



**Convention on the Elimination  
of All Forms of Discrimination  
against Women**

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**Committee on the Elimination of  
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**Concluding observations of the Committee on the  
Elimination of Discrimination against Women: Fiji**

**Addendum**

**Information provided by the Government of Fiji on the follow-up to the  
concluding observations of the Committee (CEDAW/C/FJI/CO/4)\***

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\* In accordance with the information transmitted to States parties regarding the processing of their reports, the present document was not edited.

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## **1. Introduction**

1.1 This is the follow up report to the Committee on the Elimination of Discrimination against Women, on Fiji's obligations under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in relation to the following recommendation made by the Committee in July 2010 in relation to Fiji's combined Report:

“11. The Committee strongly urges the State party to take immediate, clear and credible steps to adopt a new constitution through a collaborative process involving the full participation of women, and to fully restore the rule of law and the independence of the judiciary through, inter alia, the re-establishment of the Judicial Service Commission. The Committee also urges the State party to hold free and fair elections as early as possible. In keeping with its previous recommendation the Committee encourages the State party to ensure that the constitutional review process addresses the need to incorporate the principle of equality of men and women, in line with article 2, as well as the definition of discrimination against women, and to include a clear procedure for the enforcement of fundamental rights in line with article 1 of the Convention.”

## **2. Overview**

2.1 This report falls into ten parts. First, it will respond to the issue of the constitutional review process and the steps envisaged towards constitutional change. Second, it will respond to the issue of ensuring the full and meaningful participation of women in the process of constitutional change. Third, it will deal with the steps taken to strengthen the rule of law, and fourth the steps taken to strengthen the independence of the judiciary in Fiji. Fifth, it will respond to the recommendation to restore the Judicial Service Commission. Sixth, it will address the steps taken to ensure that legal and constitutional change will include the principle of gender equality. Seventh, it will address the issue of the definition of discrimination against women, fair and unfair, direct and indirect. Eighth, it will respond to the recommendation that there be a clear enforcement procedure for gender discrimination. Ninth, it will address the issue of free elections. Tenth, it will address the issue of fair elections, the time required to ensure that elections in Fiji are both free and fair, and that they include the free participation of men and women, rural and urban dwellers, rich and poor, literate and illiterate.

## **3. The Constitutional Review Process**

3.1 The constitutional review process will commence in 2012. However it is envisaged that a constitutional review process will be based on the People's Charter for Change, and the Roadmap for Democracy and Sustainable Socio-Economic Development 2009-2014 . It is also likely that the process of ensuring meaningful participation of women will involve using the strategies used to ensure that public consultation on the People's Charter for Change was meaningful and representative.

3.2 The National Peoples' Charter Advisory Council (NPCAC) monitors the implementation of the Roadmap for Democracy and Sustainable Socio Economic Development. It provides a forum for national consensus building on development issues, and it has advised a dialogue, consultation and awareness process to ensure a representative constitutional framework design.

3.3 The Ministry of Social Welfare, Women and Poverty Alleviation, in partnership with civil society groups, will be establishing 20 women's centres around the country. These centres will also be utilised for the consultative process of the constitutional review mechanism.

#### **4. The Participation of Women**

4.1 A real obstacle to the real and meaningful participation of women in the past has been the patriarchal nature of Fiji society. Another is the existence of cultural barriers in ensuring that women's voices are heard in a way in which cultural, religious and family pressures are minimised. During the constitutional review processes in 1995 and 1996, as a result of which the 1997 Constitution was drafted, the participation of women was disappointing. There was some representation of women's organisations and elite women, but there was no real process of ensuring that the voices of women's groups and of the elite women truly represented the voices of Fijian women.

4.2 Indeed through the Charter process of consultation, attempts were made, with some success, to avoid the pitfalls inherent in consulting only elite women, and instead to forge new methods of consultation at grassroots level which involved consultation with women in traditional settings, in poor urban areas, and within all religious and cultural groups. The aim was to penetrate layers of elitism which were not representative of all views of all women in Fiji, and to devise strategies to consult with informal and formerly unacknowledged groups of women.

4.3 Thus, in a village setting, cultural norms have not always allowed the voices of women to be heard. Often, informally, the village nurse may speak for the women. Formally, women are usually heard through male elders. During the Charter consultation process, this traditional method of consulting the village communities was adapted to allow for the seeking of views of separate groups of women. The result was gratifying, as the women felt more comfortable speaking to representatives of the Charter group, away from the men of the village, and often had different views and perspectives from the male views in the village. It was also clear that the women's groups, often led by elite women, did not speak for the women in the villages, squatter settlements, and heavily populated urban areas. This is not to diminish the worth of the contributions of the various representatives of women's groups in the past. They have at least ensured that women had some voice. However, it is time to work towards a more representative contribution from women.

4.4 It is therefore intended, that to ensure the real and meaningful participation of women in the constitution-making process, that the People's Charter strategy of consultation will be adopted. Indirectly, the adoption of informal mechanisms for consulting women, side-stepping cultural protocols, some of which do not allow women's voices to be heard, may lead to a useful adaptation of tradition and cultural practices in Fiji, which is in itself in accordance with Fiji's obligations under the Convention.

4.5 Consideration will also be given to the suggestion that in the selection of a panel for the constitutional review process, at least one woman, or 30% of the total membership, should sit on the panel, and that all members of the panel, male and female, should be gender-competent.

4.6 Pillar 1 of the People Charter requires that there be "sustainable democracy and just governance". The principles that Fiji is committed to are: a fair and representative electoral system, the strengthening of national security, substantially reducing the likelihood of coups d'état, defining and articulating the role of the Republic of Fiji Military Forces, ensuring the effective operation of the rule of law, improving the response to law and order issues, entrenching a culture of democratic governance, enhancing public sector

accountability and participation in governance, maintaining an effective anti-corruption framework, creating a free and responsible media which contributes to good governance and national development, and improving Parliamentary oversight.

## 5. The Rule of Law

5.1 The rule of law is said to be about equality before the law. It has two aspects, one, that every person should be subject to the law (the King is subject to God and the law) and two, that the law must be applied in the same way for every person. The concept has been developed by jurisprudence around the common law world because of the inescapable fact that societies have inequalities, and that “equal” treatment of the disadvantaged often leads to greater disadvantage.

5.2 Thus affirmative action is not necessarily an example of inequality. It can be used to enforce an equal access to justice for those who have had an unequal access to justice. Thus in discussing the rule of law, it is necessary to discuss inequality in the access to the courts, gender justice, and the relationship between poverty and gender inequality in the justice system. It is necessary to discuss reforms to the Legal Aid Commission, which represents the poor, and which until 2007 had been grossly under-funded by government. It is necessary to discuss legal reforms intended to remove systemic gender discrimination, such as the abolition of the law on spousal privilege and on previous sexual history. It is necessary to discuss the availability of efficient and fast court services to the poor, the rural areas, and to women and children. The Asia-Pacific Human Development Report on Gender, “Power, Voice and Rights” says:

“Globally, four billion people—most of the world’s population—are excluded from the rule of law. This figure covers a significant number of women in Asia-Pacific, even in countries where laws are relatively sound. Specific barriers, rooted in gender, prevent women from getting to court or other judicial mechanisms, or finding fair judgments once they are there. This propensity worsens when the laws themselves ignore or discriminate against women. Effective justice systems are particularly critical when power is imbalanced, and people with a weaker voice and fewer options for recourse—like women—have limited options for redress. Women are often more vulnerable to injustice to start, and more in need of measures to protect their legal rights. Impoverished women carry an additional burden. The extra-powerlessness of poverty makes them even more prone to criminal and human rights violations, and more likely to fall further into poverty through the lack of redress.”

5.3 Fiji is aware of these real barriers to the rule of law. If there is no effective access to justice, there is no rule of law. In particular, perpetrators of gender-based violence have for many years been above the law.

5.4 The reforms currently being implemented in relation to the equal access to justice of all persons in Fiji, and in particular those who have been historically disadvantaged, include the adequate resourcing of the Legal Aid Commission.

5.5 The 2010 statistics for the Legal Aid Commission show that the vast majority of women applicants apply for assistance in family law cases. In that year, 316 cases were handled for women at the Legal Aid Commission in relation to family law. In contrast, 109 cases were handled by the Commission, for women who sought advice or representation in criminal matters. The Duty Solicitor Scheme run by the Commission, to give free 24 hour advice services to the public, is well-utilised by women. By 2012, there should be an increased number in female clients at the Commission, and a greater capacity to represent women from a poor economic background. The legal staff at the Commission also shows a

gender balance, and gender and human rights training for the legal officers, is compulsory. Each legal officer is trained to use the International Covenant on Civil and Political Rights to protect the due process rights of Legal Aid Commission clients.

5.6 In 2006, government contribution to the Legal Aid Commission was \$400,000. Although there was to be some contribution to the Commission from the interest on solicitors' trust accounts, this contribution was minimal. In 2007, aid funding from Australia which had previously assisted the Commission, was withdrawn as a response to the political relationship between Fiji and Australia. The greatest impact of the underfunding was on the poor, and the women. Of all applicants for legal aid in 2007-2010, 29.20% are women. This however, is only for applicants and does not include advisory and duty solicitor services rendered to women. In 2010, the government budget for the Legal Aid Commission was increased to \$800,000 and staff at the Commission has been increased from 19 to 46. There are 5 Legal Aid Commission centres located in Fiji, namely Labasa, Lautoka, Ba, Suva City and Nausori, which have recently opened this year.

5.7 In 2010, the Supreme Court of Fiji held that although Fiji had not ratified the International Covenant on Civil and Political Rights, the rights contained in the Covenant applied to Fiji by virtue of the incorporation of the Covenant in the 2009 Crimes Decree. The court held at page 4 of the judgment:

“Most common law jurisdictions recognise the right of an accused person to a fair trial without unreasonable delay. That right is set out in Article 8 of the Universal Declaration of Human Rights to which Fiji is a party and in the International Covenant on Civil and Political Rights, Article 9(3). Fiji has not ratified this Covenant but the provisions of it have been incorporated in successive Constitutions in Fiji since 1970.

Although Fiji has not had any Parliament for some years, the existing Government has shown its willingness to respect the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights by its passing of the Crimes Decree, 2009 which incorporates the International Covenant on Civil and Political Rights. The Courts here have shown at all levels their respect for the rights of accused persons to a fair trial, that is a trial according to law. This includes the right to counsel, the right to disclosure, the right to adequate time and facilities in order to prepare a defence, the right to remain silent, and the right to trial without delay.”

5.8 The Human Rights Commission continues to do its work, despite the lack of an Ombudsman and Chairperson of the Commission. The office is fully operational, and the Office accepts complaints on a number of human rights violations, considers whether the matter should be the subject to mediation and conciliation, or whether it should be taken to court for redress. In 2010, the Commission received 42 complaints, 29 of these complaints were taken to court, and 16 out of those before the courts, were in relation to complaints by women. These complaints were largely in relation to domestic violence and family court cases. A number of these complaints were referred to the Commission by the Office of the Prime Minister. An example of a matter referred to the courts by the Human Rights Commission is at Appendix 7.

5.9 In order to improve access of government services to the people, and in the absence of Parliament, the Office of the Prime Minister offers a service of responding to complaints by members of the public and provides a direct telephone line for lodging of complaints. There is a dedicated investigation process set up to consider such complaints and to refer them to the necessary body or institution empowered to deal with the matter.

5.10 Equitable access to justice is a challenge in Fiji. Although a significant proportion of the population is urban, access to justice in the rural areas is important, particularly because there are significant numbers of cases of gender-based violence in rural areas. Lautoka, the

second largest city in Fiji, has in the past been grossly under-resourced in judicial terms. From 1999 to 2005, the High Court at Lautoka was staffed by only two judges, compared with 10 in Suva. The backlog of cases in Lautoka was a matter of concern and in 2007, the Chief Justice appointed 4 judges to sit in Lautoka, with additional judges being sent to Lautoka regularly to clear the backlog of cases.

5.11 Currently, in 2011, there are three civil judges, a Master of the High Court, and two criminal judges based full time in Lautoka. Labasa, the major town in Vanua Levu had been similarly neglected in the past. Indeed from 2003 to 2005, no judges were sent to Labasa to hear criminal cases. There was a resulting severe back log of cases. They included homicide trials, and cases of sexual violence against women and children. The Chief Justice since 2007 has embarked upon a project for Labasa to case-manage the hearings, and to ensure that cases in Labasa will be heard within 6 months of the charge being filed. That aim was achieved in March of this year. All High Court criminal and family cases in Fiji are case-managed, and strategies are used to cut down delay, prevent judge-shopping, and ensure that a uniform quality of justice is delivered in all courts in Fiji. The case-management system is computerised and is managed by judges of the High Court. Plans are under way to extend the system to the magistrates' courts, and the case management system has already been introduced to the civil jurisdiction of the High Court.

5.12 The Small Claims Tribunal has extended its activities. In 2011, there are 10 (of whom 3 are women) Referees and in June 2011, a Small Claims Tribunal was opened for the first time in Sigatoka, a rural town. The advantage of the Small Claims Tribunal for women, is that they cost very little to litigate in, the ceiling for claims is F\$5000 and lawyers are not permitted to represent the parties. The referees are all lay persons. There are plans to extend the service of the Small Claims Tribunal to other rural towns. The Referees are required to undergo compulsory training at least twice a year.

5.13 In the island courts, justice is delivered throughout the year in Taveuni, Kadavu, Lomaiviti and the Lau Group. A magistrate is sent to the islands by plane or by boat, and although the numbers of cases are not high, the principle of access to justice by all our communities is an important one for the rule of law. Although somewhat constrained by the cost of each trip, the Judicial Department is committed, in the interests of providing equal access to justice to the island communities, to run the island and rural courts.

5.14 The service is important for another reason. The concept of one system of justice being relevant to all our communities, and being accessible and significant to all our people, is an important one to ensure that cultural norms in relation to justice take a subordinate place to the national justice system. This is particularly because culture has often driven gender biased attitudes towards women, with no right of redress in a culturally accepted justice model. Our experience is that gender equality has a better chance in a justice system which is sensitive to culture, but removed from patriarchal cultural norms.

5.15 There are attempts at ensuring that the appointment of commissioners for oath is done in a transparent way, such that a gender balance may be achieved. Expressions of interest are sought from the public by advertisement in newspapers, and there are currently 45 men and 13 women commissioners of oath in Fiji. In a move to make the court system responsive to the needs of the many communities which need to have access to it, the High Court has invited expressions of interest for interpreters with a working knowledge in Mandarin, Cantonese, Vietnamese, Indonesian, Japanese, and Korean. The witness allowance rates have been increased, as have the allowances payable to assessors in criminal trials.

5.16 A common barrier to gender justice is the attitudes of judges, magistrates, police officers, prosecutors and prison officers, in the implementation of laws. Fiji accepts that this is a continuous challenge, and one which can only be defeated by sustained and

thoughtful training. For instance, although the Domestic Violence Decree has now been in place for almost a year, police officers and magistrates still appear reluctant to apply for and make the appropriate orders for restraining orders. The Decree also empowers any interested members of the community to apply for restraining orders in the courts, but there have been few such applications. It appears that non-governmental organisations also share the same reluctance to implement the Domestic Violence Decree.

5.17 However, the High Court in several judgments has been very critical of the magistracy for failing to implement the Decree, as a result of which there has been a change in attitude. In the case of *State v S.T*, the Judge of the High Court said:

“On 7th February 2011, the learned Magistrate noted that he had no jurisdiction to sentence for an offence of act with intent to cause grievous harm. The case was transferred to the High Court. It was only [then that] I highlighted to counsel for the State that this is a case of domestic violence and the State was bound to implement the provisions of the Domestic Violence Decree...This is rather an unfortunate state of affairs. The Domestic Violence Decree came into effect on 6th September 2010. But it seems to me that there is a lack of commitment to enforce the law by law enforcement officers. This lack of commitment can defeat the clear objectives of the Domestic Violence Decree. The Domestic Violence Decree is designed to give greater protection to the victims of domestic violence who are generally women. Women victims are vulnerable. Most of them are financially dependent on their spouses. Judicial experience has shown that they do not have equal bargaining power as their spouses. They are forced to reconcile in domestic violence cases because of cultural and social constraints placed on them. The Domestic Violence Decree is designed to take away those constraints and to empower them to live a life without violence

5.18 In addition to this, the judges and the magistrates have attended a total of 5 workshops which include sessions on domestic violence. The Orientation Programme for new judges and magistrates has a component of gender justice and also a component about the relationship between culture and gender. The Police Force has a continuous training programme on domestic violence and gender-based violence. The training on the Domestic Violence Decree involved mock court situations (presided over by sitting judges and magistrates who were also thereby trained) which required police officers to make the restraining order applications. In 2010, there were 13 such workshops in Suva, Lautoka and Labasa. Additionally, the Domestic Violence Decree and the Child Welfare Decree have been made part of the police training courses at the Police Academy, and a total of 59 workshops have been conducted as part of the general police training programmes.

5.19 Prosecutors of the Office of the Director of Public Prosecutions have had a compulsory component of human rights education as part of their training schedule, which includes training on all the international conventions relevant to justice and the law. They have received training on the Domestic Violence Decree, and on gender and the law training, and one such workshop is scheduled for July 29th 2011. It is accepted that even the best laws in the world cannot ensure there is equal access to justice. It is accepted that Fiji needs to work hard, and in a sustained way, to train our law enforcement officials to remove subjective gender and culturally driven stereotypes from their assessment of individual cases.

5.20 Other measures already highlighted in the Statement by the Minister for Social Welfare, Women and Poverty Alleviation at the 46th Session of the Committee, intended to remove barriers to justice through legal reforms are:

- (a) The abolition of the law of corroboration;
- (b) The abolition of homosexuality as a criminal offence;



- (c) The regulations in the Crimes Decree in relation to abortion which better protects the rights of women to give informed consent, as well as the rights of the unborn child;
- (d) The prohibition of the law on cross-examination on previous sexual history;
- (e) The abolition of spousal privilege in the giving of evidence;
- (f) The special provisions in the Criminal Procedure Decree for the taking of evidence from vulnerable witnesses;
- (g) The new definition of the law on rape which is now gender-neutral and is defined inter alia as penetration of any part of the body by a penis or of the vagina by an object;
- (h) The new offences of trafficking in women and children;
- (i) The new offences of sexual servitude, and sexual assaults;
- (j) The higher penalties for cases of sexual exploitation of women and children;
- (k) The incorporation of all offences created by the Rome Statute of the International Criminal Court;
- (l) The incorporation of the ICCPR in the Crimes Decree;
- (m) The provisions in the Crimes Decree which provides that corporations can be prosecuted for any offence under the Crimes Decree (including those of gender-based violence) where the offence has been committed by an officer, agent or employee of the corporation in the course of actual or apparent employment, and where the corporate body has failed to put in place a corporate culture that will discourage such offending. ;
- (n) Cabinet has this year approved the signing of the Convention on Inter-Country Adoptions and is already a signatory to the Hague Convention on Child Abduction;
- (o) The legal age for consent for marriage has been increased from 16 to 18. This will prevent the marriage of children, especially girl-children;
- (p) Cabinet has approved the ratification by Fiji of the Palermo Convention on Trafficking in Persons;
- (q) The Ministry of Social Welfare, Women and Poverty Alleviation in partnership with UNICEF is in the process of reviewing the Adoption of the Infants Act, the Probation of Offenders Act, and the Juveniles Act, to ensure the effective protection under the law for inter alia, the girl child.

## **6. Independence of the Judiciary**

6.1 Central to the rule of law is the independence of the judiciary. Fiji accepts that the judiciary must be independent, not only of the executive, but also of other influential and well-resourced authorities, in Fiji and abroad. True independence is about making decisions on the merits of a case without actual or apparent bias.

6.2 The United Nations Development Programme (UNDP) suggests that in order to maintain judicial independence and to protect against judicial corruption, judicial reform should focus on the following:

- (a) Independence in the appointment process;
- (b) Security of tenure and independent disciplinary processes;

- (c) Publication of judgments and access to them by the public;
- (d) Sittings in open court;
- (e) A judicial code of ethics and sanctions for breach;
- (f) Case management of cases to protect from judge-shopping and delay;
- (g) Compulsory and continuous judicial training.

**a. Appointments**

The appointments to the High Court, Court of Appeal, Supreme Court and the magistracy, are currently made by the President of Fiji. Positions are advertised in newspapers in Fiji and abroad. However, it is envisaged that a Judicial Service Commission to make recommendations to the President will be enlivened by the President at an appropriate time. This issue is dealt with under (7) below.

Currently there are impediments in making appointments to the Bench from the local Bar.

All judges and magistrates in Fiji are on a ban for travel to New Zealand and Australia, and this ban has led many qualified local lawyers to avoid appointment. This has led to appointments from the sitting Bench and the Attorney-General's Chambers in Sri Lanka. However insofar as the political action of Australia and New Zealand has led to obstacles in the recruiting of competent, qualified and suitable men and women from Fiji to the Fiji judiciary, this is a direct interference to the judiciary. The appointment process should be on merit alone. In a statement made on the 1st of November 2009, the Chief Justice said:

“Like many a Chief Justice I would normally be slow to issue a press statement let alone appear on camera for such a purpose. However as Head of the Judiciary in Fiji I must stand up against such interference. Fiji must have a judiciary. And it is not for Australia and New Zealand to tell us we cannot have one, or to tell us who we are to appoint. No international convention allows for such a supervisory role to a neighboring state.”

There is currently an attempt to achieve a gender balance on the judiciary. There are 16 men and 8 women in the magistracy, 12 men and 2 women in the High Court and Court of Appeal. There is one woman in the Supreme Court. The Chief Registrar of the High Court is a woman, and 3 Small Claim referees are women out of a total of 10.

Of course, a gender balance in appointments is not all that is required to redress gender insensitivity. What must be achieved is a gender-competent bench through continuous training of both men and women judges and magistrates.

**b. Security of Tenure**

All judges and magistrates are on contract. Under the 1997 Constitution, although judges could be appointed on life terms, most were appointed on contract. Consideration will be given to this issue in the consultation process for the new constitution. However, if judges are to be given life terms, then there must be adequate and independent processes in place for the discipline of judges for misconduct in office. Consideration will also be given to appropriate terms of appointment of expatriate judges.

At present there are no regulations for the discipline of judicial officers. Indeed no Judicial Service Discipline regulations were ever passed under the 1997 Constitution, despite the fact that there were serious complaints against judges in relation to alleged corrupt activities and delay. Indeed it has been said that life terms may not be suitable for small island communities which rely heavily on expatriate judges who do not wish to be appointed for life. This is an important issue, to be addressed with care, and after balancing the principles

of judicial independence with judicial accountability. The appropriate forum for a discussion on this issue will be the Constitutional Review process, after hearing from the judges, lawyers and the public.

**c. Publication of Judgments**

The Chief Justice has instructed all judges to publish their judgments. They are available online at the Pacific Islands Legal Information Institute (PACLII) and also on the Judiciary website. They are the best indicators of the independence of the judiciary. Judgments on the website demonstrate the independence of our judiciary. Examples are the cases of *State v. Lole Vulaca and Others* HAC 120/07, *State v. Ilaisa Kurimana and Others* HAC 165/07, and *State v. Maika Vuniwaqa* HAC 170/07. These trials arose out of complaints against police officers and soldiers of violence and human rights violations. They resulted in convictions for murder and manslaughter, and sentences. Also on the website, is the case of *Sakuisa Tuisolia and Imrana Jalal v. State* [2010] HAM 122/09 where the High Court stayed a case filed against a well-known woman's rights lawyer and her husband, and *Fiji Independent Commission Against Corruption v. Sakuisa Tuisolia* [2010] FHHC 484 HAC 127/2008, in which the same defendant, Mr. Tuisolia, was acquitted by the High Court after trial on all six counts of fraud.

Also available for any member of the public are multiple cases of rape and sexual assault of women and children. Cases such as *State v. Joji Mara* HAC038.2010 show that the judiciary has responded to the increased penalties in the Crimes Decree for gender-based violence and has increased the tariff for all such offences. This is in contrast to the statistics in 2005 and 2006, which show that the Court of Appeal (constituted only of men) reduced sentences or quashed convictions in 95% of cases involving gender-based violence. The judiciary website was launched for the first time in 2010.

**d. Sitting in Open Court**

Chamber hearings have been prohibited since 2007 as a result of a Circular issued by the present Chief Justice. This does not of course prevent judges from closing the court under the Criminal Procedure Decree to protect vulnerable witnesses, or under the HIV/AIDS Decree 2011.

**e. A Judicial Code of Ethics and Sanctions for Breach**

Fiji has had a Judicial Code of Ethics since 2005. However, it has no provision for discipline for breach. This will be a matter under consideration during the Constitutional Review process.

**f. Case Management**

The criminal cases in the High Court are case-managed with a high degree of success. It has led to the efficient disposal of cases and there are no allegations of judge-shopping. The system has been introduced to the civil High Court and is in the process of being introduced to the magistracy.

**g. Judicial Training**

The National Judicial Education Committee is responsible for judicial training. Training activities are scheduled every month and the 2010 and 2011 Schedules are attached. Details of the programmes show the compulsory gender components. Training includes gender sensitivity and cultural sensitivity programmes as well as courtroom management and judicial ethics.

## **7. The Judicial Service Commission**

7.1 Although the Administration of Justice Decree 2009 provides for the establishment of the Judicial Service Commission, the commission is yet to be established. Its membership will be: The Chief Justice (chair), the President of the Court of Appeal, a senior legal practitioner, and one member of the public. At present there is no judge who is appointed to be the President of the Court of Appeal. The Judicial Service Commission, established under the 1997 Constitution, and successor to the Judicial and Legal Services Commission under the 1970 Constitution, had powers to appoint magistrates and make recommendations to the President for appointments of judges. It also had powers to discipline judicial officers, but this power was never exercised. Furthermore, the work of the Commission was frustrated from 2000 to 2009 by the lack of trust between the judiciary and the Fiji Law Society (the President of the Fiji Law Society was a member of the Commission under the 1997 Constitution) as a result of the perceived role of the judiciary after successive national crises.

7.2 As a result, the President of the Law Society was either not present at meetings, or was out-voted regularly by the other two members, the Chief Justice and the Chairperson of the Public Service Commission. In effect, the Judicial Service Commission since 2000 was largely ineffective in its expected role, that is, to provide independent and transparent processes to the appointment and discipline of judges and magistrates.

7.3 One criticism of the Commission was that it was an old boys' club, with no gender representation and no real transparency. The proceedings were never documented, and in 2007, the current Chief Justice discovered that the majority of the minutes of the meetings of the Commission from 1998 to 2006 were missing. The current Chief Justice, on his appointment as Acting Chief Justice in 2007, insisted on audio recording of all meetings of the Commission. However the Fiji Law Society refused to attend meetings, other than to attend only to express disapproval of them. Indeed the Fiji Law Society took the step of taking legal proceedings to challenge the validity of the appointment of the then acting Chief Justice and the Judicial Service Commission in a judicial review application in 2007. As such, the Commission in the last 11 years has been largely ineffective in its expected role.

7.4 The Commission of Inquiry on the Court System of Fiji recommended the creation of a Judicial Commission, with the Chief Justice as Chairperson, and made up also of the Chairman of the Public Service Commission, the Solicitor-General, the Secretary for Justice, the President of the Fiji Law Society (or a representative of the Fiji Law Society), and one other lay member to be appointed from the community by the President of Fiji after consulting the Chief Justice. The Commissioner Sir David Beattie also recommended that the Judicial Commission should have the power to recommend appointments, arrange study and refresher programmes, and provide the means of dealing with complaints about judicial officers. He recommended that the Chief Courts Administrator should be the Secretary of the Commission. These recommendations were not accepted when the 1997 Constitution was drafted. In particular no lay membership of the Commission was provided for. In contrast, the Administration of Justice Decree does provide for a lay person to be a member.

7.5 The Connors Report into the magistracy in 2009 was similarly critical of the ability of the Judicial Service Commission to appoint on merit, or to hold magistrates accountable for misconduct. The Commissioner found at page 72 of his report:

“.....very little action has been taken by way of an investigative or disciplinary role. Some attempt appears to have been made some years ago with respect to a Resident Magistrate; however this action was at the time being driven by the then Chief

Magistrate and no overt action appears to have been taken to bring the matter to finality by the Judicial Services Commission.”

By its very constitution the Commission is quite an inadequate body to carry out investigations into allegations that might be made from time to time against judicial officers. In other jurisdictions far more appropriate entities have been established for this purpose. One such example is the Judicial Commission of New South Wales, which was established under the Judicial Officers Act of 1986 and which throughout its history has risen to have the status of being considered one of the best models of its type functioning throughout the Commonwealth.”

7.6 The constitutional review process will be expected to consider whether the process of appointing judges and magistrates on recommendations of a Judicial Service Commission is necessarily the best method of ensuring that appointments are made on merit, whilst reflecting the gender and cultural make-up of Fiji, and that judicial officers are subjected to disciplinary action for misconduct in office, or whether the experiences of other countries in the common law world, such as Australia and New Zealand, may be more useful. Clearly, Fiji’s experiences with a Judicial Service Commission have not been entirely satisfactory. The question of a Judicial Service Commission is in Fiji’s opinion better left for the constitutional review process.

## 8. Gender Equality and Constitutional Change

8.1 The 1997 Constitution, under section 38, guaranteed the right to gender equality, as well as a number of other rights, including freedom from discrimination on the ground of sexual orientation. It is unlikely that there will be any derogation from this right in a new constitution. Firstly, the Human Rights Commission Decree provides specifically for the right not to be discriminated against on the ground of gender. The Decree also provides for effective enforcement procedures to ensure that the guaranteed rights are not mere platitudes. The Decree also defines discrimination in accordance with developing jurisprudence in particular in the light of jurisprudence from the European Court of Human Rights.

8.2 Secondly, the Domestic Violence Decree specifically states that it was passed in accordance with Fiji’s obligations under the Convention on the Elimination of All Forms of Discrimination against Women. In effect, and following the reasoning in *Tevita Nalawa vs. the State*, the Convention has become a part of Fiji’s domestic law, and in interpreting the Decree, the courts may consider the provisions and spirit of the Convention. Section 6 of the Domestic Violence Decree provides

“The objects of this Decree are –

- (a) To eliminate, reduce and prevent domestic violence;
- (b) To ensure the protection, safety and wellbeing of victims of domestic violence;
- (c) To implement the Convention on the Elimination of all Forms of Discrimination Against Women, the Convention on the Rights of the Child and related conventions; and
- (d) To provide a legally workable framework for the achievement of (a) (b) and (c) above.”

8.3 Thirdly, the Child Welfare Decree 2009 refers to the principles in the Convention on the rights of the Child as follows:

“This Decree is to be administered subject to the principle that at all times the welfare and best interests of the child are paramount and under the following principles –

- (a) Every child has a right to protection from harm or likely harm;
- (b) Families have the primary responsibility for the physical, psychological and emotional well-being of their children;
- (c) The preferred way of ensuring a child’s well-being is through the support of the child’s family and extended family;
- (d) Any powers exercised under this Decree must be exercised in a way that is open, fair, and respects the rights of people affected by their exercise, and in particular in a way that ensures –
  - (i) The views of a child and a child’s immediate and extended family are considered; and
  - (ii) A child and a child’s parents have the opportunity to take part in making decisions affecting the well-being of the child;
- (e) A child should be kept informed of matters affecting him or her in a way and to an extent that is appropriate having regard to the child’s age and ability to understand.”

8.4 Fourthly, the Mental Health Decree, passed in 2010 has the following provision”

“For the purpose of this Decree a person is not to be regarded as having a mental disorder by reason only that –

- (d) The person expresses or exhibits or refuses or fails to express, or has expressed or refuses or fails to express, a particular sexual preference or sexual orientation;
- (g) The person engages or has engaged in sexual promiscuity;”

Furthermore section 4 requires the Decree to be interpreted in accordance with standards of the World Health Organization, and the International Conventions on Human Rights as well as the Convention on the Rights of the Child.

8.5 The HIV/AIDS Decree, passed in 2011, has the following provisions:

“3-(1) When interpreting or applying any provision of this Decree, and when exercising any prescribed power, duty or function, all persons and courts should as far as possible-

- (a) Ensure that full regard is had to the recognised universal human rights standards and public international law applicable to the protection of rights and ensure that these standards and laws are applied to the fullest extent possible to protect all such rights including the highest attainable standard of physical and mental health including the availability and accessibility of HIV prevention and HIV/AIDS treatment, care, and support for all persons regardless of age, gender, gender orientation or sexual orientation;
- (b) Apply as far as practicable and subject to any written law and available resources currently accepted international practices and universal standards identified in the context of HIV/AIDS and, in particular the United Nations International Guidelines and Declaration of Commitment saved from time to time

and ensure that all persons living with or affected by HIV/AIDS receive health services that are consistent with their rights; and

(c) Apply, to the fullest extent possible within Fiji, subject to written laws and available resources, the principles, rights, and obligations of ICCPR, ICESCR, CEDAW, CRC, and CRPD, in the administration of health facilities and the provision of health services to all persons living with or affected by HIV/AIDS.”

8.6 These provisions are set out to demonstrate that Fiji’s commitment to incorporating human rights principles, and, specifically, the Convention on the Elimination of All Forms of Discrimination against Women, is obvious. Given this commitment to human rights principles in the Decrees, it is unlikely that a lesser commitment will be demonstrated in the new Constitution. However, there are many issues still to be decided on for the purpose of constitution building.

8.7 One such issue is the way in which particular rights have been modified by jurisprudence. Another issue is whether the modifications should be codified or merely the simple rights as set out in the International Covenant on Civil and Political Rights (ICCPR) or the European Convention on Human Rights. An example is the protection from cruel and inhuman treatment or punishment. The right has been expanded by several jurisdictions to include disproportionality of sentence. The 1997 Constitution specifically included disproportionality of punishment as part of the general right to be protected from torture and cruel and inhuman treatment. In contrast the United Kingdom Human Rights Act 1998 did not, confining itself to the definition of the right under the Convention – “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

8.8 Thus the issue of the inclusion of rights is a matter to be discussed fully during the constitutional review process. The right to gender equality will be non-negotiable. How it is to be expressed, whether there should be separate provisions for separate rights, what the enforcement processes will be, what powers the Human Rights Commission will have to enforce rights in the courts and through mediation processes, what remedies are to be available, whether social and economic rights may be enforced through the courts in addition to civil and political rights, are only some of the issues that Fiji will have to decide in 2012. It would be premature to speculate what the result of the consultation process will be. However, Fiji will have a guarantee of freedom from discrimination on the ground of gender. The provisions of the Decrees set out above demonstrate that intention.

## 9. The Principle of Gender Equality

9.1 Article 1 of the Convention defines discrimination against women as,

“.....any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

9.2 The 1997 Constitution did not have a distinct and separate right to be protected from discrimination on the ground of gender. The constitutional Bill of Rights provided that:

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

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

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

Or on any other ground prohibited by this Constitution.”

- 9.3 The Employment Relations Promulgation 2008 defines “discrimination” as:

“...any distinction, exclusion or preference based on the grounds set out in section 6(2) and 75.”

- 9.4 Section 6(2) provides:

“No person shall discriminate against any worker or prospective worker on the grounds of ethnicity, colour, gender, religion, political opinion, national extractions, sexual orientation, age, social origin, marital status, pregnancy, family responsibilities, state of health, including real or perceived HIV status, trade union membership or activity, or disability, in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment, or other matters arising out of the employment relationship.”

- 9.5 The HIV/AIDS Decree defines discrimination as:

“ ‘discrimination’ includes harassment and occurs when a distinction is made against a person which results in that person being treated by another person or body unfairly, inconsistently with normal practice in any given circumstance;”

- 9.6 The Decree defines harassment as:

“ ‘harassment’ means unjustifiable conduct, typically but not necessarily persistent and repetitive, aimed at an individual, that causes distress, embarrassment, fear or discomfort, and ‘harass’ has a corresponding meaning.”

- 9.7 The Human Rights Commission Decree 2009 defines discrimination as follows:

“Prohibited ground of discrimination means –

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

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

Provided however, that any law or administrative action which –

(a) appropriates revenues or other moneys for particular purposes;

(b) imposes a retirement age on a person who is the holder of a public office;

(c) imposes on persons who are not citizens a disability or restriction, or confers on them a privilege or advantage, not imposed or conferred on citizens;

(d) makes provisions with respect to adoption, marriage, divorce, burial, devolution of property on death or other like matters;

Shall be exempt from and shall not infringe or contravene the prohibited grounds of discrimination.”

- 9.8 Article 14 of the European Convention on Human Rights incorporated into the United Kingdom Human Rights Act 1998 provides:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language,



religion, political, or other opinion, national or social origin, association with a national minority, property, birth or other status.”

9.9 There are therefore different models for the protection of the multiplicity of human rights set out in the various international conventions and under common law. Fiji will adopt a model which is the most effective from the point of view of enforceability. Fiji’s experience with discrimination is that it may be on multiple grounds including ethnicity and gender. The jurisprudence on the interpretation of the right to equality and protection from discrimination has however developed in a uniform way in all common law countries. It includes a definition of discrimination which takes into account what is fair discrimination (for instance social justice programmes which discriminate to eliminate historical disadvantage) and indirect discrimination (discriminatory behavior in effect) as well as unfair and direct discrimination.

9.10 The European Court of Human Rights in defining Article 14 rights said that a difference of treatment is discriminatory if it has “no objective and reasonable justification” and if it does not have a legitimate aim, or if there is no relationship of reasonable proportionality “between the means employed and the aim sought to be realized”. Discrimination may also arise when the State, without an objective and reasonable justification, fails to treat differently persons whose situations are significantly different.

9.11 Fiji will consider carefully the merits of providing protection from discrimination on multiple grounds, or whether particular grounds require individual protection, such as Article 1 rights under the Convention on the Elimination of All Forms of Discrimination against Women. However the right to be protected from unfair discrimination, direct and indirect, on the ground of gender, will be protected by a constitutional provision.

## **10. Enforcement**

10.1 Article 2(c) of the Convention requires States Parties to “establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination.”

10.2 Currently, the rights of women can be enforced through the Human Rights Commission, the Legal Aid Commission, and the courts. In particular the law in Fiji provides better strategies for protection since the enactment of the Crimes Decree, the Criminal Procedure Decree, the Employment Relations Promulgation, the Domestic Violence Decree, the Child Welfare Decree, the Mental Health Decree, the HIV/AIDS Decree, and the Human Rights Commission Decree.

10.3 It is envisaged that there will be rights to enforcement in the new Constitution. The 1997 Constitution gave the judiciary the power to strike down or read down laws which were inconsistent with the Bill of Rights. Using these powers the judges read down criminal laws on homosexuality and struck down laws on the mandatory imprisonment of juveniles. Consideration will be given to retaining such a judicial power in the new Constitution. However, an accompanying priority for Fiji is the continuous training of judges and magistrates on gender justice and human rights. This is accepted by the judiciary, and is being implemented.

10.4 Additional forms of enforcement are the processes already in place, namely the criminal law for cases of gender-based violence, the Employment Tribunal and Court for cases of sexual harassment, the mediation and conciliation processes of the Human Rights Commission, and the restraining order regime for family violence. It is accepted that the real barrier to enforcement is not the law, but the way it is enforced. The training of law enforcement agencies continues to be a priority.

## 11. Free Elections

11.1 Ensuring that elections in Fiji will be free is a challenge for Fiji. This is because, our past experience has shown that the authority of traditional, patriarchal, and cultural institutions influence how votes are registered and made. Pillar 1 of the People's Charter for Change identifies those barriers to democracy which have existed in the past. They are: a communal representation system, a preferential system of voting which did not necessarily represent the views of the majority, the absence of a law which ensures that no person shall be discriminated against by political parties on the grounds of race, religion, gender, or circumstance, a voting age of 21 so that adults over the age of 18 were not permitted to vote, compulsory voting, a constitutional electoral process which was hard to amend to reflect the will of the people, and most importantly, reserved seats for different racial groups and voting on ethnic bases as was required by the 1997 Constitution.

11.2 Our experience of past elections was that the elections were far from free. The laws on elections easily permitted malapportionment, inaccurate voter registration which then effectively dispossessed whole groups of people of the right to vote, and the transfer of massive numbers of votes from one constituency to another.

11.3 The steps currently being taken to ensure the elections in 2014 are free, such that people are free of any pressure, political, cultural, and religious, or influenced by patriarchy, are aimed at the following:

- (a) Enhancing voter registration processes – the introduction of Electronic Voter Registration;
- (b) Maximizing voter turnout by running voter education programmes using the same participatory channels as the Charter consultation and the constitutional review process;
- (c) Minimizing invalid votes by, inter alia, reviewing ballot paper design;
- (d) Eradicating voter fraud by using measures such as the use of fingerprint and photograph identification;
- (e) Ensuring that elections are financed in a cost-effective way, by measures such as holding elections on one day, and using the same Roll for municipal and national elections;
- (f) Ensuring the elections satisfy national and international standards by reviewing policies systems and procedures;
- (g) Ensuring there are rules for political campaigning, campaign funds, and media reports on political campaigns. This will include review of codes of conduct for politicians and political parties.

11.4 Pillar 1 of the People's Charter states that reform must be implemented to abolish the alternative voting system which did not reflect voter opinion, to adopt the List Proportional Representation Open System, to adopt an electronic voter registration system so the flaws in door to door manual registration are removed, and to remove voting on ethnic lines. It is envisaged that equal franchise, non-ethnic voting, and proportional representation will be enshrined in the Constitution, but that the electoral processes and regulations will be in a separate Electoral Decree. By removing the ethnic basis of voting, and by removing reserved communal seats, it is anticipated that political parties will increasingly campaign on the basis of social and economic policies. It will also be necessary to educate the public on the need to vote on policies and not on racial or communal lines.

11.5 The State of the Nation and the Economy Report (NCBBF, August 2009) set out the proposed electoral reforms as follows:

11.5.1 the complete abolishment of the communal representation system as provided for under the Constitution and the Electoral Act 1998 and the use of a common roll for all future elections;

11.5.2 the electoral and voting system as provided for under the Constitution and the Electoral Act 1998 is reformed to enable the adoption of a Proportional Representation System;

11.5.3 that the open party list be advised as the preferred electoral system in public consultations on electoral reform. Other systems that may be included for these consultations are the closed list and MMP systems;

11.5.4 that specific anti-discrimination measures be incorporated into Fiji's electoral laws to ensure no person is discriminated against by political parties on the grounds of race, religion, gender or circumstance;

11.5.5 that a relatively small number of large constituencies, but no more than five, is adopted to maximise the proportional benefits of a PR electoral system;

11.5.6 that the mandatory power sharing arrangement as provided under section 99(5) – (9) of the Constitution be removed and due consideration shall be given for the formation of a truly representative Cabinet;

11.5.7 the reduction of the voting age from 21 to 18; and

11.5.8 the abolition of compulsory voting.

The Fiji government has accepted these recommendations as the basis of electoral reform. Other reforms considered are in relation to the term of sittings of Parliament, the size of the House of Representatives, the future status of the Senate, eligibility to contest a general election, eligibility to vote, and ways in which the Constitution may be amended.

11.6 Following the abrogation of the Constitution in April 2009, all appointments under the Constitution were revoked, including that of the Supervisor of Elections. The Office was re-established under Decree No 6 as was the Electoral Commission. The Office is working on the steps necessary to administer the elections, including spearheading electoral reform. By 2014, the numbers of voters eligible to vote (over the age of 18), will be approximately 660,000. It is likely that there will be 4 or 5 constituencies, that the voting system will be the Proportional Representation Open List System, that there will be 1,150 polling stations, that registration will be compulsory and that voting will be optional. Registration will be electronic, there will be approximately 1,150 ballot boxes and it is planned to have electoral reforms to ensure that voting takes place over one day.

## **12. Fair Elections by 2014**

12.1 Where elections are free, they are more likely to be fair. However, often unfairness arises from circumstances which are not easy to detect or police. How free are women in Fiji to vote where they want? Or must they vote with their husbands and male children? Just as women are often pressurised not to complain about family violence inflicted on them, and just as the dark figures of unreported crime are the highest for crimes where the victims are women and children, so are women pressurised to vote along the lines expected of them in patriarchal society.

12.2 The Office of the Supervisor of Elections has adopted a gender mainstreaming policy which is designed to strengthen the participation of women at each stage of

preparation and conduct of elections. They include strategies for consulting women during the voter education programmes, the political party nomination process, the registration process, and the voting process. It is designed at improving the representation of women during and as a result of elections.

12.3 To ensure that elections are truly “fair”, Fiji is embarked on a period of fundamental social change, aimed at the substantive democratisation of our society. By democratisation, we mean substantive equality. By equality is meant, equality between men and women, between the rich and the economically disempowered, and amongst all the ethnic groups in Fiji. In order to ensure that every vote has the same weight, what must be eradicated are our fundamental social inequalities, which have prevented elections from being fair in the past.

12.4 How this is to be achieved, is set out in the People’s Charter for Change and in the Roadmap for Strategic Change, which deals not only with legal reform but also with social and economic reforms. It is accepted by Fiji that legal reforms have little meaning without economic empowerment. Thus government is working on reforms to the right to safe housing, the right to access micro financing, the right to benefit equally from land rents, poverty alleviation programmes, the legalising of the titles to land for squatters, the development of village communities, free education for all children, free text books and bus fares for school children, and the removal of VAT from essential food items. This is not to say that our people will be reliant on handouts from the State. We have had such a relationship between the State and groups of people since colonial rule, and it has not built a self-sufficient and self-reliant population. Our reforms are aimed at encouraging self-empowerment.

12.5 Nor is there a plan to abolish our cultures. We are proud of our cultures and draw strength from them. Our reforms are aimed at educating the people and their cultural leaders that responsible leadership is democratic leadership, and one which empowers men and women in order that they may make wise decisions for themselves and all of the community. Wise leadership is also about accountability, of the leaders, to the people.

12.6 Therefore our reforms are aimed at the substantive democratisation of our society, and at unifying our people regardless of ethnicity, gender and economic status. Fair elections are only possible when there is substantive equality and therefore substantive democracy. We do not wish to hold elections, only to have the results rejected by groups of people because their party did not win. Yet that has been our history. If democracy is to survive in Fiji, it must have meaning in the hearts of our people. It is for that reason that the reforms must take place before elections – to ensure that elections in the future will be fair in the true meaning of the word. It is for that reason that elections cannot be held earlier than 2014. They will be held no later than 2014.

### **13. Conclusion**

This Follow up Report is specifically aimed at responding to the recommendations of the Committee on the Elimination of Discrimination against Women on the constitutional reform process, the elections, and the rule of law and independence of the judiciary. Fiji’s response reflects the fundamental reforms that our country has embarked upon to achieve substantive democracy. This report has not specifically addressed the problem of corruption, another barrier to democracy. The reforms are also aimed at improving governance. There is also a direct link between development, gender barriers, and corruption. The reforms in Fiji are aimed at achieving a sustainable democracy, based on equality, good governance and accountability. Gender justice is a necessary aim to be achieved in order to gain substantive equality and democracy. The State Party is able to provide any other information required in relation to this recommendation.