

CONSTITUTIONAL REVIEW **COMMITTEE REPORT**

31 AUGUST 2016



The Vanuatu we desire
Vanuatu we yumi wantem
Le Vanuatu que nous rêvons

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MEMBERS OF THE CONSTITUTIONAL REVIEW COMMITTEE

(Full list of the members of the Constitutional Review Committee is in Appendix 1 and the members of the Report Drafting Committee is in Appendix 2.)

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Acknowledgement

As Chairperson, may I take this opportunity to thank the members of the Constitutional Review Committee for their time and commitment to dispensing with the duty that Parliament has seen fit to bestow on them. The Committee comprises of Members of Parliament representing different interests in Parliament and representatives of the civil society. Considering changes to be made to the Constitution, the most important and sacred document of the nation, is no easy matter. Thank you for work well done.

May I also convey my gratitude to the Report Writing Committee who, despite time constraints, have managed to capture the essence of the discussions of the CRC and to convey the main messages of the deliberations of the Committee, including emotions echoing the aspirations of the founding fathers of the Constitution of the Republic of Vanuatu. Thank you.



.....
Hon. Ralph Regenvanu

Minister of Lands and Chairperson of the Constitutional Review Committee

1. Introduction and background

A Special Sitting of Parliament, pursuant to Chapter 14 of the Constitution, was convened between the 9th and the 16th of June 2016 for the primary purpose to deliberate over the Bill for the Constitution (Seventh) (Amendment) Act No ... of 2016 (Bill). A copy of the Bill is attached and marked as Appendix 2.

Consequently on the 16th of June 2016, it was unanimously resolved by Parliament that the said Bill comprising the Constitutional Amendments be submitted to an ad hoc committee for the purposes of further scrutinising the proposed amendments and to consider the extent upon which there required to be a broader consultation upon the provisions of the said Constitutional Amendments.

Subsequently on the convening of the First Ordinary Session of Parliament between the 10th and 17th of June 2016, Motion Number 11 of 2016 was passed by Parliament establishing a Constitutional Review Committee (Committee), to work in unison with the ad hoc committee referred to in the special Constitutional Sitting of Parliament in order to capture the intentions set out by Parliament through the said Motion Number 11 of 2016.

The said Motion Number 11 of 2016 and its composites inclusive of the Terms of Reference for the Committee are set out in Appendix 3.

The underlying theme of the intentions of Government which are captured within the context of the references of the Committee focus principally on the experiences Vanuatu has faced in the past with much political instability and the desire of successive Governments to put an end to what predominantly has had a negative effect on the development of this country. Hence the spirit of the Constitutional Amendments now before the Committee.

Guiding Principles

It is important to not lose sight of the fact that the Constitution is a *document sui generis* rendering interpretation thereof to be subject to none other than its very clear and unambiguous expressions.

It is the founding document of this nation cleared by its framers to capture the aspirations, visions and understandings of a proud independent people.

The document is one owned by the people of Vanuatu and as such the expressions therein ought to be testament to the will of its people. Indeed this must be the ambit of the spirit of the people, its ancestors and its future generations.

Serious care must be taken to ensure anything alien to such of the spirit of Vanuatu is not to be imported into the provisions of the Constitution to corrode upon its emphasis or to reduce the Constitution to an ordinary piece of legislation. To commit this is to erode the very spirit of Vanuatu.

The Constitution must be regarded as Vanuatu's most sacred founding document and all and any person of Vanuatu origin to whom this Constitution was founded must safeguard with vigour the intents and purposes from which this very document surfaced into being.

Six themes contained in the proposed Constitutional Amendments

The Constitutional Amendments highlight six (6) themes identified by Government in its endeavour to address the very instability that resulted in these Constitutional Amendments coming to Parliament.

They are:

1. Allowing for political party legislation to be passed by Parliament;
2. Tighter controls on motions of no confidence in a Prime Minister;
3. Independent speaker;
4. More independent auditor general;
5. Extending the life of Parliament;
6. Non-stability related amendments.

Accordingly, with the above guiding principles in consideration the Committee addressed the themes propounded by the intended Constitutional Amendments.

Within the first theme, is a consideration of articles 4 and 5 of the Constitution. The intention is to delete the word “freely” and to substitute it with a clause that provides reasonable restrictions upon which how political parties must be regulated towards the attainment of political integrity and stability. In so far as article 5 is concerned, it is merely to integrate political integrity and political stability.

In the second theme it is a consideration of articles 21 and 43 of the Constitution. The intention is to provide for tighter controls on motions of no confidence in a Prime Minister.

The purpose of the amendment is to require Members of Parliament intent upon supporting a motion of no confidence against the seated Prime Minister, to give certainty to their support by insisting upon a manner upon which their signatures are affected upon the said motion. It insists that the motion must be executed by the required numbers of the Members of Parliament in the presence of the Speaker.

In addition, a restriction is imposed upon the timing and period of motions of no-confidence. It prohibits the exhibition of a motion of no confidence within 12 months of the election of a Prime Minister after a general election.

Also prohibited is any consideration of a motion of no confidence by Parliament 12 months prior to the expiry of the term of a Parliament.

Furthermore in the period not covered by those restrictions where, there is a failure in a motion to remove the Prime Minister, there is a further prohibition of another motion for the next six months thereafter.

Consideration of the third theme covers article 22 of the Constitution. The intention is to repeal the incumbent article and to replace it with an article that requires the Speaker to not be a Member of Parliament but to be elected as an independent Speaker. The intention of the new article as well as prescribing the manner upon which the independent Speaker is elected and removed is to require a future Speaker to remain impartial in the conduct of his or her Office.

The fourth theme deals with the establishment of the Office of the Auditor General within the Constitution under a new article 25A. The purpose of the amendment is to give more independence to the Office of the Auditor General and to enable the office holder to perform his or her functions without the involvement or interference of politics. The article prescribes the manner upon which the Auditor General will be appointed and removed and the nature of his or her functions.

The fifth theme covers the extension of the life of Parliament and the intention is to increase the years of Parliamentary service from 4 to 5 years. The intention sought by this amendment is merely to enable a Government to properly address if not exhaust its policies within the term of a Parliament.

The final theme deals with non-stability related amendments and it focuses on articles 5, 17 and 28 of the Constitution. The amendment of article 5 is intended to embrace relevant principles in the preamble of the Constitution, in particular respecting Christian principles and traditional Melanesian values. The amendment to article 17 is intended to restrict the ability of naturalised citizens to be able to contest any elections to Parliament.

The intention sought by the amendment of article 28 is to address the occurrence of Governments operating in between the elections, otherwise recognised as caretaker Governments. It is the intention of this provision to restrict the ability of an outgoing Government to authorise public expenditure that has not been otherwise appropriated by Parliament, to be restricted from approving any new projects or policies and to be restricted from making any permanent appointments.

It is through such intentions of the Government through these amendments and the establishments of the relevant committees that the Constitutional Review Committee commenced its deliberations on the 18th of July 2016 with a targeted period set by Parliament to complete and report back to it by the 31st of August 2016.

The Committee has conducted a total 19 daily meetings in which there have been comprehensive minutes to document the discussions and debates regarding the said Constitutional Amendments. Those minutes are appended to this report for the sake of completeness and are marked as Appendix 4.

It is abundantly clear from the mood of the Committee that in a task as immense as the consideration of the Constitution and the proposed Constitutional Amendments, it is difficult to give justice to a complete and thorough examination of all issues required by Parliament for the Committee's consideration in the time given.

No doubt the Committee appreciates that it is the wisdom of Parliament that given such limitation in the period given, there can be further consideration towards granting the Committee further time to fully pursue the matters which have been required for deliberation.

In addition this Committee appreciates as much as Parliament that there are serious issues within the Constitutional Amendments that must traverse this entire nation and its people through consultations obviating the consideration of Parliament to grant the Committee the required time to undertake consultations and having completed those consultations to be able to report comprehensively back to Parliament for its final disposal of the said Bill for the Constitution (Seventh) (Amendment) Act No....of 2016.

During the deliberations of the Committee we have been assisted by the provision of advices and opinions from independent professionals, as well additional submissions of issues presented on behalf of the Offices of Women, the Disability and the Vanuatu Christian Council (VCC).

2. Summary of discussions

A. Allowing for political party legislation to be passed by Parliament

ARTICLE 4

Existing article 4:

“4. National sovereignty, the electoral franchise and political parties

- (1). National sovereignty belongs to the people of Vanuatu which they exercise through their elected representatives.
- (2). The franchise is universal, equal and secret. Subject to such conditions or restrictions as may be prescribed by Parliament, every citizen of Vanuatu who is at least 18 years of age shall be entitled to vote.
- (3). Political parties may be formed freely and may contest elections. They shall respect the Constitution and the principles of democracy.
- (4). For the purposes of determining national sovereignty, people of Vanuatu means all indigenous and naturalised citizens of Vanuatu.”

Proposed Amendments:

Subarticle 4(3)

Delete “freely”

Subarticle 4(4)

Repeal the subarticle, substitute

- “(4). Subjects to subarticle 5(1), Parliament may provide for the reasonable regulation of the formation of political parties and the manner in which they may contest elections. Such regulation must be designed to ensure financial and political integrity and the fair representation of political opinions.
- (5). Parliament may impose reasonable restrictions on elected candidates and upon political parties to ensure the maintenance of political integrity and stability.”

ARTICLE 5

Existing Article 5(1):

“5. Fundamental rights and freedoms of the individual

- (1). The Republic of Vanuatu recognises, that, subject to any restrictions imposed by law on non-citizens and holders of dual citizenship who are not indigenous or naturalised citizens, all persons are entitled to the following fundamental rights and freedoms of the individual without discrimination on the grounds of race, place of origin, religious or traditional beliefs, political opinions, language or sex but subject to respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health –
 - (a) life; / (b) liberty; (c) security of the person; / (d) protection of the law; / (e) freedom from inhuman treatment and forced labour; / (f) freedom of conscience and worship; / (g) freedom of expression; / (h) freedom of assembly and association; / (i) freedom of movement; / (j) protection for the privacy of the home and other property and from unjust deprivation of property; / (k) equal treatment under the law or administrative action,

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

Proposed Amendment:

Subarticle 5(1)

Delete “welfare and health”, substitute “welfare, health, political integrity and political stability”

On this first point the Committee was guided by legal advice received from SLO and several other independent legal advises which are appended hereto and marked as Appendix 4.

It has been the general consensus of the members of the Committee that the reference in article 4 of the Constitution to the term “freely” should remain because of its constitutional importance and embracing a fundamental principle of democracy.

Having said this, the Committee further by consensus acknowledge the importance of having reasonable regulations or legislation in place as subordinate legislation to regulate the manner upon which political parties, once established should be subjected to a structure that recognises the need for there to be coherence in the form of political parties that require them to fulfil, if not embrace the importance of political and financial integrity, and stability.

Relevant principles such as:

1. The necessary registration of political parties once established pursuant to the article 4 of the Constitution to subscribe to a level of conduct or process that adheres to the principles of political and financial integrity, and stability.
2. Restraining members of a political party from departing from the constitutional structure of a political party to which they are affiliated.
3. By ensuring that independent Members of Parliament are encouraged to align their particular platform with a political party with certainty of tenure with sanctions that will expect such Members as much as possible to respect and be governed by the relationship with a political party to which they align themselves. This is important to ensure that the country ceases to be held at ransom to individual tendencies of an independent Member of Parliament.
4. Ensuring that political party structures contain serious to severe sanctions that ground Members of Parliament, either independent or the affiliated members of a political party to a tenure that recognises the need for there to be stability in the life of Parliament as a deterrent against floor crossing. Several features of such regulation could be, a requirement for political parties to be obliged to hold regular congresses, or leadership succession within political parties to mention a few. Ultimately the bottom line must be to ensure that political party structures are actually democratised.
5. Insisting within the regulatory framework of political parties a no tolerance attitude against the use of monies or favours to cajole the personal interests of Members of Parliament affiliated within the structure.

Insisting within the regulatory framework of Standing Orders of Parliament relevant rules enabling the Speaker to be vigilant in supervising the movement of Members of Parliament within the Chambers thereof.

Thus in essence the consensus of the Committee was in relation to proposed amendments, in particular –

1. “Sub article 4 (3), delete “freely” “, to not delete “freely”.
2. “Subarticle 4(4) Repeal the subarticle, substitute “(4) Subject to subarticle 5(1), Parliament may provide for the reasonable regulation of the formation of political parties and the manner in which they may contest elections. Such regulation must be designed to ensure financial and political integrity and the fair representation of political opinions.

“Sub article 4 (5) Parliament may impose reasonable restrictions on elected candidates and upon political parties to ensure the maintenance of political integrity and stability.”, to retain sub article 4(4). However, there exists a possibility within the Constitution to require as an extra sub-article in article 4 to enable Parliament to regulate by subordinate legislation political parties in such a manner as to attain and maintain political and financial integrity, and stability.

The other option were Parliament to be otherwise persuaded was to not insert such a provision in the Constitution but to accept that there exist a possibility for Parliament other than reverting to the Constitution to accept from the Government in the normal manner as policy to enact legislation that secures the principles of political and financial integrity, and political stability.

It was the consensus of the Committee that the consideration of these amendments did not necessarily require the consultations of the people. However, the Committee submits to the overall direction of Parliament with respect to the manner forward in this respect.

In the unlikely event that Parliament becomes disposed to remove the expression “freely” from article 4 of the Constitution, it is the vehement consensus of the Committee that a referendum on this question is absolutely vital.

B. Tighter controls on Motions of No Confidence

ARTICLE 21

Existing article 21:

“21. Procedure of Parliament

- (1) Parliament shall meet twice a year in ordinary session.
- (2) Parliament may meet in extraordinary session at the request of the majority of its members, the Speaker or the Prime Minister.
- (3) Unless otherwise provided in the Constitution, Parliament shall make its decisions by public vote by a simple majority of the members voting.
- (4) Unless otherwise provided in the Constitution, the quorum shall be two-thirds of the members of Parliament. If there is no such quorum at the first sitting in any session Parliament shall meet 3 days later, and a simple majority of members shall then constitute a quorum.

(5) Parliament shall make its own rules of procedure.

Proposed Amendment:

After subarticle 21(2)

Insert

“(2A) A request made by the majority of members of Parliament under this Article must be signed by the majority of members at the same time in the office of the Speaker and in his or her presence.”

The intention of this particular amendment is to require Members of Parliament requesting an extraordinary session of Parliament pursuant to article 21 (2) particularly to deal with the issues of motion of no confidence, to present themselves before the Speaker and to execute the request for the extraordinary session in his or her presence. It is intended by this amendment that there become a more transparent process governing the manner upon which requests are made by Members of Parliament for the calling of the session. Experiences have shown including untold litigation that the practice of executing requests have been called into question by Members of Parliament even to the extent that there have been commentary in the decisions of the courts referring to instances of forgery.

Another justification for the Constitutional Amendment is to embrace the manner upon which matters concerning governance could be conducted lending assistance from the manner upon which matters dealt with and disposed of at the customary level. The “Nakamal way” was propounded in discussions and it was felt that in the manner how issues of custom are dealt with at the nakamal should be imported into the manner in which Parliament transacts its business. Much in the same way that all issues are brought before the nakamal, in the nakamal and are disposed of in the spirit of the nakamal way in application of custom then it is proposed that motions should be initiated in the like manner.

In support for this proposition were the concerns about the frustration of civil society regarding constant changes in Governments, the free movement of Members of Parliament from the left to the right and back during the process, the lack of stability in the country receiving developments sorely needed by the people in particular in the rural areas of Vanuatu and the inability of Governments being able to fully execute their development plans and provide good governance to the people.

Several concerns were raised in relation to the application of the intended amendment. There have been concerns raised about the effect that such a process would have on the security of Members of Parliament intent upon executing such a request. There were expressions of fear raised in the discussions in relation to the previous experiences regarding the motions where Members of Parliament could potentially be cajoled either by more influential Members of Parliament or members of the public into expressing their rights as Members of Parliament either for or against when such an open process is stipulated. The notion of a Member of Parliament’s right is enshrined in the ideals of democracy. It is akin to the right of a Member of Parliament within the chambers of Parliament to exercise his democratic vote by way of a secret ballot as an extension of this concern.

In addition were concerns raised about the possibility of one person becoming dictatorial when it comes to the operations of the amendment. A Speaker could potentially exert influence during the process, even he himself or she herself is a Member of Parliament elected into office by the seated Government in right.

Another concern if Parliament was to consider in its wisdom that the intended amendment was appropriate is to insist upon a process that protects the integrity of Members Parliament

involved in the application of the amendment so as to protect the secrecy vital to the proper application of the amendment.

A suggestion was to involve the offices of the Clerk in the process whereby the Members of Parliament, unbeknownst to the Speaker would present themselves before the Clerk, the Clerk appreciating the level of secrecy required and the integrity of the process would ultimately disclose the request to the Speaker upon the request becoming compliant with the constitutional provision. This would as much as possible allow the process to be impartial and it would retain credibility of the Office of the Speaker.

Another concern was raised regarding the honour and integrity of a Member of Parliament. It was contended that such a requirement would erode upon the respect otherwise normally accorded to a Member of Parliament of the Republic of Vanuatu.

Concerns were raised about the difficulty in such process involving Members of Parliament intent upon supporting the request but are placed in difficult circumstances in their constituencies far away in the islands. If such a process was to be adopted by Parliament, there would have to be inserted into the Constitutional Amendment provision that recognised this difficulty and would overcome it.

ARTICLE 43

Existing Article 43:

“43. Collective responsibility of Ministers and votes of no confidence

- (1) The Council of Ministers shall be collectively responsible to Parliament.
- (2) Parliament may pass a motion of no confidence in the Prime Minister. At least 1 weeks’ notice of such a motion shall be given to the Speaker and the motion must be signed by one-sixth of the members of Parliament. If it is supported by an absolute majority of the members of Parliament, the Prime Minister and other Ministers shall cease to hold office forthwith but shall continue to exercise their functions until a new Prime Minister is elected.”

Proposed Amendments:

Subarticle 43(2)

Repeal the sub article, substitute

- “(2) Parliament may pass a motion of no confidence in the Prime Minister.
- (3) At least 1 weeks’ notice of such motion must be given to the Speaker and the motion must be signed at the same time by one-third of the members of Parliament in the office of the Speaker and in his or her presence.
- (4) If the motion is supported by an absolute majority of the members of Parliament, the Prime Minister and other Ministers must immediately cease to hold office but shall continue to exercise their functions until a new Prime Minister is elected.”

Like the amendments in article 21 (2 A) this particular amendment also attempts to achieve a more transparent process also requiring the Members of Parliament intent upon executing a motion of no confidence against a Prime Minister during a session of Parliament to be required to present themselves before the Speaker and to execute a motion of no confidence in his or her presence.

It has been the experience of Parliament resulting in numerous cases before the court like the experiences under article 21 that the incumbent constitutional provision needs to be tailored in such a manner that achieves the purposes of the constitutional provision in order to render the process not only to be transparent but also cost effective.

A concern raised in justification of the intended amendments is associated with the costs involved in the process of moving a motion and subsequently the costs of the change of government following the successful motion of no confidence being carried.

The representations made above with respect to article 21 (2A) are repeated and relied upon for the purposes of addressing this particular provision.

It is the consensus of the Committee that the requirements of the one sixth of the Members of Parliament to execute a motion should be retained.

ARTICLE 43

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“43. Collective responsibility of Ministers and votes of no confidence

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Proposed Amendments:

New Subarticle 43(5)

- “(5) Parliament must not consider a motion of no confidence within any of the following periods:
- (a) within a period of 12 months after a general election;
 - (b) within a period of 12 months after a new Prime Minister has been elected;
 - (c) 12 months before the expiry of the term of Parliament.
- (6) If a motion of no confidence is tabled and is not supported by an absolute majority of members of Parliament, Parliament must not debate any motion of no confidence in the Prime Minister for the next 6 months.”

The rationale behind there being a need for a grace period for 12 months after a general election is to enable a Prime Minister once elected to be able to focus with his or her cabinet to develop plans in motion and to be able to anticipate favourably or to actually embark upon the implementation of the cabinet’s development plans.

The intention is to reduce the potential for political overkill at the expense of service delivery to the people as in the current regime it is open to the Members of Parliament at any given time to change a Prime Minister. This works contrary to the aspirations of the people and their expectations to be properly served by their Government.

The risk by way of contrast which was a concern raised in the Committee is to entertain the possibility of anarchic Government. Simultaneously it could potentially lead to idleness amongst State Ministers.

Thus it was felt by the Committee that if Parliament was disposed to be in adamant that the amendment should be passed that there were required to be exceptions to the grace period. Several proposed exceptions could be the following;

- (1) A Prime Minister who was committing the Government to expend monies outside the budget appropriated by Parliament;
- (2) A Minister or Ministers who were not performing properly and the Prime Minister was not addressing the non-performance; and
- (3) A non performing Prime Minister or one who was exhibiting signs of anarchic leadership.

An alternative suggestion were Parliament to proceed with the amendment, which there appears to be consensus upon is to reduce the grace period to six (6) months after an election of the Prime Minister.

In addition, it was the consensus of the Committee that if there was a failure of a motion against the Prime Minister, that Prime Minister was still required to take on board the substance of the motion against him or her and to take action.

Another concern was whether this proposed amendment impeded upon the rights of the Members of Parliament and whether there was an issue in Article 5 of the Constitution.

It was the overall consensus that the new proposed amendments 43(5)(a) and 43(5)(c) be deleted as they merely represented a restatement of 43(5)(b) and were considered redundant.

As to the proposed article 43(2), the consensus was to retain “one sixth” of the Members of Parliament.

In total upon this proposed theme the Committee returns to Parliament the following recommendations;

- (1) Sub-article 22 should not be tampered with, however if Parliament was to proceed with the amendment more work was necessary on the amendment to cater for the following;
 - (a) sanctity and secrecy of the process;
 - (b) neutrality of the process with the possibility that the Clerk become involved as a cross check on signature execution, such process itself to be secret and abreast from the Speaker until satisfaction of the requirements of the Constitution; and
 - (c) possibility of Members of Parliament being in their constituencies to present themselves before a Commissioner of Oaths or nominate in writing a proxy to execute a written request on their behalf.
- (2) The comments in (1) above are repeated and relied upon with respect to the intended article 43(2) substituting amendment.

Needless to say, the consensus of the Committee was to retain the requirement of one-sixth of the Members of Parliament to execute a motion of no confidence.

- (3)** As to the proposed Amendments to article 43 in a new Sub-article 43(5) the Committee proposes that there be legal advice upon whether it is democratic let alone legally

possible to impose a restraint upon the rights of Members of Parliament to express an unfavourable opinion on the seated Prime Minister at any given time. If it is so then the Committee proposes that the period be reduced to 6 months with exceptions as detailed above particularly on the non or adverse performance of a Prime Minister or Minister under that Prime Minister.

C Independent Speaker

Existing article 22:

“22. Speaker and Deputy Speakers

- (1) At its first sitting after any general election Parliament shall elect a Speaker and one or more Deputy Speakers.
- (2) The Speaker shall preside at sittings of Parliament and shall be responsible for maintaining order.
- (3) The functions of Speaker may be exercised by a Deputy Speaker.”

Proposed Amendments:

Repeal the Article, substitute

“22. Speaker and Deputy Speakers

- (1) The Speaker is to be elected from amongst persons who are not members of Parliament, in accordance with Schedule 1A, by secret ballot by an electoral college consisting of members of Parliament, Presidents of Provincial Councils and Mayors of Municipal Councils.
- (2) Eligibility of person to be Speaker
- (4) Subject to subarticle (5), the Speaker may only be removed from office for gross misconduct, by the Electoral College on a motion introduced by at least one-third of the members of the Electoral College.
- (5) A motion to remove the Speaker must only be introduced at a meeting of the electoral college when at least three -fourths of the members of Parliament and at least three -fourths of the Presidents of the Provincial Government Councils, and Mayors of Municipal Councils are present and must be supported by at least two-thirds of the members of the electoral college.
- (6) At least 2 weeks’ notice of the motion must be given to the presiding officer of the Electoral College.
- (8) The Speaker is to preside at all sittings of Parliament and is to perform his or her functions impartially. The Speaker is responsible for ensuring that the business of Parliament is conducted in accordance with this Constitution, any applicable Act of Parliament and the Rules of Procedure of Parliament.
- (9) The Speaker must not vote on any matter before Parliament.
- (10) At its first sitting after any general election, Parliament is to elect one or more Deputy Speakers from amongst its members.
- (11) The functions of the Speaker may be exercised by a Deputy Speaker if the Speaker is unable to discharge the functions due to illness or other reasonable excuse.

(12) To avoid doubt, a Deputy Speaker may vote at any proceedings of Parliament even though he or she is exercising the functions of Speaker during that proceeding.”

The intention sought by the amendment to article 22 of the Constitution revolved around making the Office of the Speaker to become more independent. The current makeup of the Office is political by nature because it requires the office holder to first be a Member of Parliament elected by his peers to assume the office and its functions. The new amendment changes the manner upon which a speaker is to be elected and the composition of the process is akin to the processes involved in the election of a Head of State.

The proposal has come to the floor of the constitutional sitting of Parliament due to a reflection on previous performances of the Speaker of Parliament after Independence and the level of litigation brought against the Speaker in a manner perceived to bring the office of the Speaker into disrepute. By insisting upon an office of neutrality it is hoped that this would restore confidence in the Office.

It is the overwhelming consensus of the Committee that this particular amendment is wrought with complexities that the only sensible outcome must be to retain the incumbent provision.

1. If the provisions regarding the election of the President are to be of any assistance, the practice and the experience of these elections have shown quite clearly that the candidates regardless of the neutrality have always been supported by politics to an end it matters little about the neutrality of the office holder because the perception that the office holder is elected by politics does not remove the tendency of being influenced by the very politics involved in the election.
2. The preferred consideration is to ensure that a Member of Parliament regardless of his or her political affiliation has a sensible appreciation of the Office and its functions. A seated Speaker of Parliament must have a proper grasp of the protocols surrounding the Office and aura of the Speaker and the limitations attached to the Office which are a clear insignia of the principle of separation of powers. A Member of Parliament elected as a Speaker must understand with clarity that the legislature is a separate whilst integral part of the Westminster system of Government adopted out of convenience by Vanuatu. This could be achieved by requiring in the Constitution that the Speaker is required to be impartial.
3. In addition it is the consensus of the Committee that it would be helpful if the Standing Orders of Parliament could spell out how the Speaker must conduct himself or herself in the House as well as maintaining order so as to give a seated Speaker the impression that he or she cannot and must not be an active participant in debates in Parliament and that his neutrality must always be actual in the conduct of his or her office and functions.

D. Extend The Life of Parliament

ARTICLE 28

Existing Article 28:

“28. Life of Parliament

- (1) Parliament, unless sooner dissolved under paragraph (2) or (3), shall continue for 4 years from the date of its election.
- (2) Parliament may at any time decide, by resolution supported by the votes of an absolute majority of the members at a special sitting when at least three fourths of the members are present, to dissolve Parliament. At least one week’s notice of such a motion shall be given to the Speaker before the debate and the vote on it.
- (3) The President of the Republic may, on the advice of the Council of Ministers, dissolve Parliament.
- (4) General Elections shall be held not earlier than 30 days and not later than 60 days after any dissolution.
- (5) There shall be no dissolution of Parliament within 12 months of the general elections following a dissolution under subarticle (2) or (3).”

Proposed Amendment:

Subarticle 28(1)

Delete “4”, substitute “5”

What is sought by this amendment is to increase the life of Parliament under article 28 of the Constitution from four (4) to five (5) years. The rationale explaining the proposal suggests that the period of 4 years is insufficient not only for Government to deliver undertakings to the people but simultaneously Members of Parliament observing from previous experience have themselves been unable to develop their constituencies in such a way that gives credit to a Member of Parliament and satisfaction to a Constituency.

Given the geographical construct of the Republic of Vanuatu into numerous islands and the difficulty and immense expense not to mention the meagre resources available to a Member of Parliament, a Member of Parliament and his or her constituency is always faced with a handicapped situation.

Extending the life of Parliament would give more certainty to the projects a Member of Parliament can make for his or her constituency and the expectation the Member has in the realisation of those projects or development plans coming to fruition.

Parliamentary consideration could be given towards ensuring that a Member of Parliament’s allocation and available resources are proportionate to the size of the electorate and the remoteness of the constituency. Indeed re-structuring the Community Development Fund (CDF) in such a way that it addresses the need of the islands and constituencies more than the being and politics of a Member of Parliament would be a step in the right direction.

Comments from the members of the Civil Society as well as the Committee in large part was to approach the people through consultation on this prospect. It may well be that the more remote islands and constituencies could see merit in the advancement of this proposition.

By contrast there is always a possibility that extension of the term could run contradictory to the wishes of the people. If Vanuatu is to experience in the ensuing years continuity in the political fragmentation as witnessed in the past it is possible that an increase in the tenure of Parliament would operate as an aggravation more than the good that it might bring.

The Committee considered the likelihood if the period was to remain at 4 years and that Members of Parliament could be better resourced through their allocations to attend to the needs of the constituencies. In addition, offices of Members of Parliament could be equipped with technical personnel to advance the plans of a Member to ensure a necessary service delivery to his or her constituency is recognised.

There was also the suggestion that more government effort was needed to direct or influence the work of aid donors, Public servants and non-government entities to give direct assistance to Members of Parliament in particular their project focus on the public interest in their constituencies.

In summary, the general consensus of the Committee that whilst there may be merit in the proposed amendment the resolution would only be complete once it traversed the country through consultations for the people to contribute to the prospect.

E. More Independent Auditor General

ARTICLE 25

Existing Article 25:

“25. Public finance

- (1) Every year the Government shall present a bill for a budget to Parliament for its approval.
- (2) No taxation shall be imposed or altered and no expenditure of public funds shall be incurred except by or under a law passed by Parliament.
- (3) No motion for the levying or increase of taxation or for the expenditure of public funds shall be introduced unless it is supported by the Government.
- (4) Parliament shall provide for the office of Auditor-General, who shall be appointed by the Public Service Commission on its own initiative.
- (5) The function of the Auditor-General shall be to audit and report to Parliament and the Government on the public accounts of Vanuatu.
- (6) The Auditor-General shall not be subject to the direction or control of any other person or body in the exercise of his functions.”

The intention sought by this amendment seeks to justify the need for the Auditor General to be more independent in the exercise of his or her functions. The rationale advanced by this amendment lies particularly in article 25(4) of the Constitution which incumbently requires the Auditor General to be appointed by the Public Service Commission.

It is suggested that this provision of itself potentially hampers the functions of the Auditor General in that it is perceived that the Public Service Commission being appointed by the President on the recommendation of the Prime Minister raises a question of the likelihood of the political interference in the appointment and conduct of the Auditor General.

It is the consensus of the Committee that the Office of the President should not be part of the process of the appointment of the Auditor General. This is merely to ensure that the highest Office in the country that has the symbolic function to ensure unity in the country is not eroded by attaching the exercise of powers that can potentially raise questions as to whether the President has exercised such powers in an independent and impartial manner.

In addition, it is also posited that it may have been difficult for the Auditor General in the past to undertake an enquiry audit upon its employer. What is sought from this proposed amendment is to enable the Auditor General to be independent as far as possible, so that there cannot be any suggestion that his or her performance is susceptible or subject to the interferences of politics or restraint of hierarchy.

Furthermore, it is suggested that as the incumbent provision stands, it potentially operates counter to the maintenance and enhancement of stability.

It was the overwhelming consensus of the Committee that the functions of the Auditor General and its sought after independence proposed by the amendment has a negligible effect on the question of stability. What became abundantly clear as the Committee sat to deliberate over this issue was the obvious lack of Government attention given to ensuring that the Office of the Auditor General is properly resourced and able to execute its functions effectively.

The Constitution in particular article 25(6) adequately equips the Auditor General with abundance of independence required for him or her to discharge the functions of the Office such as that it is seriously difficult to envisage an amendment that would give more effect to the independency of this Office. The requirement under article 25(4) that the Auditor General is appointed by the Public Service Commission quite explicitly includes the words “on its own initiative”. This necessary addition to that sub article instils upon the Public Service Commission that in the appointment of the Auditor General, serious care must be taken to ensure that the appointment is free from any political interference.

It is important that persons appointed as members of the Public Service Commission have a clear appreciation of their role as independent members of the Commission in the appointment of an Auditor General.

The Committee was unanimous in its support for the importance of the Office of the Auditor General and its duty to hold greater government to account at all times. The Committee has recommended to return this issue to Parliament to consider firstly adequately furnishing the Auditor General’s Office with resources, enabling him or her to discharge the duties of the Office. In the meantime, it has been difficult for the Committee to appreciate whether there is a connection between the Office of the Auditor General and the notion of stability.

In addition the Committee proposes to Parliament that consideration must be given in legislation to hold the Auditor General to account in the performance of his or her duty. A similar provision can be found in the Ombudsman’s legislation which whilst, sustaining the independence of the office, yet renders him or her subject to be examined by the Attorney General by way of enquiry as a check on his or her ability or otherwise to perform. Such a provision is a check necessary to ensure that the Office of the Auditor General functions and performs in accordance with its legislative requirements.

Some consideration was given towards enabling in legislation a definition or elaboration upon what is meant by “on its own initiative”, in article 25 (4).

In summary with regard to the proposed amendments as proposed by sub-article 25A, the consensus of the Committee is as follows:

1. No amendment is required as there is no correlation with stability.
2. The Government must provide adequate resources to enable the Auditor General to function with competency.
3. There must be a check on the performance of the Auditor General by the appropriate authority.
4. Where deemed necessary by Parliament, it is possible to elaborate on what is stated in article 25 (4) as “on its own initiative”.
5. The Auditor General can be no more independent than what is clearly the expression of article 25(6).

F. NON-STABILITY-RELATED AMENDMENTS:

1. Re-emphasise preamble in bill of rights

ARTICLE 5

Existing Article 5(1):

“5. Fundamental rights and freedoms of the individual

(1). The Republic of Vanuatu recognises, that, subject to any restrictions imposed by law on non-citizens and holders of dual citizenship who are not indigenous or naturalised citizens, all persons are entitled to the following fundamental rights and freedoms of the individual without discrimination on the grounds of race, place of origin, religious or traditional beliefs, political opinions, language or sex but subject to respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health –

(a) life; / (b) liberty; (c) security of the person; / (d) protection of the law; / (e) freedom from inhuman treatment and forced labour; / (f) freedom of conscience and worship; / (g) freedom of expression; / (h) freedom of assembly and association; / (i) freedom of movement; / (j) protection for the privacy of the home and other property and from unjust deprivation of property; / (k) equal treatment under the law or administrative action, except that no law shall be inconsistent with this sub-paragraph insofar as it makes provision for the special benefit, welfare, protection or advancement of females, children and young persons, members of under-privileged groups or inhabitants of less developed areas.”

Proposed Amendment:

Subarticle 5(1) (f)

After “worship”, insert “subject to respect for the Christian principles and traditional Melanesian values of its people”.

What is intended by this amendment under article 5 of the Constitution is to capture into law the expressions of the preamble of the Constitution so as to render certain that the application of article 5 must be a broad application to the spirit of Vanuatu nationhood.

Concerns were raised about the inhibiting features of the expressions “Christian principles”, to the effect that this could be detrimental to the present makeup of religious groupings sharing and practicing their faith in Vanuatu which have captured the spiritual interests of indigenous citizens.

The Committee was of the consensus that to comprehensively capture the intentions of the preamble, that the amendment should not just be restricted to Christian principles and traditional Melanesian values of its people but to also insert therein “Faith in God”.

2. Remove right of naturalised citizens to stand for election to Parliament

Existing Article 17:

“17. Election of members of Parliament

- (1). Parliament shall consist of members elected on the basis of universal franchise through an electoral system which includes an element of proportional representation so as to ensure fair representation of different political groups and opinions.
- (2). Subject to such conditions or restrictions as may be prescribed by Parliament every citizen of Vanuatu who is at least 25 years of age shall be eligible to stand for election to Parliament.”

Proposed Amendment to Subarticle 17(2):

“(2) Subject to such conditions or restrictions as may be prescribed by Parliament every citizen of Vanuatu, other than a naturalized citizen, who is at least 25 years of age shall be eligible to stand for election to Parliament.”

It is proposed by this amendment to reserve the privilege of becoming a Member of Vanuatu’s Parliament to indigenous citizens, whilst previously under sub-article 17, the restrictions to enter Parliament was only based on the age of a person. And in previous years naturalized citizens were not precluded from entering into Parliament. It is now proposed that this amendment purports to put an end to the participation of naturalized citizens in the governance of this country.

What is sought is to reserve this right to contest elections to the national Parliament to indigenous citizens as a matter not only of right but of privilege.

In support of this proposition the Committee heard serious reservations from within it about the improper use of Vanuatu passports and programs aimed at invoking dual citizenship in a manner that could potentially remove the power and population of indigenous Ni-Vanuatu from the governance of this country.

Embedded in this proposition is the protection of the identity and sovereignty of Vanuatu’s first people. It commits the founding fathers of this nation’s aspirations to ridicule when there is a real prospect in the years to come through programs brought about through dual citizenship and unchecked naturalization that the people of this country, the very people this country became independent for, could become the subject of sabotage from poor or ill-conceived manipulation connived by politics and petty interests of the Public Servants of the Republic of Vanuatu merely to serve the short sightedness of personal gain.

On the other hand is the concern that the problem lies not in the Constitution but the conduct of politicians and governments. What is a necessary and vital duty of a Government is to give adequate protection to its people as a priority. This necessarily entails that there must

be coherent structures to challenge the requirements for dual or naturalize citizenship so as to impress upon the categories of persons making application for the former and latter to absorb the very essence of being Ni Vanuatu. The requirements for the attainments of either one or the other must for good reason be stringent so as to reinforce the superiority of the first people of this country.

There is no easy answer to this predicament. What is clear in the minds of the Committee is that this is one of those themes that must also traverse the nation so that the consultations are received to direct the nation to certainty on this point.

3. Remove certain powers of a caretaker government

ARTICLE 28

Existing Article 28:

“28. Life of Parliament

- (1). Parliament, unless sooner dissolved under paragraph (2) or (3), shall continue for 4 years from the date of its election.
- (2). Parliament may at any time decide, by resolution supported by the votes of an absolute majority of the members at a special sitting when at least three-fourths of the members are present, to dissolve Parliament. At least 1 week's notice of such a motion shall be given to the Speaker before the debate and the vote on it.
- (3). The President of the Republic may, on the advice of the Council of Ministers, dissolve Parliament.
- (4). General elections shall be held not earlier than 30 days and not later than 60 days after any dissolution.
- (5). There shall be no dissolution of Parliament within 12 months of the general elections following a dissolution under subarticle (2) or (3).”

No change to subarticles (1) to (5)

Proposed Amendment:

Add new subarticle (6)

“During the period from the dissolution of Parliament to the date on which a new Prime Minister is elected, the Prime Minister or any Minister must not:

- (a) authorise the expenditure of public funds for any matter which has not been appropriated by Parliament; and
- (b) approve any new project or policy; and
- (c) make any permanent appointments.”

What is intended in this article is to add a new sub-article to article 28 of the Constitution that addresses periods intra government. It is because the Constitution has been silent on the powers of Government during the period from the end of the life of Parliament to the next that incumbent Prime Ministers and Ministers have continued to add in their official capacities in such manner that it has been questioned in the past as to whether it is appropriate for them to act in as much the same way as though Parliament remains undissolved.

The potential risk upon the Republic of Vanuatu is that the nation falls on whims of politicians who are no longer Members of Parliament, save that they continue to occupy Ministerial and Prime Ministerial positions authorised by the Constitution. It has come a time when the Constitution must be cleared of such obscurity and politicians occupying at the expiry of the life of Parliament must have a serious appreciation of the limitation of their powers during such period.

It is intended by Governments to hold to account the Prime Ministers and Ministers during such period so that they have a serious appreciation that whilst they retain those posts because of the requirements of the Constitution, nevertheless, their powers during such period must be properly defined so as to impress upon them the clear understanding that their tenure in Government must accord with the tenure of Parliament.

Circumstances that have arisen in the past that have led to the need for this intervention upon the Constitution, include but not limited to the following:

1. During such period, those Members of Parliament whose tenure have expired, although still in occupation of the Constitutional post of Prime Minister and Minister must understand with clarity that they are without powers to authorise expenditure of public funds for any other matter than that which has been appropriated by Parliament.
2. There must be a degree of limitation in the ability of a Prime Minister and Ministers during such period to be able to embark upon new projects or policy which would otherwise be reserved for the incoming Government.
3. The powers of a Prime Minister and Ministers of State in relation to the conferral of any new or permanent appointments during this critical period must be curtailed.

There have been concerns raised in Committee deliberations that posts of the Prime Minister and Ministers of State by reason of law must exist in perpetuity and survive the office holder. Therefore the Prime Minister or a Minister must be readily armed with powers necessary to exercise the functions of the executive.

There were also concerns about the inter relationships between the politics of the nation and the administration whereby at the end of the day even during such period the political acts are merely an endorsement of the functions of the administration. Examples that come to mind are the occurrence of national disaster, emergency situations, and a conclusion of projects that requires the country to attend to its obligations, domestic or international.

Other than these, given the shortness in the period in between elected governments the Committee did not express serious reservation to the intentions of the amendment.

In sum, in relation to a new sub article (6) (a) the Committee was of the consensus that this is appropriate. As far as concerns sub-article (6)(b), because not only of the policy implication but also the risk of the costs involved that would impede upon the development plans of the incoming government. The Committee expressed no serious reservation. In so far as sub-article (6)(c), is concerned the Committee's views were, unless the political act was one that merely complemented the requirements of the administration, which the Committee contended was not necessarily disruptive to the incoming government, the Committee also expressed no serious objection.

Additional submissions

During the deliberations of the Committee the representatives of women, Vanuatu Christian Council of Churches and of disability made written representation for the Committee's consideration.

Whilst not covered by the scope of references designated by the Parliament to the Committee, the representations were received by it merely as references given the fact that was primarily before Parliament touched upon the issues subject those representations.

There was mention by the Committee that there was serious merit in the representations given they dealt with the rights of women as well as the rights of people with disability which are clearly rights recognised by the Constitution.

Given the limitation in the scope of the Committee's references, the Committee recognised that there exist avenues available to the representatives of women and disability reverting to the avenues recognised by Parliament for entry of the issues by sponsorship of the respective Ministry in charge.

The Committee felt that it was not inappropriate given these are institutions of Government, for the Committee to append those references hereto for Parliament's consideration and direction as to how these issues can form part of the amendments of Constitution. The submissions are found in Appendix 5.

Appendixes

1. Composition of CRC Members.
 - Signatures of Members of the CRC 2016.
2. Names of drafting team.
3. Copy of Bill
4. Copy of Motion No. 11 of 2016.
 - Terms of Reference.
5. Minutes
6. Submissions.
 - Disability
 - Women Affairs.
 - Vanuatu Christian Council
7. Legal advices

Appendix 1

Composition of CRC Members

1. Hon Ralph Regenvanu, Political rep (Ground and Justice Party-GJP)
2. Hon. Johnny Koanapo Rasou, Political rep (Vanuaaku Party-VP)
3. Hon. Alatoi Ishmael Kalsakau, Political party rep (Union of Moderates Party-UMP)
4. Hon. Christophe Emelee, Political party rep (Vanuatu National Development Party-VNDP)
5. Hon. Jacob Mata, Political party rep (NAG)
6. Hon. Samson Samsen, Political party rep (VPP)
7. Hon. Edwin Macreveth, Political party rep (FMP)
8. Hon. Ludvaune Jerome, Political party rep (UMP)
9. Hon. Ephraim Kalsakau, Independent rep
10. Hon. MP Don Ken, Political rep (PSP)
11. Chief Senimao Tirsupe, Rep (MCC)
12. Mr Elison Bovu, Rep (VSDP)
13. Christine Lahua, Rep, State Law Office (SLO)
14. Hon. Sato Kilman Livtuanu, Political party rep (PPP)
15. Charles Lini was later on replaced by Hamlison Bulu, Political party rep (NUP)
16. Mrs. Loreen Baniuri, rep (VCTU)
17. Dorosday Kenneth Watson (DWA)
18. Agnes Tari, State Law Office (SLO)
19. Mr Joe Kalo, rep (VNYC)
20. Hon MP Joshua Kalsakau, Political Party Rep (VLP)
21. Hon Hosea Nevu, Political Party rep (IG)
22. Ps. Allan Nafuki was later on replaced by Ps Shem Tema, Vanuatu Christian Council (VCC)
23. Mr. Charlie Harrison, VANGO representative
24. Hon Marcellino Barthelemu, rep (RMC)
25. Hon Alickson Vira (Natatok)

COMPOSITION OF THE CONSTITUTIONAL DRAFTING REPORT COMMITTEE
2016

1. Hon. MP Johnny Koanapo, Political Rep (VP)
2. Hon. MP Alatoi Ishmael Kalsakau, Political Rep (UMP)
3. Hon. MP Christophe Emelee, Political Rep (VNDP)
4. Mr.Hamlison Bulu, Political Rep (NUP)
5. Mrs Dorosday Kenneth Watson (DWA)
6. Ms. Christine Lahua (SLO)
7. Ms. Agnes Tari (SLO)
8. Mr Joe Kalo (VNYC)