

**SUBMISSION TO THE STANDING  
COMMITTEE ON CONSTITUTIONAL  
REVIEW REGARDING THE  
CONSTITUTION (AMENDMENT) BILL  
2004**

**CITIZENS' CONSTITUTIONAL FORUM LIMITED**

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## **INTRODUCTION**

As our name suggests, the Citizens' Constitutional Forum ('CCF') is an organisation with a special interest in the Constitution. We are non-government and not-for-profit, and our overarching aim is to advocate and educate for Constitutional democracy, human rights and multiculturalism in Fiji.

The CCF began in 1992 as an informal talk shop where interested individuals could come together to discuss problems and challenges facing Fiji as a nation, with a particular focus on issues of a Constitutional nature. One of our first major projects was the preparation of a detailed submission to the Fiji Constitution Review Commission chaired by Sir Paul Reeves.

In 1996, we were registered as a charitable trust and in 2003 we became a company limited by guarantee. Throughout the last 13 years, the CCF has maintained its focus on Constitutional issues in both our advocacy and education work, with human rights, democratic principles, the rule of law and good governance being our major themes.

We are therefore keenly interested in the work of the Standing Committee on Constitutional Review, and we feel well-qualified to make this submission. We would also be very happy to appear before the Committee in person, and unhesitatingly offer our services to assist the Committee in any other way that we may be able.

## **CONSTITUTION (AMENDMENT) BILL 2004**

The CCF understands that the Committee's work currently focuses on the Constitution (Amendment) Bill 2004 (Bill No. 2 of 2004), which was introduced into Parliament early last year. The purpose of this submission is therefore to share our understanding of the Bill with Members of the Committee and to express our views on it.

We would like to point out at the outset that the CCF accepts that the *Constitution (Amendment) Act 1997* ('the Constitution') is not perfect, and that amendments may occasionally be necessary to address areas of weakness or changed circumstances, or to remove flaws or clarify ambiguities. However, the Constitution is the supreme law of Fiji, and we believe that any proposals to amend it should not only receive the most careful consideration by Government and Parliament but should also be the subject of extensive public consultation. After all, the Constitution belongs to the people of this country.

This remains our view whatever the nature of the amendments, and whether or not they may be described as "minor" or "non-controversial".

In the main, the clauses in the Constitution (Amendment) Bill 2004 appear to be intended simply to clarify existing provisions of the Constitution and the CCF has no objection to most of them.

**However, there is one clause in the Bill to which the CCF strenuously objects. That is clause 15, which proposes amendments to section 194 of the Constitution to enable indigenous Fijians who hold certain high public offices to also hold office in the Fijian Administration. The CCF cannot see any possible public benefit that might flow from these amendments. They appear solely designed to enable a small minority of indigenous Fijian elites to monopolise more leadership positions and increase their income and privileges. This can only lead to more conflicts of interest and the concentration of power in fewer hands. It will also further politicise appointments to boards and councils in the Fijian Administration, and interfere with their independent decision-making, by making them more vulnerable to manipulation by political parties.**

We also consider that:

- the amendment proposed by clause 6 of the Bill, which would enable the Senate to amend money Bills to correct “errors”; and
  - the amendment proposed by clause 8, relating to vacation of office by the Deputy Speaker of the House of Representatives,
- are unnecessary and undesirable.

The CCF’s objections to clause 15 are detailed further below, along with our specific comments on other clauses of the Bill.

## **CLAUSES 1-4**

Clauses 1-4 of the Bill clarify existing Constitutional provisions and the CCF has no objection to them.

## **CLAUSE 5**

This clause proposes an amendment to section 47 of the Constitution, dealing with the passage of Bills through Parliament. Section 47(6) currently provides that if the House of Representatives passes a Bill twice in “successive sessions”, with at least six months in between, and the Senate on each occasion rejects the Bill or passes it with amendments not acceptable to the House of Representatives, then the Bill may become law despite the Senate’s disagreement. In other words, section 47(6) provides a procedure by which the House of Representatives may overrule Senate objections to a Bill.

The proposed amendment would replace the word “sessions” in section 47(6) with the word “meetings”. Both of these words are defined in section 194 of the Constitution. Essentially, sessions are longer periods during which Parliament

meets periodically, while meetings are shorter periods during which Parliament sits regularly on the days determined by it. The duration of Parliamentary sessions is determined by the Prime Minister, while the duration of meetings is determined by the House of Representatives or the Senate, as the case may be.

At present, the requirement in section 47 for a Bill to be passed twice by the House of Representatives in “successive sessions” before it may become law despite the Senate’s disagreement, could possibly extend the requirement for a six month interval between each time the Bill is passed. The amendment proposed by clause 5 of the Bill would remove this possibility by enabling the House of Representatives to satisfy section 47 by passing the Bill twice at successive meetings in a single session, so long as the requirement for a six month interval is met.

The CCF has no objection to this amendment.

## **CLAUSE 6**

Clause 6 of the Bill proposes an amendment to section 49 of the Constitution, dealing with the powers of the Senate with respect to money Bills. Section 49(1) currently prevents the Senate from amending Bills imposing taxation or appropriating revenue or moneys. The effect of the amendment would be to create an exception to this rule, so that the Senate may amend a money Bill in order to correct “errors”.

At present, if the Senate has any concerns regarding a money Bill, its only option is to reject the Bill and send it back to the House of Representatives for reconsideration. This remains so whether the Senate’s concerns relate to the substantive proposals contained in the Bill or merely to errors or perceived errors in its drafting. The proposed amendment would, in effect, provide an alternative process for the correction of errors or perceived errors in a money Bill, whereby the Senate may correct the errors, and the corrections may then be adopted or rejected by the House of Representatives.

However, since the House of Representatives would still need to reconsider the Bill, this process does not offer any efficiency gains. The only benefit it appears to offer is that enabling the Senate to correct “errors” in a money Bill instead of rejecting it would avoid any embarrassment that such a rejection may cause for the Government.

The CCF does not believe that Government’s desire to avoid embarrassment in such circumstances can justify amending the Constitution.

The limitation imposed by section 49 on the Senate’s powers with respect to money Bills is similar to limitations that exist on the powers of the Federal Senate in Australia and the House of Lords in the United Kingdom. Neither of those

houses has the power to correct errors in money Bills. The reason why the upper house or house of review in a bicameral Westminster-style Parliament traditionally does not have the power to amend money Bills is that it is the lower house of Parliament where Government is formed. That is, it is the party or coalition that commands a majority in the House of Representatives which has the democratic mandate to govern. This includes the mandate to implement its policies by levying taxes and expending public funds. This argument carries even greater weight in Fiji, where, like the House of Lords, our Senate is not elected.

The issue of democratic mandate is further recognised in section 49, by the inclusion of sub-sections 49(3) and (4), which provide that money Bills may become law despite the Senate's disagreement if they are not passed by the Senate within:

- in the case of appropriation Bills – one sitting day; or
- in the case of other money Bills – 21 sitting days.

Clearly, then, the Senate's role with respect to money Bills is limited to review, and its powers are subordinated to those of the House of Representatives. The CCF considers that this is appropriate.

An additional reason why the CCF opposes this proposed amendment is that it has the potential to cause confusion and waste the time and resources of both houses of Parliament in fruitless debate over the meaning of the word "errors". Since there is no real problem with section 49 in its present form, we suggest it should be left as it is.

## **CLAUSE 7**

This clause seeks to correct what appears to be an error in the terminology used in section 74 of the Constitution. The CCF has no objection to it.

## **CLAUSE 8**

Clause 8 proposes an amendment to section 80 of the Constitution, in relation to the office of Deputy Speaker of the House of Representatives. Section 80(6)(a) provides that the office of Speaker becomes vacant on the day before the first meeting of the House of Representatives after a general election. This enables a new Speaker to be elected for each new Parliament.

There is currently no like provision for the office of Deputy Speaker, although it is clear that a new Deputy Speaker is intended to be elected for each new Parliament as well.

The proposed amendment would insert a new provision into section 80, to provide that "[t]he office of Deputy Speaker becomes vacant on dissolution or

expiry of the House of Representatives, and may, if necessary, perform any duty for the purposes of subsection (4)".

The CCF suggests there is no need for this amendment, because section 80(7) provides that the Deputy Speaker vacates office if he or she ceases to be a Member of the House of Representatives, and Members of that House necessarily vacate office when it is dissolved or expires before a general election. The office of Deputy Speaker therefore automatically becomes vacant before each general election.

We also suggest that the words "and may, if necessary, perform any duty for the purposes of subsection (4)" in the proposed amendment are superfluous.

## **CLAUSE 9**

This clause proposes an amendment to section 81 of the Constitution, in relation to the office of the President of the Senate. The proposed amendment appears to be intended simply to clarify the expression of section 81(6)(b)(ii), which provides that the President of the Senate automatically vacates office if, "with the consent of the President of the Senate", he or she becomes the holder of another public office.

The CCF suggests that the words "with the consent of the President of the Senate," should simply be deleted, without replacement. There is no practical possibility that a President of the Senate would be appointed to another public office without his or her consent, and deleting the quoted words would be consistent with the corresponding provision dealing with the Speaker of the House of Representatives (that is, section 80(6)(b)(ii)).

## **CLAUSE 10**

This clause proposes an amendment to section 105 of the Constitution, dealing with the vacation of office of Government Ministers. The proposed amendment would insert a provision into section 105 to provide that the appointment of a Minister terminates if he or she is dismissed under section 99(1) of the Constitution. Since section 99(1) provides for the President to appoint and dismiss Ministers on the advice of the Prime Minister, the proposed amendment appears appropriate.

## **CLAUSE 11**

Clause 11 of the Bill proposes an amendment to section 126 of the Constitution, dealing with the composition of the High Court. At present, section 126(1) provides that the High Court is to consist of a number of judges which is "not less than 10 or such greater number as the Parliament prescribes." This means that

Parliament may fix a minimum number of High Court judges which is greater than 10.

The proposed amendment would replace the words “or such greater” with the words “and not more than a”. The purpose of the amendment appears to be to enable Parliament to fix a maximum number of High Court judges, rather than to increase the minimum number above 10. The CCF queries whether this amendment is necessary or desirable, and also notes that it contains a drafting error. If it is considered appropriate to give Parliament the power to put a cap on the number of judges in the High Court, then the words “or such greater number as the Parliament prescribes” should be replaced with “and not more than such number as the Parliament may prescribe”.

## **CLAUSE 12**

Clause 12 proposes an amendment to section 130 of the Constitution, which sets out the qualifications required for appointment as a judge. At present, a person is eligible for appointment as a judge if he or she meets either of two requirements:

- if he or she holds (or has previously held) “high judicial office” in Fiji or in another country prescribed by Parliament; or
- if he or she has had at least seven years’ practice as a barrister or solicitor in Fiji or in another country prescribed by Parliament.

The effect of the proposed amendment would be to remove the second requirement, and replace it with a requirement that the person must have been admitted as a barrister or solicitor in Fiji or in another country prescribed by Parliament, for not less than 10 years.

In one respect, this amendment would relax the requirement, because a person who is admitted as a barrister or solicitor need not necessarily practise law. Admission as a barrister or solicitor is required for legal practice; however, a person who has been admitted may undertake whatever employment he or she chooses. In another respect, the proposed amendment would tighten the qualifications required for appointment as a judge, since a person would need to have been admitted as a barrister or solicitor for 10 years, rather than to have practiced law for 7 years (as under the present requirement).

It is noted that the Constitution (Amendment) Bill 2000, which was not passed, included an amendment that would have enabled a Magistrate to be appointed as a judge. The CCF queries why this amendment has not been included in the 2004 Bill.

## **CLAUSE 13**

This clause seeks to correct a typographical error in section 149 of the Constitution.

## CLAUSE 14

This clause proposes an amendment to section 183 of the Constitution, which provides for the salaries or allowances payable to certain public office holders to be automatically appropriated from the Consolidated Fund. The proposed amendment would add the Commander of the Republic of Fiji Military Forces to the list of offices to which the provision applies.

The CCF has no objection to this.

## CLAUSE 15

Clause 15 of the Bill proposes two amendments to section 194 of the Constitution:

- an amendment to the definition of “public office”; and
- the addition of a provision which would authorise the President or Vice-President of Fiji, the President of the Senate, a member of the Senate, the Speaker of the House of Representatives or a member of that House, to simultaneously hold a second public office as a member of the Bose Levu Vakaturaga, a Provincial Council, a Tikina Council, any other council established under the Fijian Affairs Act, the Fijian Affairs Board or the Native Land Trust Board.

The proposed amendment to the definition of “public office” appears to be consequential to the second proposed amendment, and designed to prevent any inconsistency with other provisions of the Constitution – notably section 67.

As noted earlier in this submission, the CCF strenuously opposes these amendments. There are four main reasons for this.

**First, the CCF cannot see any justification for allowing holders of high public office to also hold office in the Fijian Administration. Where is the public benefit in this? It has been suggested that these amendments will enable the President, Vice-President, and so on, to attend meetings of the Bose Levu Vakaturaga and Provincial Councils. However, the fact of the matter is that public officers may already attend such meetings, by invitation, as official guests. The difference between being a guest and being a member is of course that members have voting rights and owe particular duties to the board or council on which they sit.**

**This leads to the second reason why the CCF opposes these amendments. It would be highly inappropriate for public officers to take on duties to a board or council in the Fijian Administration, because this would place them in a position where their duties to the board or council, and their**

**public duties to Government, Parliament and the people of Fiji, may easily conflict. In other words, it would create potential conflicts of interest.**

**Individuals holding two offices would be likely to experience competing loyalties and may find themselves in breach of section 156 of the Constitution, which requires Constitutional and other public office holders to avoid conflicts of interest and refrain from compromising “the fair exercise of their public duties”.**

**The third reason why the CCF objects to clause 15 is that allowing indigenous Fijians to hold two offices at once would concentrate decision-making powers in Government, Parliament and the Fijian Administration in fewer hands. Why should a few individuals monopolise all the top jobs? This would reduce opportunities for others to achieve leadership positions and prevent alternative voices from being heard. The CCF believes there are many talented indigenous Fijians in this country, and no shortage of potential leaders from all ethnic groups. As a nation, we should be encouraging these people to realise their full potential, and to use their skills and abilities for the good of us all. We should not be reducing their opportunities for advancement by allowing a few elites to hold two offices at once.**

**Fourthly, and this is related to the other three reasons why the CCF opposes these amendments, allowing indigenous Fijians who hold high public office to also hold office in the Fijian Administration would interfere with independent decision-making by boards and councils in the Fijian Administration, by making them more vulnerable to manipulation by political parties. The CCF believes we have already seen such manipulation in the Bose Levu Vakaturaga, with the removal of former Chairperson, Ratu Epli Ganilau, and with the failure to remove or suspend former Vice-President, Ratu Jope Seniloli, after he was convicted of a criminal offence and sentenced to four years’ imprisonment.**

**We should not allow boards and councils in the Fijian Administration to be politicised! The Fijian Administration is supposed to provide non-partisan representation and services to indigenous Fijians at tikina, provincial and national levels. Its credibility depends on its independence from the Government of the day. For this reason, indigenous Fijian chiefs must make a choice between serving their communities in the Fijian Administration and serving them in the national Government. It is not sustainable to do both, and if they try we will see conflicts of interest, we will see the concentration of decision-making powers and we will see political manipulation. Ultimately, this can only discredit the individuals involved and the Fijian Administration as a whole. There are also signs that it could discredit the chiefly system itself.**

**For these four reasons the CCF urges all Members of the Standing Committee on Constitutional Review to reconsider and reject clause 15 of the Constitution (Amendment) Bill 2004.**

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