opportunity to reply to the complaints made against them.

(4) Wherever, after due enquiry, the Ombudsman concludes that a complaint is unjustified, he shall so inform the complainant and the President and the head of the public department or authority concerned.

(5) Wherever, after due enquiry, the Ombudsman concludes that conduct was contrary to the law, based on error of law or of fact, delayed for unjustified reasons, or unjust or blatantly unreasonable and that, consequently, any decision taken should be annulled or changed or that any practice followed should be revised, he shall forward his findings to the President and to the head of the public authority or department directly concerned.

(6) The report of the Ombudsman shall be public unless he decides to keep the report, or parts of it, confidential to the President and the person in charge of the relevant public service, on the grounds of public security or public interest. The complainant shall in any case be told of the findings of the Ombudsman.

(7) The Ombudsman shall make an annual report and may make such additional reports to Parliament as he deems appropriate concerning the discharge of his functions, and may draw attention to any defects which appear to him to exist in the administration or any law.

Further provisions

57G. Parliament may make provision for such supplementary and ancillary matters as may appear necessary or expedient to give effect to the provisions of this Part.

PART VI.

FINANCE

Treasury Fund

58. All revenues and other moneys raised or received by Nauru, not being revenues or other moneys payable by law into another fund established for a specific purpose, shall be paid into and form a Treasury Fund.

Withdrawals from Treasury Fund and public funds

59.-(1.) No moneys shall be withdrawn from the Treasury Fund except to meet expenditure that is charged upon the Treasury Fund by this Constitution or in accordance with law.

(2.) No moneys shall be withdrawn from any fund referred to in Article 58 other than the Treasury Fund except in accordance with law.

(3.) A proposed law for the withdrawal of moneys from the Treasury Fund or any other fund referred to in Article 58 shall not receive the certificate of the Speaker under Article 47 unless the purpose of the withdrawal has been recommended to Parliament by the Cabinet.

(3A.) The Minister of Finance shall, as soon as practicable after the end of the financial year and not later than three months after that date or such longer period thereafter as Parliament may by resolution appoint, deliver or transmit to the Director of Audit the statements of accounts of the moneys of the Republic of Nauru comprising the revenues and expenditure for that year and the assets and liabilities at the end of that year.

(3B.) The Director of Audit shall, within two months after receiving from the Minister of Finance the statements of accounts for the financial year referred to in the preceding clause or such longer period thereafter as Parliament may by resolution appoint, submit to the Speaker a report on his examination and audit of all accounts relating to the moneys and assets of the Republic for the year, together with certified copies of the statements and accounts.

(3C.) The Speaker shall cause the report and statements to be laid on the table of Parliament as soon as practicable and send copies thereof to the President and Minister of Finance.

(4.) The Cabinet shall cause to be prepared and laid before Parliament before the date of commencement of each financial year (or if, in respect of a particular financial year, Parliament, by resolution, determines a later date, before that later date), estimates of the revenues and expenditure of Nauru for that year.

Taxation

60. No tax shall be raised except as prescribed by law and a proposed law for the imposition of a tax shall not receive the certificate of the Speaker under Article 47 unless the imposition of the tax has been recommended to Parliament by the Cabinet.

Withdrawal of moneys in advance of appropriation law

61.-(1.) Subject to clause (2), if the appropriation law in respect of a financial year has not received the certificate of the Speaker under Article 47 on or before the twenty-first day before the commencement of that financial year, the Cabinet may, in accordance with clause (2.) of this Article, recommend to Parliament a proposed law authorising the withdrawal of moneys from the Treasury Fund for the purpose of meeting expenditure necessary to carry on the services of the Republic of Nauru after the commencement of that financial year until the expiration of three months or the coming into operation of the appropriation law, whichever is the earlier.

(1A) There shall be no more than one proposed law under clause (1) of this Article in any financial year.

(2.) A recommendation by the Cabinet referred to in clause (1.) of this Article shall be in writing delivered to the Speaker not later than the fourteenth day before the commencement of the financial year and the Speaker shall, on receiving the recommendation, lay it before Parliament as soon as practicable.

(3.) For the purposes of clause (2.) of this Article and notwithstanding Article 40, the Speaker shall, if necessary, appoint a time for the beginning of a session, or for a sitting, of Parliament.

(4.) Subject to clause (5), where the Cabinet has recommended a proposed law under clause (1.) of this Article and neither the appropriation law nor that proposed law has come into operation on or before the commencement of that financial year, the Cabinet may authorise the withdrawal of moneys in accordance with that proposed law but the amount of moneys so withdrawn shall not exceed one-quarter of the amount withdrawn under the authority of the appropriation law or laws in respect of the preceding financial year.

(5) There shall be no more than one Cabinet authorised withdrawal of moneys under clause (4) in any financial year.

Dissolution upon failure to pass appropriation law

61A.- (1) Where neither the appropriation law under Article 59 nor a proposed law under Article 61(1) has come into operation within 90 days of the commencement of any financial year, the Parliament shall be dissolved by the Speaker and the President shall cease to hold office.

(2) When Parliament is dissolved pursuant to clause (1) of this Article, the Council of State may, if moneys withdrawn by the previous Cabinet under clause (4) of Article 61 have expired, authorise the withdrawal of moneys from the Treasury Fund for the purpose of meeting expenditure necessary to carry on the services of the Republic of Nauru until the new Cabinet is formed following the General Election and that Cabinet has passed its appropriation law but the amount withdrawn shall not exceed one-quarter of the amount withdrawn under the authority of the appropriation law or laws in respect of the preceding financial year.

(3) When the Council of State authorises the withdrawal of moneys from the Treasury Fund pursuant to clause (2) of this Article, a statement of the sums so authorised shall be laid before Parliament when it first meets following the general election and the aggregate sums shall be included, under the appropriate heads, in the next Appropriation Bill.

Long Term Investment Fund

62.-(1.) There shall be a Long Term Investment Fund constituted by the moneys that immediately before the commencement of this Constitution constituted a fund called the Nauruan Community Long Term Investment Fund and by such other moneys as are appropriated by law for payment into the fund or are paid into the fund as provided by clause (2.) of this Article.

(2.) Moneys constituting the Long Term Investment Fund may be invested as prescribed by law and income derived from moneys so invested shall be paid into the fund.

(3.) Notwithstanding the provisions of Article 59, no moneys shall be withdrawn from the Long Term Investment Fund (otherwise than for investment under clause (2.) of this Article) until the recovery of the phosphate deposits in Nauru has, by reason of the depletion of those deposits, ceased to provide adequately for the economic needs of the citizens of Nauru.

Phosphate royalties

63.-(1.) Parliament may provide for the establishment of a fund for the benefit of persons from whose land phosphate deposits have been recovered and for the payment into that fund of amounts from the Treasury Fund and for the payment of moneys out of that fund to those persons.

(2.) Parliament may provide for the payment from the Treasury Fund to persons from whose land phosphate deposits have been recovered of such royalties as are prescribed by law.

(3.) No moneys held in the Nauruan Landowners Royalty Trust Fund established under the Nauruan Royalty Trust (Payment and Investment) Act 1968 as amended, or held in any trust established for the same purpose, shall be lent to any entity nor may any moneys or assets held in the same fund or funds be mortgaged or charged as security for any borrowing for any purpose whatsoever.

Contingencies Fund

64.-(1.) Parliament may provide for the establishment of a Contingencies Fund and for authorising the Cabinet, if satisfied that there has arisen an urgent and unforeseen need for expenditure for which no other provision exists, to make advances from that fund for the purposes of that expenditure.

(2.) Where an advance is made from the Contingencies Fund, provision may be made by law for replacing the amount so advanced.

Remuneration of certain officers

65.-(1.) There shall be paid to the holders of the offices to which this Article applies such salary and such allowances as are prescribed by law.

(2.) The salaries and allowances payable to the holders of the offices to which this Article applies are a charge on the Treasury Fund.

(3.) The salary and allowances payable to the holder of an office to which this Article applies and his other conditions of service shall not be altered to his disadvantage during the term of his appointment.

(4.) This Article applies to the office of judge of the Supreme Court, Clerk of Parliament and Director of Audit.

Director of Audit

~~66.-(1.) There shall be a Director of Audit, whose office is a public office.~~

~~(2.) The powers and functions and the conditions of service of the Director of Audit are, subject to this Constitution, as prescribed by law.~~

~~(3.) The Director of Audit shall not hold or act in any other public office during his period of service and a person who has held the office of Director of Audit shall not hold or act in any public office during the period of three years after he ceases to be Director of Audit.~~

~~(4.) The Director of Audit may resign his office at any time by writing under his hand delivered to the Speaker.~~

~~(5.) The Director of Audit may not be removed from office except on a resolution of Parliament approved by not less than two thirds of the total number of members of Parliament praying for his removal from office on the ground of proved incapacity or misconduct.~~

66.-(1.) The Speaker shall nominate and, with the approval of Parliament, signified by resolution, the President shall appoint, a Director of Audit of Nauru who shall be an Officer of Parliament.

(2.) The Director of Audit shall hold office during good behaviour until he reaches the age of 70 years.

(3.) The Director of Audit may at any time resign his office by writing signed by him, addressed to the Speaker; but he shall not be removed from office except on the like grounds and in the like manner as a judge of the Supreme Court.

(4.) If the office of Director of Audit is vacant, or it appears that the Director of Audit is for any reason unable to perform the functions of his office, the Speaker shall nominate and the President shall appoint an Acting Director of Audit; and the Acting Director of Audit shall continue to perform those functions until a new Director of Audit is appointed and assumes office, or, as the case may be, until the Director of Audit is again able to perform the functions of his office.

(5.) In the exercise of his functions, the Director of Audit shall act independently and shall not receive any direction from the Cabinet or from any other authority or person.

Audit of Accounts

66A.-(1.) For the purposes of clauses (3A.), (3B.) and (3C.) of Article 59 and of this Article, "accounts of the moneys of the Republic of Nauru" includes the accounts of all departments or offices of the legislative, executive and judicial branches of government and of all statutory corporations and other instrumentalities directly or indirectly controlled by the Republic; and

"the moneys of the Republic of Nauru" includes all revenue, loan, trust, and other moneys and all stamps, bonds, debentures and other securities whatsoever raised, received or held, whether temporarily or otherwise, by or on account of the Republic of Nauru and of all statutory corporations and other instrumentalities directly or indirectly controlled by the Republic.

(2.) The Director of Audit shall audit the accounts of the moneys of the Republic of Nauru, and, if provision is made by Act for audit by any other person of the accounts of a statutory corporation, such person shall report to the Director, who shall have access to such accounts.

(3.) The Director of Audit may exercise his responsibilities under clause (2) of this Article either in person or through appropriately qualified officers of the Public Service who are subordinate to him, acting in accordance with his general or special instructions.

(4.) For the purpose of carrying out his functions under this Article, the Director of Audit or any person authorised by him shall have full access to all public records, books, vouchers, documents, cash, stamps, securities, stores or other government property in the possession of any officer.

(5.) Nothing in this Article shall prevent the Director of Audit from –
a). offering technical advice and assistance to any person or authority having a responsibility in relation to the public revenues and expenditure of Nauru; and
b). performing other functions in relation to the supervision of expenditure from public funds.

(6.) In performing the audit referred to in clause (2), the Director shall satisfy himself –

(a) that all reasonable precautions have been taken to safeguard the collection of the moneys of the Republic of Nauru and that laws, directions or instructions relating thereto have been duly observed; and

(b) that all moneys of the Republic of Nauru appropriated or otherwise disbursed have been expended and applied for the purpose or purposes for which the grants made by Parliament were intended to provide and that expenditure conforms to the authority which governs it.

(7.) The Director's report to Parliament referred to in clauses (3B.) and (3C.) of Article 59 shall –

(a) draw attention to any irregularities in the accounts audited by him;

(b) give consideration to the audit test prescribed in the preceding clause; and

(c) report on the performance of the functions of the Office of Director of Audit for the relevant financial year.

(8.) The Director may, at any time, submit to the Speaker a special report on the performance of the functions of the Office of Director of Audit or on any matter of concern relating to the accounts of the Republic of Nauru, and the Speaker shall cause the special report to be laid on the table of Parliament as soon as practicable and send copies thereof to the President and Minister of Finance.

Public debt

67.-(1.) All debt charges for which Nauru is liable are a charge on the Treasury Fund.

(2.) For the purposes of this Article, debt charges include interest, sinking fund charges, repayment or amortisation of debt and all expenditure in connexion with the raising of loans and the service and redemption of the debt thereby created.

PART VII.

THE PUBLIC SERVICE

Appointments etc., in the Public Service

~~68.-(1.) Except as otherwise provided by law under Article 69, there is vested in the Chief Secretary the power –~~

~~(a) to appoint, subject to clause (3.) of this Article, persons to hold or act in offices in the Public Service;~~

~~(b) to exercise disciplinary control over persons holding or acting in such offices; and~~

~~(c) to remove such persons from office.~~

~~(2.) The Chief Secretary may, by instrument in writing under his hand, delegate to a public officer power to exercise disciplinary control over persons holding or acting in such public offices, other than offices referred to in clause (3.) of this Article, as the Chief Secretary specifies in the instrument and such delegation is subject to such conditions, if any, as the Chief Secretary specifies in the instrument.~~

~~(3.) The Chief Secretary may not exercise his power under paragraph (a) of clause (1.) of this Article in relation to the office of a person in charge of a department of government and such other offices as are prescribed by law except in accordance with the approval of the Cabinet.~~

~~(4.) The Chief Secretary shall report to the Cabinet on such matters relating to the exercise of the powers under this Article as are prescribed by law at least once a year and the Cabinet shall cause a copy of the report to be laid before Parliament.~~

Basic values and principles governing public administration

68. (1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

- a. A high standard of professional ethics must be promoted and maintained.
- b. Efficient, economic and effective use of resources must be promoted.
- c. Public administration must be development oriented.
- d. Services must be provided impartially, fairly, equitably and without bias.
- e. People's needs must be responded to, and the public must be encouraged to participate in policy-making.
- f. Public administration must be accountable.
- g. Transparency must be fostered by providing the public with timely, accessible and accurate information.
- h. Good human-resource management and career-development practices, to maximise human potential, must be cultivated.
- i. Public administration must be broadly representative of the Nauruan people, with employment and personnel management practices based on ability, objectivity and fairness.

(2) The above principles must apply to –

- a. the public service;
- b. statutory corporations; and
- c. government instrumentalities

Public Service Commission

68A.-(1.) There shall be a Public Service Commission of Nauru consisting of a Chairperson and 2 other members.

(2.) The Chairman and other members of the Public Service Commission shall be appointed by Cabinet, acting with the approval of Parliament, signified by resolution.

(3.) At any one time, at least 2 members of the Public Service Commission shall be citizens of Nauru.

(4.) No person shall be appointed to be nor shall remain a member of the Public Service Commission if he is or becomes a Member of Parliament or a holder of any office in the Public Service.

(5.) A member of the Public Service Commission shall be appointed to hold office for a term of not more than 3 years, but shall be eligible for reappointment.

(6.) In making appointments under this Article, and in fixing the terms of office of appointees, account shall be taken of the need to ensure that there is reasonable continuity in the membership of the Public Service Commission and that the terms of individual members will not expire at the same time.

(7.) A member of the Public Service Commission may at any time resign his office in writing signed by him, addressed to the President; but he shall not be removed from office except on the like grounds and in the like manner as a judge of the Supreme Court.

(8.) The compensation of members of the Public Service Commission shall be prescribed by Act of Parliament.

Procedure of the Public Service Commission

68B.(1) At least 2 members of the Public Service Commission shall concur in any decision of the Commission.

(2) Any matter which may be decided by the Commission at a meeting may also be decided by a minute of the Commission signed by all the members.

(3) The Commission shall have the power to invite such other persons as it thinks fit to assist in its deliberations, but such other persons shall not exercise the powers of a member of the Commission.

(4) No proceeding of the Public Service Commission shall be questioned on the ground that a person who acted as a member of the Commission in relation to that proceeding was not qualified to so act.

(5) Subject to this Article and to any Act, the Public Service Commission shall determine its own procedure.

Functions and Powers of the Public Service Commission

68C(1.) In exercising its powers and functions, the Public Service Commission shall promote the values and principles governing public administration set out in Article 68.

(2.) The Public Service Commission shall be the employing authority for the Public Service and shall have the general oversight of its organisation and management and shall be responsible for reviewing the efficiency and economy of all Departments and offices of government.

(3.) Subject to any law, the Public Service Commission may prescribe and determine the conditions of employment of employees of the Public Service and shall have such other functions and powers as may be conferred on it by law.

(4.) Except as provided in clause (2) of Article 68D, the Public Service Commission shall be responsible to the Cabinet for the carrying out of its duties and the exercise of its functions and powers, and the Commission shall, as necessary, inform and advise the Cabinet in relation to any matter affecting the Public Service.

(5.) Without prejudice to clause (4) of this Article, the Public Service Commission shall, as soon as practicable after the end of each calendar year, furnish to the Cabinet a report on the state of the efficiency and economy of the Public Service and on the work of the Commission for that calendar year. A copy of that report shall be laid before Parliament at its next session.

Appointments within the Public Service

68D.-(1) All employees of the Public Service, except members of the Nauru Police Force, shall be appointed by or under the authority of the Public Service Commission and, subject to any law, shall hold office on such conditions as may from time to time be prescribed or determined by the Commission.

(2) In all matters relating to decisions about individual employees (whether they relate to the appointment, promotion, demotion, transfer, disciplining or cessation of employment of any employee or any other matter) the Public Service Commission shall not receive any direction from the Cabinet or from any other authority or person, and shall act independently and in accord with criteria relating only to the individual's ability to perform his duties.

Nauru Police Force

68E.-(1) There shall be a Nauru Police Force.

(2) The functions and responsibilities of the Nauru Police Force are to prevent, combat and investigate crime, to maintain public order, to protect and secure the people of Nauru and their property, and to uphold and enforce the law.

Power of Parliament to establish Public Service Board and to make special provisions regarding police

Police Service Board

~~69.-(1.) Parliament may make provision for either or both of the following:-~~

~~(a) vesting the powers and functions of the Chief Secretary under clauses (1.) and (2.) of Article 68 in a Public Service Board consisting of the Chief Secretary, who shall be Chairman, and not less than two other persons who are not members of Parliament; and~~

~~(b) subject to clause (2.) of this Article, vesting in the public officer in charge of the Nauru Police Force the powers and functions of the Chief Secretary under clause (1.) of Article 68, in so far as they apply to or in respect of public officers in the Nauru Police Force.~~

~~(2.) Where Parliament makes provision under paragraph (b) of clause (1.) of this Article~~

~~(a) it shall also make provision for establishing a There shall be a Police Service Board consisting of not less than three persons, who are not members of Parliament, of whom one shall be the Chief Justice, who shall be Chairman, one shall be the Chair of the Public Service Commission Chief Secretary, and one shall be a person elected by members of the Nauru Police Force in such manner and for such terms as are prescribed by law;~~

~~(b) the power of the The public officer in charge of the Nauru Police Force shall have the power to appoint persons to hold or act in offices in the Nauru Police Force, and to discipline or dismiss such officers, shall be subject to such consent, if any, of the Police Service Board as is required by law; and~~
~~(c) the Chief Secretary or, where Parliament has made provision for a Public Service Board, the Public Service Board, shall not exercise the powers or perform the functions under clauses (1.) and (2.) of Article 68 in so far as they apply to or in respect of public officers in the Nauru Police Force.~~

(3.) An appeal lies to the Police Service Board from a decision of the public officer in charge of the Nauru Police Force under this Article to remove a public officer from office or to exercise disciplinary control over a public officer at the instance of the public officer in respect of whom the decision is made.

(4.) The Police Service Board shall exercise such other powers and functions as are conferred on it by law and shall, subject to this Article and any law, regulate its own procedure.

(5.) Except as otherwise provided by law, no appeal lies from a decision of the Police Service Board.

Public Service Appeals Board

~~70.-(1.) There shall be a Public Service Appeals Board which shall consist of the Chief Justice, who shall be Chairman, one person appointed by the Cabinet and one person elected by public officers as prescribed by law.~~

~~(2.) A member of Parliament is not qualified to be a member of the Public Service Appeals Board.~~

~~(3.) A member of the Public Service Appeals Board ceases to hold office-~~

~~(a) upon being elected a member of Parliament;~~

~~(b) if he was appointed by the Cabinet, upon being removed from office by the Cabinet or upon resigning his office by writing under his hand delivered to the President; or~~

~~(c) if he was elected by public officers, upon the expiration of the term for which he was elected, upon being removed from office in the manner prescribed by law or upon resigning his office by writing under his hand delivered to the Chief Secretary.~~

~~(4.) Whenever a member of the Public Service Appeals Board, other than the Chief Justice, is unable for any reason or ineligible under clause (5.) of this Article to perform the duties of his office, the Cabinet may-~~

~~(a) if the member was appointed by it, appoint a person who is not a member of Parliament; or~~

~~(b) if the member was elected by public officers, appoint, subject to such conditions, if any, as are prescribed by law, a person,~~

~~to act as a member of the Public Service Appeals Board during the period of the inability or ineligibility of the member.~~

~~(5.) Parliament may provide that a member of the Public Service Appeals Board, other than the Chief Justice, is ineligible to act in relation to such matters as are prescribed by law.~~

~~(6.) Except where an appeal lies to the Police Service Board under Article 69, an appeal lies to the Public Service Appeals Board District Court or other subordinate court from a decision to remove a public officer or to exercise disciplinary control over a public officer at the instance of the public officer in respect of whom the decision is made.~~

~~(7.) The Public Service Appeals Board shall exercise and perform such other powers and functions as are conferred on it by law and shall, subject to this Constitution and any law, regulate its own procedure.~~

~~(8.) Except as otherwise provided by law, no appeal lies from a decision of the Public Service Appeals Board.~~

PART VIII.

CITIZENSHIP

Members of Nauruan community to be Nauruan citizens

71. A person who on the thirtieth day of January One thousand nine hundred and sixty-eight was included in one of the classes of persons who constituted the Nauruan Community within the meaning of the *Nauruan Community Ordinance 1956-1966* of Nauru is a Nauruan citizen.

Persons born on or after 31 January 1968

72.-(1.) A person born on or after the thirty-first day of January One thousand nine hundred and sixty-eight is a Nauruan citizen if his parents were Nauruan citizens at the date of his birth.

(2.) A person born on or after the thirty-first day of January One thousand nine hundred and sixty-eight is a Nauruan citizen if he is born of a marriage between a Nauruan citizen and a Pacific Islander and neither parent has within seven days after the birth of that person exercised a right prescribed by law in the manner prescribed by law to determine that that person is not a Nauruan citizen.

Persons born in Nauru on or after 31 January 1968

73. A person born in Nauru on or after the thirty-first day of January One thousand nine hundred and sixty-eight is a Nauruan citizen if, at the date of his birth he would not, but for the provisions of this Article, have the nationality of any country.

Women married to Nauruan Citizens

74. A woman, not being a Nauruan citizen, who is married to a Nauruan citizen or has been married to a man who was, throughout the subsistence of the marriage, a Nauruan citizen, is entitled, upon making application in such manner as is prescribed by law, to become a Nauruan citizen.

Powers of Parliament regarding citizenship

75.-(1.) Parliament may make provision for the acquisition of Nauruan citizenship by persons who are not otherwise eligible to become Nauruan citizens under the provisions of this Part.

(2.) Parliament may make provision for depriving a person of his Nauruan citizenship being a person who has acquired the nationality of another country otherwise than by marriage.

(3.) Parliament may make provision for depriving a person of his Nauruan citizenship being a person who is a Nauruan citizen otherwise than by reason of Article 71 or Article 72.

(4.) Parliament may make provision for the renunciation by a person of his Nauruan citizenship.

Interpretation

76.-(1.) In this Part, "Pacific Islander" has, except as otherwise prescribed by law, the same meaning as in the ***Nauruan Community Ordinance*** 1956-1966 of Nauru.

(2.) A reference in this Part to the citizenship of the parent of a person at the date of that person's birth shall, in relation to a person one of whose parents died before the birth of that person, be construed as a reference to the citizenship of the parent at the time of the parent's death.

PART IX.

EMERGENCY POWERS

Declaration of an emergency

77.-(1.) If the President is satisfied, after consulting Cabinet, that a grave emergency exists whereby the security or economy of Nauru is threatened he may, by public proclamation, declare that a state of emergency exists.

(2.) A declaration of emergency lapses-

(a) if the declaration is made when Parliament is sitting, at the expiration of seven days after the date of publication of the declaration; or

(b) ~~in any other case, when parliament is not sitting,~~ at the expiration of ~~twenty-one~~ fourteen days after the date of publication of the declaration,

unless it has in the meantime been approved by a resolution of Parliament approved by a majority of the members of Parliament present and voting.

(3.) The Parliament may approve a declaration of a state of emergency for no more than three months at a time by a resolution approved by a majority of the members of the Parliament present and voting. Any successive continuation of a declaration of a state of emergency shall be by further resolution approved by a vote of no fewer than two thirds of the members of the Parliament present and voting.

(4.) The President may at any time revoke a declaration of emergency by public proclamation.

(5.) (a) Where a declaration of a state of emergency is made and Parliament is not sitting, it shall be convened by the Speaker immediately in special session and remain in session during the entire period of the state of emergency; provided that Parliament shall not remain in session beyond the end of the normal term of Parliament.

(b) Where a declaration of a state of emergency is made when Parliament has been dissolved, or when Parliament is dissolved during an emergency because the term of Parliament has ended, the members of the dissolved Parliament shall be called by the President to a special session and remain in session during the entire period of the state of emergency until the election of a new Parliament

~~(5.) A provision of this Article that a declaration of emergency lapses or ceases to be in force at a particular time does not prevent the making of a further such declaration whether before or after that time.~~

(6.) Parliament may at any time revoke a declaration of a state of emergency or amend or revoke orders made under Article 78 by resolution of a majority of members present and voting and the President shall act accordingly and immediately carry out the resolutions of Parliament.

Emergency Powers

78. (1.) During the period during which a declaration of emergency is in force, the President may make such Emergency Orders as appear to him to be reasonably required for securing public safety, maintaining public order or safeguarding the interests or maintaining the welfare of the community.

(2.) An order made by the President under clause (1.) of this Article

~~(a) has effect notwithstanding anything in Part II of this Constitution or in Article 94;~~
~~(b) is not invalid in whole or in part by reason only that it provides for any matter for which provision is made under any law or because of inconsistency with any law; and~~
~~(c) lapses when the declaration of emergency lapses unless in the meantime the order is revoked by a resolution of Parliament approved by a majority of the members of Parliament present and voting.~~

(3.) Subject to clauses (4.) and (5.) of this Article, the revocation or lapsing of an order made by the President under clause (1.) of this Article does not affect the previous operation of that order, the validity of anything done or omitted to be done under it or any offence committed or penalty or punishment incurred.

(4.) Any legislation enacted in consequence of a declared state of emergency and any Emergency Order made under clause (1.) of this Article may derogate from the provisions of Part II of this Constitution (Protection of Fundamental Rights and Freedoms) only to the extent that –

(a) the derogation is strictly required by the emergency; and

(b) the legislation or Order –

i.) is consistent with Nauru's obligations under international law applicable to states of emergency;

ii) conforms to clause (5.); and

iii) is published in the *Gazette* as soon as reasonably possible after being enacted or declared.

(5.) No Declaration of Emergency or Act of Parliament that authorises a declaration of a state of emergency, and no Emergency Order or legislation enacted or other action taken in consequence of a declaration, may permit or authorise –

(a) indemnifying the government, or any person, in respect of any unlawful act;

(b) any derogation from the Articles in this Part;

(c) the dissolution of the Legislature prior to the normal expiry of the legislative term;

(d) the suspension or dismissal of the judiciary;

(e) any amendments to the Constitution; or

(f) any derogation from an Article mentioned in column 1 of the Table of Non-Derogable Rights, to the extent indicated opposite that Article in column 3 of that table.

Table of Non-Derogable Rights:

Article Number	Article Title	Extent to which the right is protected
3	Right to equality	Clause 3(3) with respect to gender, race and colour only
4	Right to life	Entirely

5	Protection of personal liberty	With respect to clauses 5(2) and (4) only
7	Protection from inhuman treatment	Entirely
10	Provision to secure protection of law	With respect to clauses 10(1), (2) (in respect of a fair hearing by an independent and impartial court), (3), (4), (5), (6), (7) and (8) only

(6.) The Supreme Court may determine the validity of

(a) a declaration of a state of emergency;

(b) any extension of a declaration of a state of emergency; or

(c) any Emergency Order made under this Article and any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency.

Restriction on detention

79.-(1.) For the purposes of this Article there shall be an advisory board consisting of the Chief Justice, one person nominated by the Chief Justice and one person nominated by the Cabinet.

(2.) A person detained under an order under Article 78 shall, as soon as practicable, be informed of the reasons for his detention and be brought before the advisory board and permitted to make representations against his detention.

(3.) No person shall be detained under an order under Article 78 for a period exceeding three months unless that person has been brought before the advisory board and any representations made by him have been considered by it and it has within that period determined that there is sufficient cause for the detention.

PART XI.

GENERAL

Grant of Pardon Prerogative of Mercy

80. (1) In exercising the Prerogative of Mercy the President may-

(a) grant a pardon, either free or subject to lawful conditions, to a person convicted of an offence;

(b) grant to a person a respite, either indefinite or for a specified period, of the execution of a punishment imposed on that person for an offence;

(c) substitute a less severe form of punishment for any punishment imposed on a person for an offence; or

(d) remit the whole or a part of a punishment imposed on a person for an offence or of a penalty or forfeiture on account of an offence.

(2) There shall be a Committee on the Prerogative of Mercy (in this Article referred to as "the Committee") which shall consist of a qualified medical practitioner who shall be Chairperson and two other persons, one of whom shall be a senior officer of the Department of Home Affairs or such other Government Department as Cabinet may prescribe and the other of whom shall be a community leader, appointed by Cabinet.

(3) Members of the Committee shall not be remunerated or receive any allowance for their service on the

Committee.

(4) A member of the Committee appointed under clause (2) of this Article shall vacate his seat on the Committee-

(a) at the expiration of the term of his appointment (if any) specified in the instrument of his appointment; or

(b) if his appointment is revoked by Cabinet.

(5) Whenever the Committee advises the President that the Prerogative of Mercy should be exercised, the Committee must provide to the President a report which details the reasons for the recommendation, and a statement which summarises the reasons but which does not disclose any confidential information.

(6) In the exercise of the powers conferred upon him by clause (1) of this Article, the President shall act in accordance with the advice of the Committee.

(7) In any case in which the Prerogative of Mercy is exercised in accordance with clause (1), the President shall present to Parliament-

(a) if the power is exercised during a meeting of Parliament - during that session; or

(b) if the power is exercised at any other time - during the next session of Parliament,

the statement referred to in clause (5) giving details of the exercise of the power and a summary of the reasons for it.

(8) Parliament may make provision for criteria or guidelines to be followed by the Committee in exercising its functions under this Article, and for any other matter necessary or expedient to give effect to the provisions of this Article.

Interpretation

81.-(1.) In this Constitution, unless the context otherwise requires:-

"Article"

"Article" means Article of this Constitution;

"Cabinet"³⁴

"Cabinet" means the Cabinet established under Article 17;

"Chief Justice"

"Chief Justice" means the Chief Justice of the Supreme Court;

"Chief Secretary"³⁵

"Chief Secretary" means the Chief Secretary of Nauru appointed under Article 25;

"Court"

"Court" means a court of law having jurisdiction in Nauru;

"Existing law"

"Existing law" means a law in force in Nauru immediately before Independence Day;

"Government Gazette"³⁶

"Government Gazette" means the Nauru Government Gazette;

"Independence Day"

"Independence Day" means the thirty-first day of January, One thousand nine hundred and sixty-eight;

"Law"

"Law" includes an instrument having the force of law and an unwritten rule of law and "lawful" and "lawfully" shall be construed accordingly;

"Minister"³⁷

"Minister" means a Minister of the Cabinet;

"Month"

"Month" means calendar month;

"Parliament"³⁸

"Parliament" means the Parliament of Nauru established under Article 26;

"Person"

"Person" includes a body corporate or politic;

"President"³⁹

"President" means the President of Nauru;

"Property"

"Property" includes land and a right, title or interest in or over land or any other property;

"Public office"

"Public office" means an office of emolument in the public service;

"Public officer"

"Public officer" means a person holding or acting in a public office;

"Public service"

"Public service" means, subject to the provisions of this Article, the service of the Republic of Nauru;

"Schedule"

"Schedule" means Schedule to this Constitution;

"Session"

"Session" means ~~the period beginning when the Legislative Assembly of Nauru first met on Independence Day or after Parliament has at any time been prorogued or dissolved and ending when next Parliament is prorogued or dissolved~~ a series of sitting days held in accordance with Article 40.

"Sitting"

"Sitting" means ~~a period during which Parliament is sitting without adjournment~~ the daily meeting of Parliament from the time of commencement of business until the adjournment of Parliament.

"Speaker"

"Speaker" means the Speaker of Parliament;

"Supreme Court"

"Supreme Court" means the Supreme Court of Nauru established under Article 48;

"Writing"

"Writing" includes any mode of representing or reproducing words in a visible form.

(2.) In this Constitution-

(a) a reference to an office in the public service does not include-

(i) a reference to the office of President, Minister, Speaker, Deputy Speaker, member of Parliament or Clerk of Parliament;

(ii) a reference to the office of a Judge of the Supreme Court; or

(iii) except in so far as is prescribed by law, a reference to the office of a member of a council, board, panel, committee or other similar body, whether incorporated or not, established by law; and

(b) a reference to an office of profit in the service of Nauru does not include a reference to the office of President, Minister, Speaker, Deputy Speaker, or member of Parliament.

(3.) In this Constitution, unless the context otherwise requires, a reference to the holder of an office by an expression designating his office shall be construed as including, to the extent of his authority, a reference to a person for the time being authorised to exercise the powers or perform the functions of that office.

(4.) In this Constitution, a reference to the total number of members of Parliament is a reference to the number of members of which Parliament consists in accordance with Article 28.

(5.) In this Constitution, unless the context otherwise requires-

(a) words importing the masculine gender shall be taken to include females; and

(b) words in the singular include the plural and words in the plural include the singular.

(6.) Where a law is repealed, or is deemed to have been repealed, by, under or by reason of this Constitution, the repeal does not-

- (a) revive anything not in force or existing at the time at which the repeal takes effect;
- (b) affect the previous operation of the law or anything only done or suffered under the law;
- (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the law;
- (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against the law; or
- (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment,

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the law had not been repealed.

(7.) Where a person is required by this Constitution to take and subscribe an oath, he shall be permitted, if he so desires, to comply with that requirement by making and subscribing an affirmation.

Parts, etc. of Constitution

82. (1.) The Preamble forms part of this Constitution, and establishes principles upon which this Constitution, and the conduct of the public affairs of Nauru, are to be based.

~~(4 2.)~~ The headings of the Parts into which this Constitution is divided are part of this Constitution.

~~(2 3.)~~ A Schedule to this Constitution is part of this Constitution.

(3.) The ~~preamble and the~~ marginal notes to this Constitution do not form part of this Constitution.

Right to mine phosphate

83.-(1.) Except as otherwise provided by law, the right to mine phosphate is vested in the Republic of Nauru.

(2.) Nothing in this Constitution makes the Government of Nauru responsible for the rehabilitation of land from which phosphate was mined before the first day of July, One thousand nine hundred and sixty-seven.

Amendment of the Constitution

84.-(1.) This Constitution shall not be altered except in accordance with this Article.

(2.) This Constitution may be altered by law but a proposed law for that purpose shall not be passed by Parliament unless-

- (a) there has been an interval of not less than ninety days between the introduction of the proposed law in Parliament and the passing of the proposed law by Parliament; and
- (b) it is approved by not less than two-thirds of the total number of members of Parliament.

(3.) A proposed law to alter or having the effect of altering the Fifth Schedule or any of the provisions of this Constitution specified in the Fifth Schedule shall not be submitted for the certificate of the Speaker under Article 47 unless, after it has been passed by Parliament, it has been approved by not less than two-thirds of all the votes validly cast on a referendum held, subject to clause (4.) of this Article, as prescribed by law.

(4.) A person who, at the time the referendum is held, is qualified to vote at an election of members of Parliament, is entitled to vote at a referendum held for the purposes of this Article and no other person is so entitled.

(5.) A proposed law to alter this Constitution shall not receive the certificate of the Speaker under Article 47 unless it is accompanied by a certificate under the hand of the Clerk of Parliament that the provisions of clause (2.) of this Article have been complied with and, if it is a proposed law to which clause (3.) of this Article applies, by a certificate under the hand of a person prescribed by law stating that it has been approved as provided by that clause.

Opportunity for periodic review and inclusive review process

84A.(1.) At least every 15 years, Parliament shall submit to a referendum the question ‘do you think there should be a Constitutional Convention, to consider whether or not there should be any amendments to the Constitution?’, and if the referendum is passed by a majority of the votes cast, Parliament shall establish a Constitutional Convention.

(2) Nothing in clause (1) shall prevent Parliament from initiating a review of the Constitution at any other time, and any such additional review shall not require a referendum prior to being commenced.

(3) If a Constitutional Convention is established pursuant to clause (1) or a process of constitutional review is initiated pursuant to clause (2) Parliament shall pass legislation setting out an inclusive process for review of the Constitution which ensures that people are able to participate in the process prior to a proposed law being introduced to Parliament pursuant to Article 84, and in the case of Convention under clause (1), prior to the establishment of the Convention.

PART XI.

TRANSITIONAL PROVISIONS

Existing laws

85.-(1.) A law in force in Nauru immediately before Independence Day continues in force, subject to this Constitution and to any amendment of that law made by a law enacted under this Constitution or by order under clause (6.) of this Article, until repealed by a law enacted under this Constitution.

(2.) A law which has not been brought into force in Nauru before Independence Day may, subject to this Constitution and to any amendment of that law made by law, be brought into force on or after Independence Day and a law brought into force under this clause continues in force subject as aforesaid, until repealed by a law enacted under this Constitution.

~~(3.) Clause (1.) of this Article does not apply to the Nauru Act 1965 of the Commonwealth of Australia, other than sections 4 and 53 of that Act, or to an Act of the Commonwealth of Australia that immediately before Independence Day extended to Nauru as a Territory of that Commonwealth.~~

~~(4.) The Constitutional Convention Ordinance 1967 of Nauru shall not be amended so as to affect the membership of the Constitutional Convention established under that Ordinance.~~

(5.) Where a matter that, under this Constitution, is to be prescribed or otherwise provided for by law, is prescribed or otherwise provided for by a law continued in force by clause (1.) or (2.) of this Article, that matter has, on and after Independence Day, effect as if it had also been prescribed or provided for by a law enacted under this Constitution.

~~(6.) For the purposes of bringing the provisions of an existing law into accord with the provisions of this Constitution (other than Part II. of this Constitution) the President may, except as otherwise prescribed by law, within a period of two years after Independence Day, make, by order published in the Government Gazette, such adaptations, whether by way of modification of, addition to or omission from those provisions, as he deems necessary or expedient and an order so made has effect, or shall be deemed to have effect, from and including such date, not being a date before Independence Day, as is specified in the order.~~

Adaptation of existing laws

86.-(1) Subject to this Constitution, a reference in a law continued in force by clause (1.) or (2.) of Article 85 to

- (a) the Governor-General of the Commonwealth of Australia; or
- (b) the Minister of State for Territories of the Commonwealth of Australia,

shall, unless the context otherwise requires, be read as a reference to the President.

(2.) Subject to this Constitution, a reference in a law continued in force by clause (1.) or (2.) of Article 85 to the Administrator of the Territory of Nauru shall, unless the context otherwise requires, be read as a reference to the President or where responsibility for the administration of that law is assigned to a Minister under Article 23, to that Minister.

(3.) Subject to this Constitution, a reference in a law continued in force by clause (1.) or (2.) of Article 85 to the Administrator of the Territory of Nauru acting in accordance with the advice of the Executive Council of the Territory of Nauru shall, unless the context otherwise requires, be read as a reference to the Cabinet.

Existing public officers

~~87.-(1.) Subject to this Constitution and any law, a person who immediately before Independence Day hold; or is acting in a public office shall, on and after Independence Day, hold or act in that office or the corresponding office established by this Constitution on the same terms and conditions as those on which he holds or is acting in the public office immediately before Independence Day.~~

~~(2.) Nothing in this Article shall be construed as applying to a person who immediately before Independence Day holds or is acting in the office of Administrator, Public Service Commissioner or Official Secretary.~~

Existing legal proceedings

~~88. All legal proceedings pending or incomplete in the Central Court of the Island of Nauru immediately before Independence Day shall stand removed to the Supreme Court, which shall have jurisdiction to hear and determine the proceedings and the judgments and orders of the Central Court of the Island of Nauru given or made before Independence Day shall have the same force and effect as if they had been delivered or made by the Supreme Court.~~

The first Parliament

~~89.-(1.) The persons who were elected at the election conducted during January, One thousand nine hundred and sixty eight at the instance of the Constitutional Convention to become members of the Legislative Assembly of Nauru on Independence Day are members of the first Parliament and shall be deemed to have been elected in accordance with this Constitution.~~

~~(2.) The first Parliament came into existence on Independence Day under the name of the Legislative Assembly of Nauru and continues under the name of Parliament from and including the date on which this clause comes into operation.~~

~~(3.) The first Parliament shall, unless sooner dissolved, continue for a period of three years from and including Independence Day and shall then stand dissolved.~~

~~(4.) In this Article, "Constitutional Convention" means the Constitutional Convention established under the *Constitutional Convention Ordinance 1967* of Nauru.~~

Powers privileges and immunities of Parliament

~~90. Until otherwise declared by Parliament, the powers, privileges and immunities of Parliament and of its members and committees shall be those of the House of Commons of the Parliament of the United~~

Kingdom of Great Britain and Northern Ireland and of its members and committees as at the commencement of this Constitution.

~~Vesting of property, etc.~~

91. (1.) All property and assets which, immediately before Independence Day, were vested in the Administrator of the Territory of Nauru or in the Administration of the Territory of Nauru, vest in the Republic of Nauru.

(2.) All rights, liabilities and obligations of the Administrator of the Territory of Nauru or of the Administration of the Territory of Nauru, whether arising out of contract or otherwise, are rights, liabilities and obligations of the Republic of Nauru.

~~Constitutional Convention to continue in existence~~

92. (1.) Notwithstanding the coming into force of this Constitution, the Constitutional Convention established under the *Constitutional Convention Ordinance* 1967 of Nauru shall, subject to this Article, continue in existence during the period of five months after Independence Day or, if the Constitutional Convention approves by resolution a shorter period, during that shorter period.

(2.) The Constitutional Convention shall, in lieu of the powers held by it before Independence Day, have the powers conferred on it by clause (3.) of this Article.

(3.) The Constitutional Convention may, during the period referred to in clause (1.) of this Article, by resolution approved by a majority of the members of the Constitutional Convention, alter any of the provisions of this Constitution other than this Article and clause (4.) of Article 85.

(4.) In this Article, a reference to the members of the Constitutional Convention is a reference to the number of members of which it consists on the day on which the question arises.

~~Agreement of 14 November 1967 relating to Phosphate Industry~~

93. (1.) The Agreement made on the fourteenth day of November, One thousand nine hundred and sixty-seven between the Nauru Local Government Council of the one part and the Partner Governments of the other part shall, on and after Independence Day, be construed as an agreement between the Government of the Republic of Nauru of the one part and the Partner Governments of the other part and all rights, liabilities, obligations and interest of the Nauru Local Government Council in or under that Agreement are, on and after Independence Day, rights, liabilities, obligations and interest of the Government of the Republic of Nauru.

(2.) In clause (1.) of this Article, "Partner Governments" means the Government of the Commonwealth of Australia, the Government of New Zealand and the Government of the United Kingdom of Great Britain and Northern Ireland.

~~Financial provisions to 30 June 1968~~

94. Notwithstanding the provisions of Part VI. of this Constitution, no moneys shall be withdrawn from the Treasury Fund or any other fund referred to in Article 58 before the first day of July, One thousand nine hundred and sixty-eight, except-

(a) in accordance with the appropriations authorized under the *Supply Ordinance* 1967-68 of Nauru or the *Appropriation Ordinance* 1967-68 of Nauru;

(b) for the purpose of allocating, in respect of each ton of phosphate shipped from Nauru before the first day of July, One thousand nine hundred and sixty-eight, to the funds or for the purposes specified in the Sixth Schedule the amounts so specified; or

(c) under a law enacted in accordance with Part VI of this Constitution.

~~Transitional provision relating to judges of the Supreme Court~~

95. Notwithstanding clause (3.) of Article 49, until otherwise provided by law, a person is qualified to be appointed a judge of the Supreme Court if-

(a) he is or has been a judge of a court having jurisdiction in some part of the Commonwealth of Australia or in such other place as is approved by Parliament by resolution for the purposes of this Article or
(b) he is entitled to practise as an advocate in or solicitor of such a court and has been so entitled for not less than five years.

Transitional provisions relating to Chief Justice

96. (1.) The powers and functions of the Chief Justice may, until the Chief Justice is first appointed, be exercised or performed by not less than three persons, being persons who, immediately before Independence Day, were magistrates of the Central Court within the meaning of the *Nauru Act 1965* of the Commonwealth of Australia.

(2.) Notwithstanding clause (1.) of this Article, the powers and functions of the Chief Justice under Articles 69 and 70 may, until the Chief Justice is first appointed, be exercised or performed by a person who, immediately before Independence Day, was a magistrate of the Central Court referred to in clause (1.) of this Article.

Director of Audit

97. (1.) Notwithstanding Article 66, until the Director of Audit is first appointed the Cabinet shall cause to be audited at least once in every year the public accounts of Nauru and the accounts of such public bodies as Parliament by resolution determines.

(2.) The Cabinet shall cause a report on the results of an audit under clause (1.) of this Article to be laid before Parliament as soon as practicable after completion of the audit.

Transitional provisions relating to Superannuation Board

98. (1.) Until otherwise provided by law, the Superannuation Board established under the *Superannuation Ordinance 1966* of Nauru consists of three persons appointed by the Cabinet, of whom one shall be chairman, one shall be an actuary or a person experienced in respect of the investment of moneys and one shall be a person who is a contributor within the meaning of that Ordinance elected by contributors in the manner prescribed by or under law.

(2.) Notwithstanding clause (1.) of this Article and until otherwise provided by law, a person who, immediately before this clause comes into effect, is a member of the Superannuation Board referred to in clause (1.) of this Article, shall continue to be a member of the Superannuation Board.

Transitional provisions relating to the first President and Cabinet

99. (1.) Notwithstanding anything in Part III of this Constitution, the first President shall be elected by Parliament at its first sitting held after this Article comes into effect.

(2.) The powers and functions of the President and of the Cabinet may, until the first President is elected, be exercised or performed by the Council of State.

(3.) In this Article, "Council of State" means the Council of State of Nauru in existence immediately before Part III of this Constitution relating to the President and the Executive comes into effect.

Transitional provisions relating to Chief Secretary

100. Notwithstanding Article 25, the person who, immediately before this Article comes into effect, holds the office of Chief Secretary shall hold the office of Chief Secretary established by this Constitution.

THE SCHEDULES

First Schedule

Oath of member of Cabinet

I, swear by Almighty God that I will faithfully carry out my duties as a member of the Cabinet and that I will not improperly reveal any matters of which I have become aware by reason of my membership of the Cabinet. So help me God.

Second Schedule

**DIVISION OF NAURU INTO CONSTITUENCIES AND NUMBER OF MEMBERS TO BE RETURNED
BY EACH CONSTITUENCY**

Constituency	District or Districts of Nauru comprised in constituency	Number of members to be returned by constituency
Aiwo	Aiwo	2
Anabar	Anabar, Anibare, Ijuw	2
Anetan	Anetan, Ewa	2
Boe	Boe	2
Buada	Buada	2
Meneng	Meneng	2
Ubenide	Baiti, Denigomodu, Nibok Uaboe	4
Yaren	Yaren	2

Third Schedule**Oath of member of Parliament****Oath**

I, swear by Almighty God that I will be faithful and bear true allegiance to the Republic of Nauru and that I will justly and faithfully carry out my duties as a member of Parliament of Nauru. So help me God!

Fourth Schedule**Oath of Judge**

I, swear by Almighty God that I will be faithful and bear true allegiance to the Republic of Nauru in the office of and that I will do right to all manner of people according to law, without fear or favour, affection or ill-will. So help me God!

Fifth Schedule

- (i) Part I
- (ii) Part II.

- (iii) Articles 16, 16A, 17.
- (iv) Articles 26, 27, clause (7.) of Article 41.
- (v) Articles 58, 59, 60, 62, 65.
- (vi) Article 71, clause (1.) of Article 72.
- (vii) Article 84.
- (viii) Clauses (1.), (2.), (3.) and (5.) of Article 85.
- (ix) Article 93.

Sixth Schedule

<i>Amount</i>	<i>Fund or Purpose</i>
1.70	Long Term Investment Fund established under Article 62.
0.50	Nauruan Landowners Royalty Trust Fund for the benefit of owners of phosphate bearing lands.
0.60	Nauru Development Fund for promoting the economic development of Nauru.
0.60	Nauru Development Fund for promoting the economic development of Nauru.
0.80	Nauru Housing Fund for erecting, repairing or maintaining houses in Nauru.
0.20	Nauru Rehabilitation Fund for the purpose of restoring or improving the parts of the Island of Nauru that have been affected by mining for phosphate.
0.60	For payment to the owners of phosphate bearing lands leased to the British Phosphate Commissioners.
0.10	Nauru Royalty Fund for any of the purposes for which the Nauru Local Government Council is authorised by the <i>Nauru Local Government Council Ordinance 1951-1967</i> of Nauru to expend moneys.