

## THE BILL OF RIGHTS

7.1 In this chapter we review Chapter II of the 1990 Constitution entitled "Protection of Fundamental Rights and Freedoms of the Individual". We deal first with some general questions affecting the constitutional protection of fundamental rights and freedoms as a whole. Then we look in detail at particular rights and freedoms. Where aspects of these rights and freedoms are closely related to matters discussed in later chapters, we deal with them there, but with a cross-reference in this chapter.

### THE ORIGINS AND SIGNIFICANCE OF THE BILL OF RIGHTS

7.2 In many constitutions, the chapter on fundamental rights and freedoms of the individual is called a "Bill of Rights" - the name of a 17th century declaration of rights by the English Parliament that has since been used in constitutions in many parts of the world. In discussing the provisions in Chapter II of the 1990 Constitution, we therefore speak of the Bill of Rights. We also propose that, in the Constitution itself, the chapter setting out fundamental rights and freedoms should be entitled "Bill of Rights".

7.3 Some people referred in their submissions to the need for Fiji to have a Bill of Rights, unaware that fundamental rights and freedoms have been guaranteed in the Fiji Islands since 1966. This illustrates that the country's constitutional documents have never become widely known, in spite of people's keen interest in the composition of their institutions of government.

7.4 There are other reasons why the Bill of Rights has not made a large impact. Many do not have easy access to the legal processes required to invoke it. Judges and lawyers have mostly been educated in countries which have not had a judicially enforceable Bill of Rights. The constitutional expression of people's fundamental rights and freedoms was imported, not home-grown. It was also the product of contradictory influences which affected both its content and its style, making it difficult to read and creating a generally negative impression.

7.5 The 1990 Constitution made few changes to the Bill of Rights in the 1970 Constitution. The 1970 text was in a form developed by the Foreign and Commonwealth Office and included, with only slight variations, in the constitutions

of most former British colonies. The model reflected, on the one hand, the United Nations and regional initiatives to strengthen the international protection of human rights. It was based on the *European Convention on Human Rights* (1950) to which Britain became a party, not only in respect of its metropolitan territory, but also in respect of its colonies. The European Convention was itself based on the *Universal Declaration of Human Rights* (1948).

7.6 On the other hand, the formulation of the Bill of Rights reflected British caution about including individual rights in a judicially enforceable constitution - a step that has not yet been taken in Britain itself. Individual rights and freedoms were seen as already enshrined in the common law. The emphasis is not on affirming their existence but on protecting them from unjustified interference by the state. The Commission considers that, wherever possible, the Constitution should affirm rights and freedoms in positive terms.

7.7 The present Bill of Rights gives prominence to the fact that a person's rights and freedoms are not absolute. It emphasises the need to limit them in order to permit respect for the rights and freedoms of others and for the public interest. While this is true, the grounds on which limitations may be permitted occupy considerably more space than the expression of the rights and freedoms themselves and are sometimes capable of curtailing them more than is necessary or justifiable.

7.8 Yet it would be wrong to give the impression that individual human rights and freedoms have not been protected in the constitutional law of Fiji. With the exception of some aspects of political rights, already discussed at length, effect has been given in Fiji to the individual rights and freedoms generally recognised by the international standards, even in the period between 1987 and 1990. This should not be overlooked.

7.9 What is lacking is a clear understanding among the people of the Fiji Islands of the safeguards provided by a Bill of Rights. If they were more aware of these safeguards, they would be likely to accept more readily the idea that government should be shared among all ethnic communities. To protect the rights and freedoms of all people in the Republic, the Constitution should continue to contain a judicially enforceable Bill of Rights. However, it should be one whose purpose, effect and content can be more readily understood by the people.

## THE PURPOSE AND EFFECT OF THE BILL OF RIGHTS

7.10 A Bill of Rights is based on the idea that the powers of a government are limited by the Constitution. The purpose of the Bill of Rights is to protect the

rights and freedoms of individuals, and sometimes of groups, from undue interference by the state. It sets standards against which the executive and legislative branches of government should measure their policies, administrative action and legislation. The judicial branch has the responsibility of determining whether the other two branches have acted consistently with those standards. This means that the validity of both the laws made by Parliament and the government's administrative actions can be tested in the courts.

7.11 The Bill of Rights should provide clearly that it binds the legislative, executive and judicial branches of government at all levels: central, divisional, district and local; all bodies exercising legislative, executive or judicial powers in relation to a particular ethnic community; and all persons acting "in the performance of the functions of any public office or any public authority". The quotation is from section 16(1)(b) of the 1990 Constitution, the only context in which the present language of the Bill of Rights reveals the wide scope of its application.

#### **Should the Bill of Rights apply to the actions of private persons?**

7.12 Some people making submissions appeared to think that a Bill of Rights should also bind private persons, setting standards about the way citizens are required to treat one another. Historically, that has not been the purpose of a Bill of Rights, though the Fiji Bill of Rights does forbid discrimination in giving access to public facilities, even if they are privately owned.

7.13 In some countries, however, the courts, as in the United States, or the constitution-makers, as in South Africa, have sought to widen the focus of the Bill of Rights, to include private acts of discrimination. The justification for this approach is that discrimination has existed on a large scale; has curtailed the exercise of other rights, including political rights; has been recognised or supported by law; and has affected the composition of the legislature in ways that prevent it from effectively addressing the problem effectively through legislation.

7.14 The Commission believes the application of the Bill of Rights should not be expressly enlarged to require, permit or encourage its application to private persons in contexts where it does not apply to private persons already. On the other hand, nothing should be put into the Constitution to exclude its interpretation, through decisions of the courts, in ways that require private persons, as well as the state, to respect a particular right. The courts in the Fiji Islands should be free to take account of the evolving jurisprudence of United Nations bodies and court decisions in other countries with similar legal systems and values.

7.15 Although some individuals suffer from acts of private discrimination, not only on the ground of race or ethnicity, but also because they are women or members of other groups characterised by particular attributes, the Commission is aware of the long distance already travelled in Fiji. Most schools, clubs, and other institutions that once operated on a racially segregated basis have become multiracial. We consider that, if serious human rights abuses are found to exist in a particular field of private activity, the Government should address them by legislation. That has been done in countries like the United States, Australia and New Zealand.

### **What rights and freedoms should be included in the Bill of Rights?**

7.16 As has been seen, the Bill of Rights had its origins in the international standards of individual and group rights going back to the *Universal Declaration of Human Rights*. In accordance with its Terms of Reference, and the need for Fiji to comply with its international obligations in relation to human rights, the Commission examined the Bill of Rights in the 1990 Constitution from two perspectives. First, it considered whether any of its provisions conflicted with the international standards. Secondly, it considered whether its provisions should be expanded to take account of standards not at present reflected, particularly those arising from instruments adopted since the Bill of Rights first came into force in 1970.

7.17 As long as nothing in the Bill of Rights - or elsewhere in the Constitution - prevents Fiji from giving effect to the international standards, it is not essential that *all* of those standards be spelt out in the Bill of Rights. Sometimes, particular rights may be included within larger, more general rights. For example, the right to form and join political parties is an aspect of the right to freedom of association. Sometimes it may be appropriate to give effect to rights of a specialised kind in legislation, rather than in the Constitution. An example would be the rights of the child. An Act could deal more comprehensively with all aspects of the care, upbringing and education of children. Sometimes the Government, through its administrative action, may be able to give effect to the standards as a matter of policy. In the last two cases, the right does not have the status of supreme or overriding law, but the Government's compliance will often be effectively secured through its obligations to report to the international human rights body concerned.

7.18 One must judge which rights and freedoms should be included in the Bill of Rights, and in how much detail. We have already referred to the need to include only those which can appropriately be enforced by the courts. The Commission favours clarifying the scope of the rights and freedoms already referred

to in the Bill of Rights, rather than seeking to broaden its coverage. However, as in some other countries, the Constitution should include a statement that the people retain all other rights and freedoms conferred by the law of the Republic, even though they are not referred to in the Bill of Rights. This will serve as a reminder of the need to respect rights under the ordinary law that protect important values. For example, the Criminal Procedure Code confers various rights on defendants, going beyond those expressly referred to in the Bill of Rights.

### **Who should be protected by the Bill of Rights?**

7.19 The opening words of the Bill of Rights in section 4 of the 1990 Constitution recite that “every person in Fiji is entitled to the fundamental rights and freedoms of the individual”. Under the Interpretation Act (Cap 7), a “person” includes any company or association or body of persons, corporate or unincorporate. This formula includes incorporated bodies like companies and registered societies. It also includes associations or bodies of persons that are not incorporated. So, for example, mataqali or other land-owning units would be treated as “persons” with the right to protection from deprivation of their property. The reference to the rights and freedoms of all “persons” should therefore be retained.

7.20 The Commission has already emphasised that, although rights and freedoms are expressed as being those of the individual, it is often through the exercise of individual rights that particular communities and groups can exercise their rights, for example, to meet freely for the practice of their religion and other purposes, to speak their own languages and retain their culture. In Chapter 7, the Commission looks at the interface between the right to freedom from discrimination, and the duty of the Government to put in place affirmative action and social justice programmes for the benefit of Fijians and Rotumans, other ethnic communities, women, and all other disadvantaged groups. In Chapter 17, the Commission explains how the Bill of Rights can continue to accommodate the rights of Fijians, Rotumans and members of the Banaban community to their land and their own separate systems of administration. Accordingly, people have no reason to think that individual rights are or might be recognised in the Constitution at the expense of the rights of groups.

7.21 “Persons” are not of course limited to persons who are citizens. Foreigners present in Fiji are equally entitled to the protection of the Bill of Rights. This includes even a person who has not lawfully “entered” the Fiji Islands. For example, the right to liberty of the person applies to someone arrested on a beach on suspicion of attempting to enter Fiji unlawfully. His or her arrest and detention must be within the permitted limitations of that right.

7.22 There are some rights that only citizens can or should enjoy. However, there should be no unjustified distinctions between citizens and non-citizens, specially in view of the Commission's recommendations about the various categories of non-citizens who should have a constitutional right to enter and live in Fiji while waiting to qualify for registration as citizens. The Commission scrutinised the present Bill of Rights from this viewpoint.

7.23 Section 4 states that the protected rights and freedoms are enjoyed by every person "in Fiji". This statement is probably not intended to have a limiting effect, but it should be made clear that the Bill of Rights applies in any circumstance in which the law of the Republic applies to persons outside the Fiji Islands.

### THE LIMITATION OF RIGHTS AND FREEDOMS

7.24 The Bill of Rights in the 1990 Constitution sets out very fully the various ways in which particular rights may be limited. These permissible limitations take two forms. Sometimes the right or freedom itself is expressed in a qualified way. For example section 5(1) provides:

No person shall be deprived of his life intentionally *save in the execution of the sentence of a court in respect of a criminal offence of which he has been convicted* (emphasis added).

Virtually all Bills of Rights (and the international instruments which they reflect) limit some rights and freedoms through the language in which they are expressed. However, the Commission considers that such internal limitations should be retained only where the interests of clarity require them.

7.25 The Fiji Bill of Rights also allows most (but not all) rights and freedoms to be limited by laws made for certain specified purposes. Sometimes, those purposes are clearly necessary, or at least justified. Sometimes, the drafter is simply anxious to make it clear that certain types of laws are quite unconnected with the right or freedom concerned. Sometimes, the purpose for which a right or freedom may be limited by law is highly questionable. The Commission considers that the Bill of Rights should permit rights and freedoms to be limited by law only where there is a clear need to do so.

#### Limitations reasonably justifiable in a democratic society

7.26 Where the Bill of Rights permits the making of laws limiting particular rights and freedoms on broad, general grounds, such as "in the interests of defence, public safety, public order, public morality or public health", or "for the purpose of protecting the rights or freedoms of other persons", it adds the qualification

that the law, or anything done under its authority, will be upheld, except so far as it "is shown not to be reasonably justifiable in a democratic society". Some submissions discussed this test, raising the question whether it is sufficiently precise to provide adequate protection against laws that limit rights or freedoms unnecessarily or unjustly.

7.27 The standard of what is permissible in a democratic society originated in the *European Convention on Human Rights*. Under that instrument, however, and also under the *International Covenant on Civil and Political Rights*, the limitation must be "necessary in a democratic society". In domestic law, that may be difficult to establish. Such a test may not adequately reflect the "margin of appreciation" that international law allows to each state in applying the international standards.

7.28 A requirement that any limitation of a right should be judged by the standard of what is reasonable in a democratic society is a feature of other national constitutions. In Canada, there is no power to limit particular rights on specified grounds. Section 1 of the *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in the *Charter* "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". The Canadian courts have developed considerable jurisprudence about the application of this test to laws limiting the rights and freedoms set out in the *Charter*. The *New Zealand Bill of Rights (1990)* adopted the same approach to limitations, and the same test. Although the instrument is not supreme law, the New Zealand courts, too, are developing case law about the application of the test.

### Proposed approach

7.29 In comparing the different approaches, the Commission considered four questions. First, we looked at whether the Bill of Rights should continue to set out the specific purposes for which a *particular* right or freedom may be limited, or whether Fiji should follow Canada and New Zealand in moving to a general statement of the grounds upon which *all* rights and freedoms may be limited. We conclude that each statement of a right or freedom should continue to specify the particular purposes for which it can be limited by law. To do otherwise would make it even more difficult than it is now for departmental advisers and legislators to know whether a particular limitation is justified, and likely to be upheld by the courts.

7.30 Where limitations are permitted for particular purposes, those purposes should be described in general terms. This would avoid the need to include

excessive detail, and would help to make the language and structure of the Bill of Rights simpler and easier to read. We include below one or two examples of the drafting approach we have in mind.

7.31 Secondly, the Commission considered whether the test of what is reasonably justifiable in a democratic society should be retained. We have already recommended that the Constitution should continue to describe the Republic of Fiji as a democratic state. The test that any limitation of a right or freedom imposed by law must be one that is reasonably justifiable *in a democratic society* therefore remains appropriate.

7.32 The Commission concluded that the formulation of the test should not be changed to follow that used in Canada and New Zealand, or any of the variants adopted in other countries. It would be undesirable to make the test stricter than it is now, specially by using language that might suggest that what is appropriate in developed countries like Canada or New Zealand is necessarily appropriate in Fiji. The Commission recognised however that both those countries are multi-ethnic. In determining what is reasonably justifiable in a democratic society like Fiji, the courts are likely to get considerable help from looking at Canadian, New Zealand and other overseas jurisprudence, even if the language of the test in the Fiji Islands is a little different.

7.33 Thirdly, the Commission considered the extent to which the test needs to be applied. We conclude that it should be retained in all contexts where it is used now, and added in all other contexts where there is a need for the courts to look at the nature and extent, as well as the purpose, of limitations of rights and freedoms imposed by or under a law.

7.34 Fourthly, the Commission looked at the technical question of who has to prove that the limitation imposed by a law is consistent with the Constitution. Is it the complainant or the state? It concluded that the present formulation probably throws the burden of proving that the law is not reasonably justifiable in a democratic society on the person challenging the validity of that law. The formulation should be changed to make it clear that, if a law or a thing done under a law is found to limit a right or freedom, it should not be upheld unless the state discharges the burden of proving that the limitation is reasonably justifiable in a democratic society.

7.35 The question of permitting derogations from rights and freedoms in times of emergency is dealt with separately in Chapter 19.

## THE INTERPRETATION OF THE BILL OF RIGHTS

7.36 The Commission's general approach to the limitation of rights and freedoms is that each section declaring a right or freedom should be self-contained. Any power to limit it should be conferred within the section itself. It found that the introductory reference in section 3 of the 1970 Constitution (section 4 of the 1990 Constitution) to the fact that a person's rights and freedoms are not absolute, but limited by the need for respect for the rights and freedoms of others and for the public interest, has been misinterpreted on some occasions by the courts in Fiji. As one of the submissions pointed out, it has been regarded as a source of *additional* grounds for limiting rights, if there is doubt about whether a particular law is authorised by a ground for limitation referred to in the relevant section itself. In our opinion, the approach taken by the courts is plainly wrong. The risk of continuing misinterpretation should be eliminated.

7.37 The Bill of Rights should be introduced by a simple statement affirming the rights and freedoms it sets out. The existing references to specific rights and freedoms, the nature of the grounds on which they may be limited and the need for the rights and freedoms to be accorded without distinction on the listed grounds should all be omitted. We later propose a reformulation of section 16 to recognise the right of everyone to equality under the law, without discrimination on any of the listed grounds. That right will require the Bill of Rights itself to be applied on the basis of equality, without distinction on any of the prohibited grounds.

7.38 The content of each right or freedom and the grounds on which it may be limited should be determined in accordance with our recommended approach to the interpretation of all provisions of the Constitution. The need to look at the text of the relevant provision in its context and in the light of its purpose, taking account of the spirit of the Constitution as a whole, should ensure that rights and freedoms in Fiji are well-protected, but without depriving the state of the powers it should properly have.

## THE APPLICATION OF THE BILL OF RIGHTS TO ALL EXISTING LAW

7.39 In general, the Bills of Rights in the 1970 and 1990 Constitutions applied to all the law of the Fiji Islands already existing at the time of their entry into force. The one exception was that, under what is now section 16 (5)(a), the prohibition against discrimination did not apply to a law in force immediately before 23 September 1966 and continuing in force at all times since that date. In reviewing section 16, we examine the effect of that provision and make recommendations about the extent to which it should remain.

7.40 The Bill of Rights should continue to apply to all law, whether made before or after the date on which the Bill of Rights enters into force. This means that the Bill of Rights will continue to be the standard against which the validity of all the law of the Fiji Islands can be tested - whether that law is enacted after the effective date of the Bill of Rights, or was already in force, under the common law or statute, when the Bill of Rights took effect.

7.41 Even where we recommend changes to the present Bill of Rights, in most cases it should be feasible to make any necessary changes in the existing law by the date on which the new Bill of Rights takes effect. In one case, again affecting section 16, we recommend that Parliament should make provision for the progressive implementation of the right, taking account of what is reasonable in the light of available resources. If, in other cases, it should be found that there will be practical problems in giving effect to the changes, the new provision should itself set a date for its entry into force. The delay should not exceed two years.

## THE ROLE OF THE COURTS

7.42 The courts have a key role in upholding the Bill of Rights. This requires the judges to exercise their independence fearlessly in giving decisions about the validity of the actions of the other branches of government. In Chapter 13 we make recommendations designed to recognise and promote the independence of the judicial branch in carrying out all aspects of its functions.

7.43 It is widely recognised that the task of interpreting and applying the Bill of Rights requires judges not only to adjudicate between the state and the individual as independently and objectively as possible, on the basis of an informed interpretation of the Constitution, but also to display political skills. By this we mean that, as in the application of other aspects of public law, it calls for the application of public policy considerations with sensitivity to the implications for the constitutional relationship between the courts and the people's elected representatives.

7.44 Individual judges, by their temperament, experience and training, must be suited to the exercise of such responsibilities. On-going in-service training, including attendance at overseas law conferences and other appropriate meetings, provides necessary opportunities for members of the judiciary to keep abreast of international thinking about the application of Bills of Rights. In Chapter 13, we make recommendations about aspects of judicial selection and training. Here, we make the point that the Bill of Rights places a special kind of responsibility on those appointed to judicial office.

## A HUMAN RIGHTS COMMISSION

7.45 In many countries a Human Rights Commission, too, is charged with responsibilities for the promotion and protection of Human Rights. In view of the limited public awareness of the Bills of Rights in the 1970 and 1990 Constitutions, as well as the lack of in-depth understanding about the work of United Nations bodies in promoting human rights, the Commission considers that such a body could play a useful role in the Fiji Islands. The Constitution should therefore establish a Human Rights Commission.

7.46 Its work should in the first instance be directed to public education. Respect for the Bill of Rights requires understanding of its provisions and their origin in the international instruments, as well as understanding and acceptance of the promotional and supervisory role of United Nations bodies and their member states in the international protection of human rights.

7.47 The Human Rights Commission should also have an advisory function in alerting the government to matters affecting compliance with human rights norms. It should be empowered to make recommendations to the appropriate Minister on the desirability of legislative or administrative action to give better protection to human rights, and better compliance with the international standards. For example, the recommendations could relate to the desirability of Fiji becoming a party to a particular international instrument, or putting itself in a position to withdraw reservations to an instrument to which it is already a party.

7.48 The Commission could also be given the function of making recommendations on the implications of any proposed Act or regulations or other policy of the Government that the Commission considers may affect human rights. However, this is a role that needs to be exercised with extreme caution. Opinions may legitimately differ on whether a proposed way of dealing with a recognised evil is or is not consistent with human rights.

7.49 That question is properly a matter for public debate. But a body devoted to the protection of human rights should express its concerns only after undertaking adequate research and seeking to ensure that its recommendations will achieve a proper balance between human rights principles and the problem that the Government is trying to address. Otherwise its efforts could be counterproductive.

7.50 The functions of a Human Rights Commission under a Constitution that is supreme law must be compatible with the responsibility of the courts to determine whether or not a law passed by Parliament, or regulations made by the executive,

or administrative action taken by a department or other agency, comply with the Bill of Rights. It would be undesirable for the Human Rights Commission to purport to make a finding about what the Bill of Rights requires in a particular case that is within the jurisdiction of the courts. The role of the Commission and the role of the courts will need to be kept distinct.

7.51 We also looked at whether a Human Rights Commission should be empowered to assist individuals in bringing claims that their rights or freedoms under the Bill of Rights have been infringed by the state. However, such issues often arise in the course of existing proceedings, particularly criminal cases in which the state is the prosecutor. It may be undesirable, as well as impracticable, for another organ of the state to become involved. Direct assistance to individuals in enforcing their rights should therefore be given through legal aid, a matter on which we make recommendations below.

7.52 Under section 120 of the 1990 Constitution, the President, acting on the advice of Cabinet or a Minister, may seek the opinion of the Supreme Court on any question as to the effect of any provision of the Constitution. Because the courts normally develop the law by applying it in the context of the facts of particular cases, argued before them on an adversarial basis, the power to seek such opinions is one that should be used sparingly. However, situations could arise in which the Human Rights Commission could appropriately recommend to Government that a question about the legal effect of a provision of the Bill of Rights should be referred to the Supreme Court for an opinion. It should be so empowered.

7.53 Finally, in considering the functions of a Human Rights Commission, we revert to our suggestion that, if necessary, legislation could be enacted to address serious problems of discrimination between private citizens. These might include the denial of equal opportunities in the workplace for women and members of other disadvantaged groups or other human rights abuses such as sexual harassment. Under such legislation, complaints could be dealt with in the first instance by mediators or conciliators appointed under the auspices of the Human Rights Commission. Often, such situations yield more readily to relatively informal dispute settlement procedures.

7.54 Of course, a continuing dispute about whether a person's rights have been infringed must ultimately be a matter for a court or other judicial tribunal. However, the Human Rights Commission, or one of its members appointed as Proceedings Commissioner, could be given standing to bring a case on behalf of an individual

or group. We consider that, although the Constitution should set out the main functions of the Human Rights Commission, it should also empower Parliament to give it further functions by Act. This would allow an element of experimentation in working out how the new body can best contribute to the promotion of human rights in the Fiji Islands.

7.55 Taking account of the functions proposed above, we consider that the Human Rights Commission should consist of three members. One should be the Ombudsman, *ex officio*. Although the Ombudsman's powers of investigation do not normally extend to matters in respect of which the aggrieved person has a remedy before a court or tribunal, they do include questions of whether any of the provisions of the Bill of Rights have been contravened. One of the other two members should be a person who is, or is qualified to be, a judge of the High Court. We make recommendations about the other aspects of the appointment and tenure of office of members of the Human Rights Commission in Chapter 15.

#### REWRITING THE BILL OF RIGHTS

7.56 It is implicit in much of what we have said that the provisions of the Bill of Rights in the 1990 Constitution should be thoroughly revised, not only to take account of our recommended changes of substance, but also to make the Bill of Rights more readily accessible to the people of the Fiji Islands. The responsibility will rest with the members of Parliament who will have the task of putting in place any constitutional changes for this purpose. They should, however, have access to specialist advice.

7.57 During its visit to South Africa, the Commission was impressed with the way in which academics, judges and other experts were contributing to the process of constitutional reform. There could be benefit in obtaining comments on a draft of a new Bill of Rights in particular, from a panel of experts inside and outside the Republic.

#### RECOMMENDATIONS

65. **The Constitution should continue to contain a statement of judicially enforceable individual rights and freedoms. It should be called the Bill of Rights.**
66. **Wherever possible, particular rights and freedoms should be affirmed in positive terms.**
67. **In view of its function of protecting the rights and freedoms of individuals and groups from undue interference by the state,**

**the Bill of Rights should expressly bind the legislative, executive and judicial branches of government at all levels: central, divisional, district and local, as well as all bodies exercising legislative, executive or judicial powers in relation to any ethnic community, and all persons acting in the performance of the functions of any public office or any public authority.**

- 68. The Bill of Rights should not expressly bind private persons to a greater extent than it does already. However, its terms should not exclude its possible application to other actions of private persons if appropriate. The courts should take account of the developing international jurisprudence on this question.**
- 69. If serious human rights abuses by private persons are found to exist in the Fiji Islands, the Government should address them by ordinary legislation.**
- 70. The Bill of Rights should not conflict with the international human rights standards and should give effect to them where appropriate.**
- 71. The main emphasis should be on clarifying the scope of rights and freedoms already recognised. However, the Constitution should provide that the people retain all other rights and freedoms recognised by the law of the Republic, even though they are not set out in the Bill of Rights.**
- 72. The Bill of Rights should continue to affirm the rights and freedoms of all "persons" (whether citizens or not), within the wide meaning of that term as defined in the Interpretation Act. This definition enables individual rights to be invoked by or for the benefit of groups.**
- 73. In the few cases where rights are conferred on all "citizens" rather than all "persons", the exclusion of non-citizens should be evaluated in the light of the Commission's recommendations that certain categories of foreign citizens should have a constitutional right to enter and reside in Fiji while waiting to qualify for registration as citizens.**
- 74. It should be made clear that the Bill of Rights applies, not only to persons "in Fiji", but also in any circumstance in which the law of the Republic of the Fiji Islands applies to persons outside the Republic.**

75. **Where the language in which a right or freedom is expressed limits its scope or application, the limitation should be retained only if essential for the purposes of clarity.**
76. **Where the Bill of Rights permits a right or freedom to be limited by law for a specified purpose, the power to impose limitations for that purpose should be retained only if clearly necessary.**
77. **Each statement of a right or freedom should continue to specify exhaustively all the purposes for which it can be limited by law. To avoid excessive detail, those purposes should, so far as possible, be described in general terms.**
78. **Where limitations can be imposed by law for purposes described in broad language, and in any other case where the courts should be required to look in a qualitative way at the nature and extent of limitations for a particular purpose, the Bill of Rights should continue to provide that the law and anything done under it will not be valid unless "reasonably justifiable in a democratic society".**
79. **That test should not be made stricter, as has been done in some developed countries. However, despite the lower standard of justification required in Fiji, the courts in Fiji should look to the developing jurisprudence of other countries for guidance about the methodology of applying the test in the circumstances of the Republic.**
80. **The formulation of the test should make it clear that, if a law or something done under it is found to limit a right or freedom, the state has the burden of proving that the limitation is reasonably justifiable in a democratic society.**
81. **To avoid the risk of misinterpretation, the Bill of Rights should be introduced by a simple statement affirming without description or qualification the rights and freedoms it sets out.**
82. **Unless otherwise provided for good reason, the Bill of Rights should continue to apply to all the law of Fiji, whether enacted before or after its entry into force. If, in a particular case, there are likely to be substantial problems in giving effect to recommended changes involving an expansion of a right or freedom, the entry into force of the new provision should be expressly deferred for a specified period not exceeding two years, to enable the existing law to be brought into compliance.**

83. **The responsibilities of the courts to apply and enforce the Bill of Rights should be taken into account in judicial selection and training.**
84. **Without trespassing on the responsibility of the courts to enforce the Bill of Rights, the Constitution should create a Human Rights Commission with the functions of**
- (a) **educating the public about the nature and contents of the Bill of Rights, including its origins in the international instruments and the responsibilities of United Nations bodies and member states in promoting respect for human rights;**
  - (b) **making recommendations to Government about matters affecting compliance with human rights, including compliance with the international standards and the desirability, on occasions, of seeking an opinion from the Supreme Court on the effect of particular provisions of the Bill of Rights; and**
  - (c) **exercising such other functions in relation to human rights as may be conferred on the Human Rights Commission by Act. These might include functions under any legislation enacted to deal with serious abuses of human rights by private persons.**
85. **The Human Rights Commission should consist of three members, of whom one should be the Ombudsman, ex officio, and one should be a person who is, or is qualified to be, a judge of the High Court.**
86. **The Bill of Rights in the 1990 Constitution should be thoroughly revised to take account of the foregoing recommendations, as well as the recommendations on particular rights and freedoms set out below. It should have a clearer structure and be written in a simpler style, enabling it to be read and understood more easily by the people of the Fiji Islands. Consideration should be given to seeking comments on the draft of a new Bill of Rights from a panel of experts inside and outside the Republic, before its adoption by Parliament.**

## THE RIGHT TO LIFE

7.58 Section 5 of the 1990 Constitution protects the right to life, a right recognised by all the main human rights instruments. The Constitution should continue to affirm in positive terms that everyone has the right to life.

7.59 In protecting the right to life, section 5(1) provides that except in the specified circumstances no person may be deprived of life intentionally. This formulation makes it clear that the state cannot itself deprive a person of life. It also implies that the state has a duty to deter murder and other crimes involving intentional killing by making them offences against the law and sentencing persons convicted of such offences to appropriate punishment.

7.60 In contrast, most international instruments and national constitutions provide that everyone has the right to life, without any further indication about the content of the right. Such a provision can give rise to difficult issues. For example, it is sometimes claimed that abortion or euthanasia should be outlawed as incompatible with the right to life. In a few countries, people have sought to spell out the right to life in the constitution in ways that would forbid any interference with the natural processes of conception, birth and death. The Commission believes that it would be unwise to contemplate any such initiative in Fiji.

7.61 Questions of this kind give rise to complex biological and moral issues on which people hold a variety of views. In the absence of substantial consensus, it would be wrong to impose a particular view by means of provisions in the Constitution. Nor did the submissions suggest such a course. Accordingly, the Commission considers that, in affirming everyone's right to life, the Constitution should not attempt to spell out the parameters of the right. If such questions were to come before them, the courts in the Fiji Islands could be expected to take a cautious approach, as the courts have done in most other countries.

### **The death penalty**

7.62 Under the 1990 Constitution (which does not differ from the 1970 Constitution in this respect), a person's right to life is expressly qualified in various ways. As we have mentioned earlier, section 5(1) permits the execution of a person sentenced to death for committing a criminal offence. The question of whether the Constitution should continue to permit the imposition of the death penalty in Fiji was raised in the submissions and carefully considered by the Commission.

7.63 In 1979, Parliament abolished the death penalty for murder and substituted a mandatory sentence of life imprisonment. However, death is still the penalty for genocide and treason. It is a discretionary penalty for certain offences under military law. The debates in the House of Representatives and the Senate in 1979 discussed the reasons for and against abolishing the death penalty for murder very thoroughly. A number of members who had supported the retention of the death penalty in earlier debates acknowledged that they had come to a different view. On a conscience vote, the amending Bill was passed in both Houses without division.

7.64 The international standards reflect a strong preference for doing away with the death penalty. Although it is permitted for criminal offences by both the *European Convention on Human Rights* and the *International Covenant on Civil and Political Rights*, the *Covenant* provides, in the article on the right to life, that, “[i]n countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes ...”, and, later in the article, that “[n]othing in this article shall be invoked to delay or to prevent the abolition of capital punishment ...”. There is a special Second Optional Protocol to the *Covenant* through which individual states parties can assume the obligation to prohibit the death penalty. As at 1 July 1995, twenty-three states have done so.

7.65 Reflecting this trend, the constitutions of some countries, including several in the Pacific, prohibit capital punishment. Although section 5(1) of the 1990 Constitution authorises the imposition of the death penalty, section 99(6) requires every sentence of death imposed on a person, other than one imposed by a court martial, to be considered by the Commission on the Prerogative of Mercy. The Commission must then advise the President whether or not to exercise his powers of pardon or commutation. So, already in Fiji, there is constitutional recognition of the need to have very good reason for carrying out a sentence of death.

7.66 The Commission recognises that, in setting penal policy, the interests of victims and of society at large need to be considered. Those who commit crimes must be suitably punished, but account should be taken of the deterrent and reformatory purposes of punishment, as well as its purpose of retribution. Studies of the deterrent effect of capital punishment have been inconclusive. If it is prescribed as the punishment for a particular crime, its mandatory nature excludes any consideration of extenuating circumstances. The 1979 decision arose from the need to consider the existing law under which the death penalty for murder had been made discretionary. It was accepted that Parliament, not the judges, should take the responsibility of deciding whether death was the appropriate penalty.

7.67 The Commission recognises that people's views on capital punishment are ultimately moral and personal views. One such view is that the potential for change is basic to a person's humanity. Capital punishment denies this potential, focuses only on the idea that an offender should pay for the crime committed, and excludes the possibility of reform.

7.68 After taking these various considerations into account, the Commission concludes that the qualification of the right to life permitting capital punishment should be repealed. The Constitution should prohibit the imposition of the death penalty by the law of the Republic. It noted, however, that such a step would not prevent the reintroduction of capital punishment, if the Constitution were to be amended for that purpose. Nevertheless, the need for a constitutional amendment would ensure that reintroduction would not occur hastily, but only after full consideration and debate.

7.69 The Commission also noted that a sentence of imprisonment, including imprisonment for life, is usually commuted after the offender has served a certain number of years. At the point when commutation is under consideration, account can be taken of the nature of the crime and the existence of aggravating or mitigating factors. The Commission is firmly of the opinion that the proportion of a sentence of imprisonment for life, or for a term of years, that an offender is actually required to serve should be commensurate with the nature of the crime committed. It does not suggest that the matter be dealt with in the Constitution.

### **Death as a result of the use of force**

7.70 Section 5(2) of the 1990 Constitution provides that, in certain other situations, a person is not to be regarded as having been deprived of the right to life. These situations involve four elements:

- a person's death as the result of the use of force;
- the use of that force for one of the purposes specified in the subsection;
- the existence of a law permitting the use for that purpose of an amount of force that is reasonably justifiable in the circumstances; and
- a finding on the facts that, in the particular case, the amount of force actually used did not exceed that limit.

These are the elements of the normal test for excluding criminal liability when a person causes the death of another person as a result of using force. The specified

purposes for which force may be used are: the defence of any person against violence or the defence of property; effecting a lawful arrest or preventing the escape of a person lawfully detained; suppressing a riot, insurrection or mutiny; and preventing a person from committing a criminal offence.

7.71 The submissions expressed concerns about the scope of the exclusions, raising such questions as whether they permitted the killing of persons merely upon suspicion, whether they gave the police or prison officers a licence to kill escaping prisoners, and whether the use of force in defence of property, as distinct from the defence of a person, could ever be justified. The Commission notes, however, that not only the use of force, but also the amount of force actually used must be reasonably justifiable in the particular circumstances. While in some circumstances the use of force in defence of property might not be reasonable, in others, such as when a person's home is broken into in the middle of the night, the use of an amount of force that is reasonable in the circumstances might well be justifiable. We consider that, because they incorporate safeguards limiting the amount of force that may be used to what is reasonably justifiable in the particular circumstances, all of the existing exclusions should remain.

7.72 Section 5(2) also provides that the death of a person as a result of a lawful act of war is not a deprivation of the right to life. That exclusion should also remain, but with the substitution of a reference to "a lawful act in the course of armed conflict", reflecting the fact that formal declarations of war are seldom made now. It is better to use the terminology of the Geneva Conventions for the protection of the victims of armed conflict.

## RECOMMENDATIONS

87. **The Constitution should affirm in positive terms that everyone has the right to life, without spelling out the content of the right.**
88. **The present provision qualifying the right to life by permitting the execution of a person sentenced to death for committing a criminal offence should be repealed. The Constitution should prohibit the imposition of the death penalty under the law of the Republic. Section 99(6) should be consequentially amended.**
89. **Without including provision to that effect in the Constitution, the policy in relation to the commutation of sentences of imprisonment for life or for a term of years should ensure that an offender serves a proportion of the sentence commensurate with the nature of the crime committed.**

90. **The Constitution should continue to provide that the right to life is not infringed by a person's death as a result of the use of force for the purposes specified in section 5(2) of the 1990 Constitution, if a law permits the use of an amount of force that is reasonably justifiable in the circumstances and the amount of force actually used does not exceed that limit.**
91. **It should also provide that the right to life is not infringed by the death of a person as a result of "a lawful act in the course of armed conflict", rather than "a lawful act of war".**

## THE RIGHT TO PERSONAL LIBERTY

7.73 Section 6 of the 1990 Constitution protects the right to personal liberty. It does so by forbidding deprivation of a person's liberty, except on the specified grounds. The Constitution should affirm in positive terms that everyone has the right to personal liberty.

7.74 Section 6(1) sets out a comprehensive list of the grounds on which the law may authorise the deprivation of a person's liberty. A person cannot be deprived of liberty unless a law so provides. The Commission considers that the grounds on which a person may be deprived of liberty should continue to be listed comprehensively. We looked at whether all of the existing grounds were justified. With the exceptions, and subject to certain safeguards we conclude that they should be retained.

### **Imprisonment for debt**

7.75 Under section 6(1)(c), the law may authorise a person to be deprived of liberty

- (c) in execution of the order of a court made to secure the fulfilment of any obligation imposed on him by law.

The Commission took note of the *Report of the Commission of Inquiry on the Courts of Fiji* (1994) which recommended as follows:

Imprisonment as a sanction for unpaid accounts is an outmoded concept; it should be abolished. (Recommendation 256)

It also took note of a decision of the Fiji Court of Appeal that a simple contract debt is not "an obligation imposed by law".

7.76 The Commission considers that the Constitution should make clearer provision about whether, and if so when, the law should be able to provide that a

person may be imprisoned for failure to pay contract debt or unpaid fine, maintenance or tax, if a court has made an order that the amount owing should be paid. Its starting point is that a person entering into a contract under which another person is to pay money takes the risk that the other party may not do so. The processes of the state should be available to enforce payment, but most debtors fail to pay because they do not have the money. The state should not imprison them for this reason. The creditor should have resort to the other available remedies including attachment of property or income and bankruptcy proceedings.

7.77 Accordingly, the Constitution should expressly prohibit imprisonment for debt or failure to fulfil other contractual obligations. Its present provisions should not be widened to permit the arrest of absconding debtors. We stress, however, that a person who obtains credit by falsely representing that he or she has the money to pay will still be liable to criminal prosecution.

7.78 The Commission also considers that persons convicted of an offence should not be sentenced to pay a fine and, in default, to a period of imprisonment. This needlessly helps to fill the gaols and sometimes sets minor offenders on a path of crime. The Constitution should make it clear that no one can be sentenced to imprisonment for non-payment of a fine. In default, a sentence of community service should be substituted. This proposal does not affect laws under which the punishment for a particular offence is imprisonment or a fine, or both. The court will still have the discretion to impose all or any of those sentences. However, if a person fails to pay a fine, a sentence of community service, not one of imprisonment will be substituted.

7.79 The Commission believes that the Constitution should not permit the imprisonment of a person who fails to meet an obligation to pay tax or maintenance, except in cases of wilful default by a person who had the means to pay. Instead, the person should be required to undertake paid work. The obligation should be met by the attachment of all or part of the income from that employment.

#### **Arrest or detention of a person suspected of being about to commit a crime**

7.80 Section 6(1)(e) permits a law to provide that a person may be deprived of liberty upon reasonable suspicion of his having committed, *or being about to commit*, a criminal offence. (Emphasis added) The Commission notes that the concept of reasonable suspicion that a person is about to commit an offence appears to be wide enough to permit provision to be made by law for the preventive detention of persons who have not committed any offence. The Penal Code contains provisions which could be used for this purpose. The police need

reasonable powers to prevent crime, but, in view of the fact that an attempt or a conspiracy to commit an offence is itself an offence for which a person can be arrested, tried and punished, the preventive powers should not, except possibly in time of emergency, extend to the imprisonment of persons merely on reasonable suspicion that they may be about to commit offences. The provision in section 6(1)(e) authorising a law permitting a person to be deprived of liberty merely on reasonable suspicion of being about to commit a crime should be repealed. A consequential change should be made to the wording of section 6(3)(b).

### **Arrest or detention to enforce restrictions on freedom of movement**

7.81 Section 6(1)(j) authorises a law to be made permitting a person to be deprived of liberty for the purpose of enforcing restrictions on his or her freedom of movement imposed in accordance with section 15. Later in this chapter we make proposals for narrowing the permitted restrictions of the right to freedom of movement. The recommended changes will need to be reflected in section 6(1)(j).

### **Deprivation of liberty in time of emergency**

7.82 Section 6(7) authorises the right to personal liberty to be limited by law during a time of public emergency. Section 17 contains safeguards for persons detained under such a law, requiring, among other things, that the continuation of the detention be reviewed by an independent tribunal. We examine both provisions in Chapter 19.

### **Law to be reasonably justifiable in a democratic society**

7.83 The Commission notes that there is no qualitative requirement concerning the nature of the restrictions on personal liberty which can be imposed by a law for any of the purposes listed in section 6(1). For the reasons explained earlier in this chapter, it considers that the state should be required to show that a law permitting a person to be deprived of personal liberty on any of the grounds referred to in section 6(1) is reasonably justifiable in a democratic society.

### **Rights of persons arrested or detained**

7.84 Section 6(2) - (6) sets out the positive constitutional rights of a person who has been arrested or detained. These rights have long been reflected in the common law and are recognised in the international instruments and also in national constitutions, including those of most Pacific Island countries. The Commission considers that all the existing rights of arrested or detained persons should be retained, but that some should be spelt out or supplemented in the manner now proposed.

### **Right to be told of reasons for arrest or detention**

7.85 Under subsection (2), a person who is arrested or detained must be informed as soon as reasonably practicable, of the reason for the arrest or detention, in a language that he or she understands. The Constitution should also give a person arrested or detained upon reasonable suspicion of having committed a criminal offence the right to be informed of the nature of any charges that the police decide to bring. The Constitution should also require such a person, if not charged, to be promptly released.

7.86 Subsection (2) entitles a person arrested or detained for the purpose of being brought before a court in execution of the order of a court, or on suspicion of having committed a criminal offence, to “reasonable facilities to consult a legal representative of his own choice”. More modern constitutions considerably expand the statement of the circumstances in which a person should have the right to legal representation. They provide that the person should be informed of that right, should be given appropriate facilities for its exercise, and should have access to legal aid if he or she cannot afford to pay a lawyer.

### **Right to legal advice**

7.87 The Commission considers any person arrested or detained should have the right to legal advice. So also should a person who is being questioned by the police in a coercive situation, for example at a police station, even though not arrested or detained.

7.88 A suspected person’s access to legal advice is a central component in achieving a proper balance between the powers of the police to apprehend and secure the conviction of those who commit offences and a suspected person’s rights, already recognised in the Constitution, not to be subjected to torture or to inhuman or degrading punishment or other treatment (section 8), to be presumed innocent until he is proved or has pleaded guilty (section 11(2)(a)), and not to give evidence at the trial (section 11(7)).

7.89 We believe that the disproportionate number of Fijians among persons sentenced to imprisonment is in part due to lack of access to legal advice when first arrested or questioned on suspicion of having committed an offence, as well as at the subsequent trial. The right of suspects to legal advice will not make the police less able to question them effectively. On the contrary, the greater the assurance that the police have acted within the limits of the law, the less likely it is that a statement by the defendant will be excluded because it was not voluntary or was otherwise improperly obtained.

7.90 Accordingly, the Constitution should make provision to the following effect:

- (a) A person who is arrested or detained, or is being questioned by the police in a coercive situation on suspicion of having committed a criminal offence, or has been charged, should have a right to consult a lawyer, and to be informed of that right as soon as it arises.
- (b) A person suspected of having committed a criminal offence, who wants to consult a lawyer, should not be questioned, or further questioned, until he or she has had a reasonable opportunity to exercise that right; should be entitled to consult the lawyer of his or her choice, subject to any reasonable restrictions as a condition of being granted legal aid; and should be afforded prompt and adequate opportunity to consult the lawyer in private, in the place where he or she is being detained or questioned.

### **Right to legal aid**

7.91 Although, as has been seen, section 6(2) gives certain categories of arrested or detained persons a right to consult a legal representative of their choice, it makes no mention of any right to legal aid. It may be compared in that respect with section 11(2)(d) which gives a person a right, at a criminal trial, to defend himself “where so prescribed, by a legal representative provided at the public expense”. The right to legal aid is conditional on the existence of a legal aid scheme. There is no constitutional obligation to put such a scheme in place. Even so, it is a reminder that legal aid may be a necessary condition of ensuring that suspects and defendants can avail themselves of other constitutional and legal rights.

7.92 The *Report of the Commission of Inquiry on the Courts of Fiji* (1994) made extensive recommendations about the reform of the existing legal aid system in Fiji. A new scheme is now in course of implementation. We consider that a person who is arrested or detained, or is being questioned by the police in a coercive situation on suspicion of having committed a criminal offence, or has been charged, should have a constitutional right to the services of a lawyer under a scheme for legal aid, where he or she does not have sufficient means to engage a lawyer and substantial injustice would otherwise result.

7.93 Such a right would allow the state considerable latitude in deciding how best to provide such a person with access to a lawyer on a legally aided basis, and to impose reasonable restrictions on the circumstances in which legal aid should be made available. A person should, of course, be informed of the right to legal aid at the time of being informed about the right to consult a lawyer.

### **Right to contact with family and other persons**

7.94 The *United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, as well as some modern constitutions, contain guarantees that a person will not be held incommunicado, without opportunity to make contact even with his or her family. Accordingly, the Constitution should require that, if a person is arrested or detained, the police or other authority holding the person should inform a relative or friend of that person as soon as practicable. A detained person should have reasonable opportunities to receive visits from family members or friends, a religious counsellor or a social worker. He or she should be informed of that right as soon as practicable.

### **Right to be brought before a court**

7.95 Subsection (3) requires that persons arrested on the order of a court or on suspicion of criminal activity "shall be brought without undue delay before a court". It is for the courts to decide on the particular facts whether or not there has been "undue delay". A number of constitutions set a maximum time within which a person must be brought before a court.

7.96 Although it was not suggested to the Commission that undue delays have occurred in Fiji, we consider that there would be advantages in stipulating a maximum period of 48 hours from the time of arrest, or, if this is not reasonably possible, as soon as possible thereafter. This provision would allow a longer time if a person is arrested on a Friday evening, and there is no court sitting until the following Monday. It would also take account of the unavoidable delays in bringing an arrested person from an outer island. However the maximum period should not be allowed to elapse as a matter of routine, if it is possible to bring a person before a court within a shorter period.

### **Right to test the legality of arrest or detention**

7.97 The Constitution does not confer a right to seek a writ of habeas corpus or other specific means of challenging the legality of a detention of *all* arrested and detained persons. Habeas corpus, literally, is a court order to "produce the body

or person". It is the traditional common-law method of challenging the legality of a detention, and is regarded as one of the safeguards of civil liberties. It is usually sought by friends or relatives of the detainee. Although habeas corpus is available in Fiji, there is no constitutional guarantee preventing its curtailment or withdrawal.

7.98 The right to habeas corpus goes beyond existing constitutional rights in that it applies to *anyone* detained or arrested for *any reason*; enables the *legality* of, or the *reason* for, the detention to be challenged; and enables the detained or arrested person, or someone acting for him or her to take the initiative in bringing the matter before the court. Traditionally, a judge of the High Court may issue a writ of habeas corpus in any place (not necessarily a court) at any time of the day or night.

7.99 The right to habeas corpus is recognised in a number of international instruments and national constitutions. The Commission considers that the Constitution should provide that everyone who is arrested or detained has the right to have the validity of the arrest or detention determined by way of habeas corpus, and to be released if the arrest or detention is not lawful.

### **Right to release pending trial**

7.100 The Constitution does not confer an express right to release pending trial for those arrested and charged with having committed a criminal offence. Subsection (4) requires persons to be brought before the court and then not to be held further without a court order. This recognises that they cannot be detained pending trial unless the court so orders. Subsection (5) goes on to provide that those who *are not tried* "within a reasonable time ... shall be released upon reasonable conditions ...". The wording of the provision suggest that release becomes a right only after a "reasonable time" has elapsed without trial.

7.101 Again, the international standards and many national constitutions recognise that, subject to reasonable bail conditions, a person should be released pending trial, unless there is good reason for keeping that person in custody. Good reason might include the probability of a person committing further serious offences, destroying evidence, intimidating witnesses or fleeing the country, but there should be reasonable grounds for believing that such eventualities are likely. Accordingly, the Constitution should provide that, when a person is first brought before a court after arrest, the court should order his or her release, on reasonable terms and conditions, pending trial, unless there is just cause for continued detention.

7.102 The international standards and a number of national constitutions also recognise that, so far as practicable, persons detained while awaiting trial should be kept apart from persons who have been convicted and are serving sentences of imprisonment. This separation is desirable both on grounds of principle, and because young offenders or first offenders should not be exposed to the influence of prisoners who may have a substantial criminal record.

### **The right of silence**

7.103 Although as mentioned, section 11 of the 1990 Constitution dealing with rights during a criminal trial, presumes the defendant innocent until proved guilty, and gives him or her the right not to be compelled to give evidence at the trial, there is no constitutional right recognising that a suspected person has no duty to respond to questioning by the police during pre-trial investigations. Such a right is often referred to as a right of silence.

7.104 In common law countries there have long been rules excluding evidence of confessions obtained by undue pressure. Over time, these rules expanded into constitutional guarantees of the right of a person to remain silent during interrogation and to be informed of this right. This does not necessarily mean that it is in the interests of a suspect to remain silent. That is a matter for the person's judgment and that of a legal adviser. The person can still be convicted if the prosecution produces sufficient uncontradicted evidence to establish guilt beyond reasonable doubt. But the echoes of the enforced confessions elicited in England by the 16th century Star Chamber still ring strongly enough to require respect for an accused person's right to remain silent, and to place limits on the inferences that can be drawn at the trial from the decision to do so.

7.105 The right of silence is not one protected by the international instruments because it has no counterpart in the civil law system which permits pre-trial interrogation of a suspect by an examining magistrate. But, in common law countries, of which the Fiji Islands is one, it is often constitutionally protected. The Commission considers that the Constitution should provide that every person arrested, detained or questioned by the police in a coercive situation, on suspicion of having committed a criminal offence, has the right not to say anything and to be informed of that right.

### **Treatment of arrested persons and detainees**

7.106 Although the Constitution recognises the right not to be subjected to torture or to inhuman or degrading punishment or other treatment (section 8),

there are no express minimum guarantees about the treatment of persons who have been arrested or detained. In accordance with the requirements of the *International Covenant on Civil and Political Rights*, reflected in several national constitutions, the Commission proposes that the Constitution should provide that every person deprived of liberty has the right to be treated with humanity and with respect for their inherent dignity.

7.107 The international standards also recognise that children who are detained need special protection. The *Convention on the Rights of the Child*, to which Fiji is a party, provides that a child deprived of liberty should be held separately from adults, unless the child's best interests require otherwise. Children are also required to be permitted regular contact with their family, as well as the other safeguards applying to all persons deprived of liberty. Under the *Convention*, a "child" is a person under eighteen years of age, unless national laws recognise an earlier age of majority. In Fiji, the protection given to children by the Juveniles Act (Cap. 56) applies only until they attain the age of 17 years. Although this does not infringe the *Convention*, consideration should be given to raising the age to 18. The Constitution should provide that children who are deprived of liberty should, so far as practicable, be detained separately from adults, unless that is not in the child's best interests.

## RECOMMENDATIONS

92. **The Constitution should affirm in positive terms, that everyone has the right to personal liberty.**
93. **To provide certainty, it should continue to list comprehensively the grounds on which a person may be deprived of liberty. The existing grounds should be retained, with the following exceptions:**
  - (a) **Arrest or imprisonment for debt or failure to fulfil contractual obligations should be expressly prohibited.**
  - (b) **Imprisonment for non-payment of a fine should be prohibited. In default, a sentence of community service should be substituted.**
  - (c) **Imprisonment for a failure to pay tax or maintenance should be prohibited, except in cases of wilful default by a person who had the means to pay.**
  - (d) **The provision in section 6(1)(e) authorising a law permitting a person to be deprived of liberty merely on**

reasonable suspicion of being about to commit a crime should be repealed. A consequential change should be made to the wording of section 6(3)(b).

- (e) The power to deprive a person of liberty in time of emergency in section 6(7) and the safeguards conferred on such a person by section 17 should be dealt with in a separate provision on emergency powers.
94. The Constitution should require the state to show that a law permitting a person to be deprived of personal liberty on any of the grounds referred to in section 6(1) is reasonably justifiable in a democratic society.
95. The Constitution should continue to recognise all the existing rights of arrested or detained persons, but some should be spelt out or supplemented as follows:
- (a) A person arrested or detained upon reasonable suspicion of having committed a criminal offence should have the right to be informed of the nature of any charges against him. Such a person, if not charged, should have the right to be promptly released.
  - (b) A person who is arrested or detained, or questioned by the police in a coercive situation on suspicion of having committed a criminal offence, as well as a person who has been charged, should have a right to consult a lawyer, and to be informed of that right as soon as it arises, as well as of the right to legal aid, as formulated in paragraph (d) below.
  - (c) A person suspected of having committed a criminal offence who wishes to consult a lawyer should not be questioned, or further questioned, until he or she has had a reasonable opportunity to exercise that right; should be entitled to consult the lawyer of his or her choice, subject to any reasonable restrictions as a condition of being granted legal aid; and should be afforded prompt and adequate opportunity to consult the lawyer in private, in the place where he or she is being detained or questioned.
  - (d) A person who is arrested or detained, or is being questioned by the police in a coercive situation on

suspicion of having committed a criminal offence, or has been charged, should have the right to be provided with the services of a lawyer under a scheme for legal aid, if he or she does not have sufficient means to engage a lawyer and substantial injustice would otherwise result.

- (e) If a person is arrested or detained, the police or other authority holding the person should be required to inform a relative or friend of that person as soon as practicable. A detained person should have the right to reasonable opportunities to receive visits from family members or friends, a religious counsellor or a social worker. He or she should be informed of this right as soon as practicable.
- (f) A person arrested on the order of a court or on suspicion of having committed a criminal offence should have the right to be brought before a court no later than 48 hours from the time of arrest, or, if that is not reasonably possible, as soon as possible thereafter.
- (g) Everyone who is arrested or detained should have the right to have the validity of the arrest or detention determined by way of habeas corpus, and to be released if the arrest or detention is not lawful.
- (h) When a person is first brought before a court after arrest, the court should be required to order his or her release on reasonable terms and conditions pending trial, unless there is just cause for continued detention. Persons ordered to be detained pending trial should, so far as practicable, be kept apart from persons who have been convicted and are serving sentences of imprisonment.
- (i) Every person arrested, detained or questioned by the police in a coercive situation, on suspicion of having committed a criminal offence, should have the right to refrain from saying anything and to be informed of that right.
- (j) Every person deprived of liberty should have the right to be treated with humanity and with respect for their

**inherent dignity. A child who is deprived of liberty should, so far as practicable, be detained separately from adults, unless that is not in the child's best interests.**

#### FREEDOM FROM SLAVERY AND FORCED LABOUR

7.108 Section 7(1) and (2) of the 1990 Constitution provides that no person shall be held in slavery or servitude or be required to perform forced labour. By their nature, these are negative rights, and should continue to be expressed in the Constitution in their existing form. There is no power to limit the rights by law, but subsection (3) excludes from the meaning of "forced labour" certain types of labour that a person may lawfully be required to perform.

7.109 Section 7(3)(a) excludes any labour required in consequence of the sentence or order of a court. This is wide enough to cover orders for the specific performance of a contract for services or the performance of remedial work in civil cases as well as the imposition, in criminal cases, of sentences such as the performance of community service. Sentences of imprisonment "with hard labour" have been abolished in Fiji since 1957. The Commission considers it unnecessary for the Constitution expressly to forbid the reintroduction of this outdated form of punishment.

7.110 Section 7(3)(b) excludes from the definition of forced labour, labour required of a person lawfully detained which

though not required in consequence of the sentence or order of a court, is reasonably necessary in the interests of hygiene or for the maintenance of the place at which he is detained.

We understand that prisoners in Fiji are regularly required to perform work that is not expressly authorised by this provision. Generally speaking, that work is welcomed by prisoners and is likely to have a rehabilitative effect. The Constitution should therefore expressly exclude from the definition of forced labour any work reasonably required of a person sentenced to imprisonment, whether or not related to the hygiene or maintenance of the prison.

7.111 The substance of section 7(3)(c), excluding the labour required of disciplined forces, or of persons who have a conscientious objection to military service and are required to perform other types of service instead, and of section 7(3)(e), excluding labour reasonably required as part of reasonable and normal communal or other civic obligations, should be retained. The last-mentioned provision applies to the communal obligations of

Fijians and Rotumans, a matter discussed further in Chapter 17. The substance of section 7(3)(d), concerning labour required in time of emergency, is discussed in Chapter 20.

## RECOMMENDATIONS

96. **The Constitution should continue to provide that no person shall be held in slavery or servitude or be required to perform forced labour.**
97. **It should expressly exclude from the definition of forced labour any work reasonably required of a person sentenced to imprisonment, whether or not related to the hygiene or maintenance of the prison.**
98. **The substance of section 7(3)(a), (c) and (e) should be retained but the power to require the use of labour in an emergency in paragraph (d) should be dealt with in a separate provision on emergency powers.**

## FREEDOM FROM INHUMAN TREATMENT

7.112 Section 8 of the 1990 Constitution states, without qualification or exception, that no person shall be subjected to torture or to inhuman or degrading punishment or other treatment. That negative right should be retained. We have dealt already with a concern expressed in a submission that section 4 might be read as permitting limitations of section 8 by recommending that section 4 itself should become no more than an affirmation of all the rights and freedoms referred to in the Bill of Rights and incapable of being read as permitting their limitation.

7.113 Some international instruments and national constitutions develop the principle underlying section 8 by spelling out further protections against the imposition of punishment or treatment contrary to generally accepted human rights standards. The Commission believes that first, the Constitution should expressly forbid "disproportionately severe" punishment or other treatment. This would provide a clear standard against which to judge the appropriateness of particular penalties, taking into account the nature of the offence for which they are imposed. It would also provide a constitutional basis for an appeal against a particular sentence claimed to be disproportionately severe, and help to promote consistency of sentencing policy between courts in different places.

7.114 Secondly, the Constitution should contain an express prohibition against scientific or medical experimentation without the informed consent of the person concerned. This is a necessary safeguard, especially in a developing country like the Fiji Islands, to safeguard people against medical or scientific experimentation for commercial purposes without full awareness and acceptance of any risks involved.

## RECOMMENDATIONS

99. **The Constitution should continue to provide that no person shall be subjected to torture or to inhuman or degrading punishment or other treatment.**
100. **It should expressly prohibit “disproportionately severe” punishment or other treatment.**
101. **It should also expressly prohibit scientific or medical experimentation on any person without that person’s informed consent.**

## THE RIGHT NOT TO BE DEPRIVED OF PROPERTY

7.115 Section 9 of the 1990 Constitution protects people from having their property compulsorily taken by the state for a public purpose. It covers both the situation where the state takes possession of private property, or in other ways places restrictions on the use of the property, without affecting the owner’s title. It also covers the case where the state acquires the title to the property.

7.116 For example, the section applies to everything from the temporary requisitioning of a ship to provide essential transport in time of emergency, to the acquisition of the ownership of land for the purpose of constructing a new road. It also applies if the state forbids the sale of certain types of shares formerly traded on the open market to persons who are not citizens, or not resident in the Fiji Islands, thus reducing their market value. All these actions can be broadly described as a “taking” of property. The Constitution should maintain the present protection against any such taking of property by the state.

7.117 It is necessary to make it clear that a taking is something directed to a particular property or type of property, because the state wishes to use that property itself, or control its use by its owner. It should not be regarded as including every circumstance in which the state may become involved in enforcing the general law against a particular person by measures which may result in depriving that

person of property. The grounds on which the protection afforded by the section may at present be limited indicate some confusion on this point.

7.118 When a state agency wishes to use or purchase certain private property for a particular purpose, the property-owner will, in many cases, be willing and able to reach agreement with the relevant agency. This approach should be encouraged. However, the rent or purchase price has to be paid from public funds. To prevent the acquiring authority from being held to ransom, negotiations must take place against the background of a power to take the property compulsorily if necessary, subject to proper safeguards.

7.119 The right affirmed in section 9 covers the case where agreement with the owner or other person entitled to the property has not been reached. It is proper, therefore, that the state's power in those circumstances to take the property compulsorily is subject to the following stringent conditions:

- Property may be taken only under an empowering law. The state cannot take property simply by administrative action.
- The acquiring authority must give reasonable notice to the owner and any other persons whose interests are affected of the intention to take the property.
- The High Court must authorise the taking.
- The taking must be for a purpose specified in the Constitution.
- If the taking is authorised, the acquiring authority must pay prompt and adequate compensation.
- If the acquiring authority is unable to reach agreement with the owner about the amount of compensation payable, the amount must be fixed by the High Court.
- The acquiring authority must pay the reasonable costs of the owner in connection with the High Court proceedings or any appeal to a higher court.

By requiring the application of these standards, the Constitution should continue to protect all persons against the compulsory taking of their property by an agency of the state.

### **The taking of land**

7.120 The Commission considers that there is a need to narrow the grounds on which the state may take land compulsorily. At present the purposes for which

property of any kind may be taken are very wide. Section 9(1)(c) requires the High Court to be satisfied that the taking

is necessary or expedient in the interests of defence, public safety, public order, public morality, public health, town and country planning or utilisation of any property in such a manner as to promote the public benefit.

7.121 In its application to land, this provision makes no distinction between the taking of a particular piece of land for the purpose of providing a public amenity, like the extension of an airport runway; and the nationalisation of land, or the implementation of some other general policy about land. Both kinds of taking are capable of being justified as necessary or expedient “in the interests of ... utilisation of [the] property in such a manner as to promote the public benefit”.

7.122 The extent to which the Constitution permits the compulsory taking of land has given rise to concern in Fiji. It allows the state undue freedom to take native land, or the tenant’s interest in leases of land, or the owners’ interests in the reversion. Although any such taking would have to be authorised by law, the prohibition on the sale, lease or other disposition of native land under section 7 of the Native Land Trust Act (Cap. 134), for example, is subject to the provisions of the State Acquisition of Lands Act (Cap. 135), among others. Section 3 of that Act allows an acquiring authority to acquire lands for any “public purpose”. The definition of that term in section 2 of the Act reproduces the wide terms of section 9(1)(c) of the Constitution quoted above. The power to take land on a large scale is already conferred by law. The fears about the breadth of this power are well-based.

7.123 The Commission considers that the Constitution should not permit the state to take land compulsorily on the present wide ground that the taking is necessary or expedient “in the interests of its utilisation in such a manner as to promote the public benefit”. The provision to that effect should be repealed. If a government desires to implement any change in land use policy, it should do so by amendment of the entrenched legislation in the required manner, after full consultation with all the affected communities. Any other large scale “taking” of land or other property should first require a constitutional amendment.

7.124 Repeal, in relation to land, of the wide formula just discussed would leave a gap, because there would no longer be provision for taking land for what is often described as a “public work”. This would include the construction of roads, airports, harbours, dams, drains and all other public amenities involving the use of land. This is the most usual reason for the taking of land. Provision

permitting the taking of land for such a purpose should be substituted for the wider formula.

7.125 The definition of “public purposes” in section 2 of the State Acquisition of Lands Act will become inconsistent with the Constitution if it is amended in the manner proposed. However, it would be inconvenient simply to leave it to be challenged on that ground. The definition of “public purposes” should therefore be amended to bring it into line with the Constitution as amended.

### **Hardship to the owner of property**

7.126 As well as narrowing the grounds on which land may be taken by the state, a further safeguard should be introduced which would require the particular public good to be served by taking any property to outweigh any hardship caused to the owner. There is provision to this effect in the Constitutions of both Mauritius and Papua New Guinea.

7.127 In the case of a taking of land, the balancing process would take account of such matters as whether the owner would be left without adequate land, whether land retained by the owner would be adversely affected, and whether there is another feasible way of achieving the purpose without taking the land in question. In some cases, a taking of land for improvements such as a drainage work or a road will improve the usability and value of adjoining land. That too should be taken into account, both in determining whether the taking should be approved and, if so, in fixing the amount of the compensation.

7.128 The Commission considered whether section 9 should be further amended by omitting the word “expedient” in section 9(1)(c) and requiring the acquiring authority to show that the taking is “necessary” for the desired purpose. This would, however, impose a high standard of proof that the acquiring authority may seldom be able to discharge. On balance, we consider that, if the grounds on which land may be taken are narrowed, it should be possible to take land or other property after satisfying the court that the taking is “necessary or *expedient*” for the purpose for which the property is required.

### **Preserving the national heritage**

7.129 As explained, a taking of property by the state can include action that leaves a person’s title to property unaffected, but reduces its value. That is why section 9(1)(c) of the Constitution refers to “town and country planning” as a justifiable ground for a taking. Changes in permitted uses of land under planning requirements affect the purposes for which the land may be used and therefore its

value. Sometimes, that value will increase, as when farmland becomes available for subdivision. Occasionally, however, the value may be reduced, for example where land in which there was formerly a mix of industrial and residential uses is re-zoned residential. In such cases the re-zoning would need the prior or subsequent approval of the court, and, if approved, compensation would be payable.

7.130 Section 9(5)(b)(v), introduced by the 1990 Constitution, cuts across this principle. It excludes from the protection of the section the “taking of possession or acquisition”, under a law, of “property of national, archaeological, palaeontological, historical, cultural, architectural or scenic value for the purpose of its preservation”. It is not clear from the context whether the provision permits the actual acquisition by the state of the property in question, or whether it provides only for the placing of a preservation order on the property, leaving the title to the property unaffected. In either case, the important interests of the state in securing the preservation of the property need to be balanced against any loss of the property or its value suffered by the owner.

7.131 This should be done by expanding the grounds on which property may be taken to include the case where a taking is necessary or expedient in the interests of preserving property of national, archaeological, palaeontological, historical, cultural, architectural or scenic value. There should be a further provision, modifying the right to prompt and adequate compensation in such cases. In deciding whether to authorise the taking, the High Court should be required to take account of the need to ensure the preservation of the heritage of the Republic of Fiji at a cost which the nation can afford, without placing an unjust burden on the owner of the property concerned. It should apply the same test in deciding whether compensation should be payable, and if so, the appropriate amount.

7.132 Such a provision would give a clear signal that any statutory scheme under which preservation orders may be made or other measures taken in respect of property having the described values, would need to include fair mechanisms under which the competing interests can be properly balanced. Guidance should be obtained from a study of comparable schemes for the preservation of the national heritage in both developed and developing countries. Section 9(5)(b)(v) should be consequentially repealed.

### **Extraction of minerals**

7.133 The 1990 Constitution also introduced new provisions, section 9(6), (7), (8) and (11) about the need for the state to share with the owners of land or customary fishing rights any royalties received from the extraction of minerals

from the subsoil of the land or seabed. These provisions are not concerned with the protection of property against a taking by the state in the legal sense and would be better placed in a separate constitutional provision. We discuss them in Chapter 17.

7.134 Section 9(2), dealing with the taking of property in an emergency, should also be in a separate provision, as proposed in Chapter 19. Section 9(5)(a)(i) and (ii), and (vii), so far as they relate to the temporary holding of property for the purposes of an examination, investigation, trial or inquiry, do not concern a taking of property but are permissible limitations of the right to be protected against unreasonable searches or seizures. They should become part of a separate provision recognising that right.

### **Other matters**

7.135 Even the remaining provisions of section 9 need considerable pruning. Their substance should be retained, except where they are the product of excessive legal caution about validating laws unconnected with the taking of property or the spelling out of matters of detail which should be left to implementing legislation. The safeguard at present found only in section 9(5)(a)(vii) should apply generally. The state should need to show that all laws limiting the right to protection against the deprivation of property, or administrative action taken under such laws, are reasonably justifiable in a democratic society.

7.136 Although section 9 protects property against a taking by the state, it is not concerned with the right to property itself. In Chapter 17 we discuss the application of that right to the land held by Fijians, Rotumans and the Banaban Islanders settled on Rabi Island, in accordance with their respective customs.

## **RECOMMENDATIONS**

- 102. The Constitution should continue to protect all persons against the compulsory taking of their property by an agency of the state. However, it needs to be clarified that a "taking" is something directed to a particular property or type of property, because the state wishes to use that property itself, or control its use by its owner. A "taking" should not include every circumstance in which the state may become involved in enforcing the general law by measures which may result in depriving a person of property.**

103. The Constitution should permit the taking of property only on the following conditions:
- (a) It must be taken only under an empowering law.
  - (b) The acquiring authority must give reasonable notice to the owner and any other persons whose interests are affected of the intention to take the property.
  - (c) The High Court must authorise the taking.
  - (d) The taking must be for a purpose specified in the Constitution.
  - (e) If the taking is authorised, the acquiring authority must pay prompt and adequate compensation.
  - (f) If the acquiring authority is unable to reach agreement with the owner about the amount of compensation payable, the amount must be fixed by the High Court.
  - (g) The acquiring authority must pay the reasonable costs of the owner in connection with the High Court proceedings or any appeal to a higher court.
104. The present provision permitting the state to take property compulsorily on the ground that the taking is necessary or expedient “in the interests of its utilisation in such a manner as to promote the public benefit” should not apply to land. A provision permitting the taking of land for the more limited purpose of a public work or other public amenity should be substituted.
105. The definition of “public purposes” in section 2 of the State Acquisition of Lands Act should be amended to bring it into line with the permitted grounds for a taking of land under the Constitution as amended.
106. As a further safeguard, the Constitution should require the High Court to be satisfied that the particular public good to be served by taking the property in question outweighs any hardship caused to the owner.
107. The grounds on which property may be taken should include the case where a taking is necessary or expedient in the interests of preserving property of national, archaeological, palaeontological, historical, cultural, architectural or scenic

value. The right to prompt and adequate compensation should be modified in such cases by requiring the High Court to take account of the need to ensure the preservation of the heritage of the Republic of Fiji at a cost which the nation can afford, without placing an unjust burden on the owner of the property concerned. Section 9(5)(b)(v) should be consequentially repealed.

108. The need for the state to share with the owners of land or customary fishing rights any royalties received from the extraction of minerals from the subsoil of the land or seabed, and the taking of property in an emergency, should be the subject of separate constitutional provisions which do not form part of the Bill of Rights.
109. Section 9(5)(a)(i) and (ii), and (vii), so far as they relate to laws permitting the temporary holding of property for the purposes of an examination, investigation, trial or inquiry, should become permissible limitations of a separate right to be protected against unreasonable searches or seizures, so far as those laws are shown to be reasonably justifiable in a democratic society.
110. The substance of the remaining provisions of section 9 should be retained, unless they are the product of excessive legal caution about validating laws unconnected with the taking of property or the spelling out of matters of detail which can be left to implementing legislation.
111. All laws limiting the right to protection against the deprivation of property, or administrative action taken under such laws, should be shown to be reasonably justifiable in a democratic society.

#### THE RIGHT TO FREEDOM FROM UNREASONABLE SEARCHES AND SEIZURES

7.137 Although section 10 of the 1990 Constitution is entitled "Protection for privacy of home and other property", it also deals with searches of the person, and does not deal with privacy issues as such. The Commission considers that the Constitution should expressly recognise the right of everyone to freedom from unreasonable searches and seizures. The right to privacy should also be recognised, but in a separate provision.

7.138 The present formulation of section 10(1) appears to give a person an absolute right not to be subjected to the search of his person or his property, or the entry by others on his premises, and then allows that right to be qualified on a number of very wide grounds. The distinction proposed by the Commission between freedom from search and seizure on the one hand, and privacy on the other, requires all provisions about entry on premises for purposes other than a search or seizure, notably those provisions in section 10(2)(a), (b), (c) and (d) that do not relate to search or seizure, to become part of the separate provision recognizing the right to privacy.

7.139 The Commission considered whether the requirement that a search or seizure should not be "unreasonable" should be spelt out. We consider that, without affecting the generality of that provision, it should be provided that any search or seizure must be authorised by law. That law must provide for the obtaining of a search warrant on the ground that there is reasonable and probable cause to believe that the search will reveal evidence of the commission of a criminal offence. A law may also authorise a search or seizure without a warrant in the interests of defence, public safety, public order, public morality or public health, but only if it is shown to be reasonably justifiable in a democratic society.

7.140 As already recommended, the provisions in section 9 permitting a seizure should become permissible limitations of the right to freedom from unreasonable searches and seizures. They, too, should be shown to be reasonably justifiable in a democratic society.

## RECOMMENDATIONS

112. **The Constitution should expressly recognise the right of everyone to freedom from unreasonable searches and seizures.**
113. **Without affecting the generality of that provision, the Constitution should provide that any search or seizure must be authorised by law. Such a law should provide either for the obtaining of a search warrant on the ground that there is reasonable and probable cause to believe that the search will reveal evidence of the commission of a criminal offence, or, if the law permits search of a person or of property without obtaining a warrant, that law should be one in the interests of defence, public safety, public order, public morality or public health, and should be shown to be reasonably justifiable in a democratic society.**

- 114. The substance of section 10(2)(a), (b),(c) and (d), so far as those provisions do not relate to search or seizure, should become part of a separate provision recognizing the right to privacy.**

#### THE RIGHT TO REASONABLE PRIVACY OF PERSONAL AND FAMILY LIFE

7.141 The Commission considers that there should be a separate constitutional provision recognising the right of everyone to reasonable privacy of personal and family life. Such a right would reflect those recognised by both the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights* in the following terms:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

Everyone has the right to the protection of the law against such interference or attacks.

A right to privacy was not included in the Bills of Rights produced for adoption in former British colonies because the common law does not recognise a right to privacy as such, though it sustains it in various ways, for example through the law of defamation.

7.142 The Commission does not see a need to spell out the values protected by everyone's right to reasonable privacy of personal or family life, but considers that this right would, for instance, protect individuals against searches of the person that were unreasonably intrusive in the circumstances, and against other unreasonable measures on the part of the state which affect personal or family privacy. Recognition of the right may also encourage the state to give positive protection to personal privacy. Many countries have adopted statutory safeguards about the collection, holding and release of personal information, by the state itself and also by private persons.

7.143 The Commission considers that everyone's right to freedom from interference with their correspondence, at present recognised in section 13(1) as an aspect of the right to freedom of expression, is properly regarded as an aspect of the right to privacy and should be associated with it. The reference to "correspondence" should be expanded by adding a reference to "communications", to take account of modern technology. A person's right not to be subjected to the entry by others on his premises, at present recognised by section 10(1), should also be regarded as an aspect of the right to privacy.

7.144 It follows that the permitted limitations of a person's right to reasonable privacy of personal and family life, by or under a law, should be based on those at present set out in section 10(2) and also in section 13(2), in each case so far as relevant. The existing requirement that all such laws limiting the right, or things done under the authority of such a law, should be shown to be reasonably justifiable in a democratic society, should be retained.

7.145 The power to authorise "an officer or agent of the government, or of a local authority, or of a body corporate established by law for public purposes" to enter premises for the specified purposes should be extended to include private persons or corporations supplying public utilities to the premises under contract. If such a power cannot be conferred by law, there may be a tendency to include onerous clauses in the contract itself conferring a right of entry on private premises. If conferred by law, the power must be shown to be reasonably justifiable in a democratic society.

7.146 Because a person may exercise the right to freedom of expression in their form of communication, a permitted limitation of the right to freedom of expression may involve an interference with the privacy of communication. That question should be addressed in the redrafting of the provision. However, the principle is clear. The grounds on which the right to privacy should be capable of being limited by law should be kept to the minimum and the law or anything done under it should be shown to be reasonably justifiable in a democratic society.

## RECOMMENDATIONS

The Commission recommends as follows:

115. **The Constitution should affirm, as a separate right, that everyone has the right to reasonable privacy of personal and family life.**
116. **A person's right to freedom from interference with his correspondence, at present recognised in section 13(1) as an aspect of the right to freedom of expression, should be regarded as an aspect of this right to privacy. The reference to "correspondence" should be expanded by adding a reference to "communications".**
117. **A person's right not to be subjected to the entry by others on his premises, at present recognised by section 10(1), should also be regarded as an aspect of the right to privacy.**

118. **The permitted limitations of a person's right to reasonable privacy of personal and family life should be based on those at present set out in section 10(2) and also in section 13(2), in each case so far as relevant. All laws limiting the right to privacy, or administrative action taken under such laws, should be shown to be reasonably justifiable in a democratic society.**
119. **The power to authorise "an officer or agent of the government, or of a local authority, or of a body corporate established by law for public purposes" to enter on premises for the specified purposes should be extended to include private persons or corporations supplying public utilities to the premises under contract.**

## THE RIGHT TO A FAIR TRIAL

7.147 Section 11 of the 1990 Constitution is identical with the corresponding provision in the 1970 Constitution. It sets standards for the trial of both criminal and civil cases, though giving more emphasis to the first. For historical reasons arising from the way in which the international human rights instruments were developed, the statement of principle in subsection (1) that a "case shall be given a fair hearing within a reasonable time by an independent and impartial court established by law" applies only to criminal cases.

7.148 That statement is followed by a number of provisions spelling out aspects of the right to a fair trial. Some apply only to criminal cases. Some apply expressly to civil cases. Some might with advantage be applied to both. Finally, there are provisions making it clear that certain things done by or under law for certain relatively specific purposes do not infringe the section.

7.149 Overall, the arrangement of the section does not make it easy to see whether particular provisions apply to criminal cases, to civil cases or to both. The Commission considers that section 11 should be separated into two sections, one dealing with all trials, and one with the trial of criminal cases. The proposals that follow reflect this approach.

### **Provisions applying to the trial of civil and criminal cases**

#### *Equality before the law and fair trial*

7.150 Submissions made to the Commission made the point that the Constitution contains no guarantee of equality before or under the law. A right to equality

*before* the law expresses the principle that people must be treated by both the criminal and civil courts on a basis of equality, without making distinctions between them on any ground, and that, in all cases, fair procedures must be followed. (Equality *under* the law expresses the principle that the substantive content of the law itself should be fair and not discriminatory. We discuss that principle below in dealing with the right to freedom from discrimination.)

7.151 The Commission proposes that the Constitution should affirm that all persons are equal before the law and have the right to a fair trial in terms which apply both to criminal and civil cases. The Constitution should refer expressly to the following essential elements of the right to a fair trial, already recognised, though not completely, in section 11(1) and (8):

- Everyone charged with a criminal offence or a party to a civil dispute about a legal right or obligation should have the right to have the case determined by an appropriate court or other tribunal.
- The court or tribunal should be established by law and be independent and impartial.
- The person should be given a fair hearing within a reasonable time.

This proposal fills a gap in the Constitution which does not at present give a person who is a party to a civil dispute a clear right to have that dispute determined by a court or other tribunal.

7.152 In proposing a constitutional right to this effect, the Commission recognises that people sometimes enter into arbitration agreements which give an arbitral tribunal exclusive jurisdiction to determine certain types of civil disputes. In such cases, the person concerned will no longer have the right to bring the dispute before a court. This reflects the broad principle that, so far as is consistent with public policy, constitutional rights may be waived, though in each case the courts will wish to be very sure that the waiver was made voluntarily and with full knowledge of its effect. Accordingly, the circumstances in which an arbitration agreement should be upheld are a matter for regulation by the law of Fiji. That matter should not be dealt with in the Constitution, though in enacting and enforcing an Arbitration Act, both the policy-makers and the courts will no doubt take full account of the constitutional standards.

*Public hearings*

7.153 There are two other matters which should be regarded as applying to all trials. The first is that the hearings of courts and tribunals established by law should in principle be open to members of the public, including media representatives. This is an essential safeguard of the quality of the administration of justice. The rule at present set out in section 11(9) should be retained, except the provision that, in civil cases, the parties may agree that the hearing should be held in private. This clearly refers to the fact, already mentioned, that people are free to agree that a civil dispute will be referred to an arbitral tribunal which will hear it in private. The procedure of private arbitral tribunals should not be dealt with in the Constitution. That document should apply only to the procedure of courts and to other tribunals established by law.

7.154 The discretion to exclude the public in both criminal and civil cases should continue to rest with the court or tribunal itself, exercising powers conferred by law. The purposes for which the law may make provision for closed hearings should be those referred to in section 11(10)(a) and (b), but with the addition of a requirement that the law and anything done under it should be shown to be reasonably justifiable in a democratic society.

*Right to an interpreter*

7.155 Secondly, in a multilingual country, we think that there should be clear constitutional rules about the right of the parties or other witnesses to be examined or cross-examined and to give evidence in a language that they adequately understand and are capable of using for the purpose of communication. Similarly, defendants in criminal cases and all the parties in civil cases, should be entitled to follow the proceedings in a language that they adequately understand. As well as applying to those whose knowledge of a particular language is not adequate for the purpose of understanding or communication, the rule should apply to persons who are deaf or whose hearing is impaired.

7.156 Again, this is a minimum condition for the fair administration of justice. At present, only the defendant in a criminal case is entitled, under section 11(2)(f), to have without payment the assistance of an interpreter if he cannot understand the language "used at the trial". It should be made clear that the right to an interpreter arises if the defendant or other parties do not adequately understand or cannot communicate in the language used in any part of the trial. Most people are unfamiliar with court proceedings and have little knowledge of the procedures. They should not have the added burden of trying to follow them in words which they cannot hear or in a language of which they do not have adequate knowledge.

7.157 In order to implement the right proposed above, the Constitution should provide that the services of competent interpreters, including persons able to communicate in sign language, should be available as required, without cost to the witnesses or parties. By “competent” we mean that the persons concerned should not merely know the language being spoken and the language into which it is being translated. So far as practicable, they should be fully trained in the skills of interpretation. Otherwise the right to the services of an interpreter will be an empty one.

### **Provisions applying to the trial of criminal cases**

7.158 Our remaining proposals relate to the trial of criminal cases. The Constitution should make it clear that the procedural rights set out are the minimum standards necessary to safeguard the right of the defendant to a fair trial. They do not exclude the application of other safeguards which may be necessary for this purpose.

#### *Presumption of innocence*

7.159 Section 11(2)(a) gives constitutional force to the presumption of innocence, which places on the state the burden of proving guilt. Section 11(11)(a) makes it clear that the presumption of innocence does not prevent the law from casting on the defendant the burden of proving particular facts - as where a person found in possession of a certain quantity of dangerous drugs is presumed to be a dealer unless he or she proves otherwise. The Constitution should continue to make provision to this effect.

#### *Standard of proof*

7.160 It is well settled that guilt must be proved “beyond reasonable doubt”, though there is at present no constitutional guarantee to this effect. In civil cases the standard of proof is lower. The court needs to be satisfied about a matter only “on the balance of probabilities”. The Constitution should require the guilt of the defendant in a criminal case to be proved beyond reasonable doubt.

#### *Unlawfully obtained evidence*

7.161 An underlying reason for the protections accorded to persons suspected of, or charged with, a criminal offence under the right to personal liberty, and the right to freedom from unreasonable search and seizure, is the need to place limits on the way in which the state may obtain evidence of a person’s guilt. Under the

common law as applied in Fiji, a court has a discretion to exclude evidence that has been unlawfully obtained. We consider that the constitutional protection of people's rights should go somewhat further, reflecting those recognised in countries that have had longer experience of what is required by a right to a fair trial under a Bill of Rights.

7.162 The Constitution should provide that unlawfully obtained evidence is inadmissible, unless the interests of justice require it to be admitted. For example, this gives the courts a discretion to admit evidence such as a murder weapon which was discovered only because its hiding place was disclosed by the suspected person in a statement obtained without being cautioned that he was not required to say anything. The court would probably still exclude the statement itself.

#### *Pleading guilty*

7.163 If the defendant pleads guilty, the prosecution no longer has to prove that he or she committed the offence. The court will be concerned only with passing sentence. Guilty pleas are sometimes entered by a defendant, perhaps without the benefit of legal advice, in circumstances where there is real doubt about the facts. Sometimes, too, the defendant may not understand the full significance of a plea of guilty. Therefore there should be some reference to the need for the court to be satisfied that, in the circumstances, the plea of guilty is acceptable.

#### *Information about the nature of the offence*

7.164 We have already recommended that, as soon as the police have decided to charge an arrested person, that person should be informed of the nature of the charges. However, there may be a considerable difference between the charges which seem appropriate to the police when they have carried the investigation far enough to decide that the person should be charged with some offence, and the charges as finally formulated by the prosecution when all the evidence has been assembled and assessed. A person required to stand trial needs to know in good time the charges on which he or she is to be tried, and on what allegations of fact they are based. Only then can that person make an informed decision about seeking legal advice and preparing a defence.

7.165 Section 11(2)(b) provides that every person who is charged with a criminal offence shall be informed as soon as reasonably practicable, in a language that he understands *and in detail, of the nature* of the offence. We consider that this rule should be written in a way that makes it clear that the defendant needs to be given, in writing, sufficient details of the offence with which he or she is charged, and also of the allegations of fact on which the charge is based, so as to be able to answer it.

*Access to witness statements*

7.166 The provisions of section 11(2)(c) requiring the person to be given adequate time and opportunities for the preparation of a defence should be retained. The Commission received a submission that, for this purpose, the defendant should have a constitutional right of access to all statements by witnesses held by the prosecution. In a recent case, the High Court, on appeal, found that no such right exists at present. The right is one recognised in neighbouring common law countries. It should be recognised by the Constitution in terms which require the prosecution to provide access to the statements on request, but not necessarily to provide copies. The right should extend to all statements, whether or not the person making the statement is to be called as a witness.

*Right to legal representation and legal aid*

7.167 Section 11(2)(d) provides that a person charged with an offence shall be permitted to defend himself in person or, at his own expense, by a legal representative of his own choice or, *where so prescribed*, by a legal representative provided at the public expense. The effect is that legal aid is available only if so provided by law. In examining the content of the right to personal liberty, we have already made a recommendation about the need of arrested or detained persons for a constitutional right to legal aid if the person concerned has insufficient means to engage a lawyer and the interests of justice so require. Our discussion of the policy issues relating to the provision of legal aid need not be repeated.

7.168 The Constitution should continue to provide that a person has the right to defend himself or herself in person, or at his own expense by a legal representative of his or her choice. The person should also have the right to be provided with the services of a lawyer under a legal aid scheme, if he or she does not have sufficient means to engage a lawyer and substantial injustice would otherwise result. The defendant should be informed of these rights at the time of being given written notice of the nature of and grounds of the charge.

*Examination of witnesses*

7.169 The substance of section 11(2)(e) about the examination and cross examination of witnesses by the defendant or his or her legal representative, should be retained. Section 11(11)(b) permits a law to place reasonable conditions on the right of a defendant to call witnesses at public expense.

*Right of appeal*

7.170 The right in section 11(3) of the defendant to have access to the record should be retained. One obvious purpose of this right is to enable a convicted defendant to consider or prepare an appeal. However, although the Constitution gives the High Court, the Court of Appeal and the Supreme Court jurisdiction to hear appeals, it does not give a convicted person any right to appeal against the conviction or to have it reviewed. This gap should be filled by providing that every person convicted of a criminal offence has the right to have recourse by way of appeal to, or review by, a higher court.

*Trial in the presence of the defendant*

7.171 The Constitution should also continue to provide that the trial must not take place in the absence of defendants, unless their conduct makes it impracticable to continue the trial in their presence, or the defendants consent to the trial in their absence. Section 11(12) provides that a person who has been served with a summons or other notice of the trial and does not appear is deemed to have consented to the trial taking place in his absence. This provision should be modified so as not to apply where the offence with which the person is charged is punishable by a sentence of imprisonment.

*Retrospective punishment*

7.172 The Constitution should retain the substance of the important provision in section 11(4) that a person may not be convicted of a criminal offence if the conduct was not an offence at the time it was committed, or be punished by a more severe penalty than that applying at the time of commission. Some constitutions provide that, if the penalty is reduced between the time of the commission of the offence and the time at which the offender is sentenced, the defendant should have the benefit of the lesser penalty. We consider that the Constitution of the Republic should make provision to this effect.

*Double jeopardy*

7.173 The Constitution should also retain the substance of the provision in section 11(5) that prevents a person being tried more than once for a criminal offence arising out of the same conduct. However, the provision in its present form allows the prosecution to appeal against a person's acquittal. Recommendation 33 of the *Report of the Commission of Inquiry on the Courts of Fiji* (1994) drew attention to the need to reconsider this power as it cuts across the practice in common law countries where there is a right to trial by jury in serious criminal cases. The jury's finding of "Not guilty" is accepted as final.

7.174 Although there is no right to trial by jury in the Fiji Islands, in the serious cases which must be heard in the High Court, there is a right to a trial with assessors. The *Report* just mentioned regarded this right as a safeguard for defendants in criminal cases which should be retained. As assessors, like juries, are not required to give reasons for their decisions, the Constitution should make it clear that the prosecution cannot appeal against an acquittal in a way which affects the outcome of the particular case. No such safeguard is written into the prosecution's existing right to appeal against an acquittal. We understand, however, that this right is rarely, if ever exercised. The Constitution should permit a right to appeal against an acquittal only for the limited purpose of seeking to clarify the state of the law, on the basis that, if the appeal succeeds, it will not affect the defendant's right to go free.

*Person pardoned may not be tried*

7.175 Section 11(6) provides that no person shall be tried for a criminal offence if it is shown that a competent authority has granted him a pardon for that offence. The provision goes beyond the scope of Section 99 of the 1990 Constitution which permits the President to pardon a person for an offence only after that person's conviction. A retrial in such circumstances is already prohibited by the rule preventing a person from being tried twice for the same offence. However, the Privy Council has recognised that a law may provide for a person to be granted a pardon even before conviction. The substance of the provision should therefore be retained.

*Privilege against self-incrimination*

7.176 The substance of section 11(7) which provides that no person who is tried for a criminal offence shall be compelled to give evidence at the trial should be retained. In discussing the right to personal liberty we have referred already to the fact that persons arrested or detained or being questioned by the police in a coercive situation have the right to remain silent. The principle that a person suspected of, or charged with, a criminal offence should not be required to say anything before the trial or give evidence at the trial is basic to the administration of justice in common law countries.

*Treatment of children*

7.177 The international instruments include provisions relating to juvenile justice. *The Convention on the Rights of the Child* entitles a child in conflict with the law to treatment which takes the child's age into account and aims at his or her re-integration into society. The emphasis is on avoiding judicial proceedings and placement in an institution wherever possible.

7.178 It is also becoming increasingly common in many countries to take special measures for the protection of children who are required to give evidence in criminal cases, specially if they are the victims of the alleged crime. Their evidence is increasingly given from behind a screen, or on closed circuit television, so they are not brought into direct contact with the defendant. These arrangements must not, of course, deprive the defendant of the right to be present during the whole of the trial and to cross-examine the prosecution witnesses.

7.179 The Commission therefore considers that the Constitution should require a child taking part in a criminal trial, either as defendant or as a witness, to be treated in a manner which takes the child's age into account. Such a provision would be broad enough to cover all aspects of the child's treatment during the trial.

## RECOMMENDATIONS

120. **Section 11, entitled "Provisions to secure protection of law" should be separated into two separate sections. The first section should affirm that all persons are equal before the law and have a right to the fair trial of both criminal and civil cases in which they may be involved. It should spell out certain requirements for a fair trial which apply in both criminal and civil cases. The second section should spell out the minimum guarantees required to secure a fair trial in criminal cases.**
121. **The section applying to all trials should refer expressly to the following essential elements of the right to a fair trial:**
  - (a) **Everyone who is charged with a criminal offence or is a party to a civil dispute about a legal right or obligation has the right to have the case determined by an appropriate court or other tribunal.**
  - (b) **The court or tribunal should be established by law and be independent and impartial.**
  - (c) **The persons concerned should be given a fair hearing within a reasonable time.**
122. **The hearings of courts and tribunals established by law should be open to the public. The provision that, in civil cases, the parties may agree that the hearing should be held in private refers to private arbitral tribunals and should be repealed. The Constitution should apply only to courts, and to other tribunals established by law.**

123. **The discretion to exclude the public in both criminal and civil cases should continue to rest with the court or tribunal itself, exercising powers conferred by law for the purposes referred to in section 11(10)(a) and (b), but with the addition of a requirement that the law and anything done under it should be shown to be reasonably justifiable in a democratic society.**
124. **The parties or other witnesses should have the right to give evidence and be questioned in a language that they can adequately understand and use for the purposes of communication. The defendant in a criminal case, and all the parties in a civil case, should have the right to follow the proceedings in a language that they adequately understand. The right should apply to persons who are unable to understand because their hearing is impaired. It should arise if the persons concerned cannot adequately understand or communicate in the language used in any part of the trial.**
125. **The Constitution should provide that the services of competent interpreters, including persons able to communicate in sign language, should be provided as required, without cost to the witnesses or parties.**
126. **The section applying to criminal trials should guarantee to the defendant the following minimum procedural rights:**
  - (a) **Every person who is charged with a criminal offence should be presumed to be innocent until proved guilty beyond reasonable doubt, or until he or she has pleaded guilty and the plea has been accepted by the court.**
  - (b) **The Constitution should provide that wrongfully obtained evidence is inadmissible, unless the interests of justice require it to be admitted.**
  - (c) **Everyone who is charged with a criminal offence should have the right to be informed as soon as reasonably practicable, in writing and in a language that they understand, of the nature of the offence with which they are charged and also of the allegations of fact on which the charge is based, in sufficient detail to be able to answer the charge.**
  - (d) **Every person who is charged with a criminal offence should be given adequate time and opportunities for**

the preparation of a defence. He or she should have a right of access, in person or through a legal representative, to all statements by witnesses held by the prosecution, whether or not the prosecution plans to call them. There should be no right to be provided with copies.

- (e) The Constitution should continue to provide that everyone has the right to defend themselves in person, or at their own expense by a legal representative of their choice. They should also have the right to be provided with the services of a lawyer under a legal aid scheme if they do not have sufficient means to engage a lawyer and substantial injustice would otherwise result. Defendants should be informed of these rights at the time of being given written notice of the nature and grounds of the charge.
- (f) The substance of section 11(2)(e) and (11)(b) about the right of the defendant or his or her legal representative to examine or cross-examine witnesses should be retained.
- (g) The defendant's right of access to the record under section 11(3) should be retained.
- (h) Every person convicted of a criminal offence should have a right of recourse by way of appeal to, or review by, a higher court.
- (i) The Constitution should continue to provide that the trial must not take place in the absence of defendants, unless the conduct of the defendant makes it impracticable to continue the trial in their presence or the defendants consent to the trial in their absence, but the failure to appear of persons charged with an offence punishable by imprisonment should not be taken as consent to the trial taking place in their absence.
- (j) The Constitution should retain the substance of the provision in section 11(4) that a person may not be convicted of a criminal offence if the conduct was not an offence at the time it was committed, or be punished by a more severe penalty than that applying at the time of its commission. If the penalty is reduced between the

**time of the commission of the offence and the time at which offenders are sentenced, they should have the benefit of the lesser penalty.**

- (k) The Constitution should retain the substance of the provision in section 11(5) that prevents a person being tried more than once for a criminal offence arising out of the same conduct. However, the Constitution should make it clear that the prosecution cannot appeal against an acquittal, except for the purpose of clarifying the law for the future without affecting the outcome of the particular case.**
- (l) The substance of the provision in section 11(6) which provides that no person shall be tried for a criminal offence if it is shown that a competent authority has granted him a pardon for that offence should be retained.**
- (m) The substance of section 11(7) which provides that no person who is tried for a criminal offence shall be compelled to give evidence at the trial should be retained.**
- (n) The Constitution should require a child taking part in a criminal trial, either as defendant or as a witness, to be treated in a manner which takes the child's age into account.**

## **THE RIGHT TO FREEDOM OF RELIGION, CONSCIENCE, THOUGHT AND BELIEF**

7.180 Section 12 of the 1990 Constitution protects the right to what is described as "freedom of conscience". Its terms are identical with the corresponding provision in the 1970 Constitution. Freedom of conscience is regarded as including not only individual freedom of conscience, but also

- individual freedom of thought and of religion;
- individual freedom to change one's religion or belief;
- individual and group freedom ("alone or in community with others in public and in private") to manifest and propagate religion or belief in worship, teaching, practice or observance.

7.181 Although different opinions were expressed in the submissions about whether the Republic of the Fiji Islands should, or should not, be officially linked to the Christian religion - a matter already discussed in Chapters 3 and 5 - people were agreed about the need to respect the right to freedom of religion in this country. The Commission therefore concentrated on the best way of recognising and protecting this freedom in the Bill of Rights.

7.182 In contrast to the international instruments and many national constitutions, the 1990 Constitution treats freedom of religion, thought and belief as aspects of freedom of conscience. The Commission considers that the Constitution should positively affirm that everyone has the right to freedom of religion, conscience, thought and belief. Each object of the freedom should be regarded as separate and entitled to recognition and protection in its own right.

7.183 The freedom just described should be expressed as including a person's freedom to change his or her religion or beliefs. Some constitutions elaborate this idea by providing expressly that a person is free to have *no* religion or beliefs, and is also free to *adopt* or *maintain* a religion or beliefs. However, we do not think it necessary spell out in the Constitution these facets of what is already implicit in a person's freedom to "change" his or her religion or beliefs, an expression that is well-accepted and understood.

7.184 We consider that the Constitution should recognise separately from the individual freedoms just mentioned, the freedom of everyone, either alone or in community with others, and both in public and in private, to manifest and propagate their religion or belief in worship, teaching, practice and observance. One's right to *manifest* or *propagate* religion or beliefs should be subject to limitations. In that context the state might be justified in intervening to protect the public interest or the rights and freedoms of others.

7.185 We considered whether the freedom to "propagate" a religion or beliefs should be maintained, or whether a word like "disseminate" should be used instead. However, we think it better to retain the word "propagate" which is used in the international instruments and a number of national constitutions. The courts of the Republic will be able to look to the international jurisprudence if the meaning of the term "propagate" should ever be in issue.

### **Education and religious instruction**

7.186 Section 12(2) protects the subsidiary right of religious communities to establish, maintain and manage places of education. The Commission considers

that this right should be expanded to apply also to ethnic, social, linguistic and other groups. We therefore propose that the Constitution should recognise a right to establish, maintain and manage institutions of education or training in a separate section of the Bill of Rights. The content of the proposed right is discussed below.

7.187 Section 12(3) protects the subsidiary right of religious communities to provide religious instruction as part of any education they provide, regardless of whether that course of education is wholly or partly funded by the State. Section 12(4) recognises the associated right of young persons not to be required to receive religious instruction or to participate in religious observance relating to a religion that is not their own.

7.188 The principle behind these provisions is well-suited to the Fiji Islands where many religious communities and other groups establish and maintain schools. Usually they receive some state aid. Most, if not all, are open to students of all ethnic groups and all faiths. The fact that an institution of education or training is partly or wholly funded by the state should not exclude the possibility of conducting prayers or other religious observances or giving religious instruction in any such institution. The Constitution should continue to recognise this freedom, along with the safeguards about the freedom not to participate recognised in section 12(4).

### **The taking of oaths**

7.189 Section 12(5) recognises the right of any person not to be compelled to take an oath contrary to his religion or belief or to take an oath in a manner contrary to his religion and belief. It appears in the constitutions of common law countries where the practice is current of invoking God's help to keep a solemn promise intended to have legal consequences, while holding a bible or other religious book, or performing some other action symbolic of a belief in God. Historically, the form of oath required in England in the 18th and early 19th centuries was used to persecute Roman Catholics whose beliefs were inconsistent with its terms. That is why the freedom not to take an oath or a particular form of oath was later regarded as a constitutional right.

7.190 Its express protection is scarcely necessary in the Republic which recognises the right to make an affirmation, or solemn promise not involving an appeal to God, in all cases where the law formerly required the swearing of an oath. But because of the adverse inference that might be drawn from repealing the provision, its substance should be retained.

### **Limitation of the right to religious freedom**

7.191 Finally, the Commission looked at the grounds on which the rights and freedoms recognised in this area might need to be limited. It considered that there should be no power to limit the right to individual freedom of religion, conscience, thought and belief. There is no valid reason why the state should attempt to control a person's individual thought processes and belief systems about religion or any other matter. The only activity that might conceivably call for control measures is the exercise of the freedom of everyone, either alone or in community with others, to manifest and propagate his or her religion or belief in worship, teaching, practice and observance. The Constitution should continue to confer power to limit that aspect of the protected rights and freedoms by laws, or action taken under laws, for specified purposes.

7.192 Those purposes should continue to include the protection of the rights and freedoms of other persons, including their right to observe and practise any religion without the unsolicited intervention of members of any other religion, as provided in section 12(6)(b). They should also continue to include the interests of public safety, public order, public morality or public health as provided in section 12(6)(a). There is no need to provide that the freedoms in question may be limited in the interests of "defence". In each case the law should continue to be one that can be shown to be reasonably justifiable in a democratic society.

### **RECOMMENDATIONS**

- 127. Instead of regarding freedom of thought and of religion as aspects of freedom of conscience, the Constitution should treat each aspect separately. It should positively affirm that everyone has the right to freedom of religion, conscience, thought and belief, including the freedom to change their religion or beliefs.**
- 128. The Constitution should continue to recognise, but separately from the individual freedoms just mentioned, the freedom of everyone, either alone or in community with others, and both in public and in private, to manifest and propagate their religion or belief through worship, teaching, practice and observance.**
- 129. It should recognise the subsidiary right of any community or group maintaining an educational or training institution to hold religious observances, or to provide religious instruction as part**

of any education or training they provide, whether or not that institution is wholly or partly funded by the state, and the associated right of young persons not to be required to receive religious instruction or to participate in religious observances relating to a religion that is not their own.

130. It should also continue to recognise the right of everyone not to be compelled to take an oath contrary to his or her religion or belief or to take an oath in a manner contrary to his or her religion or belief.
131. There should be no power to limit the right to individual freedom of religion, conscience, thought and belief.
132. The freedom of everyone, either alone or in community with others, to manifest and propagate his or her religion or belief in worship, teaching, practice and observance should be subject to limitation by a law, or action taken under a law, for the purpose of protecting the rights and freedoms of other persons, as provided in section 12(6)(b), and also in the interests of public safety, public order, public morality or public health, as provided in section 12(6)(a). The present power to impose limitations in the interests of "defence" should be repealed. In each case the law should be one that can be shown to be reasonably justifiable in a democratic society.

#### THE RIGHT TO ESTABLISH AND MAINTAIN INSTITUTIONS OF EDUCATION OR TRAINING

7.193 In discussing religious and related freedoms as set out in section 12 of the 1990 Constitution, the Commission expressed the view that the Constitution should recognise the separate right, not only of religious communities, but also of ethnic, social, linguistic or other communities to establish, maintain and manage educational or training institutions. This is an important right in the Fiji Islands. The majority of schools and institutions have been set up by religious and other groups. In contrast, however, to the present provision in section 12(2), the community or group which establishes a school should have the right to manage it, whether or not it receives aid from the state to assist in maintaining it.

#### **Duty not to discriminate**

7.194 The Commission also considers that, in principle, all educational or training institutions wholly or partly funded by the state should be expressly required to admit students without discrimination on any ground prohibited by

the Constitution; that is, on the ground of race, ethnic origin, sex or gender, birth, place of origin, political opinions, colour, religion, creed, language, economic status, age or disability. However, it recognises that a religious, ethnic, linguistic or other group often establishes a school or other teaching institution for the purpose of meeting a special need, such as instruction in a particular religion or language, or the fostering of the leadership qualities of young women or men belonging to a particular community.

7.195 The duty not to discriminate should therefore take second place to the object of maintaining the school's special character. But if the institution is in a position to admit students other than the category for whose benefit it was established, the admissions policy should not discriminate on any of the prohibited grounds. To allow some flexibility in taking account of the circumstances of different institutions, the Constitution should allow the general principle just proposed to be applied on conditions established by law.

### **Limitation of the right**

7.196 The new right should be subject to limitation by law for the purposes referred to in section 12(6)(c), that is, for imposing standards or qualifications with regard to such matters as the curriculum, examination or accreditation, the qualifications of the teaching staff and other relevant matters, but only if the laws for this purpose can be shown to be reasonably justifiable in a democratic society.

### **RECOMMENDATIONS**

- 133. The Constitution should recognise a new and separate right, not only of religious communities, but also of ethnic, social, linguistic and other communities, to establish, maintain and manage educational or training institutions.**
- 134. The community or group which establishes such an institution should have the right to manage it, whether or not the cost of maintaining it is partly met by the state.**
- 135. Except so far as may be necessary to maintain the special character of an educational or training institution, it should be open to all qualified students, without discrimination on any ground prohibited by section # (Right to equality under the law and freedom from discrimination), on such conditions as may be established by law.**

136. **The right to establish and maintain educational or training institutions should be subject to limitation by law for the purpose of imposing relevant standards or qualifications, but only so far as such laws can be shown to be reasonably justifiable in a democratic society.**

## THE RIGHT TO FREEDOM OF EXPRESSION

7.197 Section 13 of the 1990 Constitution begins with the words "Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression ...". The right to freedom of expression is intrinsic to human identity, including the identity of communities and groups. It has value for its own sake, and also because it is essential to the exercise of other rights and the promotion of important values. People cannot exercise their political rights freely unless they also have the right to freedom of expression. The exercise of that right also enables them to participate in local, provincial and central government decision-making processes. This enhances the legitimacy of the decisions reached and helps to promote unity and harmony.

7.198 For these reasons, great care must be taken both in formulating the content of the right to freedom of expression and in allowing it to be restricted by law for particular purposes. In the multi-ethnic and multicultural society of the Fiji Islands, where there are significant differences in the cultural approach of different communities to the expression of opinions, the terms in which the right to freedom of expression is affirmed, the power to limit it by law, and the way in which people choose to express themselves are all matters which call for the right balance between robustness and sensitivity.

7.199 At present, a person's right to freedom of expression is defined as comprising "freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence". We have already recommended that everyone's freedom from interference with their correspondence should become part of a right to reasonable personal and family privacy. We also consider that the Constitution should not refer to particular aspects of freedom of expression in a way that appears to exclude other aspects of that freedom. The international instruments and other national constitutions make it clear that the concept of freedom of expression is open-ended. The Constitution should therefore affirm the right of everyone to freedom of expression *including* the particular freedoms specifically mentioned. These should continue to include freedom to hold opinions and to receive and impart ideas and information without interference.

**Freedom to seek ideas or information**

7.200 Unlike the international instruments and many other constitutions, the 1990 Constitution makes no mention of the freedom to *seek* ideas or information. We consider that this aspect of freedom of expression should also be referred to expressly, because it supports the role of the news media in supplying information to the public and enabling people to exercise their political rights on a well-informed basis.

7.201 However, it should be clearly understood that the freedom to seek information does not mean that there is any right to be given the information sought, whether the request is directed to politicians, officers of the state or private individuals. That is a matter for the person to whom the request is made. Moreover, any exercise of the right to seek information will have to be balanced against the recommended right to reasonable personal and family privacy.

7.202 Some submissions did indeed suggest that, in the Fiji Islands, there should be a right to official information, as there is in some neighbouring countries. Such a right should be conferred by legislation, rather than by the Constitution. We explain our reasons for that view and make recommendations about the purpose, scope and implementation of such a right in Chapter 15.

**Form of expression**

7.203 The Commission considers that the Constitution should leave open the form in which people are free to express themselves. The use of language will always be a form of expression. The courts may, however, sometimes be required to consider whether other human activities also are forms of expression.

**Freedom of the press**

7.204 We received submissions that the Constitution should expressly recognise the freedom of the press and other news media, in view of the important responsibilities of the media in keeping the public informed. The constitutions of Papua New Guinea, Namibia, Canada and South Africa, among others, contain express references to this aspect of freedom of expression. We believe that the freedom of the press should also be explicitly recognised in the Fiji Islands, in terms that make it clear that the freedom extends to all media, but subject to the following condition.

7.205 The *American Convention on Human Rights* recognises the right of anyone injured by inaccurate or offensive statements or ideas disseminated to the

public in general by the news media to make a correction using the same communications outlet, under such conditions as the law may establish. The Papua New Guinea Constitution recognises a similar right of correction. The Commission considers that this Constitution should also provide for a right of correction under conditions established by law.

7.206 The intervention of the law is required because there must be a means of striking a proper balance between encouraging courageous investigative journalism on the one hand and, on the other, requiring the media to give the same publicity to corrections where these are warranted. The law of defamation already goes some way towards striking this balance, but legislation may also be required. The media must retain the responsibility of deciding whether or not to publish the correction, but at their peril. To indicate the need for this balance, the right of correction should be exercisable on reasonable conditions imposed by law.

7.207 The Constitution provides that the right to freedom of expression may be limited by law, or things done under the authority of a law, on both broad and relatively specific grounds. All such laws are subject to the important over-riding requirement of being reasonably justifiable in a democratic society. That safeguard should be retained. Section 13(2)(a) and (b) permit limitations on fairly general grounds for the purpose of protecting the interests or the rights and freedoms of others and also the public interest. For those purposes provision should continue to be made permitting the right to freedom of expression to be limited by law.

### **Public officers**

7.208 Section 13(3)(e) allows a law to be made “for the imposition of restrictions upon public officers”. The restrictions could be for any purpose and of any extent. The Commission considers that the provision should be amended to make it clear that the only justification for imposing restrictions on the freedom of expression of public officers (a term which is at present confusingly defined as including the judges), is to secure their impartial and confidential service, where confidentiality is required. Restrictions for that purpose should be required to be reasonable.

### **Preventing ill-will between communities**

7.209 Section 13(2)(d) is a new provision appearing for the first time in the 1990 Constitution. It permits a law to be made limiting the right to freedom of expression

for the purpose of protecting the reputation, the dignity and esteem of institutions and values of the Fijian people, in particular the Bose Levu

Vakaturaga and the traditional Fijian system and titles or the reputation, dignity and esteem of institutions and values of other races in Fiji, in particular their traditional systems.

This new provision reflects the cultural sensitivity of indigenous Fijians to criticism of their traditional leaders and institutions, especially by persons whom they regard as outsiders, but it is even-handed in protecting also "the values of other races in Fiji, in particular their traditional systems". However, no law has ever been made for any of the purposes described, perhaps because they cast a potentially wide net that would be capable of catching all sorts of statements of fact or comment concerning the institutions and values of all groups and communities. A law to give effect to those purposes as they are written would restrict freedom of expression severely. It might be hard to show that it was reasonably justifiable in a democratic society.

7.210 The Commission considers that the only justification for restricting the freedom of expression to take account of the sensitivities to criticism among the various communities, is the ground already recognised in section 17 of the Public Order Act (Cap. 20). That section creates the offence of inciting racial antagonism. We consider that the Constitution should be amended to allow a law to be made restricting freedom of expression by forbidding improper attacks on the dignity of traditional offices or institutions, in order to prevent ill-will between different races or communities.

7.211 Accordingly, the Commission includes in its recommendations a suggested redraft of the present section 13(2). This indicates both its approach to the substance of the permissible limitations on freedom of expression and also the need to describe such limitations in more succinct and accessible language.

## RECOMMENDATIONS

137. **The Constitution should affirm that everyone has the right to freedom of expression including the freedom to hold opinions, to receive and impart ideas and information without interference and the freedom to seek ideas or information.**
138. **The Constitution should not make specific provision about the form in which people are free to express themselves.**
139. **It should be specifically provided that freedom of expression includes freedom of the press, in terms that make it clear that the freedom extends to all media, but subject to the right of persons injured by inaccurate or offensive media reports to**

**have a correction published on reasonable conditions established by law.**

- 140. The Constitution should continue to require that all laws limiting the right to freedom of expression for a purpose authorised by the Constitution are reasonably justifiable in a democratic society.**
- 141. The existing grounds on which laws may limit the right to freedom of expression for the purpose of protecting the rights and freedoms of others and the public interest should be retained.**
- 142. The Constitution should be amended to permit the freedom of expression of public officers to be limited by law only for the purpose of imposing reasonable restrictions in order to secure their impartial and confidential service.**
- 143. It should be further amended to permit the right of freedom of expression to be limited by laws forbidding improper criticism of traditional offices or institutions only for the purpose of preventing ill-will between different races or communities.**
- 144. The permissible limitations of the right to freedom of expression should be expressed by a provision on the following lines:**

A law, or an executive or administrative action under the authority of a law, may limit the right to freedom of expression

- (a) in the interests of defence, public safety, public order, public morality or public health; or
- (b) for the purpose of protecting the reputations, privacy, or rights and freedoms of other persons, preventing the disclosure of information received in confidence, or improper attacks on the dignity of respected offices or institutions in a manner likely to promote ill will between different races or communities, maintaining the authority and independence of the courts, imposing reasonable restrictions on public officers in order to secure their impartial and confidential service or regulating the technical administration of communications;

but only to the extent that the limitation is shown to be reasonably justifiable in a democratic society.

## THE RIGHT TO FREEDOM OF PEACEFUL ASSEMBLY

7.212 Section 14 of the 1990 Constitution protects both freedom of assembly and freedom of association. Although people often exercise their rights to each of these freedoms simultaneously, by meeting together for a common purpose, the rights are distinct. Different policy considerations apply in considering the purposes for which each right may need to be limited. The Commission therefore considers that they should be affirmed in separate sections of the Constitution.

7.213 Historically, freedom to assemble was protected by the common law only by reason of the fact that everyone is free to do what is not prohibited. If a group of people decide to go to the same place at the same time, that is not unlawful, as long as, individually and as a group, they keep within the law. The constitutional protection of freedom of assembly provided by section 14(1) goes only a small distance in turning the common law liberty into a constitutional right. Following the terminology of the international instruments and a number of national constitutions, the Constitution should affirm in positive terms that everyone has the right to freedom of peaceful assembly.

### **Limitation of the right**

7.214 The introduction of the word “peaceful” in itself suggests that the right to freedom of assembly is not unlimited. Section 14(2) permits the right to be limited by laws or things done under laws making provision

- (a) in the interests of defence, public safety, public order, public morality or public health;
- (b) for the purpose of protecting the rights and freedoms of others; or
- (c) for the imposition of restrictions upon public officers.

The laws, or things done under laws, for any of these purposes must be reasonably justifiable in a democratic society.

7.215 The apparent brevity of the permitted limitations does not truly reflect the extent to which laws for the purposes mentioned might restrict the right to freedom of peaceful assembly. This is partly because succinct and seemingly innocuous words like “defence”, “public safety” and “public order” have a very wide application and partly because, like freedom of expression, the right of people to assemble is fundamental to the exercise of political rights. The assembly may be for the purpose of discussing a public issue, rallying support for a political party or candidate, or exercising the right to protest peacefully against the policies of a government - in the Fiji Islands or in another country - on an issue of public concern.

*Prior restraints on freedom of assembly*

7.216 The right to assemble for such purposes is necessary to the functioning of a democratic society. However, the responsible authorities may sometimes wish to limit the exercise of the right, either because their policies or actions are under attack or because they fear that an assembly by one group may lead to a clash with an opposing group and consequent disorder. The Commission has therefore examined some of the laws of the Republic which are regularly used to control the exercise of the right to freedom of assembly in public places or otherwise.

7.217 The most widely invoked limitation on freedom of assembly is to be found in section 8 of the Public Order Act (Cap. 20). This requires “any person who wishes to organise or convene a meeting or procession *in a public place* to obtain a permit from the District Officer. The District Officer is entitled to refuse the permit *only* if he or she is satisfied for good reasons that the meeting or procession is likely to prejudice the maintenance of peace or good order. No permit is required for a “sporting, recreational or social event or fixture, private entertainment or any assembly for religious or charitable purposes” conducted with the permission of the person or body having control of the public place in which it is held.

7.218 Section 9 of the Public Order Act empowers the Minister to prohibit by order any assembly, whether public or not, or any meeting or procession in *any place other than a public place*. Before he can make such an order, the Minister must be satisfied that it is expedient to do so in the interests of public safety and the maintenance of public order. Police officers are empowered under section 10 to disperse processions or meetings for which no permit has been issued or which breach any condition of a permit. Maximum penalties range from imprisonment for 6 months to 12 months with or without fines of \$200 to \$400. The consent of the Director of Public Prosecutions is not required for prosecutions under these sections.

7.219 The Commission is satisfied that the offences under the Penal Code relating to unlawful assembly, riot, sedition and conspiracy provide ample means of dealing with actual or threatened breaches of the peace, whether by those who have assembled or by others, as well as persons who assemble for the purpose of breaking the law or inciting others to do so. Except possibly in time of emergency, the Minister should not have a power to prohibit an assembly in advance, on the wide grounds in section 9 of the Public Order Act. Such a power is too easily capable of being used to stifle legitimate public protest.

7.220 The only reason for which a prior permit to assemble should be required is to enable reasonable conditions as to time and place to be imposed on an assembly which may block the access of other members of the public to a public place or impede the flow of pedestrian or road traffic. A District Officer should not be required to anticipate any likely disturbance of the peace - except for the purpose of advising the police of the time and place of the assembly so that they can be present in adequate numbers. Again, it is too easy for the District Officer to suppose that he or she is required positively to approve the purpose of the assembly, and is ultimately answerable to Ministers for the decision. Any need for prior approval capable of being directed to the purpose for which people may assemble has a chilling effect on the exercise of the right to freedom of peaceful assembly itself.

#### *Need for review of the law*

7.221 The Commission therefore proposes that, although the Constitution itself should not be changed, the laws of the Republic bearing on the right to freedom of peaceful assembly should be reviewed. The Constitution should continue to confer a power to limit the right to freedom of peaceful assembly by a law, or administrative action under its authority, in the interests of defence, public safety, public order, public morality or public health, or for the purpose of protecting the rights and freedoms of others, to the extent that the law or the action taken under it can be shown to be reasonably justifiable in a democratic society. It would be possible for an aggrieved citizen to challenge the breadth of the existing laws imposing such limitations in the interests of public safety and public order, on the ground that they do not satisfy this last-mentioned requirement. However, it would be preferable for those laws to be re-examined by the responsible Minister.

7.222 Except possibly in time of emergency - a matter we consider in Chapter 19 - there should be no general power to prohibit an assembly in advance on the grounds of public order. The need for a prior permit should apply only to assemblies in a public place and should be confined to the imposition of reasonable conditions as to time and place, with the purpose of protecting the interests of other members of the public.

#### *Public officers*

7.223 The unfettered power to limit the right to freedom of peaceful assembly for the purpose of imposing restrictions on public officers duplicates similar limitations on other rights. Again, we think that the purpose of the restriction should be expressed. It is presumably to prevent public officers from taking part

in assemblies in ways which could compromise their political neutrality. The Constitution should therefore be amended to permit the right to be limited by laws imposing reasonable restrictions on public officers only for the purpose of securing their impartial service.

## RECOMMENDATIONS

- 145. Freedom of assembly and freedom of association should no longer be linked for the purpose of affording them constitutional protection.**
- 146. The Constitution should positively affirm that everyone has the right to freedom of peaceful assembly.**
- 147. It should continue to confer a power to limit the right to freedom of peaceful assembly by a law, or administrative action under its authority, in the interests of defence, public safety, public order, public morality or public health or for the purpose of protecting the rights and freedoms of others, if the law or the action taken under it can be shown to be reasonably justifiable in a democratic society.**
- 148. The existing laws imposing such limitations in the interests of public safety and public order should be reviewed, with a view to removing the power to prohibit an assembly in advance, on the grounds of public order. The need for a prior permit should be limited to assemblies in a public place. The only purpose of such a permit should be the imposition of reasonable conditions as to the time and place of the assembly, in order to protect the interests of other members of the public.**
- 149. The Constitution should be amended to permit the right to freedom of peaceful assembly to be limited by laws imposing reasonable restrictions on public officers only for the purpose of securing their impartial service.**

## THE RIGHT TO FREEDOM OF ASSOCIATION

7.224 Like the freedom to assemble, the original common law concept of the freedom to associate with other persons for any lawful purpose is residual, in the sense of being a freedom to do anything which the law does not prohibit. The Constitution should affirm in positive terms that everyone has the right to freedom of association.

7.225 Section 14 of the 1990 Constitution, like the corresponding section of the 1970 Constitution, refers to a person's right to "associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his interests". Given the long history of the fight to obtain recognition of the right to form trade unions, it is perhaps not surprising that the right to form or belong to trade unions is given particular protection. However, we believe that the emphasis on trade unions tends to overshadow the all-encompassing purposes of the right to freedom of association. It is desirable to recognise the right to associate freely for a wider range of specific purposes, as well as other purposes not mentioned.

7.226 Drawing on the words of the *American Convention on Human Rights*, we propose that the Constitution should affirm that everyone has the right to freedom of association for political, economic, labour, cultural, sports or other purposes. Freedom of association for religious purposes is already recognised as an aspect of the right to freedom of religion.

7.227 The references to association for "economic" or "labour" purposes are wide enough to include the existing right to form or belong to trade unions or other associations for the protection of a person's interests in relation to the workplace, whether as employee or employer. Nevertheless, we propose that these aspects of the right to freedom of association should be spelt out in a separate right to organise and to bargain collectively. Therefore, nothing will be lost by the omission of the right to form and join trade unions from the list of the more widely-ranging purposes for which people may wish to exercise their right to freedom of association.

7.228 The Constitution should continue to confer a power to limit the right to freedom of association by a law, or administrative action under its authority, in the interests of defence, public safety, public order, public morality or public health or for the purpose of protecting the rights and freedoms of others, if the law or the action taken under it can be shown to be reasonably justifiable in a democratic society. The power to impose restrictions on the right of public officers to freedom of association under section 14(2)(c) should be amended to permit the imposition only of such reasonable restrictions as are necessary to secure their impartial service. We propose later a power to restrict the right of members of disciplined services to form and join trade unions or exercise the other new labour rights we recommend.

## RECOMMENDATIONS

150. **The Constitution should affirm in positive terms that everyone has the right to freedom of association. The right to associate**

should be described as being “for political, economic, labour, cultural, sports or other purposes”.

151. **The right to form or belong to trade unions or other associations for the protection of a person’s interests, already recognised as an aspect of the right to freedom of association, should become part of a separate right to organise and to bargain collectively.**
152. **The Constitution should continue to confer a power to limit the right to freedom of association by a law, or administrative action under its authority, in the interests of defence, public safety, public order, public morality or public health or for the purpose of protecting the rights and freedoms of others, if the law or the action under it can be shown to be reasonably justifiable in a democratic society.**
153. **The power to impose restrictions on the right of public officers to freedom of association under section 14(2)(c) should be amended to permit the imposition only of such reasonable restrictions as are necessary to secure their impartial service.**

#### THE RIGHT TO ORGANISE AND BARGAIN COLLECTIVELY

7.229 Section 14 of the 1990 Constitution protects a person’s right to “associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his interests”. The wording of the provision is broad enough to confer rights on both workers and employers. However, the Constitution does not guarantee any further rights capable of being directly applied in the area of industrial relations.

7.230 In particular, the Constitution does not expressly recognise a right to bargain collectively nor a right to take industrial action. Furthermore, courts in Fiji and elsewhere in the world have consistently declined to interpret the right to form and join trade unions or any other constitutionally protected right in an expansive way so as to include rights of that kind.

7.231 Some submissions pointed out that a right merely to form or join trade unions can be meaningless without further rights which allow the purposes of trade union membership to be realised. They suggested that the Constitution should expressly guarantee the most important labour rights contained in the international human rights instruments.

## The international standards

7.232 The main human rights instruments which protect labour rights are the *Universal Declaration of Human Rights*, the *International Covenant on Economic, Social and Cultural Rights* and various instruments negotiated within the International Labour Organisation. Fiji is a member of the Organisation, but is not a party to all of its conventions.

7.233 The international standards govern labour rights in two ways. First, some provisions confer individual rights applying in the workplace and setting standards for what might be broadly described as the terms and conditions of employment. Secondly, other provisions give rights relevant to the freedom of individuals to organise and if necessary take collective action to ensure that those standards are met. The Commission is directly concerned only with this second category of labour rights.

7.234 Article 8 of the *Covenant on Economic, Social and Cultural Rights* recognises the right of “everyone” to “form trade unions and join the trade union of his choice...”. It also recognises a “right to strike, provided that it is exercised in conformity with the laws of the particular country”. The Article also confers rights on “trade unions” in addition to individual persons. Unions are to enjoy the right to establish national federations or confederations and the right to form or join international trade union organisations. They also enjoy the right to function freely subject only to limitations which are prescribed by law and are necessary in a democratic society.

7.235 The most important International Labour Organisation Conventions in this area are *Convention 87: Freedom of Association and Protection of the Right to Organise*, and *Convention 95: Right to Organise and Collective Bargaining*. Although Fiji is not a party to these Conventions, we look to them as the authoritative source of the relevant international standards. *Convention 87* requires workers and employers, without any distinction whatsoever, to have the right to establish and join organisations of their own choosing, without previous authorisation, for furthering and defending the interests of workers or of employers. Article 3 gives workers’ and employers’ organisations “the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes”. Paragraph (2) of the article prohibits public authorities from interfering with those activities in ways which would restrict the right or impede its *lawful* exercise. The wording clearly implies that, although some legal regulation by the State of the right to organise is permissible, this should not negate the content of the right.

7.236 Under *Convention 95*, states assume the obligation to protect workers from anti-union discrimination in respect of their employment. In particular, it outlaws conditions of employment which prohibit union membership or actions which penalise workers for union membership or legitimate union activity.

### **Constitutional recognition of labour rights**

7.237 Fiji's statute law at present recognises and reflects many of the international standards, including the possibility of lawful strikes and lockouts, subject to certain conditions. Even so, as statutory rather than constitutional rights, these can be easily changed or withdrawn. The Commission believes that some labour rights are so fundamental to the realisation of social justice in a modern industrial society that they should be elevated to the level of constitutional rights. We are persuaded that the existing right to form and join trade unions can be an empty right unless the members of trade unions have the right to organise and bargain collectively for the purpose of securing reasonable terms and conditions of employment.

7.238 The Commission therefore proposes that the Constitution should recognise a separate right to organise and bargain collectively. The expression of that right should begin with an affirmation that the right of everyone to freedom of association includes the right to form or join trade unions or other associations for the protection of their interests as workers or employers. It should then spell out the right of workers and employers and their trade unions to organise and bargain collectively, but without implying that such rights are inherent in the right to freedom of association.

7.239 In Chapter 3, we recorded our view that the Bill of Rights should not include economic and social rights of a kind which cannot be implemented without the intervention of the state and the need to make budgetary provision for the purpose. One would be the right to fair and safe conditions of employment. Such a right would need to be implemented through a combination of legislative standards supported by state inspection and the exercise of the right to bargain collectively about the terms and conditions of employment. Recognising labour rights in the Constitution will therefore go some way towards ensuring the attainment of certain other rights which do not themselves have constitutional protection.

7.240 Among other national constitutions, that recently adopted in South Africa sets out labour rights most fully. The Republic of Fiji could with advantage adopt some though not all of the provisions carefully worked out there, first for inclusion in their interim constitution and more recently in the permanent constitution adopted

by the Constitutional Assembly. Accordingly, the Constitution should recognise that everyone has the right to fair labour practices. This is a useful way of balancing the freedom of unions to organise and the need for government to provide some legal framework for their operation. The Constitution should also recognise the right of both workers and employers to organise and bargain collectively.

### **A right to strike?**

7.241 In South Africa, the interim constitution recognised that workers have the right to strike, but only “for the purpose of collective bargaining.” It also guaranteed that “employers’ recourse to the lockout for the purpose of collective bargaining should not be impaired”. The lockout section of the labour rights provision proved politically controversial and was not included in the final constitution. Nor was the restriction on the purposes for which workers might exercise the right to strike.

7.242 The Commission considers that, in conferring labour rights, the Constitution should not expressly protect either a right to strike or a right to lockout. The existence of such rights has never been in issue in the Fiji Islands, but their exercise is controlled by statute, in the public interest and in the interests of affected citizens. We think that giving such rights a constitutional status might upset the reasonable balance among the competing interests which the law seeks to achieve. Any new legislation affecting the rights of workers or employers should be discussed by the Labour Advisory Board established under the Employment Act (Cap. 92) before enactment by Parliament.

### **A right not to join a trade union?**

7.243 In debating and negotiating labour rights in international organisations and in other countries, “closed-shop agreements” and compulsory unionism have been controversial issues. The underlying questions of principle are sometimes expressed in an over-simplified form by asking whether a right to associate or to join a trade union includes a right *not* to do so. The Commission does not consider that the Bill of Rights needs to resolve this question. It should be left to the legislature and the courts, guided by the international standards.

### **A right to federate and confederate?**

7.244 Some submissions sought a specific constitutional right for trade unions to federate and confederate, and to join international trade union organisations, as recognised in some international instruments. That right is already inherent in the right to freedom of association, of which the right to form and join trade unions is but one aspect. We have already proposed that the right to freedom of association

itself should recognise that the right may be exercised for “economic” and “labour” purposes, among others. There is no need for the Constitution expressly to recognise the rights in question.

### **Limiting the right to organise and bargain collectively**

7.245 In recommending a new constitutional right to organise and bargain collectively, the Commission is acutely aware that the right should not be absolute. Some limitations will be necessary to ensure that it is exercised fairly and responsibly. Like the existing section protecting freedom of assembly and association, the new right should be subject to limitation by law, and administrative action under the authority of a law, in the interests of defence, public safety, public order, public morality or public health, or for the purpose of protecting the rights and freedoms of others. As with all other rights which may be limited for these broad purposes, the law or the action taken under it must be shown to be reasonably justifiable in a democratic society.

#### *Interference with the conduct by trade unions of their own affairs*

7.246 That last-mentioned requirement should be adequate to protect the freedom of trade unions to conduct their own affairs - another matter raised in submissions. We consider that the recognition of the new labour rights will provide a context within which any interference with that freedom can be put to the test. Regulation of the affairs of trade unions will be unconstitutional if it restricts unduly the exercise of the constitutionally recognised rights of trade unions and their members.

#### *Public servants*

7.247 At present, section 14(2)(c) limits the freedom of assembly and association by permitting “the imposition of restrictions upon public officers”. In the context of a right to organise and bargain collectively, the Commission considers that this limitation is too wide. The existing law allows public servants, as distinct from members of the military and police forces, to organise, bargain collectively and to strike in the same way as other workers. Existing restrictions which apply to public servants do so by virtue of the *services* which particular public officers perform. These restrictions apply to all workers performing services deemed to be “essential” to public order, safety or health. They therefore find their authorisation in the general limitation contained in paragraphs 14(2)(a) and (b) and not in paragraph (c) which applies to “public officers”.

7.248 The Commission is also mindful that fewer and fewer essential services are being provided by “public officers”. For some time now, services like the

provision of electricity and the operation of civil aviation have been performed by employees of statutory bodies, rather than public officers. This trend will continue as corporatisation and privatisation proceed. The Commission therefore considers that there should be no express power to limit the right to organise and bargain collectively for the purpose of imposing restrictions on “public officers”.

*Members of the armed forces and the police*

7.249 We recognise, however, that the military and the police, as disciplined services, are in a different situation. The Constitution should therefore include an express power to make laws imposing reasonable restrictions on members of the armed forces and the police in the exercise of the rights recognised by the new provision. All of the international instruments permit special limitations applying to the members of those forces.

**The new rights to be an additional protection**

7.250 Our recommendations for the separate and extended recognition of labour rights will confer on trade unions and their members constitutional protections additional to those they already enjoy under other provisions of the Bill of Rights. They will, for example, continue to have the rights to freedom of assembly and expression. Under the Bill of Rights, all rights are cumulative. The limitation of one right does not affect another, unless the limitation is lawfully imposed in respect of that right also, under its own terms.

RECOMMENDATIONS

154. **The Constitution should recognise a separate right to organise and bargain collectively. The new right should continue to affirm that the right of everyone to freedom of association includes the right of everyone to form or join trade unions or other associations for the protection of their interests, whether as a worker or an employer.**
155. **The Constitution should recognise that everyone has the right to fair labour practices.**
156. **It should also recognise the right of both workers and employers to organise and to bargain collectively.**
157. **The Constitution should confer in respect of the new right the same powers to limit it by a law, or administrative action under the authority of a law, as already apply in respect of the right**

**to freedom of association. Limitations should be permitted in the interests of defence, public safety, public order, public morality or public health or for the purpose of protecting the rights and freedoms of others, if the law or the action taken under it can be shown to be reasonably justifiable in a democratic society.**

- 158. The Constitution should also permit the limitation of the right for the purpose of imposing reasonable restrictions on members of the armed forces or the police force.**

## THE RIGHT TO FREEDOM OF MOVEMENT

7.251 Section 15 of the Constitution protects the right of all persons to freedom of movement. It reproduces the corresponding section of the 1970 Constitution without change. Freedom of movement is defined as meaning

- the right to move freely throughout Fiji;
- the right to reside in any part of Fiji;
- the right to enter Fiji;
- the right to leave Fiji; and
- immunity from expulsion from Fiji.

7.252 The international standards recognise that citizens and non-citizens may not always enjoy these various rights to the same extent. However, section 15 accords *all* of the rights to *all* persons, and makes distinctions between citizens and non-citizens only in prescribing the purposes for which the various rights may be limited by law. This technique makes it difficult to ascertain the rights to which different categories of persons are entitled. In keeping with its overall approach, the Commission considers that the Constitution should clearly affirm the rights of citizens, non-citizens and all persons, to those aspects of the right to freedom of movement appropriate in each case. This in turn will make it easier to see whether the rights of the different groups should be subject to limitation by law and if so on what grounds.

7.253 Accordingly, we propose that, under the heading of “Right to freedom of movement”, the Constitution should affirm the various aspects of that right in the following way:

- (1) Every citizen of the Republic of the Fiji Islands has the right to enter and reside in the Republic, and the right not to be expelled from the Republic.

- (2) Every citizen, and every other person lawfully in the Republic of the Fiji Islands, has the right to move freely throughout the Republic and the right to leave the Republic.
- (3) Every citizen, and every other person who has been granted a right to reside in the Republic of the Fiji Islands, has the right to reside in any part of the Republic.
- (4) Every person who is not a citizen of the Republic of the Fiji Islands but is lawfully in the Republic has a right not to be expelled from the Republic except under a decision taken on grounds prescribed by law.

We comment in turn on each of these proposed provisions, and the extent to which they might be capable of limitation by law.

### **Freedom to enter, reside and not to be expelled**

7.254 In a multi-ethnic country like the Republic of the Fiji Islands, it is important to provide a clear assurance that all citizens have the right to enter and reside in and the right not to be expelled from the country. This is the effect of the proposed right in paragraph (1) above. We have already recommended, in Chapter 5, that such a right should be assured as part of a *Compact* among the citizens of Fiji. Paragraph (1) implements that assurance.

#### *Limitation of those freedoms*

7.255 The only purpose for which the proposed right in paragraph (1) should be capable of being limited by law is to permit the execution of an order of a court that a person be removed to another country to answer to the legal processes of that country. That limitation should apply to citizens and non-citizens alike.

7.256 The most usual reason for removal is the making of an extradition order under which a person may be required to stand trial in another country for an offence against its laws and, if convicted, to undergo punishment. This possibility is already provided for in the first part of section 15(3)(g). However, the power in the second part of that provision to remove a person to serve a sentence of imprisonment in another country should not apply to Fiji citizens. Its purpose is to allow foreign citizens to serve in their own country all or part of a sentence of imprisonment imposed in Fiji.

7.257 The Constitution should also permit children, whether citizens or not, to be removed from Fiji for the purpose of restoring them to the custody of a parent

or lawful guardian, if they have been removed from another country contrary to the law of that country. Again it should be a requirement that an order for the child's return must be made by a court of the Republic. Such a provision would implement *The Hague Convention on International Child Abduction* which is an important weapon in preventing parents not awarded custody after a separation or divorce from abducting their children unlawfully.

### **Freedom to move freely and to leave**

7.258 The rights proposed in paragraphs (2) and (3) above concern the right to move freely throughout the Republic, the right to reside in any part of the Republic, and the right to leave the Republic. The rights to move freely and to leave are accorded to citizens and all other persons lawfully in the Republic. The right to reside in any part of the Republic is accorded to citizens and other persons granted a right to reside in the Republic. There may be good reason to allow limitations to be imposed by law on each of those rights, but the limitations should not be oppressive.

#### *Limitation of those freedoms*

7.259 Section 15(2) permits restrictions on any aspect of a person's freedom of movement if that person is lawfully detained. Its purpose is simply to prevent a person from claiming that his or her detention is unlawful solely on the ground that detention restricts that person's freedom of movement. The provision does not affect the content of the right to freedom of movement itself. Its substance should be retained.

7.260 There is another consequential provision in section 12(3)(e) which permits the right to freedom of movement to be limited, so far as may be necessary to give effect to restrictions imposed under the law of the Republic on the acquisition or use by any person of any property in Fiji. This provision allows a person's right to move freely throughout Fiji and to reside in any part of Fiji to be restricted by such laws as those which prevent persons trespassing on the land of others, control the disposition of land by sale or lease or the purpose for which land may be used under zoning laws. The substance of the provision should be retained, but its purpose should be made clearer.

#### *Restricting the freedoms of individuals*

7.261 Section 15(3)(a) permits restrictions to be imposed by or under a law on the freedom of *a particular individual person* to move freely throughout Fiji, to reside in any part of Fiji or to leave Fiji. The restriction must be *reasonably required*

in the interests of defence, public safety or public order. There is no requirement that the law be reasonably justifiable in a democratic society. This is the classic power to restrict the freedom of movement of individuals who, for one reason or another, are regarded as endangering the security of the state.

7.262 Such a power has been used in some countries to impose house arrest on a particular political leader or in other ways to restrict the operation of the democratic process. In the Commission's view, it is a power which should not be capable of being exercised except in time of emergency. There should be no general power to limit *an individual person's* right to freedom of movement. Section 15(3)(a) should be repealed.

*Restricting the freedoms of members of a class*

7.263 It may be desirable to restrict the right of persons generally, or any class of persons, whether citizens or not, to move freely throughout Fiji, to reside in any part of Fiji or to leave Fiji. A power to do so is conferred by section 12(3)(b). Such a restriction may be imposed by or under a law in the interests of defence, public safety and public order as well as public morality and public health. Limitations made under this paragraph must be reasonably justifiable in a democratic society. The power to limit the right to freedom of movement in this way should be retained.

7.264 For example, limitations on the right to move freely throughout Fiji might need to be imposed to check the spread of a particularly dangerous infectious disease. The limitations cannot, however, discriminate against any class of persons on a ground prohibited under section 16, unless they comply also with the conditions under which the right to freedom from discrimination can be limited. We return to the discussion of that point below.

*New ground for restricting freedom*

7.265 The Commission also believes that there is a need to widen the purposes for which such restrictions may be imposed. It has in mind the need to limit the access to areas where the ecosystem needs to be protected, or to which, under the customs of the indigenous people, outsiders should be admitted only with their consent. It therefore proposes that the purposes for which restrictions may be imposed under section 12(3)(b) should include "the protection of the economy, ecology or distinctive culture of a particular area". A necessary safeguard will be provided by the retention of the requirement that a law for any of these purposes must be shown to be reasonably justifiable in a democratic society.

*Determination that person is a member of a restricted class*

7.266 Where restrictions are placed by law on the right to the freedom of movement of a *class* of persons under the power just discussed, as distinct from persons generally, some authority within the state must be given the power to determine whether or not a particular person is a member of the restricted class. Such a determination is, of course, open to challenge in the courts, on the facts or the law, or both. A restricted person will also have the right to claim that the law imposing the restriction is contrary to the Bill of Rights. But as an extra safeguard against the *policy* of a restriction, rather than its *legality*, the Commission considers that there should be a requirement to set up a tribunal of the kind provided for in section 15(4).

7.267 At present the function of such a tribunal is to review restrictions placed on the freedom of movement of individual persons under section 15(3)(a). Although we propose the repeal of that provision, we think that the Constitution should retain provision for the setting up of a review tribunal at the request of a person whose freedom of movement has been restricted as a member of a class to which the restriction applies. The proposed Judicial Service Commission, rather than the Chief Justice, should be empowered to appoint its members.

7.268 The right of access to a review tribunal will also remain an important safeguard for individual persons whose freedom of movement is restricted in the exercise of emergency powers. We so propose in Chapter 19.

*Classes based on prohibited grounds of discrimination*

7.269 The power under section 15(3)(b) to restrict classes of persons in their freedom of movement within Fiji or freedom to leave Fiji allows restrictions to be imposed by a law for a particular purpose on some groups but not others. If the law makes distinctions among citizens on grounds prohibited by the Constitution, then those distinctions must be justifiable under the provisions which permit the limitation for certain purposes of the right to equality under the law and freedom from discrimination proposed below. We believe that the permitted limitations of that right will allow the drawing of justified distinctions when necessary.

*Non-citizens*

7.270 Citizenship or nationality is not a prohibited ground of discrimination, but in any case the draft provision we have put forward permits laws to be made for the purpose of imposing any disability or restriction or conferring any privilege or advantage on persons who are not citizens of the Republic. Accordingly, the

power to restrict the freedom of movement of non-citizens, or classes of non-citizens, within Fiji or the freedom to leave Fiji is also amply covered by section 15(3)(b).

7.271 Under the proposals made above, a non-citizen has no general constitutional right to enter Fiji. The constitutional right to enter Fiji recommended for non-citizens who are the spouses or the natural-born or adopted children of citizens will itself be subject to the normal immigration controls on persons granted permits to enter and reside in the country. It is therefore unnecessary for the constitution to authorise the making of laws controlling the entry of foreign citizens as a limitation on the right to freedom of movement. The only need to authorise laws applying to non-citizens is to permit their expulsion from Fiji on prescribed grounds. For example, most countries make laws empowering a court or a Minister to order the deportation of a non-citizen who has been convicted of a serious offence in that country. Section 15(3)(d) should be amended accordingly.

#### *Court orders and other legal obligations*

7.272 Two of the remaining powers to restrict freedom of movement are concerned with the enforcement of court orders or other legal obligations. Section 15(3)(c) authorises laws for restricting the freedom of movement of persons within Fiji or their freedom to leave Fiji to ensure that they appear before a court at a later date for trial, or proceedings preliminary to trial, or for the purpose of extradition or deportation proceedings. Provision to this effect should be retained but in a more general form to cover other possible reasons for appearances before a court.

7.273 Section 15(3)(c) also allows a person's freedom of movement to be similarly restricted "in consequence of his being found guilty of a criminal offence". This provision is wide enough to permit the making of a law under which certain types of offences, and certain classes of offenders, for example first offenders convicted of relatively minor offences, may be sentenced to reside for a certain period at a particular address or within a particular village, or otherwise have their freedom of movement restricted. Such a sentence may have a far greater rehabilitative effect than a custodial sentence. The provision should be retained.

7.274 Section 15(3)(h) allows the making of a law under which a person's right to leave Fiji may be restricted in order to secure the fulfilment of any obligation imposed on that person by law. The restrictions imposed must be reasonably required to secure the fulfilment of the obligation and both the enabling law and the action taken under that law must be reasonably justifiable in a democratic society.

7.275 As already mentioned, the courts in Fiji have held that a simple contract debt is not an obligation imposed by law. Accordingly, the provision would not allow a person to be prevented from leaving Fiji simply on the ground that he or she has unpaid debts. As proposed in relation to the deprivation of the personal liberty of a person who owes unpaid tax or maintenance, the power to prevent such a person from leaving Fiji should be limited to the case where there has been wilful default by a person who had the means to pay and a court has made an order restricting that person's freedom to leave Fiji until the amount owing has been paid. With an amendment to this effect, the substance of section 15(3)(h) should also be retained.

*Public officers*

7.276 Finally, as in the case of other rights, section 15(3)(f) allows an unfettered power to make laws for imposing restrictions on the freedom of movement or residence within Fiji or on the right to leave Fiji, of any public officer. The Commission considers that the only power to restrict the freedom of movement of public officers by law should be for the purpose of imposing and enforcing reasonable terms and conditions of employment. In judging reasonableness account should be taken of the nature of the particular public officer's employment.

RECOMMENDATIONS

**159. Under the heading of "Right to freedom of movement", the Constitution should affirm the following rights:**

- (1) Every citizen of the Republic of the Fiji Islands has the right to enter and reside in the Republic, and the right not to be expelled from the Republic.**
- (2) Every citizen and every other person lawfully in the Republic of the Fiji Islands has the right to move freely throughout the Republic and the right to leave the Republic.**
- (3) Every citizen, and every other person who has been granted a right to reside in the Republic of the Fiji Islands has the right to reside in any part of the Republic.**
- (4) Every person who is not a citizen of the Republic of the Fiji Islands but is lawfully in the Republic has a right not to be expelled from the Republic except under a decision taken on grounds prescribed by law.**

160. The rights of citizens in paragraph (1) should be capable of being limited by law only for the purposes of permitting their extradition, or the removal of children who have been abducted from another country, for the purpose of restoring them to the lawful custody of a parent or guardian. In each case the removal should require the order of a court. The power of removal for these purposes should apply to non-citizens as well as citizens. The power to remove a person to serve a sentence of imprisonment in another country should apply only to non-citizens. With amendments to give effect to these recommendations, the substance of section 15(3)(g) should be retained.
161. The substance of section 15(2), permitting restrictions on any aspect of a person's freedom of movement if that person is lawfully detained, should be retained.
162. The substance of section 12(3)(e) which permits the right of freedom of movement to be limited, so far as may be necessary to give effect to restrictions imposed under the law of the Republic on the acquisition or use by any person of any property in Fiji, should be retained, but its purpose should be made clearer.
163. Section 15(3)(a), which permits restrictions to be imposed by or under a law on the freedom of any individual person to move freely throughout Fiji, to reside in any part of Fiji or to leave Fiji, if the restriction is reasonably required in the interests of defence, public safety or public order, should be repealed.
164. The Constitution should retain the power conferred by section 12(3)(b) to impose by or under a law restrictions on the right to move freely throughout Fiji, to reside in any part of Fiji or to leave Fiji of persons generally, or any class of persons, whether citizens or not, in the interests of defence, public safety and public order, public morality or public health, if the law can be shown to be reasonably justifiable in a democratic society.
165. The purposes for which such restrictions may be imposed should include the protection of the economy, ecology or distinctive culture of a particular area.

166. As a way of challenging the *policy* of a restriction, rather than its *legality* (which can be challenged in the courts), the Constitution should include a requirement to set up a tribunal of the kind provided for in section 15(4) at the request of a person whose freedom of movement has been restricted as a member of a class to which the restriction applies. The proposed Judicial Service Commission, rather than the Chief Justice, should be empowered to appoint its members.
167. In view of the recommendation that a non-citizen should have no constitutional right to enter Fiji, the only special power required to deal with non-citizens is a power to make laws permitting their expulsion from Fiji on prescribed grounds. Section 15(3)(d) should be amended accordingly.
168. Section 15(3)(c), authorising laws restricting the freedom of movement within Fiji or the freedom to leave Fiji of any person, either to ensure that person's appearance before a court at a later date for trial or other proceedings, or in consequence of that person being found guilty of a criminal offence, should be retained.
169. The Constitution should retain the substance of section 15(3)(h), allowing the making of a law under which a person's right to leave Fiji may be restricted if reasonably required to secure the fulfilment of any obligation imposed on that person by law, so long as the enabling law and the action taken under it can be shown to be reasonably justifiable in a democratic society. The power to prevent a person who owes unpaid tax or maintenance from leaving Fiji should be limited to the case where there has been wilful default by a person who had the means to pay and an order restricting that person's freedom to leave Fiji has been made by a court.
170. Section 15(3)(f) should be amended to permit laws imposing restrictions on the freedom of movement of public officers only for the purpose of imposing and enforcing reasonable terms and conditions of their employment.

## THE RIGHT TO EQUALITY UNDER THE LAW AND FREEDOM FROM DISCRIMINATION

### Equality under the law

7.277 The purpose of section 16 of the 1990 Constitution is to protect persons from discrimination on any of the grounds referred to in the section. Again, the section does not express a positive right. Some submissions suggested that the Constitution should confer a right to equality in terms similar to those used in other constitutions. Various formulations were suggested, including a right to “the equal protection of the laws”, originating in the *Constitution of the United States of America*, and expanded in the *Canadian Charter of Rights and Freedoms* to include also a specific right to “the equal benefit of the laws”.

7.278 The Commission considers that it would be better not to use the North American formulas which might be regarded as bringing with them a wealth of case law, not all of it apposite in the legal system and social climate of the Fiji Islands. We have already recommended that people should be assured of equal treatment by the courts, by including in the Constitution a provision affirming that all persons are equal *before* the law and have a right to a fair trial. We now propose that the Constitution should affirm that all persons are equal *under* the law and have a right to freedom from discrimination on any of the listed grounds.

### Meaning of “discrimination”

7.279 “Discriminate” is a word which has different meanings, depending on the context. It can mean “discern differences” in a neutral or even a complimentary sense. But in the context of human rights, it has come to mean “make unjustified differences” in a pejorative sense. Even then, it is not always easy, by reference to the word alone, to determine whether a law or an administrative action discriminates against a person in a way forbidden by the human rights norms.

7.280 Article 16(1) provides that a law may not be “discriminatory” of itself or in its effect, and also that no person may be treated in a discriminatory manner under a law or in the performance of the functions of a public office or public authority. Subsection (2) defines the term “discriminatory”. Although the definition is not very easy to read, it does provide a reasonably clear test of when a law or action is discriminatory and when it is not. It has three elements:

- Some persons, described by reference to a prohibited ground of discrimination, are treated differently from others described by reference to the same ground, for example “Fijians” are treated

differently from members of other races, or “women” are treated differently from “men”.

- The different treatment is attributable wholly or mainly to that ground, for example the fact that the persons concerned are “Fijians” or “women” is the sole or main reason for the different treatment.
- The different treatment places disabilities or restrictions on the persons concerned, or accords them privileges or advantages. For example “Fijians” are subject to restrictions that do not apply to members of other races, or “men” have privileges not accorded to “women”.

7.281 Unless the second and third elements are present, as well as the first, the mere fact that some people are treated differently from others does not mean that either group has been treated in a discriminatory manner. In affirming the right of everyone to freedom from discrimination, the Constitution should retain the elements of the present test of what is discriminatory, but formulate it more simply and clearly. We recommend below a draft for this purpose.

### **Application of the right**

7.282 The right to equality and freedom from discrimination on a prohibited ground should apply to the rights conferred by the Bill of Rights itself and to the application of all other provisions of the Constitution, unless, in the particular case, there is good reason to exclude its application. The present introductory words in section 16(1) making the right subject to all other provisions of the Constitution are too general and should be repealed. The right will also apply to all other law of the Republic and all administrative action taken by or on behalf of the state, whether or not under a law, unless that law or administrative action falls within a permitted limitation of the right.

### **Prohibited grounds of discrimination**

7.283 The 1990 Constitution prohibits discriminatory treatment on the ground of race, sex, place of origin, political opinions, colour, religion, or creed. The Commission compared this list with the prohibited grounds of discrimination referred to in the international instruments and other national constitutions. Its conclusions are as follows:

- The term *race* is well understood in the Fiji Islands and should be retained, but a reference to *ethnic origin* should be added. This is a wider term which includes all the characteristics which a group

of people feel they have in common. People belonging to a particular race may have different ethnic origins.

- A person's *sex* refers to his or her biology. The term is well-understood and should be retained, but it should be accompanied by the word *gender*. This word signifies the attributes which society associates with men and women respectively. Its inclusion would prohibit discrimination against women by or under the law on the ground of the place in society accorded to them under a particular culture.
- A person's *place of origin* was originally a colonial concept used to distinguish an immigrant group, but it applies equally to persons originating from different places within the Fiji Islands and should be retained.
- The reference to *political opinions* should be retained. The term includes *beliefs*.
- Although outdated as a way of referring to persons of different ethnic origin, the word *colour* should also be retained.
- The reference to *religion* was inserted by the 1990 Constitution, apparently because of some doubt about the meaning of the word *creed*. The latter is not a common word, but includes both religious and non-religious beliefs. It too should be retained but should be regarded as separate from religion.
- At present discrimination on the ground of a person's *language* is not prohibited. A reference to language should be added.
- A reference to *birth* should be included. It would cover aspects of a person's family status.
- Taking account of submissions made to us, we propose the inclusion of three further grounds - *economic status*, *age* and *disability*, which, we believe, are factors that are at times taken into account in a discriminatory way in the Fiji Islands. There are some circumstances in which it is necessary or desirable to make a distinction on one or other of those grounds, but the onus should be on the state to show that the distinction is justifiable.

7.284 For example, a graduated income tax requires people who have a comparatively high income to pay tax at a higher rate than those who have a lower income. The imposition of a compulsory retiring age requires a balance between the continued employment of older people who have a contribution to make and would like to go on working and the need to give younger people employment

and opportunities for promotion. It is important to ensure that disabled people are provided with adequate facilities to enable them to lead as normal a life as possible, and are not discriminated against by or under law on account of their disability. But if they are unable to support themselves they may need access to a social security benefit.

7.285 We discuss below the way in which the onus should be placed on the state of showing that, in the circumstances, some people should be given more advantageous, or more onerous, treatment than others on a prohibited ground. The inclusion of additional grounds, especially the references to economic status, age and disability, will often make it necessary to enact laws limiting the right to equality under the law and freedom from discrimination on one or more of those grounds, but it should always be possible to question the constitutionality of such a law or administrative action under it in the particular circumstances.

7.286 The Commission considered whether the prohibited grounds now recommended should be further widened by including a reference to "any other ground". A few national constitutions so provide, as do a number of the international instruments. However, the latter are concerned only with ensuring freedom from discrimination in the enjoyment of other human rights or freedoms. The right of all persons in the Fiji Islands to freedom from discrimination will apply also to all the laws of the Republic and anything done under their authority. We believe that it is neither desirable nor practicable to make such a wide-ranging guarantee of freedom from discrimination open-ended.

### **Public facilities**

7.287 Section 16(7) contains a subsidiary right to freedom from discrimination that binds not only the state but also private persons. It provides as follows:

... no person shall be treated in a discriminatory manner in respect of access to shops, hotels, lodging-houses, public restaurants, eating houses or places of public entertainment or in respect of access to places of public resort maintained wholly or partly out of public funds or dedicated to the use of the general public.

The Constitution should continue to affirm that right but in positive terms. To make it clearer that the final phrase, "maintained wholly or partly out of public funds or dedicated to the use of the general public" applies only to places of public resort and not to the other places referred to in the provision, a comma should be inserted after the word "entertainment".

7.288 The provision is very similar to one in the *Convention on the Elimination of All Forms of Racial Discrimination*, to which the Republic is a party. That provision, however, is a little wider. It includes any “service intended for use by the general public such as transport”. The Commission considers that a right of access to public transport, by air, sea or land without discrimination should be specifically included, because public transport is often relied upon by the most disadvantaged section of the community.

7.289 The Commission also recognises that the inclusion of disability as a prohibited ground of discrimination is likely to have a substantial impact on the obligations of those who provide the public facilities mentioned. It will require them to install, at their own expense, the amenities and equipment that make it possible for disabled persons to use those facilities. This may not always be practicable, and, even if it is, access for the disabled cannot be achieved overnight. The duty to provide access has to be implemented progressively.

7.290 We therefore propose the inclusion of an additional provision to the effect that the proprietor of a place or service referred to in the provision is required to provide access for disabled persons to the extent provided by law. Such a requirement should encourage the imposition of a duty to provide access for the disabled when new facilities are constructed or acquired. It could also be used to bring about the gradual adaptation of existing facilities as resources permit. This need was urged upon us by submissions from organisations working with the disabled.

### **Limitation of the right**

7.291 The protection of the right to freedom from discrimination afforded by section 16 is subject to a complex set of provisions enabling that right to be limited by law. Some of these provisions will continue to be required, though not necessarily in their existing form. Some are unnecessary or invidious and should be repealed or amended. We examine them in an order that highlights the applicable principles.

#### *The standard test*

7.292 Section 16(3)(e) has the widest potential application. It validates any law under which persons described by reference to a prohibited ground of discrimination may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons, or to other persons to whom the law does not apply, is reasonably justifiable in a democratic society.

7.293 This is a common-form provision in the constitutions of most other former British colonies. Its original purpose was probably to permit social justice or affirmative action programmes for a disadvantaged group identified by reference to a prohibited ground of discrimination. These are now provided for in other sections too. As we explain in Chapter 8, we propose that all programmes for those purposes should be brought within a single section.

7.294 However, a provision along the lines of section 16(3)(e) will still be needed. It will permit necessary limitations to the right to equality under the law and freedom from discrimination to be imposed when there is good reason to accord different treatment to people on one of the prohibited grounds. For example, a law about old age and sickness or invalids' benefits for low-income groups would require different treatment to be accorded to different people on all three of the grounds - *economic status*, *age* and *disability* - now recommended.

7.295 Section 16(3)(e) applies the test that the law or the thing done under its authority must be "reasonably justifiable in a democratic society". It also requires its reasonableness to be judged in the light of the nature of the limiting law and the existence of special circumstances relating to the persons affected by the law, or those excluded from its application. For this reason, the provision does not unduly limit the right to equality under the law and freedom from discrimination on the prohibited grounds. We propose that it should be retained and its terms regarded as the "standard" test for limiting the right.

7.296 We have evaluated the other purposes for which the right to freedom from discrimination may be limited by law. If that purpose is necessary, it should, if possible, be achieved by applying the standard test. If, however, the application of the test might lead to too much uncertainty about the validity of the limiting law, specific provision should continue to be made permitting the right to be limited for that purpose. We begin by looking at whether the particular purposes for which limitations may be imposed are in fact necessary at all.

#### *Discrimination in limiting other rights*

7.297 Section 6(8) permits laws to be discriminatory if they limit certain other rights protected by the Bill of Rights. The affected rights are as follows:

- Protection for privacy of home and other property: all limiting laws permitted under section 10(2);
- Protection of freedom of conscience: all limiting laws permitted under section 12(6) (the reference is to section 12(5) but this is an obvious mistake);

- Protection of freedom of expression: all limiting laws permitted under section 13(2);
- Protection of freedom of assembly and association: all limiting laws permitted under section 14(2);
- Protection of freedom of movement: restrictions on movement or residence within Fiji and the right to leave Fiji of any particular person, permitted under section 15(3)(a), and restrictions on movement or residence within Fiji and the right to leave Fiji of persons generally or of any class of persons, permitted under section 15(3)(b).

7.298 The provision reflects a policy view that, if it is necessary to limit a right or freedom for a permitted purpose, then it should be possible to do so on a discriminatory basis without the need for any further justification. This, however, would be contrary to the international standards. All the general international human rights instruments provide that those rights must be accorded without discrimination. If other constitutionally protected rights are limited by law and that law is discriminatory, it should be subject to the standard test for limiting the right to freedom from discrimination. Any discriminatory derogation from other rights in time of emergency should be authorised under the separate provision on emergency powers proposed in Chapter 19. The Commission is of the view that section 16(8) should be repealed.

#### *Qualifications for office*

7.299 Section 16(3)(f) does not allow laws setting standards or qualifications for office in the service of the state to discriminate expressly on a prohibited ground, but it does permit them to be discriminatory in their effect. For example it would authorise a law or administrative action setting a minimum height for recruits to the army that had the effect of discriminating against women or members of a particular community.

7.300 The Commission accepts that standards and qualifications must be set for most aspects of state service. In forbidding any express discrimination for this purpose, the Constitution applies a principle of great importance to women and to all members of the diverse society of the Fiji Islands. However, it should not permit what is expressly forbidden to be achieved indirectly. If standards or qualifications are set that might seem to discriminate on a prohibited ground, they should be subjected to the standard test. If the state can show that they serve a necessary purpose they are likely to be upheld. The Commission therefore considers that section 16(3)(f) should be repealed.

*Discretions in relation to legal proceedings*

7.301 Section 16(4)(b), again in common form, validates the exercise of a discretion relating to the institution, conduct or discontinuance of criminal or civil proceedings, whether or not that exercise is discriminatory. In the Fiji Islands, this provision serves the special purpose of allowing criminal proceedings to be discontinued if it appears that the defendant and the victim of the offence have become reconciled in accordance with traditional procedures for reconciliation, and the offence is one in respect of which discontinuance is permitted on that ground. In Chapter 17 we make proposals for the further recognition of these traditional processes of dispute settlement.

7.302 However, we believe that section 16(4)(b) should not remain in its present wide form excluding any claim that, in a particular case, the right to equality under the law and freedom from discrimination has been infringed. If the claim is unmeritorious, the courts are likely to be robust in dealing it. We consider that the provision should be reworded so as to permit the enactment of a law allowing the exercise of any discretion relating to the institution, conduct or discontinuance of civil or criminal proceedings in any court to take account of traditional procedures in the Fiji Islands for the settlement of disputes.

*Protecting group rights*

7.303 Several provisions of section 16 permit limitations to the right to equality under the law and freedom from discrimination on the prohibited grounds for the purpose of validating customary law and the separate administrative systems for Fijians, Rotumans and members of the Rabi Island community. They are:

- section 16(3)(d), validating the application of the customary law for any purpose;
- section 16(5), validating all law in force before 23 September 1996 and continuously in force ever since, and thus applying to the Fijian Affairs Act and other entrenched legislation; and
- section 16(6) inserted by the 1990 Constitution to protect any new regulations made under section 6 of the Fijian Affairs Act.

There is an ongoing need to limit the right to equality for these purposes, but, in some cases, further safeguards are also required. Our proposals to this end are explained in Chapter 17.

*Pre-1966 law*

7.304 That raises the question whether section 16(5) is needed to protect other pre-1966 legislation. This provision, too, is a variant of those which routinely protected the existing law of newly independent Commonwealth countries from inconsistency with the right to freedom from discrimination. However, the international instruments do not, generally speaking, excuse a state from the duty to bring its existing law into line with the obligation not to discriminate on a prohibited ground.

7.305 We are not aware of any particular pre-1966 law basic to the administration of Fiji that might be open to challenge on the ground that it is discriminatory. If such a law is identified, then it should be amended to conform with the right to freedom from discrimination or be capable of being upheld as a permitted limitation of that right, under the standard test. On this basis we propose that section 16(5) should be repealed.

*New prohibited grounds of discrimination*

7.306 However, we realise that, in proposing that the prohibited grounds of discrimination should for the first time include *language, birth, economic status, age* and *disability*, any existing law that discriminates on any one or more of those grounds would be open to challenge. We therefore propose that the Constitution should protect against challenge on any of those grounds law in force immediately before their introduction which remains in force continuously for up to two years after that date. This will give a breathing space during which all existing law can be examined by the administering department and amended if necessary. After the two-year period, any remaining provisions discriminating on any of those grounds will have to be capable of being upheld under the standard test.

*Other limitations*

7.307 Of the remaining provisions permitting limitations of the right, section 16(3)(g), which deals with measures taken during a public emergency, will be discussed in Chapter 19. Section 16(9) (which makes the protection from discrimination afforded by section 16 subject to section 21 (Protection and enhancement of Fijian and Rotuman interests) will be discussed in Chapter 8. That chapter will also discuss section 18 which overrides section 16. That leaves only three further provisions validating laws for the specified purposes and one provision of a definitional nature. We discuss them in turn.

*Appropriations*

7.308 Section 16(3)(a) puts beyond challenge laws “for the appropriation of revenues or other funds of Fiji”. It reflects the view that the prohibition on discrimination should not be allowed to interfere with the budgetary process. The courts are normally very reluctant to get involved in such questions, but, even so, we think there are good policy reasons for maintaining the constitutional bar on court actions to set aside appropriations as discriminatory, perhaps years after the funds appropriated have been spent. In the areas likely to be most controversial, other processes will be available to protect the interests of all groups and communities.

7.309 We have proposed in Chapter 5 that the allocation of resources for social justice and affirmative action programmes should be broadly acceptable to all ethnic communities. In Chapter 8 we propose that such programmes should be authorised by Act and should be subject to stringent safeguards. Appropriation Bills for these and other purposes will always be open to challenge in Parliament. In the process, the criteria set by the Constitution are likely to be invoked.

*Non-citizens*

7.310 Section 16(3)(b) allows the right to freedom from discrimination to be limited by laws “with respect to persons who are not citizens of Fiji”. It seems to have the purpose merely of reinforcing the point that a person’s citizenship is not a prohibited ground of discrimination. For example, a law could require non-citizens to pay departure tax at a higher rate than citizens. The provision also allows the making of laws with respect to non-citizens that discriminate among them on one or more of the prohibited grounds. It could impose conditions on the grant of work permits to female non-citizens that are more onerous than those applying to the work permits granted to male non-citizens.

7.311 The provision should be retained, but in a revised form which makes its purpose clearer. The limitation should permit laws under which persons who are not citizens of the Republic may be subjected to a disability or restriction or entitled to a privilege or advantage not applying to citizens. Such a provision would not permit the other constitutional rights of foreign citizens to be limited, unless the limitation is one permitted by the Constitution in respect of the right in question.

*Personal law*

7.312 Section 16(3)(c) permits different personal law to be applied to different persons or members of different communities with respect to such matters as

adoption, marriage, divorce, burial and devolution of property on death. Again, it is a common-form provision reflecting the well-established practice of recognising personal law based on the religion and culture of the community concerned. The Constitution should continue to permit such laws in the Republic of the Fiji Islands. It should be noted, however, that the recognition of personal law will sometimes give rise to important policy issues, including, in particular, the way it treats women and children. For that reason, such law should be shown to be reasonably justifiable in a democratic society.

*Suggested redraft*

7.313 Finally, section 16(4)(a) makes it clear that, where a law is permitted for a certain purpose, anything done under the law is also permitted. Its substance should be retained. In our recommendations, we set out a suggested redraft of the whole of section 16. The provisions dealing with the separate systems governing the land, chiefly titles and administration of Fijians, Rotumans and the Rabi Island community under the entrenched legislation relating to those communities are fully discussed in Chapter 17.

## RECOMMENDATIONS

171. **The Constitution should affirm that all persons are equal under the law. It should continue to provide that they have a right to freedom from discrimination on any ground prohibited by the Constitution.**
172. **The Constitution should retain the elements of the present test of what is discriminatory, in section 16(1) and (2), but should express it more simply and clearly.**
173. **The right to equality and freedom from discrimination on a prohibited ground should apply to the rights conferred by the Bill of Rights itself and to the application of all other provisions of the Constitution, unless, in the particular case, there is good reason expressly to exclude its application. The present introductory words in section 16(1), making the right subject to all other provisions of the Constitution, should be repealed.**
174. **The Constitution should continue to prohibit discrimination on the grounds of race, sex, place of origin, political opinions, colour, religion, or creed. The new grounds of ethnic origin, gender, language, economic status, age and disability should be added. The right to freedom from discrimination should not be widened by adding a reference to "any other ground".**

175. **The Constitution should continue to affirm, but in positive terms, the right of all persons under section 16(7) to freedom from discrimination in respect of access to the specified places of public resort, whether the proprietor of such places is the state or a private person. A right of access without discrimination to public services, such as transport, by air, sea or land should be included. The proprietor of a place or service for the use of the general public should be required to provide access for disabled persons to the extent provided by law.**
176. **The Constitution should retain the substance of section 16(3)(e) validating any law which limits the right to equality under the law and freedom from discrimination on a prohibited ground if, having regard to its nature and to special circumstances pertaining to persons affected by, or excluded from, the law, it is reasonably justifiable in a democratic society. That should be regarded as the “standard” test for limiting the right. The Constitution should permit limitations for specific purposes only if strictly necessary.**
177. **Section 16(8), which makes it possible to limit certain other rights and freedoms affirmed by the Constitution on a discriminatory basis, should be repealed.**
178. **Section 16(3)(f), which prohibits laws setting standards or qualifications for office in the service of the state from discriminating expressly on a prohibited ground, but permits them to be discriminatory in their effect, should be repealed.**
179. **Section 16(4)(b), which prohibits any challenge to the exercise of a discretion relating to the institution, conduct or discontinuance of criminal proceedings, on the ground that it is discriminatory, should be reworded to allow such a challenge but permit the enactment of a law authorising the exercise of the discretion to take account of traditional processes in the Fiji Islands for the settlement of disputes.**
180. **Section 16(5), validating all law in force before 23 September 1996 and continuously in force ever since, should be repealed. To the extent necessary, the section should separately and specifically protect against inconsistency with the right to freedom from discrimination the legislation entrenched by section 78 of the 1990 Constitution. Any other pre-1966 law basic to**

the administration of Fiji should be amended to conform with the right to freedom from discrimination or be capable of being upheld as a permitted limitation of that right under the standard test.

181. During a period of two years after their introduction, the Constitution should protect against challenge for inconsistency with the recommended new, prohibited grounds of discrimination; ie, *language, birth, economic status, age and disability*, all law in force immediately before the date on which those grounds were introduced and remaining in force continuously after that date.
182. The substance of section 16(3)(a), barring challenges to Appropriation Bills on the ground that they are discriminatory, should be retained.
183. The substance of section 16(3)(b) should be retained in a revised form permitting the enactment of laws under which persons who are not citizens of the Republic may be subjected to a disability or restriction or entitled to a privilege or advantage not applying to citizens.
184. The substance of section 16(3)(c), permitting different personal law, with respect to such matters as adoption, marriage, divorce, burial, devolution of property on death, to apply to the members of different ethnic communities, should be retained. Such law should be shown to be reasonably justifiable in a democratic society.
185. Section 16 as a whole should be replaced by a provision on the following lines:
  - # Right to equality under the law and freedom from discrimination
  - (1) All persons are equal under the law, and have the right to freedom from discrimination on the ground of race, ethnic origin, sex or gender, birth, place of origin, political opinions, colour, religion, creed, language, economic status, age or disability.
  - (2) Accordingly, no law, and no executive or administrative action of the state, may of itself

- or in its effect, impose disabilities or restrictions, or confer privileges or advantages, on any person or the members of any group on a prohibited ground.
- (3) Everyone has the right of access, without discrimination on a prohibited ground, to shops, hotels, lodging-houses, public restaurants, eating houses, places of public entertainment, services for the use of the general public such as transport, by air, sea or land, and places of public resort maintained wholly or partly out of public funds or dedicated to the use of the general public.
  - (4) The proprietor of a place or service referred to in subsection (3) is required to facilitate reasonable access for disabled persons to the extent provided by law.
  - (5) No law, or administrative action under the authority of a law, shall be held to be inconsistent with the right to freedom from discrimination on the grounds of language, birth, economic status, age or disability, during the period of two years after the date on which discrimination on those grounds was first prohibited by this Constitution, if the law was in force immediately before that date and has remained in force continuously after that date.
  - (6) Except as otherwise provided in subsections (8) and (9) or section # (Social Justice and Affirmative Action), a law, or an administrative action under the authority of a law, may limit the right affirmed in this section, for the purpose of imposing a disability or restriction or conferring a privilege or advantage on a person or group on a prohibited ground, but only if, having regard to its nature and to special circumstances pertaining to the person or group, the limitation is shown to be reasonably justifiable in a democratic society.

- (7) A law, or administrative action under the authority of a law, is not to be taken as limiting the right affirmed in this section by reason only of the fact that it
- (a) appropriates the revenues or other funds of the Republic of the Fiji Islands;
  - (b) imposes on persons who are not citizens of the Republic a disability or restriction, or confers on such persons a privilege or advantage, not imposed or conferred on persons who are citizens;
  - (c) permits any person who exercises a discretion vested in that person to institute, conduct, or discontinue civil or criminal proceedings in any court to take account of traditional procedures in the Fiji Islands for the settlement of disputes; or
  - (d) makes provision with respect to adoption, marriage, divorce, burial, devolution of property on death or other like matter as the personal law of any person or the members of any group, but only so far as that law is shown to be reasonably justifiable in a democratic society.
- \* (8) A law, or an administrative action under the authority of a law, may limit the right affirmed in this section, for the purpose of
- (a) providing for the application of the customs of Fijians, Rotumans or the Banaban community to the holding, use, transmission, or distribution of the produce or proceeds of land, fishing rights or minerals, or to the entitlement of any person to any chiefly title or rank; or
  - (b) imposing any restriction on the alienation of land or fishing rights held in

accordance with Fijian, Rotuman or Banaban custom, or permitting the temporary alienation of such land or fishing rights without the consent of the owners;

- \* (9) To the extent permitted by subsection (10), a law, or an administrative action under the authority of a law, may limit the right affirmed in this section, for the purpose of providing for
- (a) the governance of Fijians, the Rotuman community or the Banaban community and of other persons living as members of a Fijian community, the Rotuman community or the Banaban community, or
  - (b) the application to persons referred to in paragraph (a) of Fijian, Rotuman or Banaban custom respectively, in respect of any matter other than those referred to in subsection (8)(a) or (b).
- \* (10) A limitation for a purpose referred to in subsection (9) is valid only if it
- (a) accords to every person to whom it applies the right to equality before the law without discrimination on any prohibited ground, other than the race or ethnic origin of that person or members of that community, and
  - (b) does not deny to any such person any other human right or fundamental freedom recognised by law.

\* Gives effect to recommendations discussed and made in Chapter 17.

## ENFORCEMENT OF THE BILL OF RIGHTS

7.314 Section 19 contains important provisions which ensure that everyone claiming that his or her constitutionally protected rights or freedoms have been, or are likely to be, infringed, has access to the courts for redress. Such claims may come before the courts in two ways. Often they arise in the course of existing

cases, particularly criminal cases. The defendant may allege that, by reason of some defect in the procedure followed, his or her right to a fair trial has been infringed. Or it may be claimed that the offence which the defendant is alleged to have committed is created by a law which is unconstitutional, and that the charge should be dismissed on that ground. A person may also wish to take the initiative in claiming that the state has acted unconstitutionally, for example by passing a law requiring the licensing of newspapers on conditions that infringe the right to freedom of the press.

7.315 Subsection (1) gives a person claiming that his or her rights or freedoms have been contravened, or are likely to be contravened, a direct right to apply to the High Court for redress. That right should be retained. Historically, the right to bring a claim of any kind before a court depended on showing that it came within a recognised cause of action, such as tort or contract. If this hurdle was overcome, claims against the state might be met by a plea of state immunity, another legacy of history reflecting the Crown's position as the personification of the state. These days, state immunity is usually substantially limited by statute, but the claimant still has to show that the claim is admissible under its provisions. Subsection (1) sweeps aside all of these potential barriers to enforcing individual rights and freedoms against the state.

### **Jurisdiction of High Court**

7.316 Subsection (2) gives the High Court jurisdiction to hear claims of infringement of the Bill of Rights, made by application under subsection (1) or referred to it by a subordinate court. "Jurisdiction" is the term used to describe the kinds of cases that a particular court has power to hear and decide. We suggest in Chapter 13 that, as recommended by the *Report of the Commission of Inquiry on the Courts of Fiji* (1994), all provisions of the Constitution and other law dealing with the original jurisdiction of the High Court, as well as its jurisdiction on appeal from decisions of lower courts, should be reviewed, with a view to its expression in a modern way. The substance of the provisions about the jurisdiction of the High Court in subsection (2) should be retained, but their expression should take account of the outcome of that review. We note in passing that the jurisdiction of the High Court needs to be wide enough to enable it to take up issues concerning the Bill of Rights if they arise in the course of existing proceedings in the High Court. That must be implicit, but is not stated expressly.

7.317 Subsection (2) also gives the High Court wide powers to secure the enforcement of the rights and freedoms it protects, but freedom to decline to exercise its powers if the claimant is found already to have received, or had access

to, adequate redress. These powers should be retained. There is now a substantial body of international jurisprudence about the techniques available to the courts in upholding rights and freedoms. The courts of the Republic should, where appropriate, look to it for guidance.

7.318 If possible, the courts seek to avoid the substantial inconveniences likely to result from holding invalid and void everything done, since the time of its enactment, under every provision of a statute found to contravene the Bill of Rights. It may, for example, limit its relief to things done after the date of its decision. Among other forms of redress, the courts may direct the parties themselves to negotiate, under their supervision, agreed solutions that are in conformity with the Bill of Rights.

7.319 The Commission considers that the High Court's power to "make such orders, issue such writs and give such directions as it may consider appropriate" for the purpose of securing the enforcement of the Bill of Rights, does not need amplification. It should continue to be kept broadly in line with other constitutional provisions (at present to be found in section 113), about the jurisdiction and powers of the High Court in determining allegations that other provisions of the Constitution have been infringed. We make recommendations about that provision in Chapter 13.

### **References from lower courts**

7.320 Under section 19(3), a lower court may refer a question as to the contravention of the Bill of Rights, arising in a case before it, to the High Court for determination, and must do so if either of the parties so requests. Under subsection (4), the lower court must dispose of the question in accordance with the decision of the High Court, or of the Court of Appeal or the Supreme Court if the question has been referred to either of them on appeal. The Commission received a submission that lower courts should be required to refer all questions concerning the Bill of Rights to the High Court for determination. We do not think that such a requirement is practicable, because such questions are likely to arise quite frequently in the course of criminal proceedings and should, where possible, be disposed of in the course of the trial, without the delay involved in a reference to the High Court, perhaps while the defendant remains in custody.

7.321 The measures recommended by the Commission of Inquiry on the Courts of Fiji to improve the qualifications and training of magistrates should ensure that they will exercise good judgment about when a question concerning the Bill of Rights should be referred to the High Court. If, however, a Magistrate should

dismiss a case because of a finding that the Bill of Rights has been infringed, and the state does not consider that finding to be sound in law, that is just the kind of matter which should, as we have suggested, be brought to the higher courts on appeal, without, however, affecting the outcome of the particular case itself. Defendants aggrieved by the decision of a lower court or the High Court on a question concerning the Bill of Rights, will, of course, be able to exercise their rights of appeal to the Court of Appeal and the Supreme Court, subject to compliance with the conditions about the grant of leave to appeal recommended in Chapter 13. The substance of section 19(3) and (4) should therefore be retained.

### **Attorney-General to have standing**

7.322 If, however, a question concerning the Bill of Rights (or other provisions of the Constitution) should arise in a case before any court, whether or not the state is a party, it is important that the Attorney-General should have standing to intervene, in order to ensure that the constitutional issues are fully argued. For the same purpose, any court should have the power to join the Attorney-General as a party separately from any other officer or organ of the state.

### **Standing of interest groups and class actions**

7.323 Some submissions suggested that, like the constitutions of such countries as Papua New Guinea, Namibia and South Africa, the Constitution of the Republic should enlarge the existing rules about standing and permit class actions so that questions concerning compliance with the Bill of Rights can more readily be brought before the courts. The rules of standing are designed to ensure that only those who have a substantial interest in a particular matter are entitled to bring a case about that matter before the courts. These days, however, non-governmental organisations and other interest groups are increasingly being recognised as having standing to bring cases about matters in which there is a clear public interest - the degradation of the environment, for example.

7.324 Class actions are a way of enabling harm suffered on a large scale to be remedied by the courts, even if the individuals concerned are not parties to the case. For example, class actions were brought on behalf of the thousands of deformed children whose mothers were prescribed the drug thalidomide during pregnancy. This meant that all of them had a right to share in the global amount of damages awarded by the court, even though they had not been named as parties. The practical effect was to give compensation to many who would otherwise have been denied it.

7.325 Rules about standing and class actions have potential application to claims of any kind. The Commission considers that it would not be appropriate to include in the Constitution special provisions about these matters in relation only to cases concerning the enforcement of the Bill of Rights. If any changes in the existing rules about either standing or class actions should appear desirable, they should occur either through the development of the law by the courts, or by appropriate amendments to the relevant substantive and procedural rules.

7.326 The Constitution should be framed in terms which continue to allow any changes in the general law of the Republic, in relation to standing or class actions, to apply to applications for redress made under the Constitution, on the ground of an alleged contravention of the Bill of Rights. This approach is consistent with the provisions in section 19(6) and (7) about the subsidiary powers and the rules of practice and procedure of the High Court, for the purpose of enabling it more effectively to exercise its jurisdiction to enforce the Bill of Rights. The substance of those provisions should be retained.

#### RECOMMENDATIONS

186. **The Constitution should continue to give a person claiming that his or her rights or freedoms under the Bill of Rights have been contravened, or are likely to be contravened, a direct right to apply to the High Court for redress.**
187. **The High Court should continue to have original jurisdiction, and jurisdiction on a reference from a lower court, to determine claims that the Bill of Rights has been contravened. In conferring that jurisdiction, regard should be had to the outcome of the review recommended by the Commission of Inquiry on the Courts of Fiji (1994), about how the jurisdiction of the High Court should be defined.**
188. **The Constitution should continue to allow a lower court to refer a question as to the contravention of the Bill of Rights, arising in a case before it, to the High Court for determination, and require it to do so if either of the parties so requests.**
189. **The Attorney-General should be given standing to intervene in a case before any court in which a question concerning the Bill of Rights (or other provisions of the Constitution) arises, whether or not some other officer or organ of the state is a party, in order to ensure that the constitutional issues are fully argued. The court should also have the power in those circumstances to join the Attorney-General as a party.**

- 190. The Constitution should not include special provisions about standing or class actions in relation only to cases concerning the enforcement of the Bill of Rights, but should be framed in terms which continue to allow those cases to be disposed of, taking account of any changes in the general law of the Republic on those matters.**

#### DRAFTING QUESTIONS

7.327 Section 20 of the 1990 Constitution contains definitions and other provisions about the interpretation of the Bill of Rights. In revising the Bill of Rights in accordance with the Commission's recommendations, the drafter should consider to what extent the substance of these provisions remains relevant, and, if so, the manner in which it should be dealt with in the Constitution.