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GOVERNMENT OF FIJI

HUMAN RIGHTS COMMISSION DECREE 2009
 (DECREE NO. 11)

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IN exercise of the powers vested in me as the President and Commander in Chief of the Republic of the Fiji Military Forces, I hereby make the following Decree—

PART 1—PRELIMINARY

Short title and Commencement

1. This Decree may be cited as the Human Rights Commission Decree 2009, and shall come into force on 12th May 2009.

Interpretation

2. In this Decree, unless the context otherwise requires—

“Commission” means the Human Rights Commission which is established by this Decree and which has functions conferred by this Decree;

“Commissioner” means any member of the Human Rights Commission;

“department” means a department in the public service;

“employment” includes—

- (a) the employing of an independent contractor;
- (b) the relationship between a person for whom work is done by contract worker pursuant to a contract and the person who supplies that worker;

- (c) employment in the public service, including the Fiji Police Force, the Fiji Prisons Service and the Republic of Fiji Military Forces;
- (d) unpaid work;

“functions of the Commission” means the functions conferred on the Commission by this Decree, or by or under any other written law.

“human rights” means the rights embodied in those United Nations Covenants and Conventions on Human Rights which are ratified by the State of Fiji, and the rights and freedoms as may be prescribed by the President by Decree;

“Minister” means the Minister responsible for human rights matters;

“Proceedings Commissioner” means the person designated as such under section 14;

“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 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 diminution of the rights or 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 provision 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

Decree to bind State

3. This Decree binds the State.

Application

4. This Decree applies both within and outside the Fiji Islands.

PART 2—HUMAN RIGHTS COMMISSION

Human Rights Commission established

5.—(1) This section establishes the Human Rights Commission, which shall have such functions, powers and duties as prescribed in this Decree.

(2) The Commission is a body corporate with perpetual succession and a common seal, may enter into contracts, may sue and be sued in its corporate name, has the power to acquire, hold and dispose of property both real and personal and generally may do all such acts and things as are necessary for and incidental to the performance of its functions by or under this Decree or any other written law.

(3) Without limiting any other provision of this Decree, the Commission has the rights, powers and privileges of a natural person of full age and capacity.

Membership

6.—(1) The Commission consists of—

- (a) a chairperson; and
- (b) 2 other members.

(2) The chairperson is appointed by the President, acting in his or her own judgment following consultation with the Prime Minister.

(3) The other members are appointed by the President, on the advice of the Prime Minister.

(4) In advising the President as to the persons to be appointed as members of the Commission pursuant to subsection (3), the Prime Minister must have regard not only to their personal attributes but also to their knowledge or experience of the different aspects of matters likely to come before the Commission.

Conditions of appointment

7.—(1) A Commissioner must not—

- (a) actively engage in politics;
- (b) subject to subsection (2), engage either directly or indirectly in the management or control of a body corporate, or of any other body carrying on business for profit.

(2) Nothing in subsection (1)(b) prevents a Commissioner from—

- (a) holding office in a professional body in relation to which his or her qualifications are relevant; or
- (b) engaging in the direct or indirect management or control of a body corporate, or of any other body carrying on business for profit, if leave for such engagement is granted by the Minister.

Term of office

8. The chairperson and the members of the Commission hold office for a term of any period up to 3 years, and are eligible for re-appointment.

Remuneration and Allowances

9. The chairperson and the members of the Commission are entitled to such remuneration and allowance as fixed under the Prescription of Salaries Act or any written law.

Removal from office

10. The chairperson and the members of the Commission may be removed by the President for inability to perform the functions of the office (whether arising from infirmity of body or mind, absence, or any other cause) or for misbehaviour, or may otherwise be removed by giving one month's notice or one month's remuneration in lieu of notice.

Functions of the Commission

11.—(1) Subject to subsection (2), the functions of the Commission are—

- (a) to educate the public about the nature and content of human rights;
- (b) to make recommendations to the Government about matters affecting compliance with human rights;
- (c) to promote and protect human rights of all persons in Fiji;
- (d) to perform such other functions as are conferred on it by this Decree or any written law.

(2) Notwithstanding anything contained in this Decree or any written law, the functions, powers and duties of the Commission do not extend to receiving complaints against, or investigating, questioning or challenging, the legality or validity of the Fiji Constitution Amendment Act 1997 Revocation Decree 2009, or such other Decrees made or as may be made by the President.

(3) For the purpose of performing its functions the Commission has the powers and duties conferred by this Decree.

Powers and duties of the Commission

12.—(1) The Commission has the following powers and duties—

- (a) to increase general awareness of human rights, including by making public statements and educating public opinion and public officials, coordinating human rights programs and acting as a source of human rights information;
- (b) to invite and receive representations from members of the public on any matter affecting human rights;

- (c) to consult and co-operate with other persons and bodies concerned with the promotion and protection of human rights;
- (d) to inquire generally into any procedure or practice whether governmental or non-governmental, if it appears to the Commission that human rights are, or may be, infringed thereby;
- (e) to make recommendations to the Government on the desirability of legislative, administrative or other action so as to give better protection to human rights;
- (f) to promote better compliance in Fiji with standards laid down in international instruments on human rights;
- (g) to encourage the ratification of international human rights instruments by the State and, where appropriate, to recommend the withdrawal of reservations entered to those instruments;
- (h) to advise the Government on its reporting obligations under international human rights instruments and, without derogating from the primacy of the Government's responsibility for preparing those reports, to advise on the content of the reports;
- (i) to make recommendations on the implications of any proposed law or any proposed policy of the Government that may affect human rights;
- (j) to investigate allegations of contraventions of human rights and allegations of unfair discrimination, of its own motion or on complaint by individuals, groups or institutions on their own behalf or on behalf of others;
- (k) to resolve complaints by conciliation and to refer unresolved complaints to the courts for decision;
- (l) to advise on any human rights matter referred to it by the Government having regard to the available resources and priorities of the Commission.
- (m) to publish guidelines for the avoidance of acts or practices that maybe inconsistent with or contrary to human rights;
- (n) to take part in international meetings and other activities on human rights; and to co-operate with other national, regional and international human rights bodies.

(2) The Commission may, from time to time, in the public interest or in the interests of any person or department, publish in any manner it thinks fit reports relating generally to the exercise of its functions or to any particular case or cases investigated under this Decree.

(3) The Commission must not investigate (but may comment on) any decision by a court of law.

Functions of Chairperson

13. The functions of the Chairperson are—

- (a) to chair meetings of the Commission;
- (b) to be responsible for matters of administration in relation to the Commission;
- (c) to allocate spheres of responsibility among Commissioners;
- (d) any other functions conferred or imposed on the Chairperson by this Decree or any other written law.

Proceedings Commissioner

14.—(1) The Chairperson may from time to time in writing designate a Commissioner, or the Chairperson himself or herself, to act as Proceedings Commissioner for the purposes of this Decree.

(2) A designation under subsection (1) may operate for a specified period of time and may either be general or specify a particular case or cases or class of cases.

(3) Until a designation under subsection (1) is revoked, it continues in force according to its terms.

(4) A designation under this section is revocable at will and no such designation prevents the exercise of any function by the Commission as a whole.

Performance of functions of the Commission

15.—(1) A decision of the Commission requires the concurrence of a majority of its members and it may act

despite the absence of a member but, if, in a particular case, a vote is taken to decide a question and the votes cast are equally divided, the chairperson must exercise a casting vote.

(2) Meetings of the Commission are to be held at such times and places as the Commission or the Chairperson from time to time appoints.

(3) At a meeting of the Commission, the quorum necessary for the transaction of business is the Chairperson and one Commissioner.

(4) Subject to this section, the Commission may regulate its own procedure.

(5) In the performance of its functions or the exercise of its powers, the Commission is not subject to the direction or control of any other person or authority, except a court of law or as otherwise provided by this Decree.

(6) Nothing in subsection (5) limits—

- (a) the responsibility of the Government for the structure of the Commission;
- (b) the Government's general policy responsibility for the management of the Commission; and
- (c) the power of the Government, through the Minister, to give general policy, administrative and financial guidelines to the Commission.

(7) In addition to the functions conferred upon it by or under this Decree, the Commission has such powers and other functions (if any) as are prescribed by law.

(8) The validity of the transaction of business of the Commission is not affected if someone who was not entitled to do so took part in the proceedings.

Funds of the Commission

16.—(1) The funds of the Commission consist of—

- (a) any moneys appropriated for the purposes of the Commission and paid to the Commission;
- (b) all other moneys lawfully received by the Commission for its purposes; and
- (c) all accumulations of income derived from any such money.

(2) The accounts of the Commission must be audited by the Auditor General.

Adequacy of funding

17. The Minister must use his or her best endeavours to ensure that moneys appropriated for the Commission are adequate—

- (a) for the performance of the functions of the Commission; and
- (b) to maintain the Commission's independence and impartiality.

Staff of the Commission

18.—(1) The Commission must appoint—

- (a) a Director of the Commission; and
- (b) any other employees, including casual and contract employees, needed for the efficient performance of the functions of the Commission.

(2) The Director and other employees of the Commission are subject to the control and direction of the Commission.

(3) The Director and other employees of the Commission hold office on terms and conditions determined by the Commission after consultation with the Public Service Commission.

(4) The Director of the Commission is entitled to such remuneration determined from time to time by the Higher Salaries Commission.

(5) Any person employed as a staff of the Commission prior to the commencement of this Decree (excluding the Chairperson and members of the Commission), shall continue to be employed as a staff of the Commission, as if appointed under the provisions of this Decree.

PART 3—UNFAIR DISCRIMINATION

Areas where unfair discrimination prohibited

19.—(1) It is unfair discrimination for a person, while involved in any of the areas set out in subsection (3), directly or indirectly to differentiate adversely against or harass any other person by reason of a prohibited ground of discrimination.

(2) Without limiting subsection (1), sexual harassment, for the purposes of this section, constitutes harassment by reason of a prohibited ground of discrimination.

(3) The areas to which subsection (1) applies are—

- (a) the making of an application for employment, or procuring employees for an employer, or procuring employment for other persons;
- (b) employment;
- (c) participation in, or the making of an application for participation in a partnership;
- (d) the provision of an approval, authorisation or qualification that is needed for any trade, calling or profession;
- (e) the provision of training, or facilities or opportunities for training, to help fit a person for any employment;
- (f) subject to subsection (4), membership, or the making of an application for membership, of an employers' organisation, an employees' organisation or an organisation that exists for members of a particular trade, calling or profession;
- (g) the provision of goods, services or facilities, including facilities by way of banking or insurance or for grants, loans, credit or finance;
- (h) access by the public to any place, vehicle, vessel, aircraft or hovercraft which members of the public are entitled or allowed to enter or use;
- (i) the provision of land, housing or other accommodation;
- (j) access to, and participation in, education.

(4) Subsection (3)(f) does not apply to access to membership of a private club or to the provision of services or facilities to member of a private club.

Genuine occupational qualification

20.—(1) It is not unfair discrimination in relation to any of the areas referred to in paragraphs (a) to (e) of section 19(3) if the prohibited ground of discrimination is a genuine occupational qualification.

(2) For the avoidance of doubt, adverse differentiation by reason of a prohibited ground of discrimination is a genuine occupational qualification where a position is for the purposes of an organised religion and the differentiation complies with the doctrines, rules or established customs of the religion.

Genuine justification

21. Adverse differentiation by reason of a prohibited ground of discrimination in relation to any of the areas referred to in paragraphs (f) to (j) of section 19(3) is not unfair discrimination if there is genuine justification for the differentiation.

Guidelines on genuine occupational qualification and genuine justification

22. Without limiting the Commission's power to issue guidelines on any other matter within its jurisdiction the Commission may, for the avoidance of acts and practices which might amount to unfair discrimination, from time to time issue non-binding guidelines on genuine occupational qualifications and genuine justification.

Social justice and affirmative action

23. A programme, whether provided by the Government or by the private sector, designed to achieve for any groups or categories of persons who are disadvantaged effective equality of access to the areas set out in section 19(3) is not unfair discrimination.

Victimisation

24. It is unfair discrimination for a person while involved in any of the areas set out in section 19(3) to victimise

any other person on the ground that that person, or a relative or associate of that person—

- (a) intends to make use of his or her rights under this Decree or any other written law;
- (b) has made use of his or her rights, or promoted the rights of some other person, under this Decree or any other written law;
- (c) has given information or evidence in relation to any complaint, investigation or proceeding under this Decree or any other written law;
- (d) has declined to do any act which would contravene this Decree or any other written law; or
- (e) has otherwise done anything under or by reference to this Decree or any other written law.

Employment applications and advertisements

25.—(1) It is unfair discrimination—

- (a) to use or circulate any form of application, or to make any enquiry of or about any person seeking employment, which indicates, or could reasonably be understood as indicating, an intention directly or indirectly to differentiate adversely by reason of a prohibited ground of discrimination; or
- (b) to publish or display, or cause or allow to be published or displayed, any advertisement or notice which indicates, or could reasonably be understood as indicating, an intention to differentiate adversely by reason of a prohibited ground of discrimination.

(2) Subsection (1) does not affect the operation of sections 20, 21 and 23.

Liability of employers and principals

26.—(1) Subject to subsection (3), anything done or omitted by a person as an employee of another person is, for the purposes of this Decree, to be treated as done or omitted by the other person as well as by the first-mentioned person, whether or not it was done with that other person's knowledge or approval.

(2) Anything done or omitted by a person as the agent of another person is, for the purposes of this Decree, to be treated as done or omitted by that other person as well as by the first-mentioned person, unless it was done or omitted without that other person's express or implied authority, previous or subsequent.

(3) In proceedings under this Decree against any person in respect of an act alleged to have been done or omitted by an employee of that person, it is a defence for that person to prove that he or she took all steps reasonably practicable to prevent the employee from doing or omitting the act, or from doing or omitting as an employee of that person acts or omissions of that description.

PART 4—COMPLAINTS AND INVESTIGATIONS

Complaints about contravention of human rights

27.—(1) Any person may make a complaint to the Commission, including a representative complaint on behalf of other persons with a similar cause of complaint, about a contravention or alleged contravention of human rights.

(2) Notwithstanding anything contained in this Decree, the Commission shall not receive, nor shall it investigate on its own motion, any complaints questioning or challenging the legality or validity of the Fiji Constitution Amendment Act 1997 Revocation Decree 2009, or such other Decrees made or as may be made by the President.

Complaints about unlawful discrimination

28.—(1) Any person may make a complaint to the Commission, including a representative complaint on behalf of other persons with a similar cause of complaint, about unfair discrimination.

(2) Notwithstanding anything contained in this Decree, the Commission shall not receive, nor shall it investigate on its own motion, any complaints questioning or challenging the legality or validity of the Fiji Constitution Amendment Act 1997 Revocation Decree 2009, or such other Decrees made or as may be made by the President.

Discretion whether to investigate

29.—(1) The Commission must investigate any complaint received by it, unless before commencing or during the investigation it decides not to do so because—

- (a) the complaint is not within the jurisdiction of the Commission;

- (b) the complaint is trivial, frivolous, vexatious or not made in good faith
- (c) the complainant, or a person acting on his or her behalf, has brought proceedings relating to the same matter in a court or tribunal;
- (d) the complainant has available another remedy or channel of complaint that the complainant could reasonably be expected to use;
- (e) the complainant has not a sufficient interest in the complaint;
- (f) the person alleged to be aggrieved does not desire that the complaint be investigated;
- (g) the complaint has been delayed too long to justify an investigation;
- (h) the Commission has before it matters more worthy of its attention; or
- (i) the resources of the Commission are insufficient for adequate investigation,

and may defer or discontinue an investigation for any of these reasons.

(2) No decision by the Commission to decline, defer or discontinue an investigation into a complaint affects the Commission's power to inquire generally into a matter of its own initiative.

Investigation of Commission's own motion

30. Subject to sections 27(2) and 28(2), the Commission may investigate of its own motion any act, omission, practice, requirement or condition which is or appears to be unfair discrimination or a contravention of human rights or which has been referred to it by the High Court.

Letters from prisoners or patients

31. A letter written by—

- (a) a person in custody; or
- (b) a patient in a hospital,

and addressed to the Commission must be forwarded immediately, unopened and unaltered, to the Commission by the person in charge of the place or institution where the writer of the letter is detained or in which he or she is a patient.

Investigation procedure

32.—(1) Before investigating any matter within its jurisdiction, the Commission must inform—

- (a) the complainant (if any);
- (b) the person alleged to be aggrieved, if not the complainant;
- (c) the person to whom the investigation relates; and
- (d) in relation to an investigation relating to a department the person holding or performing the duties of the office of Secretary of the department ,

of the Commission's intention to make the investigation.

(2) An investigation under this Decree must be conducted in private.

(3) The Commission may hear or obtain information from any person whom the Commission considers can assist in the investigation and may make whatever enquiries it thinks fit.

(4) Nothing in this Decree requires the Commission to hold any hearing and no person is entitled as of right to be heard by the Commission.

(5) The Commission must not in any report make any comment that is adverse to or derogatory of any person to whom a complaint relates without—

- (a) providing the person with a reasonable opportunity of being heard; and
- (b) fairly setting out in the report the person's defence (if any).

(6) In conducting an investigation, the Commission is not bound by the strict rules of evidence or procedure, but must act fairly at all times.

Conciliation

33.—(1) The Commission may, before commencing an investigation, or during or after an investigation, call a conciliation conference of the parties to the conciliation by formally requesting, by post, telephone, facsimile, electronic mail or otherwise, the attendance of each party at a time and place specified.

(2) If a person fails to comply with a request made under subsection (1) the Commission may issue a summons requiring the person to attend a conciliation conference at a time and place specified in the summons.

(3) The objectives of a conciliation conference are to identify the matters at issue between the parties and to use the best endeavours of the Commission to secure a settlement between the parties on the matters at issue.

Power to require information to be provided

34.—(1) Subject to this section and to section 35, for the purposes of an investigation a Commissioner may, by notice in writing, require any person to furnish any information, or to produce any document, record or thing in the possession or under the control of that person that is in the opinion of the Commissioner relevant to the investigation.

(2) If a Commissioner has reason to believe that a person is able to give information relevant to an investigation, the Commissioner may, by notice in writing, require the person to attend before him or her, on a date and at the time and place specified in the notice, to answer questions relevant to the investigation.

(3) For the purposes of an investigation the Commission and a Commissioner have the same powers as a judge of the High Court in respect of the attendance and examination of witnesses and the production of documents.

(4) A person is not excused from giving information, producing a document, record or thing or answering a question when required to do so pursuant to this Decree, if the only ground for refusal is that the giving of the information, the production of the document, record or thing or the answer to the question would contravene a provision of a written law, would be contrary to the public interest, or might tend to incriminate the person or make him or her liable to a penalty; Provided that the information, document, record, thing or answer is not admissible in evidence against the person in proceedings other than proceedings for an offence against section 49.

(5) Subject to section 35, a person is not excused from giving information, producing a document, record or thing or answering a question when required to do so pursuant to this Decree on the ground that the material is commercially sensitive.

(6) Except on the trial of any person for perjury in respect of his or her sworn or affirmed testimony, or proceedings for an offence against section 49, no statement made or answer given by that or any other person in the course of any inquiry by or proceedings before the Commission or a Commissioner is admissible in evidence against any person in any court or at any inquiry or other proceedings, and no evidence in respect of proceedings before the Commission or a Commissioner must be given against any person.

Disclosure of certain matters not to be required

35.—(1) If the Attorney General certifies that the disclosure of information concerning a specified matter (including the furnishing of information in answer to a question or the disclosure to the Commission or a Commissioner of the contents of a specified document or record or the production of a specified thing) would be contrary to the public interest because it would—

- (a) seriously harm the commercial interests of any person or body;
- (b) prejudice the security, defence or international relations of the State;
- (c) involve the disclosure of deliberations or decisions of the Cabinet or of a committee of the Cabinet;
or
- (d) a claim of State privilege could be made in relation to the information concerned,

the Commission or a Commissioner cannot require a person to give information concerning the matter, to answer questions concerning the matter or to produce the document, record or thing.

(2) The Commission must withhold publication of any written material which comes into its possession in the course of an investigation and which is the subject of a certificate by the Attorney General under subsection (1).

Procedure after investigation

36.—(1) After completing an investigation, the Commission must inform the parties of the result of the investigation and whether, in its opinion—

- (a) the complaint does not have substance, or cannot be established to have substance or, in relation to an investigation of the Commission’s own motion, that the matter ought not to be proceeded with; or
- (b) the complaint has substance or, in relation to an investigation of the Commission’s own motion, that the matter ought to be proceeded with.

(2) If the Commission is of the opinion that a complaint does not have substance, or cannot be established to have substance, but considers nonetheless that it may be possible to reach a settlement between any of the parties concerned, the Commission may act as a conciliator and use its best endeavours to reach a settlement of the complaint.

(3) If the Commission is of the opinion that a complaint does not have substance, or cannot be established to have substance, or if the Commission pursuant to section 29(1) decides not to investigate, or investigate further, a complaint, it must inform the complainant of the complainant’s right to bring civil proceedings before the High Court.

(4) If the Commission has investigated a complaint and is of the opinion that the complaint has substance, it must act as conciliator in relation to the complaint and use its best endeavours to effect a settlement in relation to the complaint.

(5) For the purposes of this section, “settlement” includes a satisfactory assurance by the person to whom a complaint or investigation relates against repetition of the conduct that was the subject-matter of the complaint or the investigation or against conduct of a similar kind.

(6) Whether or not it takes any of the actions referred to in subsections (2), (3) and (4), the Commission may—

- (a) advise the parties of their respective rights, including the complainant’s right to bring proceedings in the High Court;
- (b) refer the complaint and, if it considers appropriate, the result of the investigation to another competent authority;
- (c) make recommendations to the competent authority, proposing amendments to or reform of any laws, regulations or administrative provisions or practices which have created the difficulties or hardship encountered by the complainant or the aggrieved person;
- (d) recommend to the relevant authority, in respect of a person who in the opinion of the Commission has contravened human rights, either prosecution of the person or the taking of other action, and the authority must consider the recommendation, take such action as it deems appropriate and advise the Commission in due course of the action it has taken.

Functions of Proceedings Commissioner

37.—(1) The functions of the Proceedings Commissioner include—

- (a) in relation to a complaint or an investigation of the Commission’s own motion – deciding whether an application should be made for an order under section 42 and, if so, making the application;
- (b) in relation to a complaint resulting from a failure by a party to observe the terms of a settlement on a previous occasion – deciding whether to institute proceedings against the party and, if so, instituting the proceedings;
- (c) in relation to a complaint or an investigation of the Commission’s own motion, if it appears to the Proceedings Commissioner that a settlement has not been reached and that no action or further action by the Commission is likely to facilitate a settlement – deciding whether to institute proceedings against the person against whom the complaint was made or to whom the investigation related, and if so, instituting the proceedings.

(2) The Proceedings Commissioner must not institute proceedings against a person referred to in paragraph (b) or (c) of subsection (1) unless the Commissioner has given the person an opportunity to be heard.

(3) Notwithstanding anything contained in this Decree or any written law, the functions, powers and duties of the Proceedings Commissioner do not extend to receiving complaints against, or investigating, questioning or challenging, the legality or validity of the Fiji Constitution Amendment Act 1997 Revocation Decree 2009, or such other Decrees made or as may be made by the President.

Proceedings

38.—(1) Civil proceedings in the High Court lie at the suit of the Proceedings Commissioner against a person referred to in paragraph (b) or (c) of section 37(1) for unfair discrimination or a contravention of human rights; Provided however that no proceeding which seeks to question or challenge the legality or validity of the Fiji Constitution Amendment Act 1997 Revocation Decree 2009, or such other Decrees made or as may be made by the President, shall be brought by the Proceedings Commissioner.

(2) The Proceedings Commissioner may, under subsection (1), bring proceedings on behalf of a class of persons if the Commissioner considers that a person referred to in paragraph (b) or (c) of section 37(1) has engaged in unfair discrimination which affects that class or has contravened the human rights in relation to that class; Provided however that no proceeding which seeks to question or challenge the legality or validity of the Fiji Constitution Amendment Act 1997 Revocation Decree 2009, or such other Decrees made or as may be made by the President, shall be brought by the Proceedings Commissioner.

(3) If proceedings are commenced by the Proceedings Commissioner under subsection (1), neither the complainant (if any) nor the aggrieved person (if not the complainant) may be an original party to the proceedings, or, unless the High Court so orders, join or be joined in the proceedings.

(4) Notwithstanding subsection (1), the complainant (if any) or the aggrieved person (if not the complainant) may bring proceedings before the High Court if—

- (a) the Commission is of the opinion that the complaint does not have substance or cannot be established to have substance or that the matter ought not to be proceeded with;
- (b) the Commission pursuant to section 29(1) decides not to investigate, or to investigate further, a complaint; or
- (c) the Proceedings Commissioner would be entitled to bring proceedings but—
 - (i) agrees to the complainant, in the case of a complaint, or an aggrieved person, in relation to an investigation of the Commission's own motion, bringing proceedings; or
 - (ii) decides not to take proceedings.

Provided however that no proceeding which seeks to question or challenge the legality or validity of the Fiji Constitution Amendment Act 1997 Revocation Decree 2009, or such other Decrees made or as may be made by the President, shall be brought before the High Court.

(5) Nothing in this section limits the right of any person to apply to the High Court for redress for a contravention of his or her human rights; Provided however that no proceeding which seeks to question or challenge the legality or validity of the Fiji Constitution Amendment Act 1997 Revocation Decree 2009, or such other Decrees made or as may be made by the President, shall be brought before the High Court.

Right of Proceedings Commissioner to appear in High Court

39.—(1) The Proceedings Commissioner may appear and be heard in the High Court or the Court of Appeal in relation to any proceedings under section 38, whether or not the Proceedings Commissioner is or was a party to the proceedings.

(2) With leave of the court, tribunal or arbitrator, the Proceedings Commissioner may appear and be heard in relation to any proceedings before a court, tribunal or arbitrator in which human rights are in issue.

(3) If the Proceedings Commissioner appears before any court, tribunal or arbitrator he or she may, unless the rules of procedure of the court, tribunal or arbitrator otherwise provide—

- (a) appear in person or by a legal practitioner;
- (b) adduce evidence and cross-examine witnesses, unless the proceedings are by way of appeal,

Remedies

40.—(1) In any proceedings before the High Court brought under section 38 by the Proceedings Commissioner, a complainant or an aggrieved person, the plaintiff may seek any or all of the remedies described in subsection (2) of this section.

(2) If in any proceedings as mentioned in subsection (1) the High Court is satisfied on the balance of probabilities that the defendant has engaged in unfair discrimination or has contravened human rights, it may grant one or more of the following remedies—

- (a) a declaration that the defendant has engaged in unfair discrimination or has contravened human rights;
- (b) an order restraining the defendant from continuing or repeating the conduct complained of or causing or permitting others to engage in conduct of the same kind or of any similar kind specified in the order;
- (c) damages in accordance with section 41;
- (d) an order that the defendant perform any act specified in the order with a view to redressing any loss or damage suffered by the complainant or the aggrieved person or to preventing conduct of a similar kind in the future;
- (e) a declaration that a contract requiring performance of anything that constitutes unfair discrimination or contravenes human rights is void and unenforceable;
- (f) such other relief as the High Court thinks fit.

(3) It is not a defence to proceedings under this section that the unfair discrimination or contravention of human rights was unintentional or without negligence on the part of the defendant, but the High Court must take the conduct of the defendant into account in deciding what remedy, if any, to grant.

(4) In any proceedings under section 38, the High Court may make such award as to costs as it thinks fit, whether or not it grants any other remedy.

(5) If the Proceedings Commissioner is a party to proceedings, any costs in the proceedings awarded against the Commissioner under subsection (4) must be paid by the Commission and the Commission is not entitled to be indemnified by the complainant or, as the case may be, the aggrieved person for such costs.

(6) Notwithstanding anything contained in this Decree, the High Court shall not have the jurisdiction to accept, hear, determine, or in any other way entertain, any proceeding or any application of any form whatsoever in a proceeding, which seeks to question or challenge the legality or validity of the Fiji Constitution Amendment Act 1997 Revocation Decree 2009, or such other Decrees made or as may be made by the President, and the High Court shall not have the jurisdiction to grant any remedies in these proceedings or applications.

(7) Any proceeding of any form whatsoever, as well as any application of any form whatsoever in a proceeding, seeking to challenge the validity or legality of the Fiji Constitution Amendment Act 1997 Revocation Decree 2009 (Decree No. 1) or any other Decrees made by the President from 10 April 2009 or as may be made by the President, shall wholly terminate immediately upon the commencement of this Decree, and a Certificate to that effect shall be issued by the Chief Registrar to all parties to the proceeding.

Damages

41.—(1) In proceedings under section 38 for unfair discrimination or a contravention of human rights, the High Court may award damages against the defendant in respect of any one or more of the following—

- (a) pecuniary loss suffered or expense incurred by the complainant or the aggrieved person as a result of the conduct complained of;
- (b) expenses reasonably incurred by the complainant or the aggrieved person in seeking redress for the conduct complained of;
- (c) loss of any benefit, whether or not of a monetary kind which the complainant or the aggrieved person might reasonably have been expected to obtain but for the conduct complained of;
- (d) humiliation, loss of dignity and injury to feelings of the complainant or the aggrieved person.

(2) Subject to subsection (3), the Commission must pay any damages recovered by the Proceedings Commissioner under this section to the complainant or the aggrieved person on whose behalf the proceedings were brought.

(3) If the complainant or the aggrieved person is an unmarried minor or a person of unsound mind the Proceedings Commissioner may, in his or her discretion, pay the damages to the Public Trustee or to any person or trustee corporation acting as the trustee of the property of that person.

Power to make interim order

42.—(1) In respect of any matter which is the subject of an investigation by the Commission and in which the High Court has or may have jurisdiction, a judge may make an interim order if he or she is satisfied that it is necessary in the interests of justice to make the order to preserve the position of the parties pending the result of the investigation and the final determination of any proceedings resulting from the investigation.

(2) An application for an interim order under subsection (1) may be made by the Proceedings Commissioner or, in a case to which section 38(4) applies, the complainant or the aggrieved person.

(3) A copy of an application under subsection (3) must be served on the defendant who must be given an opportunity to be heard before a decision on the application is made

(4) If an interim order has been made, the defendant may appeal to the Court of Appeal to rescind or vary the order, unless the order was made with the defendant's consent.

(5) Notwithstanding anything contained in this Decree, the High Court shall not have the jurisdiction to accept, hear, determine, or in any other way entertain, any proceeding or any application of any form whatsoever in a proceeding, which seeks to question or challenge the legality or validity of the Fiji Constitution Amendment Act 1997 Revocation Decree 2009, or such other Decrees made or as may be made by the President, and the High Court shall not have the jurisdiction to grant any remedies in these proceedings or applications.

(6) Any proceeding of any form whatsoever, as well as any application of any form whatsoever in a proceeding, seeking to challenge the validity or legality of the Fiji Constitution Amendment Act 1997 Revocation Decree 2009 (Decree No. 1) or any other Decrees made by the President from 10 April 2009 or as may be made by the President, shall wholly terminate immediately upon the commencement of this Decree, and a Certificate to that effect shall be issued by the Chief Registrar to all parties to the proceeding.

Substantial merits, evidence and hearings

43. In any proceedings under this Decree before the High Court, the court—

- (a) must act according to equity, good conscience and the substantial merits of the case, without regard to technicalities;
- (b) may receive as evidence any statement, document, information or matter that will or might in the court's opinion assist it to deal effectively with the matters before it, whether or not it would be admissible but for this section;
- (c) may, if it considers it desirable to do so—
 - (i) order that any hearing held by it be heard in private, either in whole or part;
 - (ii) make an order prohibiting the publication of any report or account of the evidence or other proceedings before it (whether heard in public or in private) either in whole or in part;
 - (iii) make an order prohibiting the publication of any book or document produced at the hearing.

PART 5—MISCELLANEOUS

Annual Report

44.—(1) Without limiting the right of the Commission to report at any other time, the Commission must, within 3 months after the end of each financial year, furnish to the President a report on the exercise of its functions under this Decree during the year, and must submit a copy to the Prime Minister.

(2) Following submission of the Annual Report to the President and Prime Minister, the Commission must hold a public meeting at a time and place it fixes to discuss the contents of the Annual Report and the carrying out of its functions during the year.

Delegation of functions by Commission or Commissioner

45.—(1) The Commission may from time to time by writing under the hand of the Chairperson, delegate to a Commissioner any of the functions or powers of the Commission under this Decree, except the functions set out in section 11 of this Decree, this power of delegation, and the power to make any report under this Decree.

(2) With the prior written approval of the Minister, any Commissioner may from time to time, by writing under his or her hand, delegate to any employee of the Commission any of the Commissioner's powers under this Decree, except this power of delegation and the power to make any report under this Decree.

Nature of delegation

46.—(1) The following provisions apply to a delegation under section 45—

- (a) it may be made to a specified person or to the holder for the time being of a specified office or to the holders of offices of a specified class;
- (b) it may be made subject to such restrictions and conditions as the Commission or Commissioner thinks fit, and may be made either generally in relation to any particular case or class of cases;
- (c) it is revocable at will and no such delegation prevents the exercise of any function by the Commission or Commissioner, as the case may be;
- (d) until revoked, it continues in force according to its terms and if, in the case of a delegation by a Commissioner, the Commissioner by whom it was made ceases to hold office, it continues to have effect as if made by his or her successor.

(2) A person purporting to exercise any power of the Commission or of a Commissioner by virtue of a delegation under section 45 must, when required to do so, produce evidence of his or her authority to exercise the power.

Commissioners and employees to maintain secrecy

47.—(1) Subject to this section, a Commissioner or any employee of the Commission who, either directly or indirectly and either while remaining or after ceasing to be a Commissioner or employee, makes a record of, or divulges or communicates to any person, any information acquired in the performance of his or her duties under this Decree, commits an offence and is liable on conviction to a fine of \$5,000.

(2) Subsection (1) does not prevent a Commissioner or an employee of the Commission from making a record of, or divulging or communicating to any person information acquired by the Commissioner or the employee in the performance of his or her duties for purposes connected with the performance of the functions of the Commission under this Decree.

(3) Subsection (1) does not prevent the Commission from disclosing in a report made under this Decree any matter which in the Commission's opinion ought to be disclosed in the course of setting out the grounds for the conclusions and recommendations contained in the report.

(4) Subsection (1) does not prevent the Commission from disclosing information or making a statement to the public or a section of the public with respect to the performance of the functions of the Commission.

(5) The Commission must not, in disclosing information or making a statement under subsection (4), disclose the name of a complainant or aggrieved person or any other information that would enable the complainant or aggrieved person to be identified unless it is fair and reasonable in all the circumstances to do so.

Protection from suit

48. Neither the Commission, a Commissioner nor an employee of the Commission is liable to an action, suit or proceeding for or in relation to an act done or omitted to be done in good faith in exercise or purported exercise of a power or authority conferred by this Decree.

Offences

49.—(1) A person who refuses or fails, without reasonable excuse—

- (a) to attend before the Commission or a Commissioner;
- (b) to be sworn or make an affirmation;
- (c) to furnish information;

- (d) to produce a document, record or thing; or
- (e) to answer a question,

when required to do so pursuant to this Decree, commits an offence and is liable on conviction to a fine of \$5,000 and to imprisonment for 12 months.

(2) A person who—

- (a) without reasonable excuse, wilfully obstructs, hinders or resists the Commission, a Commissioner or an employee of the Commission in the performance of their functions; or
- (b) furnishes information or makes a statement to the Commission, a Commissioner or an employee of the Commission knowing that it is false or misleading in a material manner,

commits an offence and is liable on conviction to a fine of \$ 5,000 and to imprisonment for 12 months.

Expenses and allowances

50. The Commission may, in its discretion, pay to—

- (a) any person by whom a complaint has been made; or
- (b) any person who attends or who furnishes information for the purposes of an investigation,

such amounts in respect of expenses properly incurred or by way of allowances or compensation for loss of time, as are payable under the Criminal Procedure Code to a witness attending at a trial or an inquiry at the High Court.

Regulations

51. The Minister may make regulations, not inconsistent with this Decree, prescribing all matters that are required or permitted by this Decree to be prescribed or that are convenient to be prescribed for carrying out or giving effect to this Decree.

Repeals, Transition

52.—(1) The Human Rights Commission Act 1999 is repealed.

(2) Any complaint, proceeding or investigation, being dealt with by the Commission or the Proceedings Commissioner prior to the commencement of this Decree, shall continue to be dealt with by the Commission or the Proceedings Commissioner, but only pursuant to and in accordance with the provisions of this Decree.

(3) Any complaint, proceeding or investigation, being lodged and dealt with by the Commission or the Proceedings Commissioner prior to the commencement of this Decree, which is contrary to the provisions of this Decree or which challenges any Promulgation made by the President between 5 December 2006 and 10 April 2009, or which challenges any Decrees made or as may be made by the President shall terminate immediately upon the commencement of this Decree and the Commission shall inform the concerned parties accordingly, and the Commission shall submit to the Minister a list of all complaints, proceedings or investigations terminated under this section.

DATED this 12th day of May 2009.

RATU J. I. ULUIVUDA
President and Commander in Chief
of the Republic of the Fiji Military Forces