

**PROGRESSIVE REPORT OF THE BI-PARTISAN TALANOA
SUB-COMMITTEE, JULY 21ST, 2003:**

1. Introduction:

We, the members of the Bi-Partisan Talanoa Sub-committee, having submitted to you our progressive report on May 28th, 2003, directed the focus of our work to the other two major issues, as identified in your Joint Statement April 17th 2003, namely, constitutional changes and the CERD report. In this connection we met on June 30th, July 10th, July 17th, and July 18th and the outcome of the progress that we have made from our productive talanoa on these two very important issues is reported below for your consideration.

2. Constitutional Change

On the issues relating to constitutional changes, our talanoa concentrated on the proposed amendments as contained in the SDL Revised Draft—6/7/2002, of a bill for an act to amend the Constitution. The general parameters that we used as the signposts to guide our discussions of these proposed amendments are set out in the attached document entitled ‘Framework For Talanoa on Constitutional Changes’ (please, see Attachment 1). These parameters may be summarised into three broad areas as follows:

- (i) Our common understanding of the “unconcealed” underlying purpose or intention, taking into account the spirit, the context, the content, and the promotion of a particular proposed change;
- (ii) Our common understanding of the ‘non-controversial areas’, based on the knowledge that we are moving toward a possible convergence on a particular proposed change; and

- (iii) Our common understanding of the ‘controversial areas’, based on the knowledge that we still have differences and need more discussions and wider consultations with respect to a particular proposed change.

We have agreed, based on our common understanding, that the following proposed amendments (i.e. from (a) to (o)) are ‘**non-controversial**’, some subject to clarification, in the areas of the Constitution listed below.

(a) **Short title and definition**

- Present Constitution:

N.A.

- Proposed Amendment:

(1) This Act may be cited as the Constitution (Amendment) Act 2002.

(2) In this Act "Constitution" means the Constitution Amendment Act 1997.

- Our Common Understanding:

The intention is to provide a short title and defines “Constitution”.

(b) **Citizenship by registration, Section 12 (3)**

- Present Constitution:

12.- (3) A child who was under the age of 21 when either parent became a citizen may become a citizen by registration.

- Proposed Amendment:

Section 12 of the Constitution is amended in subsection (3) by –

(a) deleting "was" and substituting "is"; and

(b) deleting "became" and substituting "becomes".

- Our Common Understanding:

The intention is to make registration to refer to a child’s present or future status rather than past status.

(c) **Rights of charged persons, Section 28-(1) (k)**

- Present Constitution:

28.- (1) Every person charged with an offence has the right:(k) not to be tried again for an offence of which he or she has previously been convicted or acquitted; and

- Proposed Amendment:

Section 28(1) of the Constitution is amended in paragraph (k) by adding after "acquitted"- ", except on an order of a superior court in the course of appeal or review proceedings relating to a conviction".

- Our Common Understanding:

The intention is to allow a superior court to order a retrial in appeal or review proceedings relating to a conviction, as in normal practice. However, we see a need for additional information on the “normal practice” in other countries.

(d) Equality, Section 38 (7)

- Present Constitution:

38.- (1) Every person has the right to equality before the law.

(2) A person must not be unfairly discriminated against, directly or indirectly, on the ground of his or her:

(a) actual or supposed personal characteristics or circumstances, including race, ethnic origin, colour, place of origin, gender, sexual orientation, birth, primary language, economic status, age or disability; or

(b) opinions or beliefs, except to the extent that those opinions or beliefs involve harm to others or the diminution of the rights or freedoms of others;

or on any other ground prohibited by this Constitution.

(3) Accordingly, neither a law nor an administrative action taken under a law may directly or indirectly impose a disability or restriction on any person on a prohibited ground.

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

(d) permits a person who has a discretion to institute or discontinue criminal proceedings to take account in the exercise of that discretion of traditional procedures in the State for the settlement of disputes; or

(e) makes provision with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters as the personal law of any person or the members of any group;

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

- Proposed Amendment:

Section 38 of the Constitution is amended in subsection (7) by -

(a) deleting "or" at the end of paragraph (d);

(b) adding after paragraph (e) the following new paragraphs-

"(f) declares marriage to be the voluntary union of one man to one woman to the exclusion of all others; or

(g) provides for the prosecution of unnatural offences, indecent assaults or indecent practices."

- Our Common Understanding:

The intention is to make it clear that a law which declares marriage to be the voluntary union of one man and one woman is not inconsistent with section 38. We feel that this proposed amendment is unnecessary as the intention is already protected under subsection 7 and the definition of marriage is stated in the Marriage Act. We recommend that this amendment be dropped.

(e) **Social justice and affirmative action, Section 44 (1)**

- Present Constitution:

44.- (1) The Parliament must make provisions for programs designed to achieve for all groups or categories of persons who are disadvantaged effective equality of access to: (a) education and training; (b) land and housing; and (c) participation in commerce and in all levels and branches of service of the State.

- Proposed Amendment:

Section 44 of the Constitution is amended in subsection (1) by-

(a) deleting "and" at the end of paragraph (b);

(b) replacing paragraph (c) by –

"(c) participation in commerce; and

(d) participation in all levels and branches of service of the State.".

- Our Common Understanding:

The intention is to make it clear that there are four areas in which social justice programmes apply, i.e., education and training, land and housing, commerce and the public service.

(f) **Passage of Bills, Section 47 (6)**

- Present Constitution:

47.- (6) If: (a) the House of Representatives passes a Bill in 2 successive sessions;

- Proposed Amendment:

Section 47 of the Constitution is amended in subsection (6) by deleting the word "sessions" in paragraph (a) and substituting "meetings".

- Our Common Understanding:

The intention is to enable the House of Representatives to pass again a Bill which has been sent back to it by the Senate within a prescribed timeframe.

(g) **Proceedings of the Parliament, Section 74 (3)(4)**

- Present Constitution:

74.- (3) The House of Representatives must, under its rules and orders, establish not less than 5 sector standing committees with the functions of scrutinising Government administration and examining Bills and subordinate legislation and such other functions as are specified from time to time in the rules and orders of the House.

(4) Ministers are not eligible for election to sector standing committees of the House of Representatives.

- Proposed Amendment:

Section 74 of the Constitution is amended- (a) in subsection (3) by deleting "less" and substituting "fewer"; (b) in subsection (4) by deleting "election" and substituting "appointment".

- Our Common Understanding:

The intention relates to sector committees, in two minor aspects. Members of the committees in question are appointed, not elected.

(h) Speaker and Deputy Speaker, Section 80 (7)

- Present Constitution:

80.- (7) The Office of Deputy Speaker becomes vacant if the Deputy Speaker:

- Proposed Amendment:

Section 80 of the Constitution is amended in subsection (7) by inserting after "vacant" the words "upon dissolution or expiry of the House of the Representatives or".

- Our Common Understanding:

The intention is to make it clear that the Deputy Speaker's term of office (unlike the Speaker's) expires on dissolution or expiry of the House of Representatives. However, we require legal clarification on the need for a Deputy Speaker in the event of a national emergency if there is no Speaker. Also it is necessary to explain why this is limited to the Deputy Speaker only.

(i) President and Vice-President of the Senate, Section 81 (6) (b) (ii)

- Present Constitution:

81.-(6) The office of President of Senate does not become vacant on the expiry of the term of the Senate but becomes vacant:

(b) if, before that day, the President of the Senate (ii) with the consent of the President of the Senate, becomes the holder of another public office;

- Proposed Amendment:

Section 81 of the Constitution is amended in subsection (6) by deleting the words "with the consent of the President of the Senate," from paragraph (b) (ii) and substituting "with his or her consent".

- Our Common Understanding:

The intention is to clarify as to whose consent is in question in relation to holding other public office.

(j) Vacation of office of Minister, Section 105 (1)

- Present Constitution:

105.- (1) Subject to subsection (2), the appointment of a Minister terminates if: (d) the Minister ceases to be a Member of the Parliament.

- Proposed Amendment:

Section 105 of the Constitution is amended in subsection (1) by-
 (a) replacing the full-stop by "; or" at the end of paragraph (d); and
 (b) adding the following new paragraph –
 "(e) the Minister is dismissed by the President under subsection 99 (1).".

- Our Common Understanding:

The intention is to make it clear that Ministers may be dismissed by the President, on the advice of the Prime Minister, as provided by section 99 (1).

(k) Qualifications for appointment, Section 130 (a) (b)

- Present Constitution:

130.- A person is not qualified for appointment as a judge unless he or she:
 (a) holds, or has held, high judicial office in Fiji Islands or in another country prescribed by the Parliament; or
 (b) has had not less than 7 years' practice as a barrister or solicitor in the Fiji Islands or in another country prescribed by the Parliament.

- Proposed Amendment:

Section 130 of the Constitution is amended –
 (a) in paragraph (a) by deleting "high"
 (b) in paragraph (b) by deleting "barrister or solicitor" and substituting "legal practitioner"

- Our Common Understanding:

It is intended to make the necessary change so that a magistrate can qualify to become a judge. Also it replaces "barrister and solicitor" by "legal practitioner" in line with the Legal Practitioners Act 1997.

(l) **Appointment of ambassadors, etc, Section 149 (5) (a)**

- Present Constitution:

149.- (5) The Parliament may make laws relating to:
 (a) the pensions entitlements of a person referred to in subsection (4); and

- Proposed Amendment:

Section 149 of the Constitution is amended in subsection (5) (a) by deleting "(4)" and substituting "(2)".

- Our Common Understanding:

It is intended to correct a cross-reference to persons removed from office as ambassadors. However, we see a need for clear legal clarification as to the logical consistency of the sequence of cross-references provided.

(m) **Standing appropriation of Consolidated Fund for payment of certain salaries and allowances, Section 183 (1) (j)**

- Present Constitution:

183.- (1) This section applies to:
 (j) the Commissioner of Police;

- Proposed Amendment:

Section 183 of the Constitution is amended in subsection (1) by adding after paragraph (j) the following new paragraph-
 "(ja) the Commander of the Republic of the Fiji Islands Military Forces;"

- Our Common Understanding:

It is intended to add to that which appropriates the salaries of certain officers, and the Commander of the Republic of the Fiji Islands Military Forces.

(n) **Interpretation, Section 194**

- Present Constitution:

194.-(1) In this Constitution, unless the contrary intention appears:
Gazette means the *Fiji Republic Gazette* published by the order of the Government;
public office means:

(g) an office in, or as a member of, a statutory authority; or (h) an office established by a written law;

(12) For the avoidance of doubt, use of the word must in this Constitution imports obligation to the same extent as if the word shall were used.

- Proposed Amendment:

Section 194 of the Constitution is amended –

(a) in the definition of "Gazette" in subsection (1) by deleting "*Fiji Republic Gazette*" and substituting "*Fiji Islands Government Gazette*";

(b) In the definition of "public office"-

(i) in paragraph (g) by deleting ", or as a member of,";

(ii) by deleting paragraph (h) and substituting -- "(h) an office which is paid out of public moneys (being moneys to which Chapter 12 applies),",

(c) in subsection (12) by placing inverted commas around the words "must" and "shall";

(d) by adding the following new subsections-

"(13) Whenever a provision of this Constitution requires a person or body ("the consulter") to consult another person or body before advising on or making an appointment, the consulter must give due consideration to the views of that person or body into account when advising or making the appointment.

(14) Nothing in this Constitution prevents or has ever prevented a Fijian who is the President or Vice President of the State, the President of the Senate, the Speaker of the House of Representatives or a member of the House of Representatives or of the Senate from being a member, Chairman or Deputy Chairman of the Bose Levu Vakaturaga, a Provincial Council, a Tikina Council, the Fijian Affairs Board or the Native Land Trust Board."

- Our Common Understanding:

Paragraph (a) is intended to make the definition of "Gazette" in line with the new name of the country.

Paragraph (b) amends the definition of "public office" in order to (i) release membership of establishing authority from the scope of the definition; and to refer to payment out of public monies rather than the existence of a written law, which is too wide.

The additional paragraph (d) is intended to define "consultation" which is used in several places in the Constitution in relation to appointments.

However we strongly believe that the word 'consultation' be left undefined in subsection 13.

Subsection 14 is proposed for further discussion with colleagues, and raises the question of extending the intention of the amendment from indigenous institutions to other institutions as well.

(o) **Re-naming of the Republic of Fiji Military Forces, Section 112 (1)**

- Present Constitution:

112. - (1) The military force called the Republic of Fiji Military Forces established by the Constitution of 1990 continues in existence.

- Proposed Amendment:

(1) Section 112 of the Constitution is amended in subsection (1) by adding at the end "under the name of the Republic of the Fiji Islands Military Forces."

(2) The Constitution is amended by deleting "Republic of Fiji Military Forces" wherever it appears (except in section 112(1)) and substituting "Republic of the Fiji Islands Military Forces."

- Our Common Understanding:

It is intended to rename the Republic of Fiji Military Forces as the Republic of the Fiji Islands Military Forces, in line with the new name of the country. We recommend that there will be no change. But if a change is thought desirable then we recommend that the historical and cost factors be explored further before taking a decision on renaming.

Moreover, however, we share a common understanding of what we see as the **'controversial'** proposed amendments (i.e. from **(p)** to **(s)**) to the following areas of the Constitution:

(p) Voting and other matters, Section 54

- Present Constitution:

54. - (1) The election of a member for each constituency is conducted under the preferential system of voting known as the alternative vote.

- Proposed Amendment:

Section 54 of the Constitution is amended by deleting "preferential system of voting known as the alternative vote" and substituting "plurality system of voting known as first-past-the-post".

- Our Common Understanding:

The proposed amendment is considered controversial and requires further discussion and wider consultation. However we see a need to review the Electoral Act with particular reference to the electoral procedures.

(q) Compulsory voting, Section 56

- Present Constitution:

56.- Every person registered as a voter whose right to registration has not ceased must, as prescribed by the Parliament and subject to such exceptions as the Parliament prescribes, vote in every election in the constituencies in respect of which he or she is enrolled.

- Proposed Amendment:

The constitution is amended by repealing section 56.

- Our Common Understanding:

It intends to replace the “preferential system of voting known as the alternative vote” with the “plurality system of voting known as first-past-the-post”. We looked at some of the advantages and disadvantages of these systems and agreed that the proposed amendment requires further discussion and wider consultation.

(r) President acts on advice, Section 96 (1)

- Present Constitution:

96.-(1) Subject to subsection (2), in the exercise of his or her powers and executive authority, the President acts only on the advice of the Cabinet or a Minister or some other body or authority prescribed by this Constitution for a particular purpose as the body or authority on whose advice the President acts in that case.

- Proposed Amendment:

Section 96 of the Constitution is amended in subsection (1) -
 (a) by inserting after "authority" the words "under this or any other written law"; and
 (b) by inserting after "Constitution" the words "or that other written law".

- Our Common Understanding:

We decided that this proposed amendment requires further discussion and wider consultation, as it appears that Cabinet is taking away the right of the BLV and President in some areas.

(s) Referendum to amend the constitution.

- Present Constitution:

N.A.

- Proposed Amendment:

The Constitution is amended by adding the following section –
'Referendum 192A. The Parliament may make law to carry out referendum to entrenched provisions of the Constitution.'

[The Parliament may make law to amend sections... .. by a referendum of registered voters.]

- Our Common Understanding:

This is intended to enable the Parliament to make laws to carry out referendums on entrenched provisions of the Constitution. This in our view requires wider consultation.

Also, we looked at sections **64** (2), **99** (1), (**100**), **137** (3), and **99** (5), that appear in Annex I and Annex II of the SDL Discussion Paper (Talanoa Sub-Committee on Constitutional Changes, Discussion Paper, by Hon. Senator Bale), and are not included in the SDL Revised Draft Bill – 6/7/2002. As such, we have not made any recommendations on these.

In addition, we see that some other issues with respect to the constitutional provisions relating to the management of the dynamics of conflict that may arise from policy-differences, the structure of Parliament, the roles of backbenchers, the position, title, and definition of the Leader of the Opposition should be brought under closer examination with a view to proposing the necessary amendments to the Constitution so as to enable the smooth operation and functioning of a multi-party Government.

Finally, the committee recommends that all these areas that are brought to bear on our common understanding in relation to certain recommendations to amend the Constitution be referred to a Special Select Committee of the Parliament in the same way as we recommended the appointment of a Select Committee on Land in our previous progressive report.

3. CERD Report:

The committee will continue to consider the CERD report in our next meeting.