

Public Participation in Constitution-making:

The Pacific Islands

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PUBLIC PARTICIPATION IN CONSTITUTION MAKING: THE PACIFIC ISLANDS*

Katy Le Roy

1. Executive Summary

The purpose of this paper is to examine constitution building episodes in five different locations within the Pacific region, and to draw from these case studies observations and lessons that might be useful in guiding the design of future constitution building processes. Consistent with this purpose, the paper aims to provide as much detail as possible about how public participation has been included in these processes, how and by whom it has been conducted, and what impact it has had.

The five case studies selected for this paper are (in chronological order from the date on which the constitution building exercises began) Papua New Guinea, Fiji, Bougainville, Solomon Islands and Nauru. The case studies span a period of more than 35 years, from 1974 to the present day. They range from the building of an independence constitution (Papua New Guinea), to attempts to create new, post-independence constitutions (Fiji and Solomon Islands), from extensive review and amendment of an existing independence constitution (Nauru) to a constitution for an autonomous region within a nation state as a prelude to the possibility of full independence (Bougainville).

The case studies have been selected because they have each featured an attempt to include public participation in the constitution building process, each to different extents and in different ways. The five jurisdictions also have many politico-legal features in common: each, except Bougainville, is a former colonial possession that has gained independence within the last half-century and adopted a system of government modelled on the Westminster parliamentary responsible government of its departing coloniser. Each has a legal system based on the British common law that also seeks to accommodate indigenous customary law. In each of the five jurisdictions examined in this study there is some tension between the modern demands of good governance and traditional ties and practices. In each it could be said that, notwithstanding the rules enshrined in their written constitutions, the rule of law has not firmly taken root.

Three of the jurisdictions examined in this study (Fiji, Bougainville, Solomon Islands), have been affected by violent conflict and/or political coups in recent years. This places an extra burden of expectation on the potential for a new constitutional settlement to aid in resolving and preventing conflict in future, and may also magnify the need for people to be involved in the process of building their new constitution together.

Special challenges for conducting public consultation in the constitution building process are common to the five cases studied. All are small island developing states which rely to varying extents on foreign aid. All except Nauru are comprised of a large number of islands with mountainous terrain, making it logistically difficult (and very expensive) to consult with the widely dispersed population. All have poor infrastructure and limited media.

* Some parts of this paper have been presented at various conferences in Australia, Fiji, Vanuatu and South Africa, but none have been previously published. My research on Fiji and the Solomon Islands was undertaken in the course of my PhD research with funding from the University of Melbourne. The information on Nauru comes from my work as the main legal adviser on the project. I am grateful to Anthony Regan for his collaboration on a presentation on this topic at a workshop hosted by International IDEA and US Interpeace in Cape Town in April 2009, and for his generous assistance with information on Papua New Guinea and Bougainville.

The case studies reveal certain common approaches to constitution building in the region. Public consultation has typically been achieved through open public meetings, conducted by a Commission or parliamentary committee. People have typically also been given the opportunity to make written submissions at some point in the process – the case studies vary in terms of whether this has been done before or after the production of a draft constitution. People have not participated in the approval stage via referenda, except in Nauru, where approval of amendments to certain Articles in the Constitution is part of the prescribed method for constitutional amendment. In each of the case studies, a representative body has been (or will be) responsible for adoption of the constitution.

The most significant variations between the case studies appear in the degree to which civic education or awareness-raising has been incorporated into the constitution-building process in order to facilitate effective public participation, and in the different approaches to the content of public consultation – what exactly has the public been consulted about? In three of the jurisdictions studied (Papua New Guinea, Bougainville and Nauru), public consultation involved engaging people in discussion about concrete constitutional issues, and trying to equip people for such discussions. In the other two jurisdictions (Fiji and Solomon Islands), public consultation was more amorphous. People were not adequately prepared for constitutional dialogue, and were not provided with any guidance in relation to constitutional issues under consideration. As a result, these episodes were less effective in terms of generating understanding, eliciting clear public views on constitutional issues, and building a sense of ownership of the process and its constitutional outcome.

Figure 1 – Basic facts and figures for each of the case studies

Country/ region	Population	Area (km ²)	GDP per capita (US\$)	Literacy rate	Independence	Constitutional status/ system of government
Papua New Guinea	6,100,000	462,840	\$2,500	57.3%	1975	Constitutional monarchy; Parliamentary responsible government; Queen represented by Governor-General is head of state; Prime Minister elected from Parliament is head of government; unicameral Parliament, 5 year term
Fiji Islands	875,000	18,274	\$4,200	93.7%	1970	(Prior to abrogation of 1998 constitution) Independent republic; Parliamentary responsible government; President is head of state; Prime Minister elected from Parliament is head of government; bicameral Parliament, 5 year term
Bougainville	175,000	9,300	no data	76.7%	n/a	Limited self-government (autonomous region of Papua New Guinea); Parliamentary responsible government; Directly elected President sits in House of Representatives and all members of the Executive Council appointed from within the House; unicameral parliament, 5 year term
Solomon Islands	560,000	28,896	\$2,700	76%	1978	Constitutional monarchy; Parliamentary responsible government; Queen represented by Governor-General is head of state; Prime Minister elected from Parliament is head of government; unicameral Parliament, 4 year term
Nauru	10,000	24	\$5,462	no data	1968	Independent republic; Parliamentary responsible government; President elected from Parliament is head of state and head of government; unicameral Parliament, 3 year term

2. Case Studies

PAPUA NEW GUINEA

Background

Papua New Guinea is located just to the north of the north-eastern tip of Australia, above Torres Strait, and extends eastward into the Bismarck Sea, the Coral Sea, the Solomon Sea and the South Pacific Ocean. The country comprises the eastern half of the island of New Guinea (the western half is claimed by Indonesia), three other large islands and 600 smaller islands and atolls. The terrain is largely mountainous, with low-lying coastal areas. The first human settlement in the islands was at least 60,000 years ago.

The population of Papua New Guinea is just over 6 million, with a median age of 21 years and a population growth rate of 2.033%.¹ At the time of independence in 1975, the population was approximately 3 million. The population is predominantly Melanesian, and extremely heterogeneous. In addition to Tok Pisin (the most widely used language), English and Motu, there are around 860 indigenous languages spoken,² many of which are endangered.³ The average literacy rate is 57.3%, and approximately 12% of the population lives in urban areas.⁴ The 2000 census found that 27% of people are Roman Catholic, and 70% belong to another Christian denomination.

Papua New Guinea's primary sources of income are the mining of copper, gold, oil and natural gas, production of coffee, copra and palm oil, forestry, and fishing.⁵ It is also a recipient of foreign aid. The per capita GDP is US\$2,500.⁶

Conditions leading to constitutional reform

What is now the Independent State of Papua New Guinea was, in the 1880s, carved up between imperial powers Germany and Britain. The protectorate of British New Guinea (the southern part of the New Guinea island) became the Australian Territory of Papua after Australian federation in 1901. During World War I German New Guinea was occupied by Australia, and after the War became a League of Nations Trust Territory administered by Australia. During World War II, the two territories were joined as a single administrative unit. Following the end of World War II, Australia continued to administer the amalgamated territories as the Territory of Papua and New Guinea. The Territory became self-governing on 1 December 1973.⁷

The UN Trusteeship Council required Australia to report annually on the administration of its territories, and sent a Visiting Mission to visit the territories every three years from 1950 onwards.⁸ From 1960 onwards, the United Nations Trusteeship Council began to push colonial and administering powers to grant independence to colonies and trust territories, and indeed many colonial and administering powers were themselves keen to grant such independence. This UN policy was reflected in the 1960 General Assembly Resolution 1514 (XV) which contained the Declaration on the Granting of Independence to Colonial Countries

¹ July 2010 estimate, at <www.cia.gov/library/publication/the-world-factbook/geos/pp.html>, accessed 19 January 2011.

² Ibid.

³ Ron Crocombe, *The South Pacific* (2001), 101-109.

⁴ CIA world Fact Book, above n 1.

⁵ Crocombe, above n 3, 702.

⁶ 2010 estimate in 2010 US dollars, CIA world Fact Book, above n 1.

⁷ Jonathan Ritchie, *Making Their Own Law: Popular Participation in the Development of Papua New Guinea's Constitution* (PhD thesis, University of Melbourne, 2003), 10-11.

⁸ Ibid, 36.

and Peoples, and in the work of the General Assembly's special Decolonisation Committee from 1961.⁹ It was in this context that Australia began to push the idea of Papua New Guinea moving towards self-government, and ultimately independence. Jonathan Ritchie writes:

Enthusiasm for independence was shared by only a few people, while many more, particularly in the highlands, remained averse and others, in parts of the country such as Bougainville and parts of Papua, would have welcomed independence, but only as a separate state from the rest of the country. This lack of support was acknowledged at the time in the decision not to ask the people directly, by referendum, whether they wanted to become independent. Yet at the same time, the Australian government was bound to follow the commitment it had given to the United Nations to honour 'the prerogative of the people to terminate the present status and take independent status if they wish'. It accepted a vote by Papua New Guinea's House of Assembly in favour of moving to independence and did not press for a referendum on the issue.¹⁰

According to Ritchie, there was no sense of nationalism among Papua New Guineans until the establishment of the Territory-wide House of Assembly in 1964. Also in 1964, a group of students at the Administrative College formed the Bully Beef Club, which became a forum for political discussions among future leaders, including Michael Somare.¹¹ In 1965, the House of Assembly established a Select Committee on Constitutional Development to consider the Territory's political future.¹² 'It toured the Territory... and heard from the people the message to go slow with the movement to self-government.'¹³ The Bully Beef Club (under the name 'the Committee of Ten' and then 'Committee of Thirteen') made a number of written submissions to the Select Committee, initially appealing to the Administration to provide indigenous leaders with the authority to properly prepare them for responsible government in the future, and later demanding self-government by 1968.¹⁴

Two European members of the House of Assembly formed a relationship with the Bully Beef Club, and encouraged its members to combine with like-minded members of the House of Assembly to form a political party. Thus in June 1967 the Pangu Pati was formed. 'Pangu was not the first indigenous party to be formed, but it was undeniably the most radical so far... It was the first truly nationalist party, dedicated to ending the Australian administration and its replacement by Papua New Guinean rule.'¹⁵ In the 1968 elections, the Pangu Pati and its sympathisers won 13 of the 69 seats, making it the largest bloc in the House. The Pangu members decided not to join government, but to be an unofficial opposition party. Some of its members left the party, allured by the promise of the status of 'Ministerial Member' of the Administrator's Executive Council.¹⁶

In 1969 a second Select Committee on Constitutional Development was appointed, and toured the Territory as well as visiting other countries.¹⁷ 'The Committee's efforts were to some extent overridden by developments in the Australian government.'¹⁸ By 1970, both Australian Prime Minister John Gorton and Australian Opposition leader Gough Whitlam were speaking as though Australia had determined that there would be early self-government for the Territory.¹⁹

Despite being told repeatedly that the people did not want self-government until after 1976, the Committee was more influenced by Gorton's intention for self-government in the life of the

⁹ Karen McDowell, *The Constitutional Development of Nauru* (PhD thesis, La Trobe University, 1986).

¹⁰ Ritchie, above n 7, 12.

¹¹ *Ibid*, 51-52.

¹² *Ibid*, 50.

¹³ *Ibid*.

¹⁴ *Ibid*, 53.

¹⁵ *Ibid*, 54.

¹⁶ *Ibid*, 58-60.

¹⁷ *Ibid*, 61.

¹⁸ *Ibid*, 62.

¹⁹ *Ibid*, 62-63.

next House – between 1972 and 1976. The perception was that, notwithstanding the people's views, the timing of self-government remained for the Australian Government to decide.²⁰

After the 1972 elections for the House of Assembly, Somare announced that he would form government with a coalition of the Pangu Pati, the People's Progress Party, and several smaller parties. Those within the House of Assembly who had resolved to proceed with independence – particularly Chief Minister Michael Somare – were also responsible for designing the process by which the independence constitution would be developed. They did so in a manner that involved unprecedented public consultation in an effort to produce a truly autochthonous constitution.²¹

Structure of the constitution making process

The constitution making process began with the establishment in 1972 of the Constitutional Planning Committee (CPC), a committee of the House of Assembly. Somare had proposed the establishment of the Committee as a means of 'bringing forward the possibility of early self-government and independence',²² and also of ensuring 'that the constitution is suited to the needs and circumstances of Papua New Guinea and is not imposed from outside.'²³ Debate over the motion to establish the committee was heated, but ultimately the motion succeeded. The Committee included representation from all the major parties in the House, and had broad and flexible terms of reference. The Deputy Chairman, and *de facto* chairman, was a Bougainvillean member, John Momis. The Committee appointed a number of legal and political advisors from within Papua New Guinea (4 expatriates and one indigenous lawyer) and also secured Professor Yash Ghai as an advisor.

The Committee's initial provisional work program, prepared in October 1972, envisaged completion of its report prior to the proposed date for self-government: 1 December 1973. As a consequence of the short timeframe, it included only 6 weeks for public consultation.²⁴ Members of the CPC were uncomfortable with this,²⁵ and so abandoned it for a more ambitious (and time-consuming) program that involved the preparation of 6 Discussion Papers, and hundreds of meetings throughout the territory to discuss the questions raised in the Discussion Papers and to record people's views, as well as a tour by the CPC (detailed in the following sections).

While the early planning work of the CPC was underway, pressure was mounting from Australia for an early date to be set for independence, to be preceded by self-government. This impinged somewhat on the Committee's work, and led to tensions between Somare and the CPC.²⁶ Separatist and secessionist movements in some regions within the territory also threatened the process. In spite of these issues, by early 1973 'the consultative exercise began to acquire momentum'.²⁷

²⁰ Ibid, 63.

²¹ Ibid, 13. Ritchie also explains (at 69): 'Somare was a keen advocate of early independence, but he also believed that the people's will should prevail. His task was to convince the many people who were reluctant to see separation from Australia of the virtues of independence.

The way that was chosen was to involve them in the decision-making process, through a consultative program, the scope of which far exceeded anything that had been undertaken before in the Territory.'

²² Michael Somare, *Sana: An Autobiography of Michael Somare* (1975), 98, quoted in Ritchie, *ibid*, 74.

²³ Michael Somare, *HAD*, Third House, Second Meeting of the First Session, 23 June 1972, p 279, quoted in Ritchie, *ibid*, 74.

²⁴ Ritchie, *ibid*, 94.

²⁵ Ibid.

²⁶ Chief Minister Michael Somare was the *ex officio* Chairman of CPC by his own design, but was an inactive member, allowing Deputy Chairman John Momis and the other members to drive the Committee (*ibid*).

²⁷ Ritchie, *ibid*, 111.

Figure 2 – Papua New Guinea’s Constitution Making Process

1964	PNG House of Assembly is established; first general elections held; Bully Beef Club is formed
1965	House of Assembly establishes Select Committee on Constitutional Development
1967, June	Pangu Pati, PNG’s first truly nationalist party, is formed
1968	Pangu Pati wins 13 of 69 seats in the general election
1969	House of Assembly establishes second Select Committee on Constitutional Development
1972	After general election, Somare becomes Chief Minister with a coalition of Pangu and others
1972, 27 June	Motion to establish Constitutional Planning Committee (CPC) passed by House of Assembly
1972, October	CPC develops provisional work program, involving 6 weeks’ public consultation
1972, December	CPC abandons provisional work program, and plans for extensive consultation based around six Discussion Papers, in addition to CPC national consultation tour
1973, 19 February	CPC local Group Discussions begin on Discussion Paper 1
1973, May-August	CPC extensive consultation tour of the Territory
1973, 27 September	CPC tables First Interim Report in the House of Assembly
1973, 27 November	CPC tables Second Interim Report in the House of Assembly
1973, 1 December	PNG transition to full internal self-government
1974, 9 July	House of Assembly resolves that PNG will move to independent nation status
1974, 20 August	CPC tables Final Report in the House of Assembly (CPC disbanded)
1974, August to 1975, March	Series of progressive draft constitutions prepared on the basis of instructions from Assembly
1975, 23 May	House reconvened as the National Constituent Assembly (without fresh elections) to debate fourth draft constitution
1975, 18 June	House of Assembly nominates 16 September 1975 as the date for independence
1975, 15 August	Assembly formally adopts constitution (after months of debate and hundreds of amendments)
1975, 9 September	Australian Parliament’s <i>Papua New Guinea Independence Act</i> receives assent and commences
1975, 16 September	Independence takes effect and Constitution commences

In late May 1973, the Committee began its 3-month tour of the country, meeting and consulting with thousands of people. At this point, 1 December 1973 had been set as the anticipated date for self-government, and independence as early as 1974 was being mooted. Somare and the CPC were keen for the process by which Papua New Guinea gained independence and adopted its constitution to be based on the people of PNG, and to make a clean legal break from Australia’s colonial authority, but the exact process by which this would be done had not yet been settled. There was tension between Somare and the Committee because of pressure being put on Somare to rush towards self-government, and attendant pressure on Committee to conclude its report more hastily than its consultation

program would allow. Some members of the CPC also felt that the work of the Committee was being sidelined or superseded by Somare's executive decisions.²⁸ Ritchie writes:

It had also become clear that the work of the Committee could not possibly be completed on schedule for self-government by the agreed date of 1 December 1973. 'What was I to do?' Somare asked; 'Papua New Guinea could not go into self-government without a constitution'. The answer was found in a two-stage path to independence, with internal self-government on 1 December, and eventual adoption of the constitution to follow, probably in April 1974.²⁹

The CPC tabled its First Interim Report on 27 September 1973. It contained findings on certain majority views expressed in public consultations, but did not contain much in the way of concrete proposals for constitutional provisions.³⁰ In the immediate lead up to self-government on 1 December 1973, the House of Assembly met from 12 to 27 November. Momis, the *de facto* Chairman of CPC, tabled the Committee's Second Interim Report on the last day of sitting. 'The Report contained thirty-three recommendations'.³¹ On 1 December, the transition to full internal self-government went more smoothly than anticipated, and without much hype or celebration.³² By that point, almost all functions of government had already been handed over by Australia.

The achievement of self-government meant that there was now even greater pressure on the CPC to produce its Final Report. It was looking increasingly unlikely that Papua New Guinea would be able to achieve full independence by Somare's projected date of September 1974.³³ Somare however did not formally concede this until June 1974, when by the time of the June session of the House of Assembly the Final CPC Report was still not available, and he 'affirmed that independence would not come before the constitution has been agreed'.³⁴ On 27 June 1974 he presented a draft copy of the Report, but noted that it had not yet been printed and adopted by the CPC. At the same time, he presented his own minority report, which differed in many respects from the official CPC Report and which angered the *de facto* Chairman of CPC and many of its members.³⁵

According to Ritchie, by the time the Final Report of the CPC was tabled in the House on 20 August 1974

the clear role for the people in the development of their constitution had concluded. There had been an attempt to involve them by referendum, but the motion... was defeated by a margin of twenty-four votes. Somare was worried that a referendum 'would confuse people at the village level'; he told the House that 'the people who had elected their representatives to the House had given them a mandate and power to make decisions for the good of the country'.³⁶

After the tabling of the Final Report, the CPC was disbanded, and the Report was debated by the House of Assembly. The members of the CPC (except Somare and Guise) together with eight other backbenchers from both sides of the House formed the Nationalist Pressure Group (NPG), a united front to advocate the Report and its recommendations.³⁷ A political battle ensued between Somare's Government and the CPC, or NPG. In contests between committee members and the government, CPC members often cited the statistics of their extensive public consultation program and national tour to argue that their recommendations reflected the will of the people of Papua New Guinea.³⁸

²⁸ Ibid, 164.

²⁹ Ibid.

³⁰ Ibid, 209.

³¹ Ibid, 210.

³² Ibid, 211.

³³ Ibid, 212.

³⁴ Ibid, 215.

³⁵ Ibid.

³⁶ Ibid, 218.

³⁷ Ibid, 219.

³⁸ Ibid, 194.

Between August 1974 and March 1975, resolutions of the House in relation to components of the constitution were relayed to the First Legislative Counsel as drafting instructions, and the draft text of the proposed constitution began to take shape.³⁹ Some members of the CPC/NPG were dissatisfied with the results, accusing the Legislative Counsel of failing to follow drafting instructions from the House. The issue was resolved in a meeting between Somare, Momis, other members and relevant advisers, at which Somare agreed that the Legislative Counsel should follow the instructions of the House, not the executive. A drafting committee was established to oversee amendments to the third draft constitution.⁴⁰

By May 1975, the fourth draft of the constitution had been prepared, and the procedure for adoption had been settled. The House of Assembly would reconvene itself as the National Constituent Assembly (NCA), to debate the draft and approve the final constitution. This procedure, in contrast to the procedure adopted in many other former colonies whereby the legislature of the departing colonial power enacts a constitution for the newly independent state, would make the constitution autochthonous. The reasoning was that there was no need to hold new elections for a Constituent Assembly, because the Members of the House of Assembly, having received an absolute majority of votes in their electorates in the 1972 election, were already a representative group and could therefore validly make themselves into a Constituent Assembly.⁴¹ The House was therefore duly adjourned and reconvened as the NCA on 23 May 1975, to debate the constitution's fourth draft. Over the following three months, the NCA met twenty-seven times, in between the regular meetings of the House of Assembly.⁴² Hundreds of amendments were made to the draft constitution. 'With tempers continuing to run high, the NPG and the Country Party called for [the First Legislative Counsel] to be replaced.'⁴³

On 15 August [1975], the Assembly formally adopted the constitution. It was not the document envisaged in the CPC's Report. Months of fighting and the hundreds of amendments – including the withdrawal of the entire section on provincial government – had resulted in a constitution that was 'only loosely based' on the Report.⁴⁴

Public participation in the process

The greatest avenue for public participation in Papua New Guinea's constitution building exercise was via the consultations carried out through local Discussion Groups and the meetings held by the CPC when it toured the country. These consultations are detailed below. In addition to consultations, people were encouraged to write to the Committee with their views on constitutional issues, and in some places, writers were appointed to assist illiterate people in submitting their ideas in writing.⁴⁵ Fifty thousand 'letter replies' were circulated, which provided people with a ready, self-addressed format in which to compose submissions.⁴⁶ Over two thousand of these completed letters were received by the CPC.⁴⁷

The public did not have the opportunity to participate by electing representatives specifically for a Constituent Assembly, although people had in 1972 elected the representatives to the House of Assembly which, in 1975, reconvened as a Constituent Assembly. No referendum was held, neither on the question of whether people wanted independence, nor on the constitution, as political leaders in Australia and Papua New Guinea determined that it was unnecessary.

³⁹ The First Legislative Counsel was Mr C J Lynch, an Australian lawyer with decades of experience in PNG.

⁴⁰ Ritchie, above n 7, 220.

⁴¹ Ibid, 220-221.

⁴² Ibid, 221.

⁴³ Ibid.

⁴⁴ Ibid, 222-223.

⁴⁵ Ibid, 95.

⁴⁶ Ibid, 99.

⁴⁷ Ibid, 204.

The program for consultation and the coverage of the constitutional planning exercise in the media reportedly led to widespread informal dialogue on constitutional issues, which was in itself another form of participation. By the middle of 1973, 'people did not stop discussing the constitution. Sundays, after service, during the brideprice ceremony, during any gathering at all, in the sunlight and in the moonlight, people were discussing the constitution.'⁴⁸

Preparation for dialogue or consultations

The CPC built civic education into its consultation process, rather than conducting it as a discrete preliminary step to consultation. In advance of its consultation program, the CPC distributed 30,000 copies of a pamphlet explaining the aims and work program of the CPC (in English, Pidgin and Motu) as well as a poster showing the members of the Committee.⁴⁹ Newspapers and magazines had also been asked to assist with the dissemination of information about the work of the CPC.⁵⁰

With the assistance of its team of expert advisors, the CPC had decided to prepare six Discussion Papers around which its consultations would be based. Each was focused on specific constitutional issues (detailed in the next section of this paper) and included an introduction to the key concepts and terminology, followed by a series of questions for discussion and input. The Papers were intended to stimulate understanding and discussion. Thousands of copies of each Paper were distributed throughout the country in advance of meetings, although there were occasional problems with logistics and timing. The CPC also used the radio network to disseminate information about its role, the schedule of consultation meetings, and some of the issues under discussion.

The Government Liaison Branch of the Chief Minister's Department, which had responsibility for political education during the foreign administration, was put at the disposal of the CPC, and was used to coordinate the establishment and conduct of District Liaison Committees and local Discussion Groups, including the provision of training seminars for Discussion Group Advisers.⁵¹ The officers of the Branch were re-designated as Government Liaison Officers (GLOs) and were also required to undergo training in constitutional matters in order that they could competently fulfil their role.⁵² 'Seventeen GLOs were Australian or other non-national officers; nine were Papua New Guineans; and a further four local officers were ready to take over from overseas officers as they left the Branch. Most of the local officers were former teachers.'⁵³

Inviting people to discuss and express their views on sometimes complex and abstract questions of how they wanted their independent state to be designed was an ambitious undertaking, but the reports from Group Advisers were generally positive, in terms of people's ability to grasp and engage with the questions and to provide informed opinions – especially in relation to the first Discussion Paper, on citizenship, the constitution and the system of government. Meetings were well attended and participants were generally enthusiastic. However, in relation to the second Discussion Paper, on relations between levels of government, Ritchie writes that

many Groups found the questions and the process of consultation extremely demanding. One Group, from Nipa in the Southern Highlands, wrote in response to questions concerning the composition of the levels of government and taxation issues simply that they were 'difficult to

⁴⁸ Mackenzie Daugi, 'Transcript of Discussion by Panel of Constitution-Makers, Port Moresby, 28 March 1996', p 361, quoted in Ritchie, *ibid*, 155.

⁴⁹ *Ibid*, 99.

⁵⁰ *Ibid*.

⁵¹ *Ibid*, 96.

⁵² *Ibid*, 98.

⁵³ *Ibid*.

answer', while the people attending the Kamano No. 1 meeting thought that there were 'too many questions on the one paper' and many people lost interest and fell asleep.⁵⁴

The Discussion Papers became progressively more sophisticated in terms of the questions posed, which increased the difficulties for some Groups. For each Discussion Paper, training seminars were held for the District Government Liaison Officers, and briefings were held for Discussion Group Advisers.

One critic of the CPC's consultation process complained that 'information about the topics to be addressed was almost impossible to obtain, and discussion was poorly informed.'⁵⁵

In spite of the challenges of seeking people's views on specific constitutional questions and preparing them adequately for such dialogue, the responses received by the CPC revealed that people in all parts of the country were capable of engaging with the relevant issues, and were largely very keen to do so. In view of the huge scale of the consultative exercise, the limited timeframe, and the remote areas that need to be reached, it would not have been feasible (and may, indeed, have been less effective) to precede the consultations with a separate and extensive education program.

Consultations

The CPC undertook extensive consultations from late 1972 to early 1974. 'The exercise, which was both educational and consultative in nature, involved asking people their views on a number of issues that were to be included in the constitution, in a way that at the same time helped to spread understanding about them.'⁵⁶

The CPC and its advisers believed that Papua New Guinea would be well served if it paid heed to the voices of the ordinary villagers, and if its independence constitution was constructed in a way that would reflect 'the active and meaningful involvement of the people in their own development'⁵⁷

In December 1972, the CPC abandoned the provisional work program that had been prepared in October, and accepted the recommendations of the government Liaison Branch of the Chief Minister's Department (contained in a paper prepared at the request of CPC) that consultation should be undertaken via the establishment of local Discussion Groups, made up of village leaders, local council members, public servants, church representatives, business groups and other interested groups.⁵⁸ The CPC would put specific constitutional issues to the Groups for discussion and invite them to submit their views. Educational material would be distributed to teachers, public servants and others who 'would explain and further the CPC's work. Each Discussion Group would have an Adviser, who would motivate and guide discussions using a variety of aids and techniques. The range of views expressed in each Group discussion would be communicated in writing to the CPC.'⁵⁹ The radio network would also be used to disseminate material on the CPC's program.⁶⁰

The direction of each Discussion Paper was based on the outcome of preliminary discussions among CPC members, and draft papers were then prepared by the CPC's advisers. Each Discussion paper was finalised by the CPC before being distributed. The six Discussion Papers covered the following topics: citizenship, the constitution, and the system of government; relations between different levels of government; the legislature and the

⁵⁴ Ibid, 152.

⁵⁵ Ibid, 194-195.

⁵⁶ Ibid, 13.

⁵⁷ Ritchie, quoting CPC Report, p 22.

⁵⁸ Ritchie, *ibid*, 94-95.

⁵⁹ Ibid, 95.

⁶⁰ Ibid.

executive; the courts and law officers; the public service and the ombudsman; and human rights, directive principles and emergency powers.⁶¹ Each Paper contained an introduction to the relevant concepts and a series of questions to which participants were invited to respond. The preparation and distribution of Discussion Papers was the CPC's way of directing the public consultation and providing a focus for discussions.⁶²

Local Group Discussions on the first Discussion Paper began on 19 February 1973, and ran over a period of six weeks. Attendance was high, with an average of fifty people per meeting in the first three weeks. An estimated 8,000 people took part in this first round of discussions. The participants were mostly 'villagers, farmers, students, public servants and mission workers.'⁶³ People were reportedly enthusiastic about the opportunity to engage in discussion and express their opinions on the set topics, as well airing their concerns on other matters.⁶⁴ 'In most cases, Advisers reported that members has a good understanding of the constitutional development process, and seemed in the main to comprehend the ideas of citizenship in the paper.'⁶⁵

Before embarking on discussion of the second Discussion Paper, lessons were drawn from the conduct of the first round of discussions and from the feedback from Group Discussion Advisers and GLOs, and certain adjustments made. 'In many Districts, the mechanisms for distributing Discussion Papers and for bringing Discussion Group members together for meetings were streamlined... [and the] membership of the Groups and the people selected as Advisers and Chairmen (or women) were critically reviewed.'⁶⁶

The GLO from East New Britain enquired about the main objective of the consultation exercise, asking whether the Group consultation exercise was 'aimed at producing coherent submissions to the CPC or at generating interest in the topics under discussion regardless of the quantity or quality of the direct feed back?'.⁶⁷ Ritchie's assessment is that '[a]t the end of the first round of consultation, the best answer to his question would be that both interpretations were correct.'⁶⁸

Some questions from the third Discussion Paper, on the legislature and executive, illustrate the level at which the discussions were pitched. The paper was released in May 1973 and discussed in Groups for the following three months, and was more complex than the two earlier papers.⁶⁹ It contained twenty-two questions for discussion in the Groups, including:

- Should there be one house of parliament or two?...
- Should the voting system in Papua New Guinea be –
 - optional preferential?
 - first past the post?
 - or some other system (such as a preferential in which voters must indicate at least a certain number of preferences)?
- Should all electorates have about the same number of people in them?
- What other things should be considered in deciding electoral boundaries?⁷⁰

The Paper provided background information explaining each of the relevant concepts, and arguments for and against certain institutional options, including for example detailed

⁶¹ Ibid, 110.

⁶² Ibid.

⁶³ Ibid, 122.

⁶⁴ Ibid, 131.

⁶⁵ Ibid, 122-123.

⁶⁶ Ibid, 130.

⁶⁷ W R Paterson, 22 March 1973, quoted in Ritchie, *ibid*, 131.

⁶⁸ Ibid.

⁶⁹ Ibid, 172.

⁷⁰ Questions 7, 14 and 15 from *Discussion Paper No.3 – Legislature and Executive*, May 1973, source appended to Ritchie, *ibid*.

arguments for and against preferential and first-past-the-post systems. 'The responses to the questions indicated that most Groups showed the level of sophistication expected of them. One sign was that, compared to earlier operations, most Groups were able to answer most of the questions.'⁷¹

In late May 1973, while the third Discussion Paper was being discussed all around the country, the CPC began its three-month tour. The Committee had a gruelling schedule. In some areas, the whole Committee visited, but for most locations, the Committee was divided into two teams, with equal party representation. The advisers attended all meetings, to provide continuity, as did the stenographers who took records of discussions. In some locations, interpreters were arranged. On some parts of the tour, the Committee was also accompanied by a group of journalists.⁷²

The tour undertaken by the CPC between May and September 1973 exposed the greatest number of people to the exercise of constitutional development through consultation. It represented the high water mark in the consultative program... For the Committee, the tour was a time of bonding, as they worked long hours and travelled to many isolated locations together. By its end the members were even more committed to the ideal of producing a constitution that reflected what they had been told by the people.⁷³

By the end of the three-month tour, it was estimated that more than 60,000 people had attended; over the course of 54 days, over one hundred meetings had been held.⁷⁴ In spite of this extensive exercise, some critics did not regard the tour as having been genuinely consultative, but said it appeared that constitutional decisions had already been made, and that the CPC was just going through the motions of a large-scale public relations exercise in which the views of the people would not really be heard.⁷⁵

The CPC tour had been a very expensive undertaking, involving air travel for a large team to many remote locations. The tour was estimated to cost around \$45,000, which was nearly half of the CPC's annual expenses.⁷⁶

After the discussion of the first three Discussion Papers and the Committee's national tour, the CPC had established the direction it would take on the two major questions: citizenship, and the relation between the centre and the regions.⁷⁷ The 'clear majority views' expressed in the consultations had reinforced the Committee's own preliminary views. Following the CPC's tour, 'the mass nature of the consultative exercise gave way to more narrowly defined questions put to more select Groups. Future consultation differed from the earlier part of the Committee's work.'⁷⁸ The three remaining Papers were more technical and sophisticated than the earlier three, and 'called for greater understanding of legal, bureaucratic, and political concepts.'⁷⁹ The fourth and fifth Papers were distributed in the second half of 1973, and the sixth and final paper in early 1974.

The members, staff and advisers of the CPC 'were determined that the people would be the ultimate authority for what went into the constitution',⁸⁰ and the officers of the Government Liaison Branch and other members of the Administration 'showed a similar level of commitment to popular consultation.'⁸¹ The high rate of active participation in Discussion

⁷¹ Ritchie, *ibid*, 173.

⁷² *Ibid*, 180-181.

⁷³ *Ibid*, 177.

⁷⁴ *Ibid*, 194, citing statistics from *CPC First Interim Report*, 27 September 1973.

⁷⁵ *Ibid*, 194-195.

⁷⁶ *Ibid*, 162.

⁷⁷ *Ibid*, 196.

⁷⁸ *Ibid*.

⁷⁹ *Ibid*, 199.

⁸⁰ *Ibid*, 227.

⁸¹ *Ibid*.

Groups and CPC meetings and the volume of submissions to the CPC are evidence of the success of the consultation program and its attempt to ensure the constitution would be home grown.⁸²

However, the pressure to complete the Committee's work and to produce a constitution as quickly as possible, as well as the magnitude of the consultation exercise, 'meant that many submissions and Discussion Group reports received at best a cursory look.'⁸³ One member of the CPC, Mackenzie Daudi, has in retrospect acknowledged that, 'in the end we abandoned the idea of analysing all the submissions that came in, because there were too many'.⁸⁴

Impact of public participation

In Papua New Guinea, public participation had an impact on the constitution building process and its outcomes in a number of different ways. Most obviously and perhaps most importantly, the Discussion Groups, the opportunity to make submissions to the CPC, and the national tour by the CPC gave people the opportunity to engage in the discussion about the future of Papua New Guinea and made people feel that they were part of the constitution making exercise.

The extent of public consultation also meant that people demonstrated a high level of trust in the members of the CPC, which in turn had an effect on the high rate of attendance at the CPC's meetings.⁸⁵ The CPC acknowledged in its Final Report the large attendance at its meetings, stating that the engagement by the public had given the members 'great encouragement and support' and that the Committee had 'been able to make our recommendations knowing the considered views of a broad cross section of representatives of the people.'⁸⁶ The fact that the Committee was later able, in debates in the House of Assembly and the National Constituent Assembly, to recite that it had met directly with thousands of people in large centres, small villages and remote patrol posts, was also an advantage in getting many of its recommendations adopted.⁸⁷

Public participation also had a direct impact on the content of the CPC's Final Report and recommendations. Particularly on issues where the input from the Discussion Groups and submissions revealed a clear majority view, that view was reflected in the Committee's recommendations. 'Of course, the Report was not the constitution. Momis has made it clear that the CPC 'was not responsible for the drafting of the Constitution as we have it today'.⁸⁸

In his extensive study of the constitution-building exercise in Papua New Guinea, Jonathan Ritchie concludes that 'the consultative exercise substantially succeeded in persuading a reluctant people to accept that Papua New Guinea would become independent, sooner than they had wished'⁸⁹ and that it also helped to develop and define a sense of national identity.⁹⁰

[T]he act of being consulted was of substantial importance, in that it allowed the people to feel that they had some ownership of this process, and this sense of ownership is one reason for

⁸² Ibid.

⁸³ Ibid, 232.

⁸⁴ Mackenzie Daudi, 'Transcript of Discussion by Panel of Constitution-Makers, Port Moresby, 28 March 1996', p 361, quoted in Ritchie, *ibid*, 232.

⁸⁵ Ibid, 178.

⁸⁶ Ibid, quoting from *CPC Final Report*, p 1/1.

⁸⁷ Ibid, 194.

⁸⁸ Ibid, 227, quoting John Momis in 'The Constitutional Planning Committee and the Constitution', in Anthony Regan *et al* (eds), *Twenty Years of the Papua New Guinea Constitution* (2001).

⁸⁹ Ritchie, *ibid*, 228.

⁹⁰ Ibid, 229.

the continuing durability of the Papua New Guinean constitution, in the context of economic and social collapse.⁹¹

FIJI

Background

Fiji is located in the South Pacific, straddling Melanesia and Polynesia, and consists of 332 islands of which approximately one third are inhabited. Fiji has two main islands, Viti Levu, on which the capital city Suva is located, and Vanua Levu. The Exclusive Economic Zone of Fiji covers almost 1.3 million km², and Fiji has around 18,300km² total surface area. The Fiji islands were first settled approximately 3,500 years ago by the 'Lapita' people, who are thought to have come from south east Asia.⁹²

In July 2010 the estimated population of Fiji was just over 875,000. Fiji's rural population is shrinking as people move to towns and cities – around 51% of the Fijian population live in urban areas.⁹³ The literacy rate in Fiji is estimated to be 93.7%.⁹⁴ The Fijian population is around 57% Fijian⁹⁵, 38% Indian, with the remaining 5% being made up by Rotumans, other Pacific Islanders, Europeans, overseas Chinese and others.⁹⁶ There are three main religions in Fiji: Christian (64.5%), Hindu (27.9%) and Muslim (6.3%).⁹⁷

Although Fiji is one of the most developed nations in the Pacific and has a relatively high income level compared to other countries in the region, it is still classed as a developing country and is a recipient of foreign aid. Fiji's economy relies on (declining) sugar exports and other agriculture such as copra and fruit, tourism and garment manufacturing. The economy, particularly the tourism industry, has been damaged by political turmoil. The estimated GDP per capita is US\$4,200.⁹⁸

Conditions leading to constitutional reform

The 1970 independence Constitution of Fiji⁹⁹ was abrogated by the coups in 1987 (led by Sitiveni Rabuka), and replaced in July 1990 with a constitution that emphasised Fijian interests and made all seats in Parliament communal.¹⁰⁰ The 1990 Constitution was widely criticised in Fiji and abroad both for its racial nature and the manner in which it was decreed, but it did at least include a requirement that it be reviewed within 7 years of promulgation.¹⁰¹

Leaders of the three major political parties at that time, SVT, NFP¹⁰² and the Labour Party, began negotiating the terms of the review in 1992, and in 1993 resolutions for the establishment of a review commission to review the 1990 Constitution were passed by both houses of Parliament. These resolutions included Terms of Reference for the Review Commission, which provided, *inter alia*, that the Commission was to 'review the Constitution

⁹¹ Ibid, 19.

⁹² R A Derrick, *A History of Fiji, Volume 1* (2nd ed, 1950), 5.

⁹³ Fiji Islands Bureau of Statistics, 2007 Census of Population and Housing.

⁹⁴ CIA World Factbook, <www.cia.gov/library/publications/the-world-factbook/geos/fj.html> at 31 December 2010, based on 2003 estimate. Definition of literacy: aged 15 over can read and write.

⁹⁵ The indigenous Fijians, especially those in the western islands of Fiji, are Melanesian by race, with some Polynesian influences – Derrick, above n 92, 3.

⁹⁶ Fiji Islands Bureau of Statistics, 2007 Census of Population and Housing.

⁹⁷ Ibid.

⁹⁸ 2009 estimate (in 2009 US\$), CIA World Factbook, above n 94.

⁹⁹ *Fiji Independence Order 1970*, Schedule ('The Constitution of Fiji').

¹⁰⁰ *Constitution of the Sovereign Democratic Republic of Fiji (Promulgation) Decree 1990*.

¹⁰¹ Ibid, s 161.

¹⁰² The full names of these political parties are the Soqosoqo ni Vakavulewa ni Taukei and the National Federation Party.

promoting racial harmony and national unity and the economic and social advancement of all communities', and

facilitate the widest possible debate throughout Fiji on the terms of the Constitution of Fiji and to inquire into and ascertain the variety of views and opinions that may exist in Fiji as to how the provisions of the Fiji Constitution can be improved upon in the context of Fiji's needs as a multi-ethnic and multi-cultural society.¹⁰³

Parliament also established a Joint Parliamentary Select Committee (or 'JPSC') on which all parties were represented.¹⁰⁴ The JPSC was to agree on the size and composition of the Review Commission, to 'undertake initiatives which will encourage the development of consensus amongst different ethnic and political groups on the country's Constitution'¹⁰⁵ and to deliberate on the Review Commission Report and secure the passage of any desirable changes to the Constitution.¹⁰⁶

Structure of the constitution making process

The Constitution Review Commission ('CRC'), which became known as the Reeves Commission, comprised three Commissioners: Sir Paul Reeves of New Zealand as Chairman, former government minister Tomasi Vakatora (an indigenous Fijian, nominated by the government) and academic Brij Lal (an Indo-Fijian, nominated by the opposition). The Secretariat included two legal counsel, and the Secretary to the Commission was also a lawyer. The Commission commenced its review in May 1995 and had to complete its report by the end of September 1996.¹⁰⁷ The Commission determined that in order to fulfil its terms of reference, it would invite submissions from the public and hold public consultation meetings throughout Fiji, it would commission research papers on various topics, and would travel to multi-racial countries overseas to examine their constitutional arrangements.¹⁰⁸

The Commission ultimately submitted its (unanimous) 800-page report on 6 September 1996, making 694 recommendations. The Prime Minister tabled the CRC Report on 10 September at a joint meeting of Parliament, and it was referred to the JPSC for consideration.¹⁰⁹

The JPSC commenced work on the Report on 9 October 1996, with a bi-partisan sub-committee of 8 members agreeing on the procedures and timeframe to be adopted. The full JPSC divided itself into 5 sub-committees, with each sub-committee focussing on a different

¹⁰³ *Fiji Constitution Review Commission – Terms of Reference*, issued by His Excellency the President of Fiji, 15 March 1995.

¹⁰⁴ The JPSC initially comprised 20 members but was later increased to 25. The House of Representatives resolved that 55% of the members were to be drawn from Fijian, Rotuman and General elected members of the two houses of Parliament, and 45% from the Indian elected members of the House.

¹⁰⁵ Resolution on the establishment of a Joint Parliamentary Select Committee on the Review of the Constitution, passed by the House of Representatives and the Senate on 24 June and 11 July 1994 respectively.

¹⁰⁶ Thanks to Krishna Datt for providing me with detailed information about the JPSC.

¹⁰⁷ The CRC was initially required to submit its report to the President by 30 June 1996, but on 11 July 1996 the President extended this date to 30 September 1996.

¹⁰⁸ The Commission visited Malaysia, South Africa and Mauritius.

¹⁰⁹ A neat summary of the hundreds of recommendations in the CRC Report is provided by Dakuvula and Willoughby: 'The Commission recommended... greater equity in rights between indigenous Fijians and others, together with a number of measures to reduce racialism in politics. In particular, the Commission recommended that the Senate should be mainly elected instead of appointed, and that two-thirds of the seats in the House of Representatives should be filled by elections that are open to all voters, regardless of race. The office of Prime Minister should no longer be reserved for indigenous Fijians only. A Human Rights Commission should be established to educate the public and advise the government on the Bill of Rights. Collective indigenous land ownership and the separate Fijian administration, both of which had been introduced during the Colonial period, were to be retained. Affirmative action policies introduced in the 1990s could continue but should be based on need and not race alone.' Jone Dakuvula and Piccolo Willoughby, 'Constitutional Renewal in Fiji: The Reeves Review, the 1997 Constitution and Recent Criticism', (Paper presented at the 'Constitutional Renewal in the Pacific' conference, Port Vila, Vanuatu, 26-28 August 2005).

section of the CRC report. ‘They were to discuss, review, make amendments if need be and submit their recommendations to the full committee for final decisions. The sub-committees met separately and held a total of 52 meetings.’¹¹⁰ They had each reported back to the full Committee by 13 March 1997.

Figure 3 – Timeline of Fiji’s constitution making process

1970	Fiji gains independence from Britain; independence Constitution commences
1987	Two military coups are staged in May and October
1990	New Constitution is decreed by military ruler (provides for review within 7 years)
1992	Government and opposition begin negotiating terms and process of constitutional review
1993	Parliament resolves to establish a Constitutional Review Commission to review the 1990 Constitution; terms of reference require public consultation
1995	Commission commences its review in May; for the next 15 months the Commission undertakes a comparative study tour, conducts public consultations and considers written submissions
1996	Commission submits its report to the President on 6 September; Prime Minister tables report in Parliament on 10 September; Joint Parliamentary Select Committee begins consideration of report on 9 October and continues for 7 months, during which time a draft constitution is prepared on JPSC instructions
1997	JPSC Report is tabled in Parliament on 14 May, and presented to Great Council of Chiefs on 6 June; Parliament passes the constitution on 10 July and assent is received on 25 July
1998	Constitution of the Republic of the Fiji Islands comes into force on 27 July
2000	Military coup
2006	Military coup
2009	President abrogates the 1997 Constitution and dismisses all judicial officers; appoints Commodore Frank Bainimarama as Interim Prime Minister; elections foreshadowed in 2014

The JPSC process involved tough negotiations and compromise from all parties involved. But ultimately a consensus was reached and the committee’s report was unanimous, with the exception of Mahendra Chaudhry who dissented on a few issues but was ‘content to have his dissent noted in the majority report’.¹¹¹ The Committee accepted most of the recommendations of the CRC Report, but also made some significant changes, including reversing the recommended split of communal and open seats,¹¹² and introducing the concept of multi-party cabinet.

The JPSC Report was tabled in Parliament on 14 May 1997 and presented to the Great Council of Chiefs on 6 June 1997. At the invitation of Prime Minister Sitiveni Rabuka, opposition leader Jai Ram Reddy addressed the Council of Chiefs urging them to give their blessing to the proposed Constitution, which they did. Throughout the meetings of the JPSC, Australian lawyer Denis O’Brien had been drafting the text of the *Constitution (Amendment) Bill 1997* based on the points agreed by the JPSC. There was some uncertainty about whether the delicate consensus reached by the members of the JPSC would be undone when Rabuka decided to allow his SVT MPs a conscience vote on the Bill.¹¹³ But the Bill

¹¹⁰ Krishna Datt, personal communication June 2005.

¹¹¹ Dakuvula and Willoughby, above n 109. Other Labour Party members of the JPSC did not dissent.

¹¹² The Reeves Report had recommended that two thirds of all seats in Parliament be open, and one third communal. The JPSC decided that two thirds would be communal and one third open.

¹¹³ *The Review* wrote: ‘As debate on the Constitution Amendment Bill wound up as this edition went to press, there were mixed feelings in the opposition about whether the Bill would go through, with some Fijian issues still

was passed unanimously by the House of Representatives on 3 July 1997 and by the Senate on 10 July 1997. Assent was received on 25 July and the Act came into force as the new Constitution of Fiji 12 months later in July 1998.

Public participation in the process

Public participation in the process of making the 1997 Fijian Constitution was limited to the discussion forums held by a small number of civil society groups, and the public consultations conducted by the Reeves Commission (detailed below). These consultations were not preceded by and did not include any form of public education or awareness-raising. People did not participate in the process through any form of voting – there was no constituent assembly and no referendum.¹¹⁴ The only formal channel for participation in the process was making written and/or oral submissions to the Reeves Commission, and this forum was inaccessible to many Fijians outside urban areas, particularly those living on remote islands. The public had no opportunity to make submissions on the Report of the Reeves Commission, on the JPSC Report, or on the draft Constitution.

A non-government organisation called the Citizens' Constitutional Forum (CCF) was established early in the process and tried to stimulate public discussion about key constitutional issues, but its reach during the constitution-making phase was fairly limited. The CCF has had a broader impact since the conclusion of the constitution-making phase, educating the public about the Constitution and human rights, contributing to public debate about the Constitution in the media and other fora, and participating in constitutional litigation.

Preparation for dialogue or consultations

The Fijian constitution-making process did not include any concerted effort to educate or prepare the public for constitutional dialogue or consultations. In part, this may be attributed to the ambitious timeframe within which the process was to be concluded. But it severely hampered people's ability to participate in a meaningful way in the CRC consultations. The only source of information on the process and the issues involved was the Fijian media, predominantly newspapers and radio, both of which have limited reach in Fiji. The lack of civic education efforts is one of the most conspicuous deficiencies in the process.

Consultations

The CRC visited 24 locations around Fiji to hear public submissions. Most of the meetings were held in large towns but the Commission also visited a handful of small communities on remote islands.¹¹⁵ It received a total of 852 submissions from individuals and groups, including church groups and political parties. Most meetings were held in buildings such as town halls or courtrooms, with the Commissioners and their Secretariat staff seated at the front facing the public. The Commission advertised its schedule in newspapers and on the radio. People were able to write to Secretary of the Commission fixing a date and time to make a submission, but spontaneous oral submissions without prior arrangement were also heard and accepted. Most people were given 15 minutes to make their submission, including time for questions from the Commissioners. Submissions ranged from very brief oral

apparently unresolved... What would keep everyone guessing until the last minute would be the conscience vote that SVT members would cast on the Bill. Rabuka's decision to grant his party members their wish to do so had irked Opposition Leader Reddy who felt it was against the grain of their agreement within the JPSC.' Tamarisi Digitaki, 'Taking the Giant Step', *The Review* (July 1997).

¹¹⁴ This is because the 1998 Constitution was adopted by Parliament in accordance with the procedure for constitutional amendment prescribed in the 1990 Constitution.

¹¹⁵ For example the village of Kese on Naviti Island and Lomaloma village in Lau.

submissions on one issue, to detailed written submissions involving extensive research and legal advice.¹¹⁶ Some submissions, including those made by the CCF and the major political parties, were prepared with the assistance of overseas constitutional experts, and were extremely detailed.

However, in order to increase public interest and to better equip people to participate usefully in the constitution making process, there ought to have been a comprehensive public education or public awareness campaign prior to the Reeves Commission hearings. The transcripts from the Reeves Commission reveal that many people who made submissions had a poor understanding of the Constitution and the issues involved in the review. One man from Ba said 'We are a little bit lost here in Ba province because we do not know the Constitution very thoroughly. A lot of us are a little bit hesitant to come and that is why I am here this morning to present what I think to the Commission'¹¹⁷ The Women's Advisory Forum, Tavua, Vautukola and the Western side, stated at the end of their submission: 'Sir, we did not have access to a copy of the Constitution. We asked the District Officer for a spare copy to be able to quote the section or provision that covers this issue but he did not have a copy'¹¹⁸ And this individual submission was made at a hearing in Korovou:

I am from Dakuivuna village. I do not represent my district, I would just like to come and voice my own personal opinion. My belief in coming here is that I thought I would be given a copy of the 1990 Constitution to study first before I make my submission. I have never sighted a copy of the 1990 Constitution... The 1990 Constitution is very hard and complicated. [It] is a bit too hard for us and now it is going to be reviewed. I am asking this Commission, which parts particularly would it like to change that we have to come and sit and try to solve it together? This will be all my submission because I do not have a copy of the 1990 Constitution.¹¹⁹

Impact of public participation

The Reeves Commission hearings and the Reeves and JPSC reports received extensive media coverage in Fiji, which may have generated public interest in and awareness of the process. Enthusiasm for the review process is evident in most of the submissions made to the CRC.

There was also some opposition to the whole constitution making exercise. Many indigenous Fijians supported the 1990 Constitution and made submissions that it ought not be changed, or that it should be amended to further strengthen and protect the rights (and 'supremacy') of indigenous Fijians. Some who made submissions to the CRC were highly critical of the CRC or of individual members. But when the JPSC had completed its consideration of the Reeves Commission Report, and released its own report on the agreed substance of the new Constitution, a march to protest against the JPSC report was deemed a flop, with only about 10 people taking part.¹²⁰

Only a small fraction of the population participated in the process formally by making submissions to the Reeves Commission, and it is likely that there were many thousands of Fijian citizens who didn't know about or take much interest in the process at all, either because of lack of access to media and other information, lack of interest in politics and government, or lack of understanding. In some cases people simply do not have access to

¹¹⁶ See for example the lengthy written submission of the Citizens' Constitutional Forum, which was prepared with the assistance of comparative constitutional lawyer Professor Cheryl Saunders, and the extensive written submission of the National Federation Party, which was prepared with the assistance of constitution expert Professor Yash Ghai.

¹¹⁷ Transcript of the Fiji Constitution Review Commission, hearing at Tavua, 6 July 1995, individual oral submission.

¹¹⁸ Ibid.

¹¹⁹ Transcript of the Fiji Constitution Review Commission, hearing at Korovou, 26 July 1995, individual submission of Mr Kitione Kulavere made in Fijian and translated into English.

¹²⁰ 'At a Glance', *The Review*, July 1997, p 9.

newspapers, radio or television, and so rely on word of mouth and community meetings for information. A study conducted by the UNDP and the Parliament of Fiji in 2003 on attitudes and understanding of democratic governance and civic education needs in Fiji, that involved over 6,000 respondents found that

although 90% of the respondents had heard of the Constitution and had some idea of what it was, 85% of those had not read the Constitution. Those who claimed to have read it have only read certain parts. Those who had some knowledge of the Constitution learned from other people or heard and read commentaries in the news... 33% said that they did not have any idea of the function of government.¹²¹

Some people were interested but sceptical, seeing the CRC as a token public relations exercise and doubting that public submissions would be taken seriously. One woman from a village near Lautoka, when interviewed in 2005 about the CRC, told me 'what I heard from some of my uncles is that they didn't go... They thought it was maybe just for chiefs you know, and the commoners would not have any say and it would be a waste of time to go down and listen because their voice would not be heard anyway.'¹²² Similar sentiments were expressed by several of the laypeople I interviewed in Fiji in 2005.

Although the Reeves Commission and JPSC constitute a very significant improvement on the way in which the 1970 and 1990 Constitutions were put together, the process could have been more inclusive. Ratu Joni Madraiwiwi,¹²³ whilst generally satisfied with the process, thought with hindsight that more could have been done. Ratu Joni suggested that a mixture of approaches to public consultation might have been more appropriate, including some smaller grassroots meetings conducted in a setting less formal than the CRC, and in a manner attuned to cultural factors that might prevent Fijians from speaking freely.¹²⁴

In spite of the fairly positive Reeves Commission process of open public submissions, the process was rather rushed and opaque from the time the Reeves Report was submitted until the passage of the Constitution. The Rabuka government was criticised by some for failing to properly facilitate public education and debate on the CRC report, JPSC report or the draft constitution. A widespread public awareness campaign, less formal and more diverse consultation, and more open debate and discussion of the Reeves Report, the JPSC Report and the draft would have resulted in greater understanding and acceptance of the process and its outcome (and may even have altered the outcome). An extensive study by Jill Cottrell and Yash Ghai suggests that inadequate public participation in the constitution making process in Fiji may be part of the reason for the coup and constitutional crisis that eventuated 3 years after the 1997 constitution came into effect.¹²⁵ Although they also say this argument should not be overstated, as the reasons for the coup were complex, and that 'the ability of the people to defend a constitution in the face of armed force should not be exaggerated'.¹²⁶

¹²¹ Baseline Study on Attitudes and Understanding of Democratic Governance and Civic Education Needs in Fiji – A Joint UNDP and Parliament of Fiji Project, May 2003, p 2.

¹²² Discussion with anonymous female respondent, age 41, 20 May 2005.

¹²³ A distinguished lawyer, Fijian chief and former Vice President of Fiji.

¹²⁴ Ratu Joni Madraiwiwi, personal communication, May 2005.

¹²⁵ Jill Cottrell and Yash Ghai, 'The Role of Constitution-Building Processes in Democratization – Constitution Making in Fiji: Context and Process', International IDEA, undated, 31. They write: 'The two main parties – and ultimately the nation – seem to have paid a price for the rather secretive, or at least not fully participatory, way in which the whole process was carried out. It was an advance on previous processes – but by the standards of modern constitution making it left a lot to be desired'.

¹²⁶ Ibid.

Postscript

In 2000 the government was overthrown in a coup by George Speight. The Court found that the coup was not legally effective, and so the Constitution survived intact, and the elected government was restored.¹²⁷ The Court ruling did not prevent the Constitution being challenged in other ways.

In the years following the commencement of the Constitution, community education about the provisions was being carried out by the Citizens' Constitutional Forum and some other civil society organisations, but not by the Government. The Qarase government (2000, 2001-2006) was openly hostile to the Constitution, as was the Methodist Church. In spite of the approval of the Great Council of Chiefs and the unanimous passage of the Constitution through Parliament, debate soon flared up over the process by which the Constitution was made and whether the Constitution was legitimate. In October 2004 Senator Apisai Tora moved a motion 'for an Independent Commission of Inquiry to investigate the constitutionality or otherwise of the processes involved in the formulation and promulgation of the 1997 Constitution.'¹²⁸ The motion was unanimously supported by all the Senators nominated by the Great Council of Chiefs, the Council of Rotuma and Prime Minister Qarase (but was not passed by a majority), and the issue was subsequently raised in the media, in letters sections of Fijian newspapers and on the radio. The main complaint of those questioning the process was that there was inadequate consultation.¹²⁹

In December 2006, the Qarase government was ousted in another coup, led by military commander Frank Bainimarama. Among the justifications proposed for the coup were that the government was corrupt and the Constitution – in particular, the electoral system prescribed in the Constitution – was flawed. The 'interim leader' said it would be unwise to hold fresh elections and restore democratic rule to Fiji until the Constitution was amended. Following a decision by the Fiji Court of Appeal in April 2009, which held that the President's appointment of an interim military government was unconstitutional, the President of Fiji decreed that the 1997 was abrogated, and revoked all judicial appointments. He decreed that elections will be held no later than September 2014, and he reappointed Commodore Frank Bainimarama as Prime Minister. For the time being therefore, Fiji does not have a Constitution. It has the promise of another constitution-making episode sometime in the next four years, and it has a 'People's Charter for Peace, Change and Progress', a policy reform initiative of the Bainimarama government which contains eleven principles or 'pillars', including changing the electoral system. The People's Charter is expected to be the foundation for constitutional reform. But, as two expert commentators put it,

[n]either elections nor coups, ... enjoy enduring legitimacy in the Fijian political system. Nor do constitutions. Fiji has had three constitutions since independence (those of 1970, 1990 and 1997), and ... there is now talk of a fourth... Fundamental rules and institutions in Fiji are accepted up to a point, but not if they threaten vested interests too directly or they deliver the 'wrong' outcome. Under these circumstances, principle counts for less than power.¹³⁰

¹²⁷ *Chandrika Prasad v Republic of the Fiji Islands* [2001] 2 LRC 743.

¹²⁸ Mikaele Serutabua, 'Constitutional Inquiry' (Letters) *Fiji Sun*, 3 August 2005.

¹²⁹ While it is true that the CRC and the government did not consult widely enough, it must also be said that the complaints made by a vocal minority in Fiji are usually accompanied by a nationalist political agenda and a misunderstanding or disingenuousness about what is actually in the Constitution.

¹³⁰ Stewart Firth and Jon Fraenkel, 'Fiji's perpetual legitimacy crisis', in Fraenkel and Firth (eds), *From Election to Coup in Fiji – The 2006 campaign and its aftermath* (2007), xxi.

BOUGAINVILLE

Background

Bougainville is a Province of Papua New Guinea, which now, as a result of the recent constitution making process outlined below, has the status of an autonomous region. Bougainville is made up of two main islands and a number of smaller islands and atolls. It has a population of 175,000.¹³¹ It is estimated that the rate of literacy in Bougainville is around 76.7%.¹³²

In 1988 conflict broke out in Bougainville, which developed into a war of independence and, from the early 1990s, included internal conflict among rival groups. A peace process began in 1997 and a ceasefire agreement was signed in 1998. The peace process was supported by New Zealand, Australia, Solomon Islands, Fiji, Vanuatu and the United Nations. After two years of negotiations between the PNG government and Bougainville leaders, the Bougainville Peace Agreement (BPA) was signed in Arawa, Bougainville, on 30 August 2001.

Conditions leading to constitutional reform

The BPA paved the way for the development of a constitution for Bougainville. The Agreement contains three main pillars: a constitutionally guaranteed high level of autonomy for Bougainville; a constitutionally guaranteed referendum for Bougainville on the question of independence to be held within 10 to 15 years of the establishment of the autonomous government of Bougainville; and the demilitarisation of Bougainville through the withdrawal of PNG military forces and an agreed process for weapons disposal.¹³³ Seven months after the BPA was signed, the PNG Parliament passed the constitutional laws necessary to give effect to the Agreement – providing for a constitution to be prepared under which an autonomous government would be established, and providing for the referendum to be held 10 to 15 years later. These laws were passed in March 2002, but did not come into effect until the UN Observer Mission in Bougainville had verified the completion of the second stage of weapons disposal in August 2003.

Structure of the constitution making process

The Bougainville constitution making process comprised three main steps: the preparation of a draft constitution, on the basis of public input, by the Bougainville Constitutional Commission (BCC); the consideration and adoption of the Constitution by the Bougainville Constituent Assembly; and endorsement of the adopted Constitution by the PNG National Executive Council.¹³⁴ The outline of this process was established in the BPA, and was given legal effect by the amendments to the PNG Constitution (the implementing laws) and the executive decisions of the Bougainville Interim Provincial Government (BIPG).¹³⁵

The implementing laws passed by the PNG Parliament effectively permitted the Bougainville Constitutional Commission to commence its work towards a constitution for Bougainville

¹³¹ National Research Institute of Papua New Guinea, *District and Provincial Profiles*, 2010.

¹³² *Ibid.*

¹³³ Report of the Bougainville Constitutional Commission (2004), 2.

¹³⁴ *Ibid.*

¹³⁵ The Report of the BCC notes: 'Early in the process it was agreed that the Constitutional Commission should be established by a decision of the Interim Provincial Executive Council (IPEC) rather than by a law passed by the Interim Bougainville Provincial Assembly', largely because of financial and time constraints; 'the legal basis for the BCC was a series of executive decision, but always made on the basis of full consultation between the two political bodies (BPC and BIPG), as required by the BPA and the implementing laws', at 65.

even before the implementing laws had commenced, in order to avoid unnecessary delays.¹³⁶ This was achieved by providing that if a body with functions equivalent to the BCC was set up prior to the coming into operation of the constitutional laws, the BIPG could, after the commencement of the relevant laws, adopt such body as the BCC, and could also adopt any consultations by and reports or drafts prepared by such body as consultations and reports of the BCC.¹³⁷ In other words, the BCC could begin its work before the relevant national laws came into effect, and could be retrospectively recognised. This provision was used in March 2004 to adopt the BCC and all the work it had done up to that point.

Figure 4: Timeline of Bougainville’s constitution making process

1987	Bougainville conflict begins
1999	Negotiations begin on 30 June between Bougainville leaders and PNG government re long-term future political arrangements for Bougainville
2001	Bougainville Peace Agreement signed on 30 August
2002, March	PNG Parliament passes enabling laws to enable Bougainville constitution making process
2002, 11 July	BIPG and BPC agree to the establish the BCC, and agree on ToR and composition
2002, 10 September	BCC commissioners sworn in
2002, October	First round of BCC consultations
2002, November	BCC reports on first round of consultations
2003, 1 February	First official Draft Constitution released
2003, February	Second round of BCC consultations
2003, 25 March	Second Draft Constitution released
2003, April	Third round of BCC consultations
2003, May	PNG AG forms working group to advise PNG government on Second Draft
2003, August	UN Observer Mission verifies completion of second stage of weapons disposal, and PNG’s enabling laws come into force
2003, August and September	Full BCC meeting in Lolohe to consider teams’ reports on third round of consultation
2003, Late October	PNG AG’s working group submits report
2003, November	Negotiations between PNG government and BCC advisers and continue until January 2004
2004, 24 February	PNG government’s Bi-Partisan Committee (BPC) presents its report to BCC
2004, March	BIPG adopts the BCC and its work, under the enabling laws
2004, mid-April	BCC presents its response to the PNG BPC report
2004, 8 July	Third Draft Constitution approved by BCC and submitted to Constituent Assembly
2004, 12 November	Constituent Assembly adopts the Constitution of Bougainville
2004, 21 December	Having been approved by CA, Constitution of Bougainville is Gazetted
2005, June	Constitution of Bougainville comes into effect

¹³⁶ Delays that would have been caused had it been necessary to wait until the implementing laws commenced, because their commencement was tied to the verification by the UN Observer Mission of the completion of the second stage of weapons disposal.

¹³⁷ Section 281(3) of the PNG Constitution; see also BCC Report, above n 133, 63.

The Bougainville Constitutional Commission was required to be, and was, broadly representative of the people of Bougainville. The Bougainville Interim Provincial Government and the Bougainville People's Congress (BPC) agreed on 11 July 2002 to the establishment of the BCC, and to its terms of reference and composition. The Commissioners reflected a range of interests including the main regions within Bougainville, women, ex-combatants, elders, churches and the youth of Bougainville. Commissioners were nominated by invited groups and appointed by the Interim Provincial Executive Council after consultation with the BPC. The BCC ultimately consisted of 24 Commissioners, who were sworn in at a special ceremony on 10 September 2002, and a Secretariat of 18 technical and support staff. The BCC was funded by the Australian aid agency AusAID and by the PNG government, with a contribution by the BIPG. The BCC completed its work in July 2004.

The Bougainville Constituent Assembly was made up of the members of the assemblies of the Bougainville People's Congress and the Bougainville Interim Provincial Government. It sat on only two occasions for about 2 days each, and, after limited debate, made only a few amendments to the Third Draft, most of which were minor. The probable reason for the limited debate and amendment is that the BCC had, throughout its work, consulted extensively with the bodies that made up the Constituent Assembly.

Public participation in the process

In addition to the three rounds of public consultations conducted by the BCC and detailed above, at which people were able to provide oral input on proposals for the Constitution of Bougainville, people were also invited to make written submissions to the Commission. In total, over 160 written submissions were received. Aside from their direct participation in consultation meetings and written submissions, all key groups in Bougainvillean society participated indirectly in the Commission and in the Constituent Assembly through their representatives.

After being adopted by the Constituent Assembly and approved by the PNG Government, the Constitution of Bougainville was gazetted on 21 December 2004 and came into operation after the first general elections for the President and the members of the House of Representatives for the Autonomous Region of Bougainville, held from 20 May to 9 June 2005.

Sometime between 2015 and 2020, in accordance with the BPA and the implementing laws,¹³⁸ the people of Bougainville will participate in a referendum to decide whether to move from being an autonomous region of Papua New Guinea to complete independence.

Preparation for dialogue or consultations

The Commissioners of the BCC and the technical team began their work with a two-week induction program which covered the history of Bougainville including the conflict and the peace process, constitutions and constitution making processes, and questions for consultations and consultation processes. The Commissioners planned for their first round of public consultation to inform the people about the work of the Commission, to explain the basics such as what a constitution is and the legal limits of a constitution for Bougainville, as well as consulting people on their views. Before embarking on their first consultation tour, the BCC prepared a questionnaire on the key choices for a Bougainville Constitution, and

¹³⁸ Section 338 of the Constitution of the Independent State of Papua New Guinea provides that a referendum on the future political status of Bougainville shall be held, on a date to be agreed after consultation by the Bougainville Government with the National Government, not earlier than ten years and not later than 15 years after the election of the first Bougainville Government.

circulated the questionnaire to the regions prior to the consultations.¹³⁹ This enabled individuals and communities to prepare for consultations, and also provided a launching pad for and structure to the discussions held at the consultation meetings.

Consultations

The Commissioners of the BCC were divided into five teams for the purpose of public consultations, with each team visiting a different region. A small team was also sent to consult with Bougainvilleans living outside Bougainville, in four of the main centres in PNG. Each team had a Commissioner as team leader, and a technical officer serving as regional coordinator. Throughout October 2002 the five teams travelled to main town centres, important villages, Council of Elders areas and to schools to consult with people and record their views on the constitution.¹⁴⁰ Although time and funding placed limits on how many areas could be visited, the BCC managed to visit all of the atolls groups and was also able to access remote mountain areas with the logistical assistance of the Peace Monitoring Group, which provided transport by helicopter.

The programs of the regional teams were publicised on Radio Bougainville, and the widely circulated news publication produced by the Peace Monitoring Group also informed people about the BCC consultations.¹⁴¹

Regional coordinators and other technical officers recorded all the views expressed at public consultation meetings, and people were also encouraged to submit written submissions to the BCC. The regional teams received approximately 150 written submissions during the first round of consultations.

Views gathered from the first round of consultations were reflected in the reports of each regional team, which were prepared in November 2002. 'Proposals on constitutional issues received were analysed and categorized in the reports of the regional teams to a large extent according to the structure of the BCC questionnaire.'¹⁴² The BCC decided to distinguish between constitutional issues and policy issues – the latter being more directed towards things that the ABG should do when governing, rather than about what should go in the constitution. But the team reports faithfully recorded such policy suggestions for the record, as well as recording grievances expressed by the people on social, economic and political issues.

BCC officials prepared a matrix of the views expressed on constitutional issues, for the Commission to use as a guide. The Commission Report notes: 'As required by the BPA, the Constitutional amendments implementing it, and the BCC's terms of reference, the BCC used the views received from the people as the basis for developing its proposals.'¹⁴³

Although the BCC had initially proposed to do only one round of consultations and to prepare only one draft of the proposed Constitution, it later decided to heed the request of the people, expressed during the first consultations, that there be a second round of consultations once the Draft Constitution had been prepared. People had expressed this wish during the first round, largely because they wanted to see what had been done with the initial input and to express their views on the Draft. The First official Draft of the Constitution was released on 1 February 2003, and the second round of consultations using the same five regional teams was conducted throughout February 2003.¹⁴⁴ There were limited copies

¹³⁹ BCC Report, above n 133, 71.

¹⁴⁰ Ibid, 72.

¹⁴¹ Ibid, 73.

¹⁴² Ibid.

¹⁴³ Ibid, 74.

¹⁴⁴ Ibid, 76.

of the First Draft available for distribution, but the BCC teams circulated information papers on the Draft, in English and Tok Pisin (a common local language), at the consultation meetings, and a number of radio programs also supported the BCC's effort to explain the contents of the Draft. The BCC reported that most of the feedback received from the people on the First Draft was positive.¹⁴⁵

Following the second round of consultations, the BCC met to consider the full range of views expressed by the people, and agreed to make a number of changes to the Draft. The Second Draft was released on 25 March 2003.

Under the terms of the BPA and the implementing laws, the BCC was required to keep the PNG government informed as proposals for the new constitution were developed, and to provide the National Executive Council with the opportunity to express its views on the draft Constitution. Accordingly, the BCC invited officials of the PNG government to attend all BCC meetings and submitted to the PNG government the BCC recommendations on which the First Draft was based, as well as the First and Second Drafts of the Constitution.

Following the release of the Second Draft, in April and May 2003 BCC advisers and PNG government officials held discussions in relation to the Second Draft. The PNG Attorney General formed a working group in May 2003 to prepare advice for the government on how it should respond to the Second Draft, taking into account all relevant constitutional and legal matters, including most obviously the need for the Bougainville Constitution to be consistent with the PNG Constitution. This process dragged on and caused some delay to the BCC, as the Attorney General's working group report was not ready until the end of October 2003 (and was not made available to the BCC until November 2003), and was followed by months of discussions and negotiations between BCC advisers, the Attorney General's Department and other PNG government officials from November 2003 to January 2004. Once agreement had been reached on most matters, the PNG Government's Bi-partisan Committee, chaired by the Minister for Intergovernmental Relations, Sir Peter Barter, met to consider the report from the officials and to decide what questions it wanted to raise with the BCC. The Bi-partisan Committee presented its report to the BCC on 24 February 2004. The BCC met to consider this report in March/April 2004, and presented its response in mid-April 2004.¹⁴⁶ The BCC and the Bi-partisan Committee, together with the Transitional Consultative Council, held further negotiations in May, and on 10 June 2004 the Bi-partisan Committee formally advised the BCC that it had agreed upon the positions that had been tentatively agreed during the May negotiations.

Meanwhile, the BCC decided to conduct a third round of public consultations, because of the widespread interest in the work of the BCC and also because many people 'had complained that the lack of general access to copies of the First Draft had reduced the effectiveness of the round of consultation with the people about the First Draft.'¹⁴⁷ Support from the PNG government and from AusAID enabled 2,500 copies of the Second Draft to be produced, in the form of a small book. Prior to embarking on the third round of public consultations, the BCC held a three-day meeting with the Joint BPC and BIPG Assemblies, to enable the Bougainville leaders who would later make up the Constituent Assembly to provide their input on the Second Draft. The regional teams conducted the third round of public consultation during April 2003, and the BCC reported that the Second Draft was also well received by the people.

¹⁴⁵ Ibid, 77.

¹⁴⁶ At the same time, in March 2004, the IPEC and the BIPG Assembly both passed a motion (pursuant to section 281(3) of the PNG Constitution) adopting the BCC and all that it had done up to that point.

¹⁴⁷ BCC Report, above n 133, 78.

The BCC met in Arawa from 23 June to 8 July 2004 to consider the final changes needed for the completion of a Third Draft. These included some changes that arose from public consultations, and some from the input of the PNG government. The Third Draft of the Bougainville Constitution was approved by the BCC on 8 July 2004. This was the final draft from the BCC that was submitted to the Constituent Assembly.

Impact of public participation

The principal and express aim of the BCC in playing its part in the constitution making process and in preparing a Draft Constitution was to contribute to peace-building and unity. The BCC stated its commitment to contribute to the Bougainville peace process through both the consultative and inclusive process it adopted and through the proposals it made on the content of the Constitution. The views expressed by the people at consultation meetings and in written submissions were collated and analysed, and formed the basis of the Commission's recommendations and formulation of drafts. The Commission also sought to ensure that the draft Bougainville Constitution would enable the fullest participation of the people of Bougainville in the future government of Bougainville, as ongoing meaningful participation was keenly demanded by the people. The BCC sought 'to express the draft Constitution in language that assists all groups to understand that their interests and concerns have been taken into account.'¹⁴⁸

The second and third rounds of consultations, conducted by popular demand, helped to satisfy people that their views really had been taken into account, and enabled them to feel that their voices actually made a difference to the outcome.

In its Final Report that accompanied the Third Draft of the Constitution, the BCC recommended that the documentation received by and generated by the BCC, as well as material that would be generated by the Constituent Assembly, should be retained in a Constitutional Archive. The BCC noted that not only would such material form an important part of the historical record, but also that in the immediate short-term future, the material showing the views of the people on a wide range of issues, not just constitutional questions, would be a valuable source of information for the new Autonomous Bougainville Government.¹⁴⁹ This material has been retained by the staff of the Bougainville House of Representatives, some of whom were key staff of the BCC, but no library has yet been established.

The people of Bougainville have quite a strong sense of ownership of their new Autonomous Government and of the Bougainville Constitution. This is probably partly attributable to the politics between Papua New Guinea and Bougainville, which makes Bougainvilleans tend to support their government, and partly attributable to the inclusive, consultative and responsive process followed by the BCC.

SOLOMON ISLANDS

Background

Solomon Islands is an archipelagic state in Melanesia, comprising 992 islands, of which almost two thirds are inhabited. Solomon Islands has a total land area of 28,330 km² and an exclusive economic zone of 1,340,000 km². The islands were first settled at least 3,000 years ago.

¹⁴⁸ BCC Report, above n 133, 18.

¹⁴⁹ Ibid, 82.

The population of Solomon Islands is approximately 560,000,¹⁵⁰ and is comprised predominantly of Melanesians (94.5%), with small numbers of Polynesians, Micronesians, Chinese and Europeans.¹⁵¹ Most people live in rural areas, with only 20% residing in urban areas.¹⁵² The official language of the Solomon Islands is English, but Pijin is commonly spoken,¹⁵³ and there are 67 other living languages throughout the islands, some of which are spoken by as few as 75 people.¹⁵⁴ Christianity is the dominant religion in Solomon Islands. Around 45% of the population are Anglican, 18% Roman Catholic and 12% Methodist/Presbyterian.¹⁵⁵ Figures on literacy rates in the Solomon Islands vary widely, but most reliable sources estimate a literacy rate of around 76%.¹⁵⁶

The Australian government aid agency AusAID reports that in the Solomon Islands 'more than 80 per cent of the people rely on subsistence agriculture and fishing'.¹⁵⁷ The main economic activities in Solomon Islands are based on fishing, forest products and plantations. The GDP per capita is US\$2,700,¹⁵⁸ and the Solomon Islands relies on overseas development assistance for at least one third of its domestic budget.

Conditions leading to constitutional reform

The possibility of the Solomon Islands becoming a federation has been discussed since before the Solomon Islands gained independence from Britain in 1978. Since independence, there have been several reviews that have recommended a move to federalism, but none has come to fruition.

The issue of federalism has been revived again since the conflict that erupted in 1998. It is one of the demands of the indigenous people of Guadalcanal, it is a provision of the Townsville Peace Agreement that was signed in 2000, and the Buala Premiers' Conference further endorsed the notion of creating a federal constitution, or 'state government system' as it is often referred to in the Solomons. A State Government Task Force was set up in 2001 to re-examine the detailed reports from the 1987 constitutional review, and to advise the government on how best to proceed. That Task Force recommended that rather than amending the existing constitution, an entirely new federal constitution be drafted. The constitution making process then began, under the leadership of the Permanent Secretary of the Ministry of Provincial Government, John Tuhaika.

Structure of the constitution making process

After recommending the adoption of a 'state government system' (federalism) for the Solomons, the SGTF, under the direction of the Ministry of Provincial Government (MPG), was charged with the task of driving the constitutional reform. Unlike most other constitution making episodes, there was no clear plan in relation to the process by which the new

¹⁵⁰ July 2010 estimate, CIA World Factbook <www.cia.gov/library/publications/the-world-factbook/geos/bp.html> (accessed 31 December 2010).

¹⁵¹ Ibid.

¹⁵² UNDP Solomon Islands Human Development Fact Sheet, 2001 figures.

¹⁵³ According to the Ethnologue Languages of the World database, Pijin has 15,000 first language speakers and 300,000 second or third language speakers in Solomon Islands: SIL International - Ethnologue, *Languages of Solomon Islands* <http://www.ethnologue.com/show_country.asp?name=Solomon+Islands> (accessed 11 July 2003).

¹⁵⁴ Ibid.

¹⁵⁵ CIA World Fact Book, above n 150; other religions: Baptist 9%, Seventh Day Adventist 7%, other Protestant 5%, indigenous beliefs 4%.

¹⁵⁶ The Infoplease Atlas puts literacy in the Solomons at 30%: <http://www.infoplease.com/ipa/A0107975.html>; the UNDP Factsheet for the Solomons says literacy is 76.6%; the 1999 census quotes 76%, and the Lingual Links website says the literacy rate in the Solomons in 1993 was only 53.5%. The literacy rates from each source are based (except Infoplease) are based on self-reporting of literacy, and therefore probably high.

¹⁵⁷ Ibid

¹⁵⁸ CIA World Fact Book, above n 150, 2009 estimate based on 2009 US\$.

constitution would be made, and no legislative or executive instruments to give effect to a constitution making process. The 'process' that the MPG proposed to follow in fulfilling its task was initially very simple and wholly inadequate, in terms of inclusive constitution-making practice: to find someone able to draft a new federal constitution for the Solomon Islands, and have Parliament pass the draft.¹⁵⁹

In order to retain a lawyer to produce a draft constitution, the Permanent Secretary of the MPG (chair of the SGTF) on behalf of the government sought financial assistance from various sources, and eventually secured the involvement of the United Nations Development Program (UNDP). The UNDP was requested to find a lawyer who could undertake the task of drafting a federal constitution, but upon receiving this request the UNDP suggested that there should first be some public consultation (some within government thought there had already been adequate consultation in the preparation of the 1987 review, and in provincial government consultations carried out in 2001/2).

Once the UNDP had been engaged, they undertook an initial fact-finding mission, and then designed a revised constitution making process based on the fact-finding report, together with the MPG (and with cabinet approval). This process involved a socio-economic study of the likely effects of greater decentralisation, a public awareness campaign, public consultation meetings throughout the nine provinces and reports on those consultations, and the engagement of a lawyer¹⁶⁰ to draw up drafting instructions for a new constitution based on those consultation reports. Another key element was the establishment of the Constitutional Review Overview Committee, chaired by the Permanent Secretary of the MPG, to oversee the entire process and provide a link between the UNDP project members and the government. This Committee comprised members selected from other parts of government, including the Attorney-General's Department.

It is important to note the unusual design of the constitution making process as it was at this stage (more recent developments are discussed below). There is no doubt that the process worked out between the UNDP and the MPG was preferable to that which was originally envisaged: simply hiring a lawyer to draft 'a federal constitution'. But it was a process that differed markedly from, and compared rather unfavourably to, many other constitution making episodes, in that it was not proposed to have any representative body involved in the process. At the final stage of this process, the new constitution would have been adopted by the Solomon Islands Parliament,¹⁶¹ but prior to that ultimate step the process was to be managed by a government department and a hand-picked committee comprised of government officials with no constituent mandate.

The Solomon Islands constitution making process has however been delayed and revised a number of times since it commenced in 2001. At around the time the UNDP public consultation process was taking place, the Government announced that immediately following the consultations, a draft constitution would be prepared for introduction to Parliament in July 2003. This date slipped by without the constitution being introduced. Meanwhile, in August 2003, RAMSI¹⁶² arrived in the Solomon Islands to restore law and order, and to undertake a program of 'institutional strengthening' (based on strengthening the existing institutions of government, not tied in with proposed constitutional renewal).

¹⁵⁹ Interview with John Tuhaika, June 2005.

¹⁶⁰ Graham Powell, an Australian lawyer in private practice in Samoa with extensive experience in legislative drafting and experience in many Pacific jurisdictions, but no recognised constitutional expertise. Mr Powell was also engaged by AusAID in 2001 to prepare a draft federal constitution for the Solomon Islands in consultation with the MPG. It is believed that the drafting instructions prepared in 2003 were a refinement of those earlier prepared, with added reference to the reports of public consultation meetings carried out in 2003.

¹⁶¹ As required by the process for constitutional change under section 61 of the current 1978 Constitution.

¹⁶² Regional Assistance Mission to the Solomon Islands, which includes police and advisers from Pacific nations, led by Australia.

Over one year later, the Prime Minister publicly ‘launched’ a draft federal constitution.¹⁶³ The draft was detailed and lengthy and contained a number of drafting flaws, some of them quite significant.¹⁶⁴ The draft recognised the existing nine provinces as states, each with its own state constitution and state institutions. The draft prescribed the division of legislative powers between the central government and the states, as well as a proposed formula for revenue sharing.¹⁶⁵ It also proposed new central institutions including a Human Rights Commission. Under this draft constitution, Solomon Islands would become a republic, with a President replacing the Queen and the Governor General.

At the time of the launch the Prime Minister also announced that the draft would be introduced to Parliament in April 2005 after further public consultations.¹⁶⁶ Again, the proposed date for parliamentary consideration of the new constitution passed without any bill for constitutional change being introduced. In December 2005, Parliament spent two days debating the draft federal constitution, and associated explanatory material, including a paper on the ‘Implications of the Constitutional Reform from an Economic Point of View’¹⁶⁷ which had been commissioned by the MPG and which said that the move to a federal system of government would not have major cost implications. Prime Minister Allan Kemakeza informed Parliament that the ongoing delays in introducing the bill for a new constitution were due to ‘unforeseen technical and legal difficulties’.¹⁶⁸ He also announced that a Constitutional Congress would be established to consider the draft prior to its eventual passage by Parliament. Further debate was postponed until after the April 2006 elections.

The process of constitutional reform survived another change of government in 2006, and the new government of Manasseh Sogavare also stuck to the plan of establishing the Constitutional Congress that had been foreshadowed by the Kemakeza government in 2005. Three months after assuming office, Prime Minister Sogavare announced in August 2006 that the new constitution would be completed by January 2007.¹⁶⁹ Under the Sogavare government, responsibility for constitutional reform was shifted from the Ministry of Provincial Government to the Prime Minister’s Office (PMO), still under the direction of John Tuhaika.¹⁷⁰

¹⁶³ Tom Woods, a New Zealand lawyer employed by John Tuhaika in the MPG, prepared the draft that was launched in 2004, which was an amended version of earlier work done by Graham Powell.

¹⁶⁴ For more detailed discussion of the provisions of the draft constitution and some aspects that are problematic, see Andrew Ladley, *Draft Report of the Constitutional Audit of the Draft Federal Constitution of Solomon Islands*, January 2007 and Anthony Regan, *Comments on the “Draft Federal Constitution of the Solomon Islands” and the Draft “Report of the Constitutional Audit of the draft federal constitution of Solomon Islands”*, Canberra 20 April 2007.

¹⁶⁵ The draft constitution (as amended in 2009) is available online at <www.sicr.gov.sb> (accessed 19 January 2011).

¹⁶⁶ The ‘further public consultations’ seem to have consisted exclusively of Members of Parliament having been given \$20,000 each to ‘consult’ their constituents about the draft. More is said about this below in the discussion of public consultation.

¹⁶⁷ Paper by Dieter Schindowski, July 2004, released together with the draft constitution, available at <www.vanuatu.usp.ac.fj/library/Paclaw/SolomonIslands/SIConstitutionDraftIMP.pdf> (accessed 19 January 2011).

¹⁶⁸ Pacific Islands Broadcasting Association, ‘Constitutional Congress to work on new federal constitution in Solomon Islands’, 8 December 2005.

¹⁶⁹ A press release from the SIG was published verbatim in at least three places: *Solomon Star*, *Island Business* and *Pacific Magazine*, 8 August 2006.

¹⁷⁰ This consistent with Sogavare’s leadership style, which involved extending direct Prime Ministerial control into as many areas as possible, and undermining the independence of various constitutional offices – see Clive Moore, ‘Uncharted Pacific Waters: the Solomon Islands Constitution and the Government of Prime Minister Manasseh Sogavare, 2006-2007’ (2008) 6/2 *History Compass* 488, 502.

Figure 5 – Timeline of Solomon Islands constitution making process showing changes in Prime Minister

Date	Announcements and developments	PM
1987	Constitutional Review Committee established, extensive public consultations undertaken. Report in January 1988 recommends a federal republic (Ezekiel Alebu is Prime Minister)	E A
2000	Townsville Peace Agreement includes undertaking to give greater autonomy to the provinces; Buala Premiers' Conference resolves that the Solomon Islands should adopt a "state government system"	Manasseh Sogavare
2001	Solomon Islands Government (SIG) appoints State Government Taskforce (SGTF); SGTF reports in May 2001. John Tuhaika of the Ministry of Provincial Government is placed in charge of constitutional reform	
2002	SGTF Report tabled in Parliament in April	
2003	February: UNDP public consultation meetings and report; Ministry of Provincial Government announces draft constitution will be presented to Parliament in July 2003 (which does not occur) August: RAMSI arrives in the Solomon Islands Second round of public consultations conducted in late 2003	Allan Kemakeza
2004	Two lawyers prepare drafting instructions and then draft a federal constitution; November: Prime Minister "launches" the draft federal constitution, and announces draft will be introduced to Parliament in April 2005 after further public consultations (neither of which occurs) December: Members of Parliament receive and spend \$20,000 each to consult their constituents on the draft constitution	
2005	February: SIG announces that the draft of the new constitution is to be finalised for presentation to Parliament by June 2005 (which does not occur) December: Parliament spends 2 days debating the draft and explanatory material; decides to continue with process after April 2006 elections; PM informs Parliament that a Constitutional Congress will be established, and "that it has been for some unforeseen technical and legal difficulties that we have not been able to bring the most expected federal bill during this meeting"	
2006	August: SIG announces that the new constitution will be completed by January 2007 (which does not occur), and announces that a Constitutional Congress will be established. John Tuhaika says a public awareness program will be conducted soon Late 2006: SIG requests VUW to conduct audit of draft, and informs VUW that the process will be: audit, debate on draft and audit by Constitutional Congress, redrafting based on recommendations of Congress, Constitutional Convention, adoption	
2007	June: Prime Minister "launches" Constitutional Congress but does not announce names of appointees; Congress to complete a draft constitution by 31 October 2008; Congress "must be progressive building on what has already been achieved to date" July: SIG names appointees to Constitutional Congress and Elders Advisory Group, comprising 56 Solomon Islanders; Congress Induction held in August December: PM Manasseh Sogavare unseated in vote of no confidence; Derek Sikua is new PM	Manasseh Sogavare
2008	January: Prime Minister states in his "Major Policy Address" that "the federal/state government reform remains an important direction for the government." March: Joint Executive Committee of the Constitutional Congress after a 3-day meeting, announces new timeline and process to complete the "draft federal constitution" – final draft to be delivered to government by July 2009; Prime Minister informs Parliament that government will receive the final draft from the Constitutional Congress by July 2009 and that cabinet will present the constitution to Parliament for passage within the term of the current government April: PM announces that the final report of the Constitutional Congress will be passed on to a national convention which will be tasked with finalising the draft constitution May: Constitutional Reform Unit launches media awareness program May to July: Members of Constitutional Congress conduct provincial consultations aimed at identifying the Solomon Islands political community	
2009	February: John Tuhaika is replaced as head of CRU by Dr Fred Rohorua June: Constitutional Congress and Eminent Persons Advisory Council hold first joint plenary and endorse modest amendments to the draft federal constitution; remainder of the work plan is delayed due to lack of government funds	Derek Sikua
2010	January: PM Sikua announces it will not be possible to complete the new constitution within his term of office; Fred Rohorua resigns from Constitutional Reform Unit August: General elections – Danny Philip elected Prime Minister, says his government 'will be committed to developing a sensible policy on federalism which will take into account the conflicting demands by our people' October: New PM launches his government's policy document – citing constitutional reform as a major priority, but apparently talking about constitutional reform of a completely different nature and scope to that which has been in train for 10 years	

In late 2006, the government requested Dr Andrew Ladley of the School of Government at Victoria University of Wellington to undertake an 'audit' of the draft constitution that had been prepared in 2004. The Audit Report was presented to the Constitutional Reform Unit in the PMO in January 2007. The audit process involved discussions with relevant people in Honiara, a detailed analysis of the draft constitution, as well as comparative research. The Report also addresses the broad vision underlying the proposed constitutional change:

The core objective of the Draft is to transform the underlying basis of government, from a top-down monarchy/parliament, to a village-up connection with a 'republican' government... [It also] demands a reciprocal set of obligations between citizens and those in office.¹⁷¹

The Audit Report then asks: 'Is this the vision of government that Solomon Islanders want to see reflected in the Constitution?' This is a question that is rather difficult to answer in view of the limitations of the process of public consultation and other forms of public participation in the constitution making process to date. The Audit Report concluded that 'achieving the ambition of a transformed system of government as proposed in [the] Draft requires clear political will, very strong popular support, and important changes to the Draft.'¹⁷²

At the request of John Tuhaika of the Constitutional Reform Unit, 'peer review' discussions were held at the Australian National University on 8 February 2007 to discuss the Draft Audit Report and the draft federal constitution. The discussions were organised by the State Society and Governance in Melanesia Program (SSGM) at the ANU. It is worth noting that the audit undertaken by VUW and the peer review at ANU were the first occasions in the constitution making process on which expert opinions were formally sought by those directing the process.¹⁷³ Following the peer review discussions, Anthony Regan of the SSGM Program prepared some written comments on the draft constitution and the Draft Audit Report, in which he stated:

[S]erious questions must arise as to whether Solomon Islands has the administrative capacity and the fiscal resources needed to develop and operate the proposed new arrangements. It is suggested that serious attention be given to undertaking a careful evaluation of:

- Estimated costs of establishing and operating all the new institutions, offices and processes envisaged by the Draft Constitution;
- The specialised personnel that will be required to both establish and operate those new institutions, offices and processes.¹⁷⁴

Regan also raised a number of important questions about the process itself.

In June 2007 Prime Minister Sogavare 'launched' the Constitutional Congress, although the names of the 56 Solomon Islanders appointed to the Constitutional Congress and to the Elders Advisory Group were not announced until July.¹⁷⁵ The Prime Minister said the Congress would finalise the draft constitution by 31 October 2008, and that the Congress 'must be progressive building on what has already been achieved to date'.¹⁷⁶ This appeared to mean that the Congress could tinker with the existing draft constitution, but would not be at liberty to reject the draft or to depart from the notion that the Solomon Islands is to shift to a federal system of government.

At the end of 2007 Prime Minister Sogavare was ousted in a vote of no confidence, and was replaced as Prime Minister by Derek Sikua. The new Prime Minister indicated his

¹⁷¹ Andrew Ladley, above n 164, 18.

¹⁷² Ibid, 22.

¹⁷³ Graham Powell and Tom Woods who were responsible for drafting are qualified and experienced lawyers, but not recognised constitutional experts.

¹⁷⁴ Anthony Regan, above n 164, 35.

¹⁷⁵ The names of appointees to the Congress and the Elders Advisory Group are available online at: <www.cicr.gov.sb> (accessed 19 January 2011).

¹⁷⁶ 'Constitutional Congress launched', *Solomon Star/Pacnews*, 14 June 2007.

commitment to continue with the constitution making process, but he appeared at least initially to be somewhat more cautious than his immediate predecessors about the proposed federal model. In the Prime Minister's Major Policy Address delivered on 18 January 2008 to launch the government's policy document before an audience of members of Parliament, members of the diplomatic corps and donors, the Prime Minister focussed more attention on issues such as combating corruption, reforming the operation of political parties and improving Parliament's ability to hold the executive to account, than on the proposed new federal constitution. He did however state that:

the federal/state government reform remains an important direction for the government. The further decentralisation of government functions and powers will be the test of the workability and affordability of various structures that will be core the federal/state government framework.¹⁷⁷

In March 2008 the Prime Minister confirmed his intention to have the draft constitution presented to Parliament before the end the parliamentary term.¹⁷⁸ Also in March 2008 after a three-day meeting, the Joint Executive Committee of the Constitutional Congress announced a new timeline to complete the draft federal constitution, saying a final draft would be delivered to government by July 2009 ('but it is too early to set the exact date').¹⁷⁹ The government said that the final draft would then be passed on to a national convention, then to cabinet, and finally to Parliament.

In May 2008, the Constitutional Reform Unit launched its media awareness program. The CRU employed a Media Officer, established a website, issued press releases on a regular basis, and coordinated a radio talkback show. In 2008 the objectives and workplan of the Constitutional Congress were also released. The four objectives of the Congress were announced as being to:

1. define Solomon Islands political community and engage that community in the constitutional [sic] making process
2. complete a final content of a new constitution
3. prepare a detailed report setting out the reasoning for the content of the new constitution
4. recommend an appropriate ratification procedure to bring the new constitution into effect.

The first objective was fulfilled in 2008 through a number of provincial meetings and workshops. The second objective was targeted in 2009. In February 2009, John Tuhaika left the Constitutional Reform Unit and again became Permanent Secretary of the Ministry of Provincial Government, and Dr Fred Rohorua took up the position of Permanent Secretary of the CRU. From May to June 2009, the Constitutional Congress and the Eminent Persons Advisory Council held their first joint plenary session, at which they discussed the 2004 draft federal Constitution, and agreed on various changes. The joint plenary also elected Jenny Tuhaika (John Tuhaika's wife) as Chairlady of the Congress, and Joseph Huta as Vice-Chairman. The changes made to the 2004 draft are remarkably minimal, and centre largely on resources and taxation, the insertion of a new preamble, and several references to God, Christianity, Christian values and custom and tradition. There are no substantive changes to the federal structure proposed in 2004. The plenary adopted the amended draft on 26 June 2009 as the *1st 2009 Draft Federal Constitution of Solomon Islands*.

Following the joint plenary, the work of the CRU and the Congress slowed down, due apparently to government cashflow problems. In a press statement issued on 9 November

¹⁷⁷Major Policy Address by Hon Prime Minister Dr David Derek Sikua MP – 18th January 2008 on the occasion of the launch of the CNURA Government Policy Document, 7.

¹⁷⁸'Draft Federal Constitution to be ready by July 2009: PM', *Solomon Star*, 1 April 2008 (referring to comments made on 31 March).

¹⁷⁹'Draft Federal Constitution for Solomon Islands should be ready by July 2009: Lapli', Solomon Islands Broadcasting Corporation, 20 March 2008.

2009 however, Prime Minister Derek Sikua was still hoping that the new constitution would be ready before the end of his term, saying 'All going well, the Federal Constitution Bill should be ready for National Parliament in November 2010'.¹⁸⁰ On 29 January 2010, the *Solomon Star* reported that the Prime Minister 'told a Guadalcanal Constitutional Congress Feedback meeting in Honiara... that his government would have loved to implement the new Federal Constitution during its administration but it could not have done so because of an acute shortage of state funds.'¹⁸¹

Following a general election for members of Parliament in August 2010, a new Prime Minister has been elected. He has not yet made any clear public statements about his intentions in relation to the Constitutional Reform Unit, the concept of 'state government' or the work of the Constitutional Congress towards a new federal constitution. Soon after being elected, the Prime Minister announced at a press conference:

My government will approach the issue of state government within the overall framework of our decentralisation policy and constitutional reform. Whatever approach we take in terms of power sharing and decentralisation must not lead to the over-burdening of our nation with huge public sector expenses. At the same time we need to take cognisance of the cry by some of our provinces for more autonomy. My government will be committed to developing a sensible policy on federalism which will take into account the conflicting demands by our people.¹⁸²

At the launch of his government's policy document, new Prime Minister Danny Philip spoke of constitutional reforms, but in a sense that seemed unrelated to the process that has been unfolding over the last ten years. He said 'constitutional reforms will target fundamental areas such as customary land, natural forest, mineral resources, rivers and so on.'¹⁸³

Public participation in the process

In spite of the length of the Solomon Islands constitution making process to date, which has now spanned ten years, there have been very few formal avenues for public participation. Until recently, the only serious attempt at providing the public with an opportunity to participate had been the UNDP public consultations that were undertaken in 2003. This has since been supplemented, in 2008 and 2009, with various workshops and consultations in Honiara and the provinces, although these have had a variety of formats and objectives. The consultations conducted in 2008 in all nine provinces were part of the work of the Constitutional Congress towards identifying the Solomon Islands political community. In 2009 a number of workshops were held to discuss the draft constitution – a formidable task in view of its length and complexity (the 2009 draft is 169 pages long and contains 316 provisions).¹⁸⁴ Most of these workshops have been conducted by the provincial appointees to the Congress, and have involved selected groups of participants, usually representatives of provincial government, rather than the public at large.

There has not yet been any call for the public to make submissions to the Congress. There has been no opportunity for the public to participate in the selection of representatives to a constitution-making body. There has not yet been and is unlikely to be any proposal for public endorsement of the final product via referendum.

¹⁸⁰ Constitutional Reform Unit, Office of the Prime Minister and Cabinet, 'PM Spells Out Intentions of Constitutional Reform to Media', Press Statement November 9, 2009.

¹⁸¹ *Solomon Star*, 'PM admits federal gov't not possible under his tenure', Friday 29 January 2010.

¹⁸² Ednal Palmer, *Solomon Star*, 'Philip lays bare policies on major issues', 26 August 2010.

¹⁸³ Eddie Osifelo, *Solomon Star*, 'PM launches policy document', 6 October 2010.

¹⁸⁴ The 2009 draft contains 270 sections, and its schedules contain a further 46 substantive provisions as well as three lists of powers (federal, state and concurrent) and details of state boundaries.

Preparation for dialogue or consultations

One of the many challenges faced by those designing and carrying out the public consultations is the low level of literacy in the Solomon Islands¹⁸⁵ and limited familiarity with constitutional and political concepts. This has an effect on the way in which information can be disseminated and also on the capacity of people to engage in the process and formulate opinions about change. One chief in the Solomon Islands has said 'I don't think the people understand anything. Our people don't read. Even if they read they don't grasp the concepts.' Another man who assisted his MP in consulting constituents on the draft, has stated that the majority of people in that constituency in Makira Province don't even know the meaning of a constitution nor anything about the current constitution of the Solomon Islands.

Early in the constitution making process, attempts were made to meet this challenge in at least two (possibly contradictory) ways: through a public awareness campaign that consisted primarily of a radio program on SIBC, and by focusing the 2003 public consultation meetings on broad themes and issues rather than directly discussing (or advocating) various constitutional options or models of governance.

The radio program, which was broadcast three times per week immediately before and during the 2003 consultations did not reach a very wide audience for a number of reasons, but some of those who both heard the radio program and participated in the consultation meetings expressed frustration that, having learned a bit about the current system and the SGTF report and proposed federal system on the radio, the consultation meetings did not address the question of federalism directly at all and the nature of the consultation was too vague.¹⁸⁶

A closely related challenge is lack of awareness of the whole undertaking of proposed constitutional reform. A number of the provincial consultation reports from the UNDP project stated that people who attended meetings claimed not to know much if anything about the current system of government, and that they had not heard anything about the Constitutional Reform Project. This is probably due to a combination of the inadequacy of the public awareness program, the difficulty of communication and limited access to media throughout the Solomons, and the understandable tendency of many people to focus on their daily concerns and needs rather than on larger political issues.

At no stage in the process has there been a coordinated civic education program to inform people about what is being mooted or proposed. There was in 2003 a limited radio program that informed people more about the process (as it then was) than about the key issues and concepts. In 2008 the Constitutional Reform Unit launched a media awareness program, but apart from a few media releases and a one-off radio talkback show, this does not appear to have produced much in the way of public awareness. There has been little opportunity for engagement in the process by civil society groups, and there does not appear to be much participation via informal dialogue or media reporting. In October 2010, a letter to the editor was published in the *Solomon Star* newspaper, complaining that media's reporting on the subject of constitutional reform was too rare, incomplete and internally inconsistent. The letter stated:

This failure of the media hurts the nation... So I must ask: Can the nation's media help give the information that the public needs to understand, comment on, and help to build a consensus on constitutional reform? Good policy comes from a broad understanding and

¹⁸⁵ The Infoplease Atlas puts literacy in the Solomons at 30%: <<http://www.infoplease.com/ipa/A0107975.html>> (accessed March 2003) ; the UNDP Factsheet for the Solomons says literacy is 76.6%; the 1999 census quotes 76%, and the Lingual Links website says the literacy rate in the Solomons in 1993 was only 53.5%. The literacy rates from each source (except Infoplease) are based on self-reporting of literacy, and therefore probably high.

¹⁸⁶ Gordon Nanau, *Makira-Ulawa Province Consultation Report I – Solomon Islands Constitutional Reform Project* (March 2003), 9.

commitment. A constitution – a nation’s ultimate written policy will, no matter how well written and well-intentioned, not succeed without that understanding and commitment.¹⁸⁷

Consultations

The public consultation phase of the process, run by the UNDP in 2003, was partially funded by Australia and New Zealand. Nine consultation teams were formed (one for each province), each with a Team Leader and 4-5 other members. Team Leaders were expected to have at least a bachelor of arts, professional experience in community awareness raising and workshop management, and good analytical and communication skills. Team members included members of the SGTF, other Solomon Islanders and some expatriates. Once the teams had been selected, a Consultation Training Workshop was held over four days, facilitated by two UNDP consultants. The workshop was designed to provide team members with relevant background information, including the history and process of governance reform and information about human rights. It is interesting to note that another key objective was to discuss and *determine* the appropriate methodology for the public consultations.¹⁸⁸ The report on the training workshop states that it ‘was conducted in a highly participatory manner... Timing and to some degree the content of the workshop was determined by the participants’.¹⁸⁹ It was made clear at this training that team members were not going out into the provinces to ‘consult’ with people on their preferred model of government, or to promote the idea of a federal system, but to listen to and record the issues of concern and suggestions raised by members of the public.¹⁹⁰ The workshop resulted in a loose questionnaire or ‘menu’ of issues to be raised and discussed in the public consultation meetings, which focused on four themes: civic engagement, security (including freedom of movement), services, and traditional leadership. These were the four themes that had been highlighted in the Socio-Economic Study Report.

The nine consultation teams then went out to their respective provinces to conduct public consultation meetings in February 2003. Most teams selected their locations based on population density and optimal ‘catchment areas’, as well as practical logistic considerations. Estimates of population coverage were based on opportunity to participate, and anyone living within a 10km radius of a meeting (the ‘catchment area’) was deemed to have had the opportunity to participate. SIBC and the VHF radio network were used to notify communities about the consultation meetings. There was some variation between teams as to how they structured the consultation meetings, but the format was generally an introduction, a brief explanation of the existing system and the history of the reform exercise, and an introduction to the four discussion themes. Meetings were then usually thrown open for questions and discussion. Some stuck very closely to the questionnaire or menu developed at the training, whilst others were more free-ranging. Some teams chose to break meetings up into small groups. Most teams held separate meetings for youth and women in addition to the main consultation meetings in their chosen destinations. Each team conducted between 11 and 18 consultation meetings, with attendance ranging from about 20 people to in excess of 200. Each team leader prepared a detailed report on the consultations, detailing the locations and attendance of all meetings, methodology, limitations and most importantly, the findings, or issues raised by participants. These 9 reports were summarised into a general report by the UNDP Project Manager.¹⁹¹

¹⁸⁷ Chuck Kick, ‘Reform’, Letter to the Editor, *Solomon Star*, 6 October 2010.

¹⁸⁸ SIG/UNDP Constitutional Reform Project (SOI/02/003), *Report on Team Leaders Consultation Training Workshop*, 2.

¹⁸⁹ *Ibid*, 3.

¹⁹⁰ Although it is important to note that those in charge of the process regarded federalism as a non-issue in the sense that they thought it had already been decided via the Townsville Peace Agreement and the SGTF Report.

¹⁹¹ Henry Kellam (UNDP), *Constitutional Reform Project Provincial Consultations Report*, April 2003.

Following this round of public consultations, drafting instructions were prepared with some reference to the consultation reports,¹⁹² and it was decided to conduct a second round of consultations. This meant that the original timetable was delayed. In the meantime, RAMSI arrived in the Solomon Islands in August 2003. The second round of consultations was conducted in late 2003 and involved presenting the drafting instructions and seeking feedback.¹⁹³ Since then, as outlined above, a draft constitution has been prepared, which was 'launched' by the Prime Minister in November 2004. This draft was to be introduced to Parliament in April 2005 after further public consultations, but this did not occur.

Just after the launch of the draft in November 2004, each Member of Parliament was given \$20,000 to spend on going back to their constituencies and consulting people on the draft constitution. This task was approached in a variety of ways by different Members. Some made the effort to familiarise themselves with the draft, and also engaged lawyers to accompany them on their constituency visits to help explain the provisions of the draft constitution. At the other extreme, some Members did not visit their constituents at all, and others used the money to host a feast at which the constitution got a brief mention. Some people who attended meetings held by their Members of Parliament said they were pleased that some effort had been made, but they found the experience rather bewildering and did not feel they had enough clear information to make any comments on the draft. The exercise shows at least some commitment to ongoing public involvement, but the efficacy of the exercise was at best very uneven.

Following the UNDP consultations in 2003 and the constituency visits by Members of Parliament in 2004 there was no further organised public consultation or public awareness program until early 2008, when members of the Constitutional Congress that had been appointed in 2007 conducted consultations throughout the 9 provinces in an attempt to 'identify the Solomon Islands political community'. According to the Constitutional Reform Unit, 'the focus of this activity was to collect information from existing communities within respective political regions (i.e. Provinces) on existing community and traditional values, traditional governance systems, issues underlying inter-community relations, and what these communities envisage for the new federal arrangement.'¹⁹⁴ After the release of the 1st 2009 Draft Federal Constitution of the Solomon Islands by the joint plenary, it was proposed that members of the Constitutional Congress would undertake public consultations to receive feedback on the draft, but this proposal appears to have been delayed by resource constraints. Under the new government of Danny Philip, it remains to be seen whether these proposed consultations will occur.

Impact of public participation

Tom Woods, former technical adviser to the Constitutional Reform Unit, claims that public opinion gathered from the 2003 consultations was fed into the 2004 draft constitution. However, in light of the nature of those consultations, which focussed on broad themes but did not address or contemplate constitutional issues, it appears likely that the only way in which public opinion could have been used to inform the draft is for the drafters to have extrapolated from the consultation reports what the public opinion on the chosen themes should mean for the shape of the draft constitution.

¹⁹² According to the personal accounts of some of those closely involved in the process, the drafting instructions were prepared with some reference to the findings of the consultation reports, but it was not until the draft constitution was prepared in 2004 that the findings of those reports were really closely examined and an attempt made to more fully reflect the findings in the draft provisions.

¹⁹³ I have not been able to locate any reports on the second round of consultations, but from discussions with some of those involved it is my understanding that the coverage of the second round of consultations was significantly smaller than the first round, with a focus on Honiara.

¹⁹⁴ Official website of the Constitutional Reform Unit, <<http://www.sicr.gov.sb/updates0007.html>> (accessed 5 January 2011).

Public participation in the Solomon Islands constitution making process to date does not appear to have delivered the usual or purportedly usual benefits of participation (such as increasing political efficacy, enhancing democratic attitudes, etc) because it was not preceded by a proper civic education campaign, and because people were not given the opportunity to engage with concrete constitutional issues directly, but rather were asked to give opinions on a range of oblique topics. The process and the impact of public consultation to date have suffered from the lack of resources that have been devoted to the process since its inception, the lack of coherent plan and legal framework for the process, and the lack of appropriate expertise in the conduct of the process.¹⁹⁵

NAURU

Background

Nauru is the world's smallest independent republic. It is a single island of about 21km sq, located just under the equator in the central Pacific. Its nearest neighbour is Ocean Island, approximately 350km to the east. The population of the island has decreased in recent years, as many expatriates who formerly worked in the phosphate mining industry have left the island due to the sharp decline in mining, and is now just over 10,000 people, of which less than 6,000 are registered voters. Nauru gained independence in 1968, prior to which it was a United Nations Trust Territory, administered by Australia.

Nauru was once amongst the richest nations in the world on a per capita basis, as a result of the wealth generated by the mining and sale of the island's phosphate reserves. However the island's fortunes have been radically reversed in recent years and Nauru's economy now depends heavily on foreign aid. Nauru's economic decline was caused in part by the depletion of phosphate reserves and a drop in the market price of phosphate, but primarily by financial mismanagement and corruption. The savings and investments that were supposed to provide for the long-term future of the island when phosphate has been exhausted, have largely disappeared.

Conditions leading to constitutional reform

There is no political party system in Nauru, and historically there have been very fluid allegiances between members of Parliament forming government. There have been frequent changes of government as a result of successful motions of no confidence, accompanied by frequent changes in senior public service positions and board and management positions in state owned enterprises. Vote-buying has been a common feature of elections, as has effectively buying a parliamentary majority once elected. Since independence, many members of Parliament appear to have viewed parliamentary office as a way to gain access to public funds and to more effectively grant favours such as jobs and chairmanships to family and friends. Until recently Nauru had so much wealth that the financial stakes involved were very high.

In 2004 after various antics and crises in Parliament, the Scotty government was elected on a reform platform; one of its stated objectives was to bring Nauru back from the brink of collapse through responsible economic management. The new government also promised to improve the accountability of government and to seek to redress the corrupt practices of the past through institutional reform. The government with donor assistance put together a National Sustainable Development Strategy: a 20 year plan covering the public and private

¹⁹⁵ Graham Hassall, 'Constancy and Change: A Perspective on Constitutional Reform the 'Pacific Way'', paper presented at the 14th Annual Public Law Weekend, Australian National University, Canberra, 12-13 November 2009.

sectors, population growth and various other national issues. Constitutional change to improve accountability and performance of government is one of the goals of the NSDS. One of the aims of the government in initiating the review of the Constitution was also to enhance stability, so that government planning and implementation of policies for the longer term might become more feasible.

Structure of the constitution making process

In late 2005 the UNDP agreed to fund a program of constitutional review in Nauru, and began by providing Nauru with assistance in designing the review process. In early 2006 the Parliamentary Standing Committee on Constitutional Review (CRC)¹⁹⁶ decided upon a process of constitutional review that would involve a number of discrete steps and which would be as inclusive as possible. The first step in the process was raising public awareness about the review itself as well as about the Constitution, through media including television and radio, leaflets, billboards, and copies of the independence Constitution, as well as through a detailed Background and Discussion Paper which set out some of the perceived problems with the existing Constitution and some of the possible options for change.¹⁹⁷ Step 2 of the process was public consultation, which involved a call for written submissions as well as 40 public consultation meetings held all around the island over a 2 month period. Just over 15% of the voting population participated in a public consultation meeting. Step 3 was a review by an independent Constitutional Review Commission, made up of three members and a secretariat, which examined all input gathered from the public and also undertook its own comparative research, and produced a lengthy report containing recommendations for constitutional amendment. In Step 4 of the process, the recommendations of the Commission were considered by a Constitutional Convention comprising 36 members, of whom 18 were elected and 18 were appointed by the Parliamentary Committee. The Convention voted on each recommendation. The decisions of the Convention were expressed in two draft Bills for consideration by Parliament.

The last two steps in the process, steps 5 and 6, reflect the procedure required by Article 84 for amendment of the Constitution, that is: the law to amend the Constitution must be passed by at least two-thirds of the total number of members of Parliament, after that law has sat in Parliament for at least 90 days, and then, if any of the proposed amendments are to the key provisions of the Constitution listed in Schedule 5, there must also be a referendum. The changes put to referendum will only come into effect if they are supported by at least two thirds of the votes validly cast. The Convention was concluded at the end of May 2007 and two constitutional amendment bills were introduced to Parliament in June 2007, however Parliament was dissolved prior to the lapse of the 90 day period required to pass such legislation. The Scotty government was re-elected with an increased majority at the end of August, but lasted only until December 2007, when a vote of no confidence resulted in a change of government (which included half of Scotty's former Cabinet). The Bills were not reintroduced until November 2008.

In early 2009, Parliament resolved to establish a Select Committee on Constitutional Amendment Bills (SCCAB) to consider the two Bills in detail. The Committee's terms of reference required it to inquire into and to report to the House on the Bills, and in particular, to examine whether it is necessary or desirable to make any amendments to the constitutional amendment Bills, whether any of the recommendations of the Constitutional Review Commission that were rejected by the Convention were so soundly based and/or so strongly supported by public opinion that they ought to be inserted into the constitutional amendment Bills, and whether the Bills are legally sound. In conducting its inquiry and

¹⁹⁶ The CRC was established in November 2004 by the *Constitutional Review Committee Act 2004*, but did not begin work on the constitutional review process until early 2006.

¹⁹⁷ Katy Le Roy, *Nauru Constitutional Review – Background and Discussion Paper* (UNDP, 2006).

preparing its report, the Committee was to have regard to the Report of the Commission, the Report of the Convention, the summary of public views on proposed constitutional amendments that had been prepared for use by the Commission, legal advice and any material of the CRC that it deemed useful. The Committee met intensively in televised sittings over a period of two months, and made a number of recommendations for amendments to the Bills. It submitted its report to the House in March 2009.

Figure 6 – Nauru Constitutional Review Process

Step 1	Public Awareness a campaign to raise public awareness of the review and of the Constitution and possible amendments	July-Aug 2006
Step 2	Public Consultation a series of forty public consultation meetings around Nauru, and the receipt of written submissions from the public	Oct-Nov 2006
Step 3	Independent Review Commission the establishment of an independent Constitutional Review Commission that took account of the views expressed by the public through the consultation process and made recommendations for amendment to the Constitution	Dec 2006-Feb 2007
Step 4	Constitutional Convention a Constitutional Convention held over a period of 6 weeks in 2007 to debate the recommendations of the Commission. The Convention consisted of both elected and appointed members. Two draft bills were prepared to reflect the motions passed by the Convention	April-May 2007
Step 5	Parliament consideration of the bills by the Parliament, including 5 weeks' detailed consideration in the Select Committee on Constitutional Amendment Bills in early 2009, and 3 weeks' detailed debate in the Committee of the Whole in June and August 2009; Parliament passed the 2 constitutional amendment bills on 21 August 2009; one bill was subject to referendum and failed; Parliament is considering consequential amendments to the other bill in 2011	June 2007-Aug 2009 (and still ongoing, 2010)
Step 6	Referendum a referendum on certain proposed constitutional amendments that require approval by referendum was held on 27 February 2010, and did not succeed	Feb 2010

In June and August 2009, Parliament resolved itself into the Committee of the Whole to consider proposed amendments to the two constitutional amendment Bills. The Committee considered in detail the report and recommendations of SCCAB, and was assisted by legal advice from a constitutional law expert who sat in the parliamentary chamber throughout the Committee's deliberations.¹⁹⁸ The Committee of the Whole accepted most of the recommendations of the SCCAB, and made numerous amendments to the two Bills. On 20 August 2009, after adopting the report of the Committee of the Whole, Parliament voted unanimously in favour of the two constitutional amendment Bills. The first of them, the *Constitution of Nauru (Parliamentary Amendments) Bill*, contained proposed amendments to the Constitution that could be made by two thirds of Parliament alone, and so was duly certified and became law (although it did not commence). The second of the Bills, the

¹⁹⁸ The expert was Associate Professor Kristen Walker of the University of Melbourne Law School, who also practices in constitutional law at the Melbourne Bar.

Constitution of Nauru (Referendum Amendments) Bill, contained proposed amendments to Articles of the Constitution listed in the 5th Schedule, and therefore required approval by referendum in addition to passage by two thirds of Parliament.

The referendum was scheduled for 27 February 2010. Approval was always expected to be difficult to achieve, because the requirement for a successful referendum is approval of two thirds of the votes validly cast, but the unanimous passage of the proposed amendments in Parliament appeared to increase the likelihood of success.

The referendum that was held on 27 February 2010 was the first time a referendum had been conducted in Nauru. Nauruans entitled to vote at a general election were entitled to vote at the referendum. Voters were asked to vote 'yes' or 'no' to the question whether they approved of the *Constitution of Nauru (Referendum Amendments) Bill*. The referendum was preceded by an extensive information campaign, so that voters had the opportunity to gather the information they needed about what was in the Bill and the opportunity to form an informed opinion about whether or not they supported it. A mobile information centre toured Nauru throughout January and February 2010, distributing written information and explaining the proposed amendments to voters. Awareness materials were also made available online. Information was broadcast on television and radio. Public meetings were conducted throughout the Districts by the Referendum Team.

However, by the time the referendum came around, the shift in numbers on the floor of Parliament had resulted in the politicisation of the proposed amendments. In the lead up to the referendum, some members of Parliament campaigned against the proposed amendments that they had voted for a few months earlier.

The referendum failed, with 67% voting 'no' and 33% voting 'yes'. The main proposals that were put to referendum were changing the method of electing the President (from election by Parliament to direct popular election from among candidates selected by Parliament), and inserting new social and economic rights in the Constitution, such as the right to information, access to education and children's rights.

If at least two thirds of the votes validly cast in the referendum had been in support of the proposed constitutional amendments, all amendments to the Constitution would have come into effect on the day of the next general election, which was 24 April 2010.

Among the many amendments that do not require approval by referendum are a change to the office of Speaker, so that the Speaker is someone selected by Parliament from outside its membership, rather than being a member, and an increase in the number of members from 18 to 19 – both measures are intended to avoid the parliamentary stalemates that Nauru has frequently experienced. Others include the insertion of a Leadership Code in the Constitution, and the establishment of an Ombudsman. However, because the two constitutional amendment bills were passed as an interlinked package, the amendments contained in the *Constitution of Nauru (Parliamentary Amendments) Act 2009* cannot commence until some consequential amendments are made to that Act to reflect the failure of the referendum. These consequential amendments consist mostly of removing cross-references to provisions that would have been in the Constitution had the referendum succeeded. In order to make these minor changes, it is necessary to comply with the procedure prescribed in Article 84 of the Constitution for constitutional amendment bills: the bill must sit in Parliament for at least 90 days, and must be approved by two thirds of the total number of members.

Shortly after the referendum, Parliament became deadlocked and was then dissolved. The general election held in April 2010 failed to resolve the deadlock, and so another general election was held, using emergency powers, in June 2010. Again, the deadlock persisted.

Parliament resumed functioning again in November 2010, and in December 2010 a Bill to effect the necessary consequential amendments to the *Constitution of Nauru (Parliamentary Amendments) Act 2009* was introduced to Parliament. This Bill is likely to be referred to the Committee of the Whole Parliament in March 2011.

Public participation in the process

Avenues for public participation were a major consideration in the design of Nauru's constitutional review process, and an effort was made to draw on emerging lessons about good practice in public participation from constitution building processes that had been conducted elsewhere. The first step in the process was designed to provide people with the information they needed to participate effectively in latter stages. The public awareness campaign sought to inform people about the basics (what is a constitution? what is the constitutional review process and why is it being conducted? how will the review be conducted and how can I participate?) as well as more complex information including what is the content of the existing Constitution, what are some of the perceived flaws in the existing Constitution, and what are some of the potential amendments that might be considered. Step 2 in the process was devoted to public consultation, in the form of public consultation meetings and the opportunity to make written submissions (only 40 written submissions were received).

In step 3, the Constitutional Review Commission was required by its terms of reference to pay particular regard to the views of the public that had been expressed in public consultations and written submissions, and to include in its report a fair account of the range of alternative views presented by members of the public. The Commissioners were provided with copies of all written submissions and the complete notes of all input gathered from the public consultation meetings, and they read through all of this material. The Commission Secretariat also prepared a matrix of the views expressed by the public, with some quantitative analysis of the views expressed. Most of the recommendations ultimately made by the Commission were based upon and consistent with the views expressed in public consultations.

In step 4, the Constitutional Convention, members of the public were able to vote for and lobby representatives to the Constitutional Convention. Throughout step 5 (consideration of the proposed constitutional amendments by Parliament) the media kept people informed about progress in Parliament, not only through the usual television and radio broadcast of Parliament sittings (and SCCAB and COTW), but also through interviews with members, media reports and news articles. In step 6 (referendum), people were able to participate in public meetings and to attend the information tent, and ultimately participated by voting directly on the proposals contained in the second Bill.

Preparation for dialogue or consultations

The first step in the six-step process of constitutional review was a public awareness campaign, designed to provide information to the public about their existing Constitution and options for change, as well as explaining the review process. The public awareness campaign began in June 2006 with the publication of a detailed Background and Discussion Paper, which formed the basis of the public awareness campaign materials. The Background and Discussion Paper provided a brief history of Nauru, a history of the constitutional development of Nauru, a background to the review, detailed explanations of each provision of the existing Constitution, and a number of discussion points that raised possible amendments for consideration. The paper was long and detailed and likely to be read only by those intending to make a written submission to the Constitutional Commission. However, the information contained in the paper also served as the primary source of

information for the preparation of shorter, more accessible information materials for dissemination in other formats.

The CRC and the consultant constitutional lawyer recruited a team of nine people to conduct the public awareness campaign. This team gave itself the name 'CRAC Team' – Constitutional Review Awareness Campaign Team. At the end of June 2006 the team completed 5 days' training with the consultant lawyer. The training commenced with a basic introduction to the concept of a constitution, followed by a detailed explanation of the step-by-step process of constitutional review and the place of the awareness team within that process, and then a detailed examination of the Constitution of Nauru based on all the material contained in the Background and Discussion Paper.

The team produced and disseminated a series of 14 different leaflets on the Constitution (approximately 350 copies of each were published and circulated) and aired 5 media announcements on radio and television, including an explanation of the review process, and introduction to what a constitution is, answers to frequently asked questions, and an overview of the Nauruan Constitution. The team placed an Article in the government Bulletin, and also arranged three large billboard displays around the island, which read in turn: 'The Constitution is for the people. The review will help us learn more about the Constitution and be more active citizens of Nauru'; 'The Constitution belongs to the people of Nauru. The review is our chance to make the Constitution more truly Nauruan. Your views and opinions will be needed in step 2 – public consultation'; and the third listed the six steps in the review process. These billboards were in highly visible places along the main ring road around the island. The CRAC Team also produced a song about the preamble to the Constitution, and made use of colourful posters to raise awareness. They attended one public meeting organised by a civil society organisation, and also visited a school to speak to students about the review.

Ultimately the breadth and reach of the public awareness phase was not as great as had been intended. A number of factors contributed to the difficulty of reaching a wide audience, including lack of television and radio signals on one half of the island, bureaucratic delays in accessing the resources required to carry out the program, and the limited time and resources devoted to the phase. The CRAC Team had no prior experience, and did not have any outside assistance after the first week of training, due to budget constraints. The team did not provide the public with much information about options for amendment.

Consultations

The primary aim of the public consultation phase was to conduct a series of meetings with district communities, interest groups and government departments to enable people to gain an understanding of the structure and function of the Constitution, to understand the provisions of the existing Constitution, and to discuss what changes (if any) people wanted to see in their Constitution.

A total of 40 public consultation meetings were completed for around 700 participants with attendance at meetings ranging from 5-45. Two meetings were scheduled in each District, one during the day and another at night to enable maximum participation. Holding the meetings in each District was designed to minimise the impact that problems such as lack of transport and lack of fuel would have on people's participation. Seven meetings targeted government departments and instrumentalities, while the remaining meetings accommodated such groups as the Sports Council and civil society groups. The schedule of meetings was widely publicised.

Most meetings lasted around four hours and were an equal mix of presentation and small-group discussions. Most of the presenting and all the small-group discussions were led by a team of ten Nauruans, supported by a consultant constitutional lawyer and a public consultation consultant. The presentations were made in English, and group discussions were largely in Nauruan.

During the first week of meetings the process began with a prayer and welcome, followed by some background introductory remarks on what a constitution is, the history of the Constitution of Nauru, the reasons for the review, and the steps in reviewing the Constitution. This was followed by a series of consecutive presentations explaining, in plain language, the provisions of the existing Constitution. The presentation was prepared by the constitutional consultant, and was a pared down and simplified version of the long Background and Discussion Paper that had been prepared earlier. The presentation was further shortened and refined during the first week of meetings.

During the first week, the presentation was followed by small-group discussions which were facilitated to clarify understanding and elicit views on what amendments, if any, should be made to the Constitution. A series of discussion points was used to focus the discussions. After the first week, the discussion points were amended to include more questions on the latter Parts of the Constitution, which had been generating interest from participants in the first week. Participants were not confined to the prescribed discussion points, and were informed that they were welcome to raise any question and to provide opinions on any Article or proposal. However, most small group discussions stuck largely to the discussion points. Views expressed by people during the small-group discussions were captured by a facilitator on butchers' paper thereby making the suggestions visible to all in the small group and giving people confidence that their views had been accurately recorded. Often, another facilitator would also record participants' comments and opinions in a notebook so as to have a complete and detailed record of suggestions made. In between meetings team members worked in the review office, transcribing their notes from the public meetings. These notes were primarily intended as a resource for the independent Constitutional Review Commission, which commenced its work after the public consultations and was required to take account of the views expressed by the public.

After the first week of meetings the process was altered such that the presentations were delivered in three parts, each followed by small-group discussions (rather than delivering one long uninterrupted presentation followed by one discussion session). Given the enormous amount of content being delivered, it was felt this approach would make the process more manageable for participants. Subsequent experience showed the revised format to be an appropriate balance of presentation and discussion. After the first week, it was also decided - based partly on feedback from participants - that rather than simply making a verbal presentation, it would be useful to provide all participants with a copy of the presentation in the form of explanatory notes, in order that they would be able to follow the presentation more readily and could also retain it for their own reference.

The revised meeting format was as follows:

- Opening prayer and welcome – *5 minutes*
- Introductory background presentation (What is a constitution? What is its function? What is constitutional review? Why is it important? What is the process of constitutional review? What is the history of constitutional review in Nauru? What is public consultation in constitutional review?) – *15 minutes*
- Presentation: The Preamble and Parts I & II of the Constitution – *15 minutes*
- Facilitated small group discussions on the preamble and Parts I & II – *45 minutes*
- Presentation: Parts III, IV and V of the Constitution – *25 minutes*
- Facilitated small group discussions on parts 3, 4 & 5 – *45 minutes*

- Presentation: Parts VI to XI of the Constitution – *15 minutes*
- Facilitated small group discussions on parts VI to XI and ideas for additional inclusions – *45 minutes*
- Closing (encouraging written submissions and attendance at next meeting(s), encouraging continued interest in the constitution via the Background & Discussion Paper, closing prayer) – *5 minutes*

A number of participants in the public consultation meetings expressed skepticism about whether their views would actually make any difference to the outcome, and suspicion about the motivations of the Government in undertaking the constitutional review. As a result of Nauru's post-independence history, there is widespread distrust of public institutions among citizens. The consultants and local facilitators responded to these concerns by explaining the process and the aim of the process to be open and inclusive, and in particular the fact that the Constitutional Review Commission would be required by its terms of reference to take account of the views expressed by the public. The team also highlighted the fact that people would be able to stand for election to the Convention and to elect their representatives, and that all Schedule 5 amendments would require a referendum in which two thirds of voters must vote 'yes' in order for the proposed amendments to take effect. The team also emphasised to participants that all views were welcome and that no decisions had been made about amendments at that early stage in the review process.

Impact of public participation

Public participation in the Nauru constitutional review process has had a number of significant impacts. It appears, to some extent and in some sectors of the community, to have restored some measure of trust in elected representatives and parliamentary processes. Those who have been actively engaged in the process have been able to see that the views expressed by the majority of people in the public consultation phase were reflected in the recommendations of the Constitutional Review Commission, and most of these were then endorsed by the Convention and ended up in the Bills that were passed by Parliament. Although the Convention rejected some of the Commission's recommendations, some of these items were later included in the constitutional amendment Bills by the Committee of the Whole Parliament, precisely on the grounds that there was evidence to suggest that the recommendations had been based on input from the public and that they were widely supported. The Commission Report also included, as it terms of reference prescribed, 'a fair account of the range of alternative views presented by members of the public', which was important for those people who had contributed their opinion on certain points but who did not form part of the majority. A list of all written submissions received was published as an appendix to the Commission Report.

In some instances, the views of the public expressed in the course of public consultations had the effect of rendering certain tentative proposals clearly untenable (such as the proposed increase in parliamentary terms from 3 years to 4 years, which was resoundingly opposed), or of introducing into the debate new, and widely supported, suggestions that had not previously been on the agenda (such as the introduction of a Leadership Code and the establishment of an Ombudsman, both of which have ended up in the *Constitution of Nauru (Parliamentary Amendments) Act*).

Public participation in the process succeeded in generating interest in the Constitution and debate on important issues of the accountability of public institutions (in a society where accountability has been seriously lacking since independence). The process, to an extent, succeeded in raising awareness about issues concerning government institutions, rights and the Constitution, but such awareness was uneven. Even though Nauru is a very small nation that does not pose any of the challenges of distance and terrain faced in the mountainous

archipelagos of Papua New Guinea, Fiji, Bougainville and Solomon Islands, it was still not possible to reach everyone. In spite of the efforts to inform and include the public, some members of civil society succeed in dispersing misinformation, particularly during the lead up to the referendum, which served to confuse people. Many people still find constitutional issues difficult to understand, or are not sufficiently interested to participate.

In spite of the failure of the referendum, most of the proposed amendments to the Constitution that have resulted from the review process do not require referendum and are still in the process of being completed. If the consequential amendments introduced in December 2010 are ultimately approved by at least two-thirds of Parliament, then those amendments to the Constitution will be made – most of which reflect the views expressed by the majority of participants during the consultation phase of the process, and some of which emanate from them.

3. Comparative Analysis and Conclusions

It is now widely though not universally accepted that public involvement in the constitution making process is essential for constitutional legitimacy.¹⁹⁹ This was not the case in the 1970s, when Papua New Guinea set out to make a constitution for independence, which makes the extent of the public consultation in the Papua New Guinea process all the more remarkable. However, it appears that, with the exception of Bougainville – where some of the same advisers were involved – countries within the Pacific region have not learned lessons from (or perhaps even been familiar with) the PNG experience. Some of the most effective aspects of the PNG participatory program, such as the use of Discussion Papers and the engagement of people in dialogue about concrete constitutional issues, were not adopted in Fiji or the Solomon Islands. As a result, public participation in Fiji and the Solomon Islands was less accessible and less fruitful.

Figure 7 (page 49) compares some of the participatory elements in the five constitution making episodes examined in this study, and reveals considerable commonality within the region. In each of the case studies, people were able to participate in the process through attending public consultation meetings. In every case except the Solomon Islands, this public consultation was undertaken by a parliamentary committee or a constitutional commission. In every case except Fiji, consultations were guided by questions, discussion points or themes. In every case except the Solomon Islands, public meetings have been complemented by the opportunity to make written submissions.

The few differences between the case studies are quite significant in terms of the accessibility and quality of participation. In Papua New Guinea, Bougainville and Nauru, participants had access to discussion papers and other information material, and were engaged in discussions about the concrete constitutional issues covered in the material. In the Solomon Islands, the themes used in public consultations were only tangentially connected to the constitution making process, which frustrated some participants and confused others. In Fiji, there was no public education, no information material, and no guidance for discussions.

¹⁹⁹ Those who argue that participation is essential include Nicholas Haysom, 'Constitution Making and Nation Building' in Raoul Blindenbacher and Arnold Koller (eds), *Federalism in a Changing World – Learning from Each Other: Scientific Background, Proceedings and Plenary Speeches of the International Conference on Federalism 2002* (2002); Vivien Hart, *Democratic Constitution Making* (2003) US Institute of Peace Special Report 107, Release date July 2003; Cheryl Saunders, 'Women and Constitution Making' (Paper presented at the conference on Women, Peace Building and Constitution Making, Colombo, Sri Lanka, 2-6 May 2002). Yash Ghai and Guido Galli make the valid point that participation enhances or contributes to constitutional legitimacy but that it is not the only relevant factor - Yash Ghai and Guido Galli, *Constitution Building Processes and Democratisation* (IDEA, 2006), 15.

Civic education is the foundation upon which effective participation can be built. Without it, formal avenues for participation will be inaccessible to many people and participation by ill-equipped citizens will be relatively fruitless. In designing a participatory constitution making process, it is necessary to consider who will provide civic education, as well as the content and method of delivery. In Bougainville, extensive civic education and awareness-raising were undertaken in the initial phase of the process. In Papua New Guinea, Solomon Islands and Nauru, awareness-raising and education took place both before and during consultations, to differing extents and with varying degrees of success. The use of clear, plain language in printed materials proved effective in Papua New Guinea, Bougainville and Nauru, as did the use of pictures and diagrams to illustrate concepts in Papua New Guinea and Bougainville. Radio programs were successful in disseminating information in Papua New Guinea, Bougainville, Solomon Islands and Nauru. In Fiji, the important element of civic education was almost completely absent.

In Papua New Guinea, Fiji, Solomon Islands and Nauru, public consultation took place before the preparation of a draft constitution, as the views gathered during consultation were supposed to feed into the recommendations that would result in an appropriate draft being produced. In the Solomon Islands, because the process has dragged on much longer than originally anticipated, there has since been the opportunity to consult on the draft constitution, although this consultation has not been as widespread or systematic as the earlier consultations. In Bougainville, the Constitutional Commission was able to be responsive to the wishes of the people, and to extend its consultation program beyond what had originally been planned, so that it held consultations before preparing a first draft of the constitution, and then held further consultations on the First Draft and the Second Draft. This undoubtedly enhanced the credibility of the process and the legitimacy of the outcome.

In the case of Nauru, people had further opportunities to participate after the conclusion of the consultation phase, by electing (or being elected as) members of the Constitutional Convention and by voting in the referendum. In Papua New Guinea and Fiji, the idea of a referendum was mooted but rejected. In Bougainville, there was no referendum on the Constitution, but a referendum on the question of whether to move to independence will be held between 2015 and 2020, as prescribed in the Constitution.

Approval of the Constitution was (or will be), in each of the cases studied, the role of a representative body: the ordinary legislature or a constituent assembly. In the case of Papua New Guinea, the ordinary legislature reconstituted itself as the Constituent Assembly to debate and adopt the Constitution, and in the case of Bougainville, the members of the Assemblies of the Bougainville People's Congress and the Bougainville Interim Provincial Government convened as the Constituent Assembly.

Designing a participatory constitution making process involves decisions about how participation is going to be woven into the process, at what stages and in what forms (and for what purpose). This includes making choices about which institutions or bodies are going to play a role in the process and what their role will be. In some of the cases studied, the central role of deciding on and coordinating the process has been vested in a parliamentary committee, whilst in other cases this role has been played by the executive government. In every case, the decision-makers on process have established other bodies to perform roles within the process.

In Fiji, Bougainville and Nauru, constitutional commissions were established – in Fiji and Nauru the commissions were designed to be small, balanced and independent; in Bougainville the Commission was designed to be larger and more representative, which was essential in view of the political situation. The roles of these commissions were slightly different: in Fiji, to consult the public and to make recommendations; in Bougainville, to

consult the public and prepare a draft constitution; in Nauru, to have regard to the views gathered in consultations that had already been undertaken on behalf of the parliamentary committee, and to make recommendations. In the Solomon Islands, the Constitutional Congress is designed to be large and representative, and its roles include consulting with the public and finalising the draft constitution. Only in Papua New Guinea has the consultative role played elsewhere by commissions been performed by members of a parliamentary committee. In Fiji, Bougainville and Nauru, political divisions and/or popular distrust of politicians would probably have made this option unfeasible.

The five case studies reveal some of the different ways in which consultations can be and have been conducted, and thereby illustrate some of the key questions that need to be asked when designing a program of public consultation in a constitution making process. Who will conduct the consultations? What are the personnel and logistic requirements and how much will it cost? What format will the meetings take? How long will they take? How will people's views be recorded? Will any parameters be set on the content of the discussions? To what extent will discussions be guided or directed by those who are conducting the meetings, and how can they be effectively guided? What aids will be used to promote understanding and dialogue? When will consultations be undertaken? Before a draft is produced, after, or both?

The case of the Solomon Islands offers some useful lessons in terms of pitfalls to avoid. Lack of advance planning of the process, combined with inadequate resources and lack of political will, has resulted in a process that has been inordinately protracted and erratic. Whilst it is often necessary to retain some measure of flexibility in relation to the process that has been mapped out, careful advance planning not only enhances the prospects that the various stages in the process will be successfully completed and that the process will produce an end result, but also enhances the likelihood that the participatory elements in the process will contribute towards the practical legitimacy of the result. People are more likely to have faith in the integrity of the process and the legitimacy of the outcome if they can see from the outset how the process will progress and the stages at which they will have an opportunity to participate.

What does careful advance planning entail? Actors responsible for the planning and design of an inclusive constitution making process need to take into consideration: the *objectives* of the process and of participation therein, the timing of various phases in the process, the resources available and required for the process, setting the parameters (if any) on constitutional issues and content, transparency of the process, inclusiveness and accessibility, civic education and the need for effective after-care and follow up.

The prevailing wisdom is that constitution making should not only be participatory, but also that constitutional dialogue should not be rushed. Even where substantial resources are allocated to constitution making, the ability of constitution making actors and authorities to fully realise an 'optimal' process is likely in most cases to be constrained by a finite budget. In the Solomon Islands and Nauru, although public consultation was undertaken, more resources would have been desirable to enable the consultation to be done over a longer period of time and to include more people. In Papua New Guinea and Bougainville, the CPC and BCC were able to secure sufficient resources to enable them to conduct consultations over a lengthy period, returning to people with different issues and, in the case of Bougainville, progressive drafts of the constitution for further discussion.

It is vitally important that adequate resources are devoted to participatory constitution making processes, notwithstanding that they tend to be remarkably expensive. Resource-allocation and budgeting are areas in which actors in process design can benefit from the experience of others. In addition to the obvious expenses such as the salaries or allowances of members of commissions or assemblies, consideration must also be given to the need to

have a properly staffed and resourced secretariat, the logistical and material costs of running an extensive civic education program, and the allocation of sufficient resources to the processing of public input and the provision of adequate feedback to the public.

In designing a participatory constitution making process, consideration also needs to be given to ways in which the transparency and integrity of the constitution making process can be maximised and maintained. This requires building into the process mechanisms to ensure a steady flow to the public of clear information about the process and the development of the constitution. In order for a participatory constitution making process to reap the potential benefit of enhancing constitutional legitimacy, the process needs to be credible and transparent. The objectives of public participation in the constitution making process should be expressly articulated. The deliberations of representative bodies need to be open to the public and the media where possible. People need to be able to see and understand how the constitution is being formulated, and to know what has become of their input. If it is necessary to find a middle ground between competing public demands, the rationale behind the compromise should be explained in an effort to minimise misunderstanding and dissatisfaction.

In Papua New Guinea, the work of the CPC was transparent and information about the work of the CPC was effectively and regularly disseminated. Members of the CPC secured the trust of the people of Papua New Guinea. The same can be said of Bougainville's BCC, Fiji's CRC and Nauru's Constitutional Commission. In each case, the final reports of these bodies set out in detail the public input they had received, and explained the rationale behind each decision or recommendation. In each of these four jurisdictions, the deliberations of the representative body that has debated, amended and adopted the constitution have been open and public.

Whilst constitution making processes will necessarily differ in each jurisdiction as a result of resources and context, it is useful to examine previous constitution making exercises to try to assess what has worked well and what has not, and to learn lessons through a comparison of experiences.

Each of the constitution making episodes examined in this paper was precipitated by very different circumstances and pressures, and the results of these episodes have been similarly mixed. The Constitution of Papua New Guinea has endured for 35 years, while Fiji's 1997 Constitution only survived for one difficult decade. Bougainville's Constitution is now almost six years old, and has seen two general elections. In the Solomon Islands and Nauru, the attempts to make and amend their Constitutions respectively are still in progress at the time of writing. It is very difficult to measure the correlation between effective public participation and a successful constitutional outcome, but in this study, the two cases with the most comprehensive and responsive participatory programs – Papua New Guinea and Bougainville – have produced constitutions that are still in place and appear to have a high degree of acceptance.

Figure 7 – Comparative table of elements of participation in constitution making processes

Country/region and dates of CBP	Structure of constitution-building process	Awareness/education?	Written submissions?	Public meetings?	Consultation on a draft constitution?	Constitution approved by?	Referendum?	Outcome
PNG (1972-1975)	Parliamentary committee (CPC) consulted and reported; report debated in parliament; draft constitution prepared on basis of instructions from parliament; parliament reconvened as Constituent Assembly and adopted constitution	Yes (both before and during consultation)	Yes	Yes (CPC)	No	House of Assembly sitting as Constituent Assembly	No	Constitution of the Independent State of Papua New Guinea 1975 (still in place, has been amended)
FIJI (1993-1998)	President established 3-member commission (ToR and members determined by parliamentary leaders); Commission (CRC) consulted and reported; Parliamentary committee debated report; draft constitution prepared on basis of instructions from parliamentary committee; Parliament adopted constitution	No	Yes	Yes (CRC)	No	Parliament	No	Constitution of the Republic of the Fiji Islands 1998 (undermined by coups in 2000 and 2006; abrogated in April 2009)
BOUGAINVILLE (2002-2005)	Peace Agreement signed; implementing laws give effect to agreed process; Commission established (BCC), consulted, drafted constitution, consulted again etc; draft debated and adopted by Constituent Assembly; Constitution endorsed by National Executive Council	Yes (extensive)	Yes	Yes (BCC)	Yes	Constituent Assembly and National Executive Council	No	Constitution of the Autonomous Region of Bougainville 2004 (still in place)
SOLOMON ISLANDS (2000-)	Government department in charge of the process; UNDP consulted > input to department; draft prepared within the department; limited consultation on draft; Congress created; draft amended; still not introduced to parliament	Yes (very limited)	No	Yes (UNDP)	Yes	(has not yet been introduced, but will be for Parliament to approve)	No	Draft Federal Constitution of Solomon Islands, prepared in 2004 and revised in 2009 (not yet introduced to Parliament)
NAURU (2004-)	Parliamentary committee established by statute (CRC); committee devised 6-step process; awareness; consultation (by consultants on behalf of committee, but input fed into Commission); 3-member Commission reported; Convention debated report and produced bill to amend Constitution; parliament (including 2 committees) debated and adopted bills; one bill subject to referendum, which failed	Yes (both before and during consultation)	Yes	Yes (CRC)	No	Parliament (two thirds majority)	Yes (required for only some amendments)	Proposed amendments to the Constitution of Nauru 1968 passed by Parliament in 2009; those that required referendum were rejected in 2010; those that do not require referendum currently before Parliament for consequential amendment before they can commence