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FIJI LAW SOCIETY
SUBMISSIONS TO THE SECTOR STANDING COMMITTEE ON JUSTICE, LAW AND ORDER ON THE PROMOTION OF RECONCILIATION, TOLERANCE AND UNITY BILL (10/2005)

Presented by Fiji Law Society
President, Graham Leung

1.0 EXECUTIVE SUMMARY

- **FLS supports reconciliation, tolerance and unity;**
- **FLS opposes the Bill on the ground that it is unconstitutional and divisive.**
- **It is unlikely to achieve its stated objectives of promoting reconciliation, unity and tolerance;**
- **The Bill undermines the rule of law;**
- **The Bill undermines the judiciary;**
- **The Bill interferes with the DPP's independence and functions;**
- **The Bill violates the separation of powers principle;**
- **It compromises the political neutrality of the President;**
- **The Bill retrospectively legalizes the offence of treason during the designated period. It will set a dangerous precedent for Fiji;**
- **The Bill is a license for state sponsored terrorism;**

- **It will threaten Fiji's security damaging the required environment to attract foreign investment and stimulate the country's economic growth.**

2.0 INTRODUCTION

2.1 In the thirty-five years of modern Fiji's independence, no single proposed law that has come before Fiji's Parliament has the far reaching consequences of the Promotion of the Reconciliation, Tolerance and Unity Bill ("the Bill"). Pause for a moment and look at those who have so far publicly opposed this Bill or made their reservations known about it.

2.2 It includes the most powerful nation in the world. It includes the military and the police, two groups that understand and know all about security. It includes the government of New Zealand a long time friend of Fiji (and who according to *The Sunday Sun of* 12 June 2005 has just beefed up development assistance to the country from the current level of $14 million to $28 million over the next 3 years). It includes the trade union movement. And it includes ordinary mothers as well as all the opposition parties. It also includes accountants, a conservative group who have a keen understanding of economics and finance. And it includes the professional body that represents all the country's lawyers who you would think are able to read

an Act of Parliament and know what it means. Excluding the political parties, those who have taken a principled opposition to the Bill cannot be accused of having a "political axe to grind". They are politically neutral bound by a common desire to guide, advise and counsel.

2.3 **Are these the kinds of groups that would engage in "blatant misrepresentation"? Would they engage in deliberate distortion? Do you think that they would ALL make hasty, shallow and ill-informed pronouncements on complicated issues? The US Ambassador has been pretty vocal in recent weeks. Does he strike you as the kind of person who would rush to emotional judgment? What would he gain by attempting to "mislead" Fiji or the people who live here? Can all these groups from so many different quarters have got it all so horribly wrong?**

2.4 **Under section 13 (c) of the Legal Practitioners Act, ("LPA") the Law Society has a duty to assist the Government in matters affecting legislation and law reform. Under section 13 (d) of the LPA the Law Society has a duty to represent the views of the legal profession, so it is in that capacity that we are here this afternoon.**

2.5 **Mr Chairman, the Law Society was advised on the 6 June to appear before this august Committee today. Let me say**

that the time frame that interested parties have been given to make submissions on this vital Bill has been insufficient. As you have no doubt heard and will continue to hear from others, the consequences of the Bill are complex and far ranging. Because it touches the very heart of the way Fiji is governed, it is in the national interest that the law making process be deliberate, reasoned and careful. Apart from political expediency, there is nothing to be gained from a rush to passage. Consultation cannot be restricted or restrictive. The debate has to be an informed one. It cannot be unilateral, nor can it be forced.

2.6 **Despite the long title of the legislation, the recent wave of public opposition to this Bill is clear evidence that contrary to its stated purposes, the Bill is unlikely to promote reconciliation, tolerance or unity. If anything, recent events and opinions have shown that the Bill is likely to promote division, disunity and even tension. Already the national atmosphere has been poisoned even before debate on the Bill has started in the House. If the government was intent on reconciliation, tolerance and unity it is off to a very bad start.**

2.7 **While FLS believes the stated objective of the Bill may be admirable, it contains some highly objectionable material**

from a constitutional and human rights point of view. Indeed, FLS considers that it imperils the rule of law in Fiji.

2.8 **FLS would like to stress that the objections we raise to the Bill are not objections that can be directed at truth and reconciliation commissions *per se*. In different contexts, truth and reconciliation commissions of the type proposed by the Bill could be the most appropriate way to confront a nation's painful past. In this regard, it is clear that the Bill has been modeled on South Africa's Promotion of National Unity and Reconciliation Act No. 34 (1995). While the establishment of the Trust and Reconciliation Commission in South Africa may have been necessary in the context of that country's social and political turmoil, it is difficult to see how a similar commission in necessary in the context of Fiji's recent political instability. In fact, the prospect of further unrest and constitutional instability cannot be dismissed given some features of the Bill.**

2.9 **There is from a legal point of view a fundamental difference between the situation Fiji and South Africa. In the case of *Republic of Fiji v Chandrika Prasad* (15 March 2001), the Court of Appeal upheld the continuing validity of Fiji's 1997 Constitution despite what occurred after 19 May 2000. There was no new legal order created by those events. The Court held it was neither a successful nor an efficient revolution. The Constitution was never superceded.**

2.10 **There is legal and constitutional continuity in Fiji that was absent in South Africa; that country made a new constitutional beginning. In Fiji, Parliament remained in legal existence and so did the Constitution. Neither has Fiji ever had a legal regime of apartheid which was so deeply offensive to international human rights norms.**

3.0 Undermining the neutrality of the President

3.1 **The President's power to grant amnesty for politically motivated crimes contravenes the separation of powers doctrine and in particular sections 117 and 118 of the Constitution which vests the judicial power in the judiciary. Furthermore, the question arises whether the bar on civil liability for politically motivated crimes infringes the right of victims of those crimes to have the matter of civil liability attaching to the crimes determined by a court of law or, if appropriate, by an independent and impartial tribunal (s 29(2) of the Constitution).**

4.0 Altering the Character of Criminal Acts

4.1 **FLS expresses grave reservations about the legal implications of clause 21 of the Bill, particularly the legal implications of altering the character of criminal acts and omissions by describing them as "political".**

4.2 Clause 21(1) of the Bill is in the following terms:

> **" Any person who wishes to apply for amnesty in respect of any act or omission committed during the designated period, on the ground that it related to an act associated with a political objective, and not purely criminal in context, shall submit his or her application to the Commission in the prescribed form."**

4.3 The supporters of the Bill would prefer that little or no attention is paid to Clause 21 of the Bill. That is the heart of the Amnesty provision. Any person can apply for amnesty. The application will be determined by an Amnesty Committee which makes recommendations to a Commission which in turn makes recommendations to the President.

4.4 Clause 21(2) goes on to direct the Reconciliation and Unity Commission ("Commission") to give priority to applications from persons in custody. Clause 21(9) then provides that the Commission shall prepare its report and findings and shall recommend by way of advice to the President that amnesty be granted if the Commission is satisfied that:

1. **The act or omission which is the subject of the application is one directly associated with a political objective;**
2. **The act or omission was committed during the designated period;**
3. **The act or omission was committed in the course of or as part of a political uprising, disturbance or event;**
4. **The act or omission was committed on behalf of a political group, organization or body of which the applicant was a member, an agent or supporter and neither the act nor the omission was committed for personal gain, out of personal malice, ill will or spite;**
5. **The applicant has made "full voluntary disclosures of all facts relevant to acts or omissions constituting or causing a violation of human rights associated with a political objective"[1].**

4.5 The President has no discretion to refuse to act on this advice given the way the Bill is drafted.

4.6 Once amnesty has been granted there can be no liability criminally or civilly for the acts done.

4.7 Clause 21(2) goes on to provide that where an amnesty has been granted in respect of an act or omission for which the person has been convicted and is serving a term of

[1] Clause 5(1)(e)

imprisonment, the person shall be released forthwith on a warrant issued by the President.

5.0 Fiji's Criminal Law is eroded by the Bill

5.1 The Bill defines with some particularity what "an act associated with a political objective" means in both clause 2 and clause 21. It is an "an act or omission the commission or omission of which is directly related to or made for the fulfillment of a political purpose or objective".

5.2 The breadth and generality of this definition and its potentially all-encompassing nature is a matter of substantial concern. It is worthwhile to note that despite similarities between the South African National Unity and Reconciliation Act and the Bill, the definition of "an act associated with a political objective" in the Bill is very different from the equivalent in the South African Act,[2]

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[2] Section 20 of the South African National Unity and Reconciliation Act provides:

> (1) In this Act, unless the context otherwise indicates, "act associated with a political objective" means any act or omission which constitutes an offence or delict which, according to the criteria in sub-section (3), is associated with a political objective, and which was advised, planned, directed, commanded ordered or committed within or outside the Republic during the period 1 March 1960 to the cut-off date, by -
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> (a) any member or supporter of a publicly known political organization or liberation movement, on behalf of or in support of such organization or movement, bona fide in furtherance of a political struggle waged by such organization or movement against the State or any former state or another publicly known political organisation or liberation movement;

(b) any employee of the State or any former state or any member of the security forces of the State or any former state in the course and scope of his or her duties and within the scope of his or her express or implied authority directed against a publicly known political organization or liberation movement engaged in a political struggle against the State or a former state or against any members or supporters of such organization or movement, and which was committed bona fide with the object of countering or otherwise resisting the said struggle;

(c) any employee of the State or any former state or any member of the security forces of the State or any former state in the course and scope of his or her duties and within the scope of his or her express or implied authority directed-

(i) in the case of the State, against any former state; or

(ii) in the case of a former state, against the State or any other former state, whiles engaged in a political struggle against each other or against any employee of the State or such former state, as the case may be, and which was committed bona fide with the object of countering or otherwise resisting the said struggle;

(d) any employee or member of a publicly known political organization or liberation movement in the course and scope of his or her duties and within the scope of his or her express or implied authority directed against the State or any former state or any publicly known political organization or liberation movement engaged in a political organization or liberation movement engaged in a political struggle against the political organization or liberation movement or against members of the security forces of the State or any former state or members or supporters of such was committed bona fide in furtherance of the said struggle;

(e) any person in the performance of a coup d'etat to take over the government of any former state, or in any attempt thereto;

(f) any person referred to in paragraphs (a), (b), (c) and (d), who on reasonable grounds believed that he or she was acting in the course and scope of his or her duties and within the scope of his or her express or implied authority;

(g) any person who associated himself or herself with any act or omission committed for the purposes referred to in paragraphs (a), (b), (c), (d), (e) and (f).

(3) Whether a particular act, omission or offence contemplated in sub-section (2) is an act associated with a political objective, shall be decided with reference to the following criteria:

(a) the motive of the person who committed the act, omission or offence;

5.3 The difference between the two definitions is considerable. The South African definition spells out to a much greater extent who could have committed "an act associated with political objective", in what context, and how a decision about whether such an act was committed could be decided. The Bill does not.

5.4 While these factors feature to an extent in clause 21(9) of the Bill, they do not form part of the definition of an "an act associated with a political objective". In fact, under the

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(b) the context in which the act, omission or offence took place, and in particular whether the act, omission or offence was committed in the course of or as part of a political uprising, disturbance or event, or in reaction thereto;

(c) the legal and factual nature of the act, omission or offence, including the gravity of the act, omission or offence;

(d) the object or objective of the act, omission or offence, and in particular whether the act, omission or offence was primarily directed at a political opponent or State property or personnel or against private property or individuals;

(e) whether the act, omission or offence was committed in the execution of an order of, or on behalf of, or with the approval of, the organisation, institution, liberation movement or body of which the person who committed the act was a member, an agent or a supporter; and

(f) the relationship between the act, omission of offence and the political objective pursued, and in particular the directness and proximity of the relationship and the proportionality of the act, omission or offence committed by any person referred to in sub-section (2) who acted-

(i) for personal gain: Provided that an act, omission or offence by any person who acted and received money or anything of value as an informer of the State or a former state, political organization or liberation movement, shall not be excluded only on the grounds of that person having received money or anything of value for his or her information; or out of personal malice, ill-will or spite, directed against the victim of acts committed.

definition in the Bill it will be possible to characterize any criminal behaviour as being for a political purpose or objective. Murder could often be said to be for that purpose. If a thief gave away the proceeds of his crime and said it was because he wanted to redistribute wealth, his crime could be said to have a political objective. The law of treason, sedition, and other offences against public order are severely undermined by these provisions.

6.0 Treason is 'Dead' During Designated Period

6.1 Essentially, the law of treason will be rendered inoperative in Fiji for the designated period if the Bill is passed.

6.2 In the context of present day Fiji, it is highly questionable whether a Bill of this nature will achieve the commendable objective of effective reconciliation in Fiji. In any case, enabling inquiry into the events that took place in Fiji during the designated period and providing for measures to promote reconciliation and foster understanding, tolerance and unity among all the people of Fiji should not come at the expense of the rule of law.

6.3 Overriding the criminal law of Fiji in this manner is a mistake. It is likely to weaken the legitimacy of the criminal law. Knowledge that criminal liability for the attempted overthrow of the State of Fiji can be so easily erased by an

Act of Parliament does not bode well for Fiji's future. It is a measure that is likely to result in Fiji being criticized internationally within legal and human rights circles. It is likely, too, to have an adverse effect upon prospects for investment by overseas persons. In this connection we refer to an interview given by the US Ambassador David Lyons to *The Fiji Times* on 30 May this year. Ambassador Lyons was asked: Does the US distinguish between political crimes and other offences? His answer is worth repeating:

> **"I am far from being a legal scholar, but in my view, a crime is when someone knowingly breaks the law, regardless of motivation. A person who robs a bank to fund political advocacy is a bank robber. An activist who firebombs an abortion clinic is an arsonist. Someone who takes a political leader he disagrees with hostage, beats him and holds him for weeks on end, is a terrorist. A judge or jury might conceivably take motivation into account in determining the length of a sentience after a conviction, but I don't believe this should be done with crimes involving violence or deaths. One danger of separating political crimes offences is that this could create a separate class of political prisoners, people who haven't committed crimes but who have in some way offended or posed a legitimate threat to their governments".**

6.4 **We are troubled by the expression "serious criminal offence" which appears in the Bill (eg see clause 2, 21(4)) which means "a criminal offence not directly**

associated with any political purpose or objective committed during the designated period." We consider the redefinition of the character of ordinarily criminal acts under the justification that they were in fulfillment of a political purpose or objective to be dangerous. Under the criminal law of Fiji, purpose or motive are legally irrelevant to proving the commission of a crime. They may however affect the question of sentencing and could be taken into mitigation once a person is convicted of an offence.

6.5 FLS believes that the legal implications of altering the character of criminal behaviour in this way will have serious and deleterious effects on the rule of law in Fiji.

7.0 Amnesty

7.1 Amnesties are a well used and, in many circumstances, a relatively uncontroversial legal mechanism. The institution of amnesty is found throughout history and appears to have been widely used from medieval China to South Africa. A quick review of amnesties across time periods, societies, and cultures reveals that amnesties are as varied as the societies and areas in which one finds them. From such disparate disciplines as tax and immigration, amnesties have been used to raise revenue, express public grace and forgiveness, and to further government

corruption and oppression. They have been used to bring law into compliance with an accepted reality, and to exempt a contested reality from public scrutiny and moral and legal accountability. They have been granted at times of great social stability and at times of great social unrest. Most recently, amnesties have been used to protect individuals from accountability for some of the worst human rights atrocities in the history of humankind.

7.2 **Opponents of the use of amnesties have focused on international law, primarily as reflected in multilateral treaties, General Assembly resolutions, official United Nations reports and studies, customary international law, and decisions by international and regional tribunals.**

7.3 **International law and the domestic legal practice of states at times permit, and even-in some cases-require, amnesties. International law explicitly encourages the use of amnesties at the end of an armed conflict, and such encouragement is codified in some of the foundational documents of international humanitarian law. Yet these amnesties can, and should be distinguished from amnesties for human rights abuses.**

7.4 **A recent statement by the International Committee of the Red Cross, the authoritative interpretation body under the Geneva Conventions, confirms that amnesties encouraged**

under Protocol II to the Geneva Conventions of 1949 were meant to apply only to the granting of amnesty to "those detained or punished for the mere fact of having participated in hostilities. It does not aim at an amnesty for those having violated international law." Such amnesties are not meant to apply to human rights violations; in fact, they are designed and intended to further, rather than thwart, human rights principles.

7.5 The United National General Assembly, the Economic and Social Council (ECOSOC), and Human Rights Committee have all stated that amnesties violate international law. International legal scholars differ on whether amnesties are prohibited under international law. Human rights advocates generally oppose the use of amnesties for gross violations of human rights.

7.6 Although international jurisprudence concerning amnesties is limited, critics of amnesties for violations of human rights point to various principles of international law and policy to argue that amnesties are illegal. There are three major international law arguments made against amnesties. First, it is argued that amnesties violate well-established principles of international law that obligate a state to prosecute individuals responsible for certain gross violations of human rights. Second, it is argued that amnesties violate a victim's fundamental rights guaranteed

under international law. Third, it is argued that amnesties undercut efforts to establish a stable democracy that honors human rights and the rule of law. In contrast to these three arguments, states generally claim that amnesties further peace, truth, and reconciliation.

7.7 **Whatever the tensions between domestic state practice and international practice, there is clearly some obligation under international law to hold accountable those individuals who are responsible for gross violations of human rights.**

7.8 **Justice Richard Goldstone, the former Chief Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda has said that "full justice" consists of the "trial of the perpetrator and, if found guilty, adequate punishment." Similarly, the Inter-American Commission has stated that an amnesty that shields an individual from criminal liability violates the right to justice of the victim, as it prevents the state from fulfilling its obligation to investigate and take "punitive action." The right of a victim to have his perpetrator prosecuted or punished is the corollary to the state's obligation to prosecute and punish.**

7.9 **The examples of Chile and Argentina suggest that amnesties are ill-advised and will not last; moreover, they**

suggest that attempts to prevent accountability in the name of social stability will not work. This argument is supported by the fact that the cries for accountability in both of these cases ultimately appear to have triumphed over the cries for caution and stability. The cases of Chile and Argentina illustrate the use of a short-term amnesty, in which claims for social stability, reconciliation, and building the rule of law take precedence over individual accountability and retribution.

7.10 **International law provides some clear principles that can be used to evaluate amnesties. First, authoritative statements concerning a state's obligation to prosecute and punish those responsible for gross violations of human rights clearly establish a minimal requirement of accountability. The limited jurisprudence on the question and contradictory state practice make it difficult to assert with any confidence a more specific obligation. Second, victims of gross violations of human rights are entitled to some form of truth, reparations, and participation. Amnesties that significantly advance these four principles (accountability, truth, reparations, and participation) are more likely to be considered legitimate, and thus deserve support, recognition, and enforcement. The Fiji Bill does not measure up to international practice in this regard.**

7.11 The dominant thesis, as presented by the philosopher Vladimir Jankelevitch in *L'Imprescriptible* and by Hanna Arendt in *The Human Condition* is that forgiveness can only be contemplated if the culprit recognizes the crime, and is repentant.

7.12 By definition, a crime links one or several victims with one or several victims with one or several culprits. As Arendt explains, forgiveness cannot be unilateral: it is the result of an exchange between the victim and the culprit, the result of a confession, which is why "no one can forgive him/her self". Following the same line of thought, Jankelevitch claims that it is impossible to forgive Nazi war crimes since the perpetrators have never clearly acknowledged their culpability. Forgiveness, according to Arendt and Jankelevitch can only be formulated as the response to an act of repentance. Once the culprit has recognized the crime and apologized, the victim will then decide if the crime is forgivable or unforgivable. This is why, Arendt explains, "men are unable to forgive what they cannot punish, and unable to punish what appears unforgivable."

7.13 International critics of amnesty laws complain they are part of a politics of silence and involuntary forgetting, often hidden behind what States call "national reconciliation."

7.14 The tremendous violence of amnesty laws, according to the philosopher Jacques Derrida, is that they deprive the victim of the right to speak, of the right to say, "I forgive you" since they forgive in place of the victim. Amnesty laws are thus a second victimization, an "absolute victimization" since they deprive the victim of the possibility of contemplating to forgive the unforgivable. Amnesty laws are thus the contrary of forgiveness; amnesty laws kill the very possibility of forgiveness. Pure forgiveness, according to Derrida, must be enunciated beyond any political, social or cultural motivations that are usually found associated with amnesty laws. [3]

7.15 The repressed voices of the victims of 1987 and 2000 can still be heard through their descendants. As long as these voices are not taken into account by the State, the reconciliation of a multicultural Fiji with itself will not be possible.

7.16 FLS strongly opposes the grant of amnesty to coup related offenders and offences. It will mean a lifting of accountability and responsibility by the perpetrators of acts which overthrew the elected government of 2000. It will send a signal to Fiji's population that they can continue to break the law and get away with it. The grant of amnesty

[3] References to international practice on amnesty have relied heavily on an article by Ronald C Slye, "The Legitimacy of Amnesties under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?", **Virginia Journal of International Law**, Fall 2002.

will erode the role of the Judiciary and weaken the resolve of the Police to continue with coup related investigations. What will be the point of investigating violations of the law if lawbreakers will be eventually absolved of wrong doing? What is the point of going through the motions of a trial if its results will be undone by the executive branch of government through this Bill?

7.17 **FLS believes that because those who committed the coup in 1987 were pardoned by the 1990 Constitution, does not make the coup right. Nor does it make it legal. The 1990 Constitution was an "imposed" one and according to the Reeves Report was "not the product of consensus among the citizens of Fiji as a whole…….Instead, it has created an air of uncertainty which has affected the ability of every community to work for the economic and social benefit of all." [4]**

7.18 **By pardoning the perpetrators of 1987, Fiji has created a rod that has come back to beat us. We must not make that same mistake twice. There may be no general amnesty in the Bill but that is not the point. In light of Fiji's history, FLS submits that the creation of a legal eligibility allowing the grant of an amnesty for the most serious crime against**

[4] "Towards a United Future" (the "Reeves Report"), Sir Paul Reeves et. al, Parliamentary Paper 34 of 1996, p.1.

the state, namely treason, is abhorrent and unacceptable. To quote again from Ambassador Lyons:

> **"I am deeply concerned with what is termed Fiji's coup culture. The 1990 Constitution has already set a precedent for pardoning coup leaders, and I have to think this made it that much easier for George Speight, along with his backers and supporters, to attack the democratically elected Chaudhry Government in May 2000. If a democratic society doesn't make it clear that the violent over-throw of its elected leaders is a crime against that society, I have to think it is inviting future upheaval. To badly paraphrase the philosopher George Santayana, perhaps I can say that those who do not learn from earlier coups are doomed to suffer coups in the future."**

7.19 **The Amnesty Committee, despite what the proposed Bill says, will be appointed by politicians. This includes the Judge chairing the Committee. So unlike the Courts which are appointed by the independent Judicial Services Commission, the Amnesty Committee will be infected by political appointees from the start. The stated independence of the Commission in clause 10 of the Bill can be avoided by stacking the appointments of both the Committee and the Commission.**

7.20 **The Commission has the trappings of a court of law: It can "invite"[5] persons to attend an inquiry. It can "order"[6]**

[5] Clause 13(1) (b)

them to appear. The Commission can also order the production of objects or documents.[7] There is nothing in the Bill that will allow the Commission to force persons to tell the Truth. Quite the opposite. Because the Commission may be permitted to have closed sessions[8], the secrecy provisions in the Bill, if used, could be a vehicle for hiding the truth.

7.21 In this regard, may I draw your attention to the Prime Minister's comments at the Second Reading of the Bill where he stated:

> **"If applicants do not give this full disclosure, Mr Speaker, they will not get amnesty. They must serve the rest of their sentence"**

7.22 Maybe so. But the Commission is not required by law to give or disclose any reasons for its decisions. Applicants are not required to give full disclosure, tell the truth or say sorry before they are considered for the grant of an amnesty. Provided they can meet the tests laid out in clause 21(9) which I have just read out, they stand a very good chance of getting an amnesty. The Bill does not make it a legal precondition for consideration for amnesty applicants to tell the Truth or to say "Sorry". The Bill is

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6 Clause 13(1) (c)
7 Clause 13(1) (e)
8 Clause 14 (2)

unclear as to the standard of proof or satisfaction that the Commission must consider before it decides in the applicant's favor (or against) for an amnesty. So it is misleading and incorrect to suggest that unless applicants give full disclosure or tell the truth they will not get an amnesty. In any event, "disclosures" are "voluntary" (clause 5(e)) and by definition cannot be "forced" out of applicants for an amnesty.

7.23 **The Bill is supposed to be a search for the truth behind the tragedy of 2000. But the Bill never once mentions the word "Truth". The difficulty of finding the truth becomes more apparent when you study the Bill. No person invited or required to come before the Commission may be compelled to incriminate himself.[9] This means that the Commissioners for example cannot legally inquire of witnesses or persons appearing before them, the nature and extent of their involvement in the events of 2000. The "Privilege" provisions[10] are very wide and make it more difficult to obtain facts and evidence. In addition to persons not being required to answer questions that may "incriminate" them, the privilege extends to the witnesses spouse or partner, parents and children. The witness cannot be forced to answer questions about whether any of his/her close relatives have anything to say which might**

[9] Clause 15(1)
[10] Clause 15

incriminate them. To further reduce the chances of arriving at the truth, the witnesses' priest, lawyer or doctor any of whom might have some relevant information incriminating the witness, are not obliged to answer questions put to them unless they have the permission of the witness to make disclosures.

7.24 **The argument that amnesty is only available to those that decide to apply for it is naïve and unconvincing. It is difficult to imagine that persons in jail would not consider taking advantage of a law that, if successfully exploited, would allow for their immediate release from detention. If the Bill is passed, FLS is concerned that persons convicted of coup related offences would be entitled to apply for and be granted a pardon, short circuiting the judicial process and escaping criminal liability for their actions. At a time when the whole world is moving in the direction of tightening laws against terrorists and terrorism, Fiji wants to legislate a law that retrospectively licenses terrorism. In any civilized country, the violent overthrow of a democratic government duly elected at the polls after a free and fair election, is an act of terror. This Bill if passed also threatens the existing government and any future government of Fiji because it will encourage the belief that if persons think they have a sufficiently good political reason to topple the government, a future group of politicians will consider granting them a pardon; that this**

would be a justifiable political act which is not criminal. So it is a recipe for instability, terror and pay back. The Bill is a retrograde step.

8.0 Contrary to the Prerogative of Mercy

8.1 Section 115(2) of the Constitution establishes a Commission which deals with the prerogative of mercy. It comprises the Attorney-General, who is the chairperson, and two other members appointed by the President acting in his or her judgment. The President must act on the advice on that Commission.

8.2 The Bill is contrary to section 115 of the Constitution because of its attempt to establish a power to grant amnesty outside the prerogative of mercy. Section 115 of the Constitution deals with the prerogative of mercy and gives the President power to grant to a person convicted of an offence under the law of the State a pardon or a conditional pardon. There is also a power to grant such a person a respite, either indefinitely or for a specified period, of the execution of the punishment imposed for the offence.

8.3 Section 2 of the Constitution provides:

> **This Constitution is the supreme law of the state.**

8.4 **It goes on to say that, "Any law inconsistent with this Constitution in invalid to the extent of the inconsistency". Therefore, Fiji has a superior law Constitution. It cannot be altered by an ordinary statute, but only by the procedure set out in section 191 of the Constitution that requires at least two-thirds majority in each House of Parliament.**

8.5 **Not only does Fiji have a superior law Constitution, it is one of the most elaborate, comprehensive and carefully balanced set of constitutional arrangements anywhere in the world.**

8.6 **The Bill undermines the constitutional status of the prerogative of mercy and is inconsistent with the Constitution. This effect cannot be denied by calling the measure provided for under the Bill an "amnesty". The power provided for under the Bill is plainly an exercise of the powers of the prerogative of mercy outside the framework of the Constitution.**

8.7 **FLS believes that a Court would hold this part of the Bill to be unconstitutional.**

9.0 **<u>Undermining the Separation of Powers Principle</u>**

9.1 **FLS believes that the proposed Bill undermines the separation of powers, especially in relation to the Courts, in the sense that it disturbs existing legal rights and cuts**

across them retrospectively. It takes away resources to the ordinary courts and has all matters dealt with by the Commission appointed by the Government, which itself then constitutes the Victims and Reparation Committee and the Amnesty Committee. As such, despite Clause 10 of the Bill, the Commission and the Committees lack the constitutional independence that the Courts enjoy under the Constitution. Judges are appointed on the recommendation of the Judicial Services Commission (Section 132(2) of the Constitution).

9.2 **Moreover, the Bill will, of enacted, have a harmful effect on the Judiciary. They have functioned very well under adverse conditions and have been put under a great deal of stress. Passage of a law of this character is likely to demoralize them. It takes away the legal powers they now have to do justice in the Courts and hands it over to a body that is not a Court and whose decisions are not subject to any appeal. The Commission and Amnesty Committee are not required to give reasons for its decisions in the way that a Court is obliged to.**

10.0 **<u>Fijian custom</u>**

10.1 **We respect Fijian custom. FLS understands and respects the customary practices of *veisorosorovi* and *matanigasau.* However, we have to be careful that we do**

not confuse the distinction between law and culture. Each has their place. In their pure un-politicized form, these customs have served the Fijian people well over hundreds of years. But we have to guard against the improper and cynical use of custom and tradition for political gain or benefit. The traditional practices referred to have their historical value in pre-colonial communities which did not have a written and institutionalized governance structure. *Veisorosorovi* and *matanigasau* worked well in that setting, typically but not exclusively to resolve disputes between neighbors and neighboring communities. It should also be stressed that even with traditional custom which recognized a place for forgiveness, there was an offender and victim who "made up". The offender expressed remorse and repentance with an assurance that his/her conduct would not be repeated. The victim accepted the apology and there was healing. The reconciliation was not forced upon the parties. The personal forgiveness and 'sorry process' which is an integral part of the traditional custom of *veisorosorovi* is not a legal requirement under the Bill before an amnesty can be granted. There is no requirement for the wrongdoer to say sorry to his victim.

10.2 **Section 186 of the Constitution (which says that Parliament must make provision for the application of customary laws and for dispute resolution in accordance with traditional Fijian processes) was never intended as a vehicle to**

weaken the rule of law. References to section 186 of the Constitution in support of introduction of the concept of restorative justice are simplistic and misleading. That section does not apply here. In any event, from a legal angle, we consider that there would be difficulties in applying customary law to persons who do not consider themselves bound by such law.

10.3 **According to the Reeves Report, section 186 of the Constitution does not exist to facilitate reconciliation between criminal offenders from the indigenous community and the victim members of any other community where the offence relates to treason or the like. In relation to 'traditional methods of dispute settlement' the Report recommended that settlements should be a bar only to prosecution for reconcilable offences within Section 163 of the Criminal Procedure Code (except Domestic Violence). Those offences are generally characterized as "substantially of a personal or private nature and … not aggravated in degree". The offences are – entry upon property with intent to commit an offence, willful and unlawful destruction of or, damage to, property, common assault and assault occasioning actual bodily harm.**

10.4 **Fiji has a written Constitution and we live in a world that is more complex. Fiji is not an island unto itself. Whether we like it or not, what happens in London, Geneva or**

Wellington affects us in Fiji. The world has become interdependent. The line between politics and economics has become blurred in the process. Much of what we consider to be questions of domestic politics have an international dimension that impacts on our ability to be accepted as a member of a civilized community of nations. It affects other countries' decisions on whether they wish to do business or trade with us. The customary practices referred to cannot be applied to the situation of 2000 when the State itself was threatened and dismembered. Also to apply these practices in the context of 2000 is to diminish the gravity of what occurred. To again quote from the Prime Minister's statement at the second reading of the Bill "No one is above the law." Perhaps the Law Society could go further and say that nothing is above the law: no culture, no religion and no government are above the law.

10.5 **Like the Prime Minister, we seek a continuation of justice according to the laws of Fiji. There can be no compromise on that. But if you agree to the draft Bill, you will be compromising the laws of Fiji. You will be compromising the rule of law in this country. You will be undermining the decisions of the criminal courts where people who broke the law were charged, tried and fairly dealt with according to law. Fiji is a country that is governed by law. We are no longer governed by custom. There is no turning back. If we "customize" the law, we do so to our collective harm,**

for in doing so we will be weakening the rule of law, the foundation of Fiji's governance and security.

11.0 Denial of Access to the Courts

11.1 The Bill also falls foul of section 29(3) of the Constitution. It removes access to the Courts. Section 29 of the Constitution provides in clear terms for access to courts and tribunals. In particular, section 29(3) provides:

> **Every person charged with an offence and every party to a civil dispute has the right to have the case determined within reasonable time.**

11.2 The victims of gross violations of human rights committed in the designated period can be granted reparations by the Commission but they are prevented from bringing civil claims against the perpetrators. The definition of "gross violation of human rights" means, according to the Bill, "the extent of excessive violations of human rights declared by the Commission as having been suffered by a victim during the designated period". Thus the Commission has the power to define the jurisdiction of the Commission in respect to human rights violations committed. Basic human rights are themselves protected by sections 21 – 43 of the Constitution. Those rights could easily be abridged by the Commission.

11.3 **The Bill is deeply offensive to the victims of human rights violations suffered as a result of the criminal activities of people during the designated period. It is clear from the Bill that some people have actions for damages which they have filed in the Courts. The proposed legislation cuts across this and prevents any redress being given by the Courts.**

11.4 **There may also be property claims for breaches of commercial arrangements in front of the Courts from commercial businesses that could be adversely affected by the measure.**

11.5 **The Bill is clearly unconstitutional in this respect.**

11.6 **Comparisons with South Africa are Misleading – different historical circumstances**

11.7 **In *The Azanian Peoples Organization v President of the Republic of South Africa* Mahomed DP for the South African Constitutional Court held that the identical provision to clause 20(11) of the Bill in the South African Promotion of National Unity and Reconciliation Act 1995 (s 20(7)) was constitutional in terms of how it dealt with**

the civil liability of a wrongdoer to whom an amnesty was granted.[11] Mahomed DP pointed out that[12]

> **Central to the justification of amnesty in respect of the criminal prosecution for offences committed during the prescribed period with political objectives, is the appreciation that the truth will not effectively be revealed by the wrongdoers if they are to be prosecuted for such acts. That justification must necessarily and unavoidably apply to the need to indemnify such wrongdoers against civil claims for payment of damages. Without that incentive the wrongdoer cannot be encouraged to reveal the whole truth which might inherently be against his or her material or proprietary interests.**

11.8 The South African Constitutional Court also addressed the question of whether it was constitutional to protect the State from any liability for acts or omissions done during the specified period of political unrest (the question also arises in regard to clause 20(11) of the Bill). The Court held that the same argument that wrongdoers would be discouraged from revealing what happened during the period in question would not justify exempting the State from liability. However, the Court pointed out that the Constitution was seeking to facilitate the transition to a new democratic order and was committed to "'reconciliation between the people of South Africa and

[11] *The Azanian Peoples Organization v President of the Republic of South Africa* [1996] (4) S.A.L.R. 671 [33] – [38].
[12] *The Azanian Peoples Organization v President of the Republic of South Africa* [1996] (4) S.A.L.R. 671 [36].

the reconstruction of society.' The question is how this can be done effectively with the limitations of our resources and the legacy of the past."[13] The Constitution permitted Parliament to legislate for a wider concept of reparation, which took the form of social measures rather than individual compensation, and on that basis section 20(7) was not unconstitutional in allowing for amnesty in respect of the civil liability of the State.[14]

11.9 However, even though the South African Court delivered a powerful judgment in favour of amnesty barring civil suits, it needs to be kept in mind that the South African Interim Constitution (1993) particularly in its Epilogue stated the need for truth and reconciliation and provided for Parliament to establish a truth and reconciliation process. Therefore, in analysing whether the South African Promotion of National Unity and Reconciliation Act 1995 infringed the South African Interim Constitution the clear statement in its Epilogue for truth and reconciliation was a major factor. Throughout his judgment Mahomed DP makes reference to the Epilogue and the need established by the Constitution for truth and reconciliation.[15] As a result the *Azanian Peoples*

[13] *The Azanian Peoples Organization v President of the Republic of South Africa* [1996] (4) S.A.L.R. 671 [41], [42].
[14] *The Azanian Peoples Organization v President of the Republic of South Africa* [1996] (4) S.A.L.R. 671 [43] et seq.
[15] See for example: "The real answer, however, to the problems posed by the questions which I have identified, seems to lie in the more fundamental objectives of the transition sought to be attained by the

Organisation **case has to be treated with great care in the Fiji context. The Fiji Constitution, unlike the South African Interim Constitution, does not provide either in its Preamble or in its sections any mechanism or framework for a truth and reconciliation process. FLS considers that the South African Constitutional Court's decision in *The Azanian Peoples Organization v President of the Republic of South Africa* does not apply to the Fiji situation and the context of our Constitution and political history.**

12.0 Usurping the Constitutional Powers of the DPP

12.1 The office of the Director of Public Prosecutions is created by section 114 (1) of the Constitution. Section 114 (4) (a), (b) and (c) provide:

> **"The Director of Public Prosecutions may:**
>
> **(a) institute and conduct criminal proceedings;**
>
> **(b) take over criminal proceedings that have been instituted by another person or authority;**
>
> **(c) discontinue, at any stage before judgment is delivered, criminal proceedings instituted or conducted by the Director of**

Constitution and articulated in the epilogue itself" *The Azanian Peoples Organization v President of the Republic of South Africa* [1996] (4) S.A.L.R. 671 [42].

Public Prosecutions or another person or authority."

Clause 9 (2) (3) of the Bill provides:

" 9.- (2) The function of the Amnesty Committee is to inquire into any application for amnesty from any person referred to the Committee by the Commission in respect of any act or omission committed or omitted by the applicant in connection with any politically motivated gross violation of human rights during the designated period."

(3) After hearing an application under sub-section (2), the Committee shall prepare and submit to the Commission a full report containing the Committee's findings on which the Commission shall make recommendations to the President with advice on whether or not an amnesty should be granted to any person under this Act.

12.2 It is well settled that the DPP's office is not subject to the authority or control of any person or authority: see *Attorney General v DPP*, (Privy Council Appeal 37 of 1981). Clause 30 of the Bill purports to bind "the Government and all its organs and institutions." Clause

21(6) of the Bill permits the Commission to apply for the postponement of criminal proceedings against an applicant charged with a criminal offence. As already discussed, the Bill facilitates the grant of amnesty (see Clauses 5(1)(e), 6(c), 7(d), 9 and 21). We consider that the overall effect of these parts of the Bill will undermine the constitutional independence of the DPP and derogate from his powers. To the extent of the inconsistency, parts of the Bill which interfere with the DPP's powers are *ultra vires* the Constitution.

12.3 **The powers of the Amnesty Committee are sufficiently wide to recommend the grant of an amnesty to persons who have not yet been charged (let alone convicted of an offence related to an act or omission related to the events of 2000) with any criminal offence during the designated period. The extent of the powers of the Amnesty Committee in this regard are far-reaching and intrusive. They can be invoked in a way that would interfere with the constitutional right of the DPP to institute or discontinue criminal proceedings. FLS believes therefore that Clause 9 of the Bill conflicts with section 114 of the Constitution. It is the DPP alone and no other body that has the legal right to terminate criminal proceedings. However, clause 9 of the Bill purports to "share" this power with the Amnesty Committee. This is an unwarranted unlawful interference with the constitutional office of the DPP.**

13.0 Conclusion

13.1 **FLS can in no way see how this proposed Bill as drafted will advance the interests of Fiji or promote unity and reconciliation. The Rt Hon. Sir Geoffrey Palmer, the former Prime Minister of New Zealand and now a renowned constitutional law expert has stated that the Bill would "be a recipe for division and constitutional disaster. Fiji has been to the brink of that before and it ought to pull back." We would be foolish to ignore the views of such an eminent jurist.**

13.2 **The proposed Bill is an affront to human rights, the rule of law, and judicial independence. It is also unconstitutional. A truth and reconciliation commission of the particular type proposed here is not appropriate given the legal and constitutional situation that exists in Fiji. The Bill rather than dispelling political dissension will create political unrest and constitutional uncertainty.**

13.3 **FLS strongly urges the Government to abandon the Bill. The Constitution already contains the tools for dealing with the issues purportedly being addressed by the Bill. These tools should be utilized and not undermined.**

13.4 **Destiny has entrusted you with this solemn responsibility of listening to the views of the people of Fiji and of reporting back to Parliament the views you have heard. A Parliament that is unwilling or unable to pass laws that are just and fair runs the risk of losing its moral authority to govern. It is a defining moment in Fiji's history. Many are called, but few are chosen. You are a powerful and influential committee. It is the justice committee. We have come before you today to seek justice. We urge you to search deep into your conscience as you consider these and other submissions. Will the Bill unite the people of Fiji or will it further divide them. Will it heal old wounds or create new ones? Will it reconcile people or further polarize them? Your committee is in a unique and special position to advise the government. You can choose to be a rubber stamp and simply sign off on this Bill. That would be the easy choice. But we urge you to exercise independent judgment when you consider all the views that come before you.**

13.5 **We ask that you examine this Bill in a bipartisan way. This will take courage and intellectual honesty. The choice you make will determine your future. It will determine your children's future. Above all it will determine the future of this beloved country. We ask you to stand up and be counted in Fiji's hour of need. Fiji's future is too important to be determined solely by narrow sectional**

interests. History will judge you on what decision you make on this Bill.

Thank you.

Fiji Law Society
16 June, 2005

ANNEX

SPECIFIC COMMENTS ON THE PROVISIONS OF THE PROMOTION OF RECONCILIATION, TOLERANCE AND UNITY BILL 2005 BY THE FIJI LAW SOCIETY FOR PRESENTATION TO THE JUSTICE LAW AND ORDER SECTOR COMMITTEE OF THE HOUSE OF REPRESENTATIVES.

A. PART 1 PRELIMINARY

Clause 2 Interpretation

"act associated with a political objective" this definition refers to political purpose, belief or objective but what is meant by "political", as "political" matters can arise in many contexts, in many activities and in many levels of society.

Note that it is unclear as to whether the 'purpose' referred to above is established by an objective test or a merely subjective test.

"amnesty" the words "for the President" after President are otiose; also the phrase "excusing and erasing from legal memory" is vague in the legal sense of not having any precedent.

"gross violation of human rights" in the definition of his phrase the Commission has the ability to assess and determine what a gross violation of human right is. Surely a definition such as "a violation of human rights through the killing, abduction, torture nor severe ill treatment of any person" would be some benchmark for the Commission to start from.

Likewise the phrase "serious criminal offence"

Clause 3 Objects of the Act

Clause 3(1)(d) Basically this provision then means that looters would be punished and while murderers and traitors would not.

Clause 3(2) While restorative justice has much to recommend it, why should it apply only to acts and omissions in the context of the events of 2000?

B. PART 2 ESTABLISHMENT, OBJECTIVES, FUNCTIONS AND POWERS OF COMMISSION

Clause 4 Establishment of Reconciliation and Unity Commission

Clause 4(1) It is recommended that it should include the words "in concurrence with" the Leader of the Opposition.

Clause 4(3) the term of a Commissioner is stated to be for 3 years when the Act itself states that it can only operate for a maximum period of 2 years. However the disturbing part of the provision is the ability to reappoint a Commissioner. The prospect of re-appointment could be perceived to encourage a Commissioner to act in accordance with political influences.

Clause 4(4) It is recommended that it should state that no public office holder is eligible to hold the position of Commissioner.

Clause 4(6) Why should the Cabinet be consulted when they are not directly involved in appointment.

Clause 4(7) It is recommended that this should also be in concurrence with the Leader of Opposition.

Clause 5 Objectives of Commission

In clause 5 the objectives of the commission are to promote reconciliation and unity among the people of Fiji by:

- **assessing the admissions and voluntary disclosures received from any person**
- **perspectives and motives of perpetrators and victims**
- **hearings to carry out these assessment**
- **granting reparation measures to victims of gross human rights violations**
- **facilitating grant of amnesty to persons**
- **compiling full reports on means to prevent future gross violations of human rights**

We note with some concern that no provision is made for protected disclosure to the Commission.

Clause 8 and 9

The appointment of the special committees for victims and reparation require the appointment of an additional 6 members.

C. PART 3 PROCEDURES FOR MEETINGS AND HEARINGS OF COMMISSION AND COMMITTEES

Clause 10

The Society is concerned that the provisions in ss10 (1) is an independent Council may be contradicted by the earlier clauses 8(1)(b) and 9(1)(b) on the appointment of members of special purposes require the approval of the Minister.

Clause 15 (1)

The provision on self-incrimination could undermine the purpose of the Commission. It may be preferable to grant immunity from prosecution to a witness in respect of any evidence given before the Commission, but to require the witness to give the relevant evidence. In the light of sub-clause 6 the privilege could be seen as unnecessary.

D. PART 4 APPLICATION FOR RELIEF

It attempts to provide declare persons as victims of gross violation of human rights, guidelines for doing so, to facilitate reparation for victims, allocate a special fund and more controversially to provide for amnesty for those committing crimes.

Clause 17 Application for declaration as victim

This provision appears to be a duplication of sections 25, 26, 27, 28, 30, and 32 of the Human Rights Commission Act (HRCA) and sections 41 and 42 of the Constitution.

Clause 17 may also be in breach of and/or conflicts with the Constitution. In fact the Constitution and the HRCA have a better procedure when compared to the procedure provided in the Bill.

The Bill states that the Commission *may* investigate upon receiving an application whereas the HRCA states that the Commission *must* investigate upon receiving a complaint. Additionally, applications to the High Court under the Constitution seeking relief are as of right.

The Bill requires complaints to be in/on a prescribed form. No such example of a form is attached to the Bill. It is unclear what information will be required.

The procedure for investigation is not clearly spelt out in the Bill.

Both the HRCA and the Constitution state in some detail the investigation procedure. We need to know what will be the investigation procedure, once again to ascertain the impact and prejudice on any intended applicant.

The BILL states what will happen once an investigation is done and a victim is declared. However, it totally fails to state what happens when an investigation or inquiry is conducted and the result is that no violation or victim is declared. The HCRA and the Constitution both provide for scenarios where an applicant is dissatisfied if he or she is not

declared a victim. Further, the HCRA clearly states that it is subject to and does not replace the provisions in the Constitution in contrast to the Bill.

Clause 18 Application for reparation

This clause is confusing in that it appears to suggest that if an applicant must apply to be recognised first as a victim and then apply for reparation. Ideally only one application ought to be recognised.

Likewise the Bill seems to say that you may make an application for reparation even though you have not been declared a victim. Again this sounds illogical. In order to decide on the issue of reparation one needs to decide whether one is a victim or not or has suffered gross violation of human rights.

An application to be declared a victim and an application for reparation go hand in hand and cannot be treated disjointedly and separately from each other.

Sub-clause 18 (1) clearly refers to harm or damage to property or personal injury or death as a result of gross violation of human rights. Therefore an investigation will have to be conducted on whether gross violation of human rights has occurred taking us back to clause 17. It thus appears the Bill will disentitle an applicant's right to reparation unless he or she has previously been declared a victim under clause 17. [See cl. 18(3)]

Applications for reparation should be automatic for persons who have been declared victims under cl. 17 and for those who have not been so declared such non-declaration should not prejudice or disentitle them from applying for reparation. This is why the procedure laid out in the HCRA and the Constitution is more fair and equitable.

The Bill is supposed to be all about "reconciliation". However, once a victim is declared it goes straight to reparation. The HRCA on the other hand has a specific provision for conciliation before, during or after an investigation. The Bill again requires the application to be in a prescribed form. No example of such a form is attached to the Bill. It is

unclear what information will be required etc. More importantly it is submitted that a victim will be compelled to disclose identity, race, name, address etc which may prejudice the applicant or cause genuine applicants not to apply.

There appears to be a typo error/omission in sub-clause (4) (b). Reference is made to a section 9. Clause 9 of the Bill deals with amnesty applications and not applications for reparation which is contained in clause 8

Sub-clause (5) states that the committee *shall* be limited by any limitations prescribed by any regulations made by the Minister. This is too much power and interference by the Minister/Government/Parliament of the day. To add further salt to injury the maximum cap for any damages for death or personal injury is as that prescribed by the archaic and outdated Workmen's Compensation Act. The maximum amount payable under this Act is $24,000 for loss of a life.

Clause 19 Guiding Principles

These provisions are designed to ensure that applicants for declaration as a victim or reparation privacy are respected however this is then published in the Gazette as provided for in clause 20(6)

Clause 20 Special Fund

This clause in requiring the publication of names and amounts of compensation may undo the earlier provisions of respecting the privacy and dignity of victims.

Clause 21 Amnesty

The definition clauses of the bill define amnesty as "*an act of forgiveness granted by the President [for the President] for the purpose of excusing and erasing from legal memory the illegality of an act or omission*

***committed in association with an political objective during the designated period*.**"

The FLS views with concern such phraseology as the Constitutional provision for pardon as contained in section 115 provides for the presidential exercise of pardon only after a person has been convicted of an offence. That is the President's power of pardon and respite from execution are exercisable only after a conviction has been entered.

Fiji's Constitution is the supreme law of State and the vesting of a pre-conviction power of amnesty in the President is at odds with the presidential powers of mercy as contained in section 115.

In clause 21(1) the Society believes that the following words should be added by way of qualification after the word 'omission', "*amounting in the opinion of the Commission to a gross violation of the human rights of an identifiable victim*"

At clause 21(3) reference is made to the Commission requiring an applicant to "perfect" an application. What does this mean?

The definition of "act associated with a political purpose" at clause 21(4) is at slight odds with the definition provided earlier at clause 2. The word "belief" is missing.

At clause 21(5) the Commission may make a request to suspend proceedings in a civil matter, while the power of the Court is discretionary, does the plaintiff have a right to be heard? If not, why not? Likewise for clause 21 (6).

We have noted some typographical errors at clause 21(7)(a)

- **there is a superfluous "the" after the phrase 'the application if'**
- **word 'omission' is missing after 'act'**
- **use of the phrase 'connected with' is inconsistent with the phrase 'directly related to' used in clause 2 and clause 21(1) – where 'directly' was left out.**

Clause 21(9) the word 'motive' is now used for the first time instead of 'purpose or belief'.

Clause 21(10) the use of the 'shall' indicates that the President has no discretion in granting amnesty. It is recommended that 'shall' should be changed to 'may' – leaving the President with discretion as in the case of a pardon.

Clause 21(11) Page: 49

This provision may well be unconstitutional and run counter to the provisions of section 29(2) of the Constitution which provides

(2) Every party to a civil dispute has the right to have the matter determined by a court of law or, if appropriate, by an independent and impartial tribunal.

Unlike the Constitution of South Africa, for example, Fiji's Constitution makes no express provision for such an amnesty.

E. PART 5 ESTABLISHMENT, OBJECTIVE, FUNCTIONS AND POWERS OF THE NATIONAL COUNCIL ON PROMOTION OF RECONCILIATION TOLERANCE AND UNITY.

Clause 22

The objective of the Council is "to promote unity among the people of Fiji Islands through genuine reconciliation, tolerance and understanding which transcends the climate of disunity and divisions of the past".

The objective of the Commission "to promote reconciliation and unity amongst the people of Fiji Islands in a spirit of tolerance and understanding…"

The Council and the Commission have the same if not similar objectives with the Council having a more permanent life in contrast to the Commission.

Clause 23 and Clause 27 Membership and Committees

The membership of the council would consist of at least 22 members who are appointed by the Minister (upon recommendations of the various groups outlined). Clause 23 (7) allows the Council to invite any person to assist the meetings by providing expert advice. Clause 27 allows the Council to establish committees to carry out some of its work.

The allowances and expenses of the Council are fixed by the Higher Salaries Commission. This is a cause for concern as the taxpayer will ultimately bear the administration costs.

Clause 24 Functions

The functions of the Council are primarily to draft national policy on the promotion of reconciliation, understanding, tolerance and unity. There are no guidelines provided however, Clause 24 (c) provides that the National Policy is to be approved by cabinet. This flies in the face of clause 26 which provides for independency of the council.

Clause 25 Powers of Council

Wide powers are given to the Council to summon any person to give information or documents for the performance of its functions. Read together with clause 29(1) (a), (f) and (g) it is an offence to refuse to disclose any information, this opens up the way to fishing expeditions and even breach of legal professional privilege.

Clause 26 Independence of Council

If the council's general and specific policy decisions are controlled by the minister then we have a situation where the Council could be the mouthpiece of government policies and no longer considered independent.

F. PART 6 MISCELLANEOUS

Clause 32 Power to give general or special policy directions to the Council

The FLS views with grave concern the inclusion of this provision as it would imply the Council despite having a legislative mandate to "promote unity among the people of the Fiji Islands through genuine reconciliation, tolerance and understanding" would still need to be subject to Ministerial direction.

Clause 35 Regulations

The provision confers on the Minister regulation making powers but it should reflect the wishes of the Commission by inserting the phrase "at the request of the Commission" after the word "Minister may"

Clause 36 Dissolution of the Reconciliation and Unity Commission

These provisions of sub-clause 1 appear to suggest that the Minister has the ability to provide for the dissolution of the Commission through regulation. This is at odds with the clause 10 (2) that provides that the Commission will operate for a period of 18 months from that date of appointment of Commissioners with an extension of up to 6 months.