

FIJI LAW REFORM COMMISSION

REVIEW OF PENAL CODE AND CRIMINAL PROCEDURE CODE

ISSUES PAPER No. 1

DEALING WITH THE VARIOUS ACTS, PARTICULAR OFFENCES AND THE REMOVAL OF OBSOLETE OFFENCES

(THIS PAPER DEALS WITH THE SPECIFIC OFFENCES OF HOMOSEXUAL
CONDUCT, ABORTION, PROSTITUTION, THEFT AND CORRUPTION IN
PUBLIC OFFICE)

PART 1 - BACKGROUND

1.1 The Review

Under section 5(2) of the *Fiji Law Reform Commission Act (Cap 26)* the Attorney General and Minister for Justice of Fiji, Senator Qoriniasi Bale, has referred the *Penal Code (Cap 17)* and the *Criminal Procedure Code (Cap. 22)* for review by the Fiji Law Reform Commission.

1.2 Objective

The objective is to comprehensively review the *Penal Code* and *Criminal Procedure Code* to update and recommend changes in relation to:

- Offences
- Penalties/Punishments
- Jurisdiction
- Defences
- Criminal Procedures

The recommendations must be reflective of and responsive to existing local and/or global conditions, circumstances, trends and practices. It is envisaged that the proposals for reforms arising from this Review will provide Fiji with statutes relating to criminal offences and procedures which are suitable to Fiji's current and future needs and circumstances.

The law relating to criminal procedure must:

- Ensure fair trials for persons accused of offences.
- Protect the rights and freedoms of all persons suspected or accused of offences.
- Provide fair, effective, speedy and efficient procedures for the investigation and prosecution of offences, and the hearing of criminal cases.
- Meet the applicable international standards and obligations.

1.3 The Time Frame for the Review

The Commission is to submit its Final Report with measures and recommendations for reform and appropriate draft bills or draft provisions to the Attorney – General and Minister for Justice by the 31st day of December, 2006.

1.4 Project Implementation

This project is being undertaken by the Fiji Law Reform Commission with support from NZAID.

All activities and outputs shall be reviewed from time to time by a Project Management Committee comprising representatives of a range of key stakeholders.

The Executive Chairperson of the Commission, Alipate Qetaki, has assigned two legal officers to work on this Review. The legal officers are Raramasi Salakubou and Cama Tuberi.

1.5 Appointment of Consultants

Pursuant to section 3(6) of the *Law Reform Commission Act* the Attorney-General has appointed Ross Ray QC, David Neal SC and Graham Powell to advise the Commission in this Review. The consultants shall assist in the preparation of the Final Report and Recommendations for Reform, and with the drafting of necessary legislation to achieve the objectives of this Review. They shall also facilitate the public and stakeholder consultation processes, and shall ensure that the views that are expressed are reflected in the drafted outcomes.

PART 2 –PRELIMINARY OBSERVATIONS

2.1 Preliminary Observations

The matters identified in this Paper are intended to promote discussion and feedback. The consultants have expertise in these areas, most notably that of:

- Ross Ray QC who is a barrister in the criminal jurisdiction and became a Queens Counsel in 1996. He is a past Chairman of the Victorian Bar Council and is soon to become President-elect of the Australian Law Council.
- David Neal SC who has been Victorian Law Reform Commissioner and was a key figure in the drafting of the *Criminal Code Act 1995* of the Commonwealth of Australia.
- Graham Powell who is an experienced legislative drafter in Fiji and neighbouring islands in the South Pacific.

However there is much to be learnt and to be considered in the Fiji context and so all views are invited. All experiences shall be instructive and all matters identified and raised shall be taken into account.

2.2 The Laws of Fiji

While the two main laws applying in the criminal law context, and which are the subject of this Review, are the *Penal Code* and the *Criminal Procedure Code*, there are a great many laws, and proposed laws, that have a direct bearing on the way these laws are applied, and the manner in which the criminal law is enforced in Fiji.

These relevant laws include –

As to the jurisdiction of the Courts:

- Supreme Court Act
- Court of Appeal Act
- High Court Act
- Magistrates Court Act
- Juveniles Act

By providing for a range of criminal offences:

- Minor Offences Act (Cap. 18) 1971
- Public Safety Act (Cap. 19) 1920
- Public Order Act (Cap. 20) 1969
- Dangerous Drugs Act (Cap. 114) 1938
- Illicit Drugs Control Act 2004
- Land Transport Act
- Penal Code (Domestic Violence) Amendment Bill 2005

Dealing with criminal process and procedures:

- Bail Act 2002
- Evidence Act (Cap. 41) 1944
- Deportation Act (Cap. 90) 1971
- Criminal Procedure Code (Domestic Violence) Amendment Bill 2005

By providing for penalties and sentencing options:

- Penal Code – Chapter VI Punishments
- Probation of Offenders Act (Cap. 22) 1952
- Community Work Act 1994

PART 3 – SOME KEY ISSUES

3.1 THE FRAMEWORK OF RELEVANT LAWS

In the early stages of this Review the Consultants have formed the view that the scope of necessary reform would indicate that entirely new laws are required to replace both the *Penal Code* and the *Criminal Procedure Code*. This is confirmed to some extent by a

stated preference by key stakeholders for consideration to be given to re-titling the current laws. This may involve the removal of the words “Code” in both instances, and the replacement of the *Penal Code* with a Crimes Act.

Request for Public Comment

The Commission is likely to propose that the re-drafted laws would be –

- A modern *Crimes Act*
- A comprehensive *Criminal Procedure Act*
- An entirely new *Penalties and Sentences Act*

Views on this may differ and the Fiji Law Reform Commission would welcome any indications of support or opposition to this proposed framework.

3.2 SPECIFIC OFFENCES TO BE CONSIDERED FOR REFORM

3.2.1 Offences relating to homosexual conduct

The criminality of homosexual conduct and the validity of current offences relating to homosexuality have risen to prominence in Fiji in recent times.

The relevant provisions of the *Penal Code* are:

- Section 175(a) – carnal knowledge of any person against the order of nature
- Section 175(c) – permitting a male person to have carnal knowledge of him or her against the order of nature
- Section 177 – indecent practices between males

In the recent High Court decision of **Dihendra Nadan and Thomas McCoskar v The State** (August 2005) these provisions have been declared unconstitutional as breaching the constitutional protections relating to privacy and equality before the law. This decision is in accordance with recent decisions of the United Nations Human Rights Committee declaring such provisions in other jurisdictions to be in breach of international law.

The judge noted that the invalidity of these laws does not affect any crime relating to male rape or predatory gross male indecency.

Request for public comment

The Commission may recommend that:

- the laws previously provided under section 175(a) and (c) and section 177 are not to be restated in a new Crimes Act
- the offence of rape shall become gender neutral and shall have application to rape by one male against another (and rape by females)

- offences of gross indecency shall also be framed in gender neutral terms

The Commission is aware that opinions on these matters may differ widely and shall consider any views expressed in this regard.

3.2.2 *Abortion offences*

There are three current offences in the *Penal Code* which deal with abortion. These are:

- Section 172 – attempts to procure abortion
- Section 173 – abortion by a woman with child
- Section 174 – supplying drugs or instruments to procure abortion

Some related provisions are:

- Section 221 – killing an unborn child
- Section 234 – surgical operation (No criminal responsibility attaches to a surgical operation undertaken with reasonable care and for the preservation of the mother's life where the operation relates to an unborn child.)

These provisions have been the subject of criminal prosecutions in Fiji in recent years and have highlighted the need to up-date their terms in accordance with legislative amendments which have been applied to the laws of England. The effect of these amendments is to clarify the circumstances in which certain persons may perform abortions to save human life and protect human health.

These laws have been the subject of consideration in two previous Position Papers published by the Fiji Law Reform Commission in 1993 and 1996. It was suggested on those occasions that abortion would remain a crime except where it was performed in the following circumstances:

1. If a medical practitioner terminated a pregnancy holding the opinion in good faith:
 - that the continuation of the pregnancy would involve risk to the life of the pregnant women or of grave injury to her physical or mental health (taking account of the woman's actual or reasonably foreseeable environment); or
 - that there is a substantial risk that if the child were born it would suffer such physical or mental abnormalities as to be seriously handicapped; or
 - that the pregnancy resulted from rape or incest.
2. Other grounds to justify a termination of pregnancy would be:
 - that the pregnant women would be mentally unfit to care for the child; or
 - that there had been a failure of a device or method used by the pregnant woman or her husband for the purpose of limiting the number of children in their family; or
 - the pregnancy arose from the defilement of a mentally unfit person.

3. It was considered that the number of doctors required to give an opinion justifying the termination of pregnancy would differ according the term that the pregnancy had run. For example:
- one medical practitioner if up to 12 weeks
 - 2 medical practitioners for between 12 and 24 weeks or where the foetus has become capable of independent survival (except where the procedure is considered by a medical practitioner to be immediately necessary to save life or prevent grave permanent injury of the pregnant woman); or
 - 3 medical practitioners if over 24 weeks (except where the procedure is considered by a medical practitioner to be immediately necessary to save life or prevent grave permanent injury of the pregnant woman)

Request for public comment

The Commission has formed no opinion as to the appropriate form of abortion offences and the grounds that may be considered to lawfully justify the termination of pregnancy. The views of the public are sought on all aspects of this.

3.2.3 Prostitution

There are a number of offences in the current *Penal Code* which apply to prostitution in brothels and on the streets. These are:

- Section 157 – Procuration (Procuring a women or girl to become a prostitute
- Section 161 – Detention of female in brothel or elsewhere
- Section 162 – Selling minors under the age of 16 for immoral purposes
- Section 163 – Buying minors under the age of 16 for immoral purposes
- Section 166 – Male person living on earnings of prostitution or persistently soliciting
- Section 167 – Women living on earnings of prostitution or aiding etc for gain of another woman
- Section 168 – Loitering or soliciting for the purposes of prostitution
- Section 169 – Suspicious premises
- Section 170 - Brothels

Request for public comment

The Commission is likely to recommend that some of these provisions be replaced by “human trafficking” offences, and aggravated offences where sexual exploitation is a feature of the offence. It shall also ensure that gender neutrality is introduced to these offences. Other aspects of these offences shall be dealt with in reforms of the offences relating to unlawful sex with minors. There may be a need for the applicable laws to shift some focus to the persons making use of the services of prostitutes, rather than on the

prostitutes alone.

In all respects the Commission shall be guided by the views expressed from the community and these are invited.

3.2.4 Larceny/Theft offences

There are many provisions of the current *Penal Code* which prescribe offences relating to larceny, embezzlement, conversion, stealing and damaging trees, destruction of certain documents, robbery and extortion, burglary and housebreaking, frauds by trustees and false pretences. In fact there are about 58 individual offences of this nature.

By contrast the recent Criminal Code Act 1995 of the Commonwealth of Australia prescribes three major offences in this regard:

- Theft and the related offences noted below
- Obtaining property by deception
- Obtaining a financial advantage by deception

This is believed to be the most modern re-statement of the concepts originating from the *Theft Act 1968* of the United Kingdom.

Request for public comment

The Commission is likely to recommend that modern theft provisions replace the current larceny and related offences in the *Penal Code*. The actual text is likely to closely reflect the provisions of the Criminal Code Act 1995 (Cmlth of Australia) and shall prescribe the following –

Offences of:

- Theft (penalty of 10 years)
- Receiving (penalty 10 years)
- Robbery (penalty 15 years)
- Aggravated robbery (penalty 20 years)
- Burglary (penalty 13 years)
- Aggravated burglary (penalty 17 years)
- Making off without payment (penalty 2 years)
- Going equipped for theft or a property offence (penalty 3 years)
- Dishonest taking or retention of property (penalty 2 years)
- Obtaining property or financial advantage by deception (penalty 10 years)

Other offences involving fraudulent conduct:

- Obtaining a financial advantage (penalty 12 months)
- Conspiracy to defraud (obtaining a gain, causing a loss, influencing a government official – penalties 10 years)

For each of these offences there shall be clear definitions given for all key elements of the offence, including matters such as:

- “dishonesty”
- Property
- Intention of permanently depriving
- “tainted property” (in the context of offences involving dealing with stolen property)
- “obtaining”
- “offensive weapon”

The Commission would welcome views on any aspect of this.

3.2.5 Bribery/Corruption offences

There are a number of offences of this nature in the current *Penal Code*. It is generally observed that these offences have failed to meet the needs of promoting good governance in modern Fiji society. These include:

- Section 106 – Official corruption
- Section 107 – Extortion of public officers
- Section 108 – Public officers receiving property to show favour
- Section 109 – Officers charged with administration of property of a special character or with special duties
- Section 110 – False claims by officials
- Section 111 – Abuse of office
- Section 112 – False certificates by public officers
- Section 113 – Unauthorised administration of oaths
- Section 114 – False assumption of authority
- Section 115 – Personating a public officer
- Section 116 - Threats of injury to person employed in public service
- Section 135 – Corruptly taking a reward
- Section 142 – Frauds and breaches of trust by person employed in the public service
- Section 376 – Corrupt practices
- Section 377 – Secret commissions on government contracts
- Section 378 – Presumption as to corrupt practices

These matters have been considered by a previous Reference undertaken by the Fiji Law Reform Commission. The key recommendations arising from that Reference were:

- That these offences be removed from the *Penal Code* and restated in a law related to bribery and corruption.
- A number of changes are required to the wording of many of these offences.
- That a policy of “zero tolerance” apply to offences committed where a claim is made of cultural practice.

- The monetary amount applying to acceptable gifts would be FJ\$100. (Public servants should be obliged to declare and record all gifts).
- The presumptions in section 378 should be extended to all corruption offences where money has changed hands.
- There should be no option of a suspended sentence in corruption matters.
- Two new offences relating to soliciting or accepting an advantage and possession of unexplained property should be considered.

Cabinet has endorsed the establishment of a Corruption Authority. Some substantive criminal offences will be stated in the new Crimes Act, whilst other matters, including the possibility of further offences, are appropriately stated in a separate law dealing specifically with corruption related issues.

Request for public comment

The Commission is not likely to recommend that attempts be made to comprehensively change the corruption offences in the Penal Code in the course of this Review. The Commission is likely to pursue their modernisation and follow the example of modern legislative precedent in appropriate neighbouring jurisdictions. It is likely to re-affirm the view that a separate comprehensive law be determined in the future and that such a law should complement, or replace, the corruption provisions that are to be retained in the re-drafted Crimes Bill.

Views from the public are sought in relation to any aspect of the matters raised in this section.

3.2.6 Deliberate or reckless transmission of HIV and other diseases

There are arguably no effective provisions of the current *Penal Code* which effectively attempt to restrict the spread of disease and the deliberate exposure of persons to risks to their health. Those that do exist relate only to:

- Section 193 – Negligent spreading of disease
- Section 232 – Witchcraft and sorcery

The provisions of section 237 of the *Penal Code* relating to endangering human life and health by a specific range of reckless or negligent conduct would not cover the deliberate, reckless or negligent transmission of disease but could be amended to do so.

Request for public comment

The Commission welcomes any views in relation to appropriate offences arising from the exposure of persons to disease from the actions of others.

3.3 **REMOVAL OF OBSOLETE OFFENCES**

It appears at a glance that some of the offences of the *Penal Code* have obsolete or irrelevant, or may be better placed in other modern legislation. In addition the police have identified some offences that they regard as obsolete and which they make no use of. It has already been noted that the many and varied larceny offences should be replaced by a modern statement of theft crimes. There is also a clear need to review and comprehensively re-state treason and sedition offences and sex offences.

It should also be noted that all references to corporal punishment shall not be re-stated in the new Crimes Act as they have been ruled to breach the Constitution.

The offences might not be re-stated in the new Crimes Act are:

Matters that appear to be obsolete or irrelevant -

- Section 70 – Defamation of foreign princes
- Section 102 - Challenge to fight a duel
- Section 104 - Assembly for the purpose of smuggling
- Section 107 – Extortion by public officers (identified by the police as unnecessary as section 106 is preferable)
- Section 108 – Public officers receiving property to show favour (identified by the police as unnecessary as section 106 is preferable)
- Section 116 - Threats of injury to person employed in public service (identified by the police as unnecessary)
- Section 184 - Fraudulent pretence of marriage (identified by the police as unnecessary)
- Section 186 - Marriage ceremony fraudulently gone through without lawful marriage (identified by the police as unnecessary)
- Section 190 - Unlawful use of locomotives etc.
- Section 232 - Witchcraft and sorcery
- Section 241 - Endangering safety of persons travelling by railway
- Section 337 - Making false entries in the books of the Chief Accountant

Matters which are or should be covered under other legislation -

- Section 109 – Identified by the police as unnecessary as being adequately enforced under PSC Code of Conduct
- Section 194 - Adulteration of food
- Section 195 - Sale of noxious food or drink
- Section 196 - Fouling air
- Section 238 - Causing death by dangerous driving (identified by police as being covered under the LTA Act)
- Section 242 - Exhibition of false light, mark or buoy
- Section 243 - Conveyance by unsafe or overloaded vessel
- Section 246 - Assaults on magistrates and other persons protecting wreck
- Section 257 - Unlawful compulsory labour
- Section 326 - Spreading infectious diseases among animals
- Chapter XXXVIII - Offences relating to coin and bank currency notes

Request for Public Comment

As noted above the Commission is likely to recommend that the above offences be deleted from the new Crimes Act. However there may be considerations that are not immediately clear and which justify the retention, with or without modification, of these offences.

The Commission invites views from the public in relation to this issue and these may focus on the following issues:

- Any grounds for retaining the offences in the new Crimes Act, with or without necessary modifications
- Any further offences in the *Penal Code* which are obsolete or restated in other laws, and which should therefore be deleted from the new Crimes Act
- Any other relevant matters

FIJI LAW REFORM COMMISSION

REVIEW OF PENAL CODE AND CRIMINAL PROCEDURE CODE

ISSUES PAPER No. 2

ACHIEVING COMPLIANCE WITH INTERNATIONAL AND REGIONAL OBLIGATIONS IN THE CRIMINAL LAW CONTEXT

PART 1 - BACKGROUND

1.1 The Review

Under section 5(2) of the *Fiji Law Reform Commission Act (Cap 26)* the Attorney General and Minister for Justice of Fiji, Senator Qoriniasi Bale, has referred the *Penal Code (Cap 17)* and the *Criminal Procedure Code (Cap. 22)* for review by the Fiji Law Reform Commission.

1.2 Objective

The objective is to comprehensively review the *Penal Code* and *Criminal Procedure Code* to update and recommend changes in relation to:

- Offences
- Penalties/Punishments
- Jurisdiction
- Defences
- Criminal Procedures

The recommendations must be reflective of and responsive to existing local and/or global conditions, circumstances, trends and practices. It is envisaged that the proposals for reforms arising from this Review will provide Fiji with statutes relating to criminal offences and procedures which are suitable to Fiji's current and future needs and circumstances.

The law relating to criminal procedure must:

- Ensure fair trials for persons accused of offences.
- Protect the rights and freedoms of all persons suspected or accused of offences.
- Provide fair, effective, speedy and efficient procedures for the investigation and prosecution of offences, and the hearing of criminal cases.
- Meet the applicable international standards and obligations

1.3 The Time Frame for the Review

The Commission is to submit its Final Report with measures and recommendations for reform and appropriate draft bills or draft provisions to the Attorney – General and Minister for Justice by the 31st day of December, 2006.

1.4 Project Implementation

This project is being undertaken by the Fiji Law Reform Commission with support from NZAID.

All activities and outputs shall be reviewed from time to time by a Project Management Committee comprising representatives of a range of key stakeholders.

The Executive Chairperson of the Commission, Alipate Qetaki, has assigned two legal officers to work on this Review. The legal officers are Raramasi Salakubou and Cama Tuberi.

1.5 Appointment of Consultants

Pursuant to section 3(6) of the *Law Reform Commission Act* the Attorney-General has appointed Ross Ray QC, David Neal SC and Graham Powell to advise the Commission in this Review. The consultants shall assist in the preparation of the Final Report and Recommendations for Reform, and with the drafting of necessary legislation to achieve the objectives of this Review. They shall also facilitate the public and stakeholder consultation processes, and shall ensure that the views that are expressed are reflected in the drafted outcomes.

PART 2 –PRELIMINARY OBSERVATIONS

2.1 Preliminary Observations

The matters identified in this Paper are intended to promote discussion and feedback. The consultants have expertise in these areas, most notably that of:

- Ross Ray QC who is a barrister in the criminal jurisdiction and became a Queens Counsel in 1996. He is a past Chairman of the Victorian Bar Council and is soon to become President-elect of the Australian Law Council.
- David Neal SC who has been Victorian Law Reform Commissioner and was a key figure in the drafting of the *Criminal Code Act 1995* of the Commonwealth of Australia.
- Graham Powell who is an experienced legislative drafter in Fiji and neighbouring islands in the South Pacific.

However there is much to be learnt and to be considered in the Fiji context and so all views are invited. All experiences shall be instructive and all matters identified and raised shall be taken into account.

2.2 Relevant provisions of the Constitution of Fiji

Regard must be had to the *Constitution of the Fiji Islands* in relation to the observance and implementation of international obligations. These include -

Provisions which relate to the application of international conventions:

- Section 3 – regard must be had to developments in the promotion of particular human rights in the interpretation of provisions of the Constitution

Provisions which relate to the recognition and enforcement of human rights:

- Section 22 – Every person has a right to life and may not be arbitrarily deprived of life.
- Section 23 – Rights of personal liberty are stated in detail.
- Section 24 – A freedom from service and forced labour is provided for.
- Section 25 – A freedom from cruel and degrading treatment is provided for.
- Sections 26 – A freedom from unreasonable searches and seizure is provided for.
- Section 27 - The rights of arrested and detained person are stated in detail.
- Section 28 - Any person charged with an offence must be given adequate time and facilities to prepare a defence and to have the services of a lawyer of their choice. No unlawfully obtained evidence may be used unless it is in the interests of justice for it to be admitted. A trial must not take place in the absence of the accused unless they choose not to attend or behave in such a manner that they should be excluded from the trial. There is a right of appeal to a higher court. No person may be charged with the same offence twice.
- Section 29 - Every person accused of an offence has a right to a fair trial before a court and to have their case determined within a reasonable time.
- Section 37 – A right to privacy is provided for.
- Section 38 – A right of equality before the law is provided for.

Other rights and freedoms under the Constitution include matters related to freedoms of expression (section 30), assembly (section 31), association (section 32), labour relations (section 33), movement (section 34), religion and belief (section 35) and rights to secret ballot (section 36) and education (section 39).

Provision is made in section 41 for the enforcement of these rights. And a Human Rights Commission is constituted under section 42.

PART 3 – SOME KEY ISSUES RELATING TO LAWS COMPLYING WITH INTERNATIONAL AND REGIONAL OBLIGATIONS

3.1 THE GENERAL APPLICATION OF INTERNATIONAL OBLIGATIONS IN THIS CONTEXT

A number of international treaties currently require State Parties to enact offences in their domestic laws criminalising conduct that the international community considers to be a threat. These include treaties requiring States to enact laws relating to a very wide range of matters, including:

- drug offences
- organised crime offences
- human trafficking offences
- people smuggling offences
- small-arms trafficking offences
- terrorism offences, money laundering and terrorism financing
- corruption offences
- cybercrime offences
- environmental offences
- intellectual property offences
- maritime offences

In fact it has been observed that there are more than 200 such treaties.

There is significant international pressure on States to become parties to these conventions. They serve as the international legal frameworks around which legal regimes made up of harmonised national laws and law enforcement practices are constructed. The purpose of these regimes is to ensure that no individual can escape criminal liability simply by staying out of or escaping to a state that does not criminalise these activities.

The necessity for states in the South Pacific to respond to these international treaties has been recognised by the Pacific Islands Forum in the 1992 when it adopted the Honiara Declaration. These matters were re-affirmed in the Nasonini Declaration in 2002. In addition, the UN Security Council's use of its Chapter VII powers to respond to terrorism means that through instruments like SC Resolution 1373 States are being obliged to sign up to existing terrorism treaties and change their national laws accordingly.

One of the problems facing Fiji is keeping pace with the huge number of obligations relating to the suppression of transnational crime that the international community is asking it to take up.

3.2 THE SPECIFIC INTERNATIONAL CONVENTIONS APPLYING TO CRIMINAL LAWS AND PROCEDURES

It is not proposed at this time to systematically review all Fiji's treaty commitments applying on the context of this Review. It is enough to note here that Fiji is a Party to many of the current drug conventions:

- 1961 Single Convention on Narcotic Drugs
- 1971 Convention on Psychotropic Substances
- 1988 UN Drug Trafficking Convention

It is also a Party to three of the terrorism conventions:

- The 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation
- The 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft
- 1988 Protocol to the Montreal Convention for the Prevention of Unlawful Acts of Violence at Airports Serving International Civil Aviation

(However it is not a Party to the nine other terrorism conventions, to the 2000 Transnational Organized Crime Convention or its protocols on human trafficking, migrant smuggling, and small arms trafficking, or to the 2002 UN Convention Against Corruption.)

3.3 THE ROME STATUTE

Fiji signed and ratified the Rome Statute of the International Criminal Court on 29 November 1999. It must decide whether to incorporate these crimes into the new Penal Code, or to enact a new Statute specifically incorporating all international crimes. Making no change does not appear to be an option given the difficulties of meeting the obligations of the Rome Statute using the present legislation. There is, for example, no express offence of “crime against humanity” in Fiji law, and no express procedure to transfer someone alleged to have committed this offence to the ICC.

3.4 THE CURRENT PROVISIONS OF THE PENAL CODE AND OTHER LAWS IN FIJI

The current Penal Code makes little attempt to implement any of the international obligations noted generally in this Paper. The applicable provisions are:

- Section 69 which prescribes an offence of genocide.
- Chapter IX which is entitled “Offences Affecting Relations with Foreign States and External Tranquillity” and contains three offences – “Defamation of foreign princes” (section 70), “Foreign enlistment” (section 71) and s72, “Piracy” (section 72)
- Division VII which deals with “Forgery, coining, counterfeiting and similar offences” and which trace their provenance to Great Britain’s adherence to the provisions of the International Convention for the Suppression of Counterfeiting Currency of 20 April 1929
- Chapter XI which deals with “Corruption and the Abuse of Office” and is therefore relevant in the context of the UN Corruption Convention 2002

It should also be noted that the limited provisions of the *Geneva Conventions Act (Colonial Territories) Order in Council 1959* relate to war crimes.

On the other hand recently Fiji has enacted a range of laws recently which seek to apply aspects of a range of international conventions and regional obligations. These include:

- Mutual Assistance in Criminal Matters Act 1997 (1998)
- Proceeds of Crime Act 1998 (1998)
- Extradition Act 2003 (not in force)
- Dangerous Drugs Act 1938
- Dangerous Drugs Decree 1990
- Customs Act 1968
- Pharmacy and Poisons Act 1938
- Dangerous Drugs (Amendment) Decree 1991 (not in force)
- Illicit Drug Control Act (2004)
- Civil Aviation (Security) Act 1994
- Immigration Act 2004
- Passport Act 2002

Request for Public Comment

The Commission is determined to give the fullest possible effect to the international obligations applying to Fiji and requiring the enactment and enforcement of laws to give effect to the applicable international conventions. However it must be acknowledged that difficulties shall be encountered in attempting to address all international obligations and to implement the full range of international conventions within the ambit of the reformed Crimes Bill and Criminal Procedure Bill.

The Commission would welcome submissions in this regard. These views may relate to –

- Any current laws or aspects of criminal process which may be inconsistent with an international obligation applying to Fiji.
- Any provisions of a re-drafted *Crimes Act*, *Criminal Procedure Act* or *Penalties and Sentences Act* that might give best effect to such obligations and implement priority matters arising from international conventions.
- Any proposed laws currently under consideration in Fiji which shall implement any aspects of these obligations and therefore shall not be required to be addressed in the revised laws.
- Any other matter or reform which would promote the attainment of Fiji's international obligations and the effective enactment of necessary laws.

PART 4 – SOME KEY ISSUES RELATING COMPLIANCE WITH HUMAN RIGHTS AND THE RIGHTS OF ACCUSED PERSONS

The provisions of Fiji's Constitution afford many rights, freedoms and protections applying in the context of Fiji's criminal laws. These shall be taken into account in relation to all drafted laws arising from this review.

In addition to these constitutional requirements, regard must be had to a range of international conventions which deal with the rights of persons brought under the criminal justice system. Other rights apply to women, children and other classes of

persons who face disadvantage or who are deserving of specific protections under the laws of Fiji. These Conventions include:

1. *The Universal Declaration of Human Rights*

While these principles are of general application and are to be a common standard for “every organ of society”, it is clear enough that they were not written with the plight of convicted persons held in custody in mind, and cannot be easily applied to them in every respect.

However they are of such fundamental importance that they should be born in mind in every aspect of this Review and applied to the fullest extent possible.

Some of the relevant statements of rights are –

- Everyone has a right to life, liberty and security of the person.
- No one shall be held in slavery or servitude.
- No one shall be subjected to torture, or to cruel, inhuman and degrading treatment.
- Everyone has a right to recognition everywhere as a person before the law.
- No one shall be subject to arbitrary arrest or detention.
- Criminal liability must be determined by a fair and impartial tribunal.
- No person shall be subject to arbitrary interference with privacy...correspondence.
- Everyone has a right to freedom of thought, conscience and religion...and to manifest his religion or belief in teaching, practice, worship or observance.
- Everyone has the right to education.

2. *UN Convention on the Elimination of all forms of Discriminations against Women (CEDAW)*

3. *UN Convention on the Rights of the Child (CRC)*

4. *International Convention on the Elimination of Racial Discrimination (ICERD)*

5. *International Convention on Civil and Political Rights (not yet ratified by Fiji)*

6. *International Convention on Economic, Social and Cultural Rights (not yet ratified by Fiji)*

7. *Standard Minimum Rules for the Treatment of Prisoners (Adopted at Geneva in 1955)*

Request for Public Comment

The Commission is determined to give the fullest possible effect to the international obligations affecting the criminal laws and processes to be applied in Fiji under the re-drafted laws.

The Commission would welcome submissions in this regard. These views may relate to –

- Any current laws or aspects of criminal process which may contravene such obligations or the rights of people in Fiji.
- Any provisions of a re-drafted *Crimes Act*, *Criminal Procedure Act* or *Penalties and Sentences Act* that might give best effect to such obligations and the recognition of such rights.
- Any other matter or reform which would promote the recognition and protection of human rights and due process in Fiji in the context of its criminal laws.

FIJI LAW REFORM COMMISSION
REVIEW OF PENAL CODE AND CRIMINAL PROCEDURE CODE
ISSUES PAPER No. 3
REFORMS RELATING TO PENALTIES AND SENTENCING

PART 1 - BACKGROUND

1.1 The Review

Under section 5(2) of the *Fiji Law Reform Commission Act (Cap 26)* the Attorney General and Minister for Justice of Fiji, Senator Qoriniasi Bale, has referred the *Penal Code (Cap 17)* and the *Criminal Procedure Code (Cap. 22)* for review by the Fiji Law Reform Commission.

1.2 Objective

The objective is to comprehensively review the *Penal Code* and *Criminal Procedure Code* to update and recommend changes in relation to:

- Offences
- Penalties/Punishments
- Jurisdiction
- Defences
- Criminal Procedures

The recommendations must be reflective of and responsive to existing local and/or global conditions, circumstances, trends and practices. It is envisaged that the proposals for reforms arising from this Review will provide Fiji with statutes relating to criminal offences and procedures which are suitable to Fiji's current and future needs and circumstances.

The law relating to criminal procedure must:

- Ensure fair trials for persons accused of offences.
- Protect the rights and freedoms of all persons suspected or accused of offences.
- Provide fair, effective, speedy and efficient procedures for the investigation and prosecution of offences, and the hearing of criminal cases.
- Meet the applicable international standards and obligations.

1.3 The Time Frame for the Review

The Commission is to submit its Final Report with measures and recommendations for reform and appropriate draft bills or draft provisions to the Attorney – General and Minister for Justice by the 31st day of December, 2006.

1.4 Project Implementation

This project is being undertaken by the Fiji Law Reform Commission with support from NZAID.

All activities and outputs shall be reviewed from time to time by a Project Management Committee comprising representatives of a range of key stakeholders.

The Executive Chairperson of the Commission, Alipate Qetaki, has assigned two legal officers to work on this Review. The legal officers are Raramasi Salakubou and Cama Tuberi.

1.5 Appointment of Consultants

Pursuant to section 3(6) of the *Law Reform Commission Act* the Attorney-General has appointed Ross Ray QC, David Neal SC and Graham Powell to advise the Commission in this Review. The consultants shall assist in the preparation of the Final Report and Recommendations for Reform, and with the drafting of necessary legislation to achieve the objectives of this Review. They shall also facilitate the public and stakeholder consultation processes, and shall ensure that the views that are expressed are reflected in the drafted outcomes.

PART 2 –PRELIMINARY OBSERVATIONS

2.1 Preliminary Observations

The matters identified in this Paper are intended to promote discussion and feedback. The consultants have expertise in these areas, most notably that of:

- Ross Ray QC who is a barrister in the criminal jurisdiction and became a Queens Counsel in 1996. He is a past Chairman of the Victorian Bar Council and is soon to become President-elect of the Australian Law Council.
- David Neal SC who has been Victorian Law Reform Commissioner and was a key figure in the drafting of the *Criminal Code Act 1995* of the Commonwealth of Australia.
- Graham Powell who is an experienced legislative drafter in Fiji and neighbouring islands in the South Pacific.

However there is much to be learnt and to be considered in the Fiji context and so all views are invited. All experiences shall be instructive and all matters identified and raised shall be taken into account.

2.2 *The Laws of Fiji*

Chapter VI of the *Penal Code* deals with “punishments”. Amendment to the Code in 2002 removed the death sentence from section 24 and related provisions. Court rulings have declared the provisions of section 34 relating to corporal punishment to be unconstitutional. Other provisions of the Code relate to:

- Imprisonment – section 28
- Suspended sentences of imprisonment – section 29
- Power of the court on conviction of further offence to deal with suspended sentence – section 30
- Court by which suspended sentence is to be dealt with – section 31
- Discovery of further offences – section 32
- Minimum period of sentence of imprisonment for life – section 33
- Fines – section 35
- Distress – section 36
- Suspension of execution of sentence of imprisonment in default of fine – section 37
- Commitment in lieu of distress – section 38
- Payment after commitment – section 39
- Payment after issue of warrant but before commitment – section 40
- Security for keeping the peace – section 41
- Security for coming up for judgment – section 42
- Provisions of the CPC relating to recognisance to apply – section 43
- Absolute and unconditional discharge – section 44
- General punishment for misdemeanours – section 47
- Escaped convicts to serve unexpired sentences when recaptured – section 48
- Forfeiture – section 49

A number of other laws make provision for penalties and sentences to be applied in the criminal law context. These are:

- *Probation of Offenders Act (Cap. 22) 1952*
- *Community Work Act 1994*
- *Rehabilitation of Offenders (Irrelevant Convictions) Act 1997*

Request for Public Comment

The Commission is likely to propose that the drafting of three new laws. These would be –

- A modern *Crimes Act*
- A comprehensive *Criminal Procedure Act*
- An entirely new *Penalties and Sentences Act*

Views on this may differ and the Fiji Law Reform Commission would welcome any indications of support or opposition to this proposed framework.

In addition, the Commission would welcome having brought to its attention any other current laws, and any proposed laws under consideration by any agency, which relate to the sentencing options and the imposition of penalties by the Courts.

PART 3 – SOME KEY ISSUES

3.1 THE CURRENT RANGE OF SENTENCING OPTIONS

The following range of sentencing options has been identified in the consultation process. It must be noted that many stakeholders have questioned the effectiveness of some of these options due to a lack of administrative support for them and a lack of resources generally. Probation and the option of community work are most often identified as falling into this category. The options are:

- Fines
- Compensation for victims (which may come out of the fine or may be ordered separately)
- Probation orders
- Section 41 bond to be of good behaviour and to keep the peace
- Section 42 bond to appear for sentence if called upon
- Prison terms
- Power to suspend prison a term
- Community work orders under the Community Work Act
- Complete discharge without conviction
- Discharge without conviction with a bond
- Absolute discharge with conviction

As noted above this list must be considered in the light of the justifiable reservations that are widely held about the effectiveness of probation and the community work option. Bonds may not be favoured also due to the general failure of holding persons to account for breaching bonds that have been imposed on them.

Some reservations are even held about the effectiveness of imposing prison terms due to the practice at some prisons of releasing prisoners on extramural punishment in the very early stages of their sentences. It has been noted that some magistrates remand prisoners in custody for a period of around 14 days prior to sentencing as an alternative to imposing short prison terms.

Request for Public Comment

The Commission seeks views on any matter relevant to the current sentencing options and practices. It also invites views on alternative sentencing provisions that might be introduced into the relevant legislation.

3.2 *PARTIAL SUSPENSION OF SENTENCE OF IMPRISONMENT AS AN ADDITIONAL OPTION*

At present there is no practice of suspending only a part of a convicted person's prison sentence. Section 29 of the *Penal Code* makes no reference to a concept of partial suspension of a sentence. Powers under section 29 may only be exercised where the term of imprisonment imposed is 2 years or less.

Request for Public Comment

The Commission is likely to propose that an option for courts to suspend only part of a prison sentence be introduced as a sentencing option. Views on this option are invited.

3.3 *THE USE OF PENALTY UNITS IN THE PLACE OF FINES*

Many jurisdictions in Australia, and in Fiji's neighbouring countries, have introduced the concept of a penalty unit applying under all criminal laws. The penalty unit replaces the designation of fines in monetary terms. In Samoa for example the penalty unit is fixed at \$100 and may be reviewed and altered by regulation made from time to time. The benefit is that fines applying under all laws can be increased to keep pace with inflation and to keep them at meaningful levels. In Victoria they are in fact indexed to inflation but the Commission is not likely to recommend that this practice be adopted.

To implement the concept of a penalty unit into the criminal laws of Fiji the following matters should be determined:

- A review of all fines applying under all laws should be undertaken. Any fines in current offences which have fallen to such low levels as to render them ineffective should be specifically raised to realistic levels.
- An amount must be ascribed to the penalty unit (e.g. FJ\$100). This will effectively become the minimum fine that can be imposed under any law.
- A procedure needs to be determined for increasing the amount of the penalty unit when this is considered to be necessary.

Request for Public Comment

The Commission is likely to propose that the concept of penalty units be introduced into the laws of Fiji through the proposed new *Penalties and Sentences Act*. It is likely to further recommend:

- that the penalty unit be initially set at FJ\$100
- that the penalty unit may be increased by regulation
- that there be no automatic linking of the penalty unit to the inflation rate

Views on this proposal are invited.

3.4 OTHER ASPECTS OF A NEW PENALTIES AND SENTENCES ACT

A new Act relating to sentencing may make provision for the following matters –

Guides to sentencing

- A statement of sentencing guidelines to be applied by the courts.
- Factors to be considered in determining an offender’s character.
- Guideline judgments by the Court of Appeal and the matters to which the Court of Appeal must have regard when giving guideline judgments
- Time held in custody before trial to be deducted from sentences
- Power of courts to order reports, including victim impact statements, pre-sentence reports, drug and alcohol reports, home detention assessment reports and other reports which may assist in the implementation of a range of sentencing options which may be applied over a period of time

Dealing with serious and habitual offenders

- The concepts of “serious offenders” and “continuing criminal enterprise offenders” which may provide for recording such findings and for imposing increased penalties and for prison sentences to be served cumulatively by such offenders

Provisions in support of a parole system

- Fixing on non-parole periods by the court
- Fixing of non-parole periods otherwise than by the sentencing court
- Determination of concurrent and cumulative sentences

Other sentencing options

- Indefinite sentences, including reasons for indefinite sentences and review of such sentences
- Combined custody and treatment orders
- Drug treatment orders
- Home detention orders
- Intensive corrections orders
- Hospital orders and hospital security orders
- Youth training centre or youth residential orders
- Special conditions for intellectually disabled offenders

Request for Public Comment

The purpose of this Paper is to promote public discussion and to invite submissions from the community. The matters stated above, and especially the other sentencing options, may need further clarification, and the Commission will attend to this if it is called for. At

present however these matters are simply raised so that some attention may be focused on them as general concepts.

The Commission is likely to propose that provisions of the new Penalties and Sentencing Act facilitate the formulation and progressive implementation of a range of additional sentencing options. Many of these will be targeted to specific types of offenders. The Commission acknowledges that they will only become effective with the appropriate administrative support and supervisory capacity. They could however be generally stated in the Act as potential sentencing options, with the details of their application being left for regulations to be made under the Act.

The Commission invites views on any of these matters.

3.5 RESTITUTION/COMPENSATION FOR VICTIMS OF CRIME

There are limited provisions under the current laws that deal with the important matters associated with the rights of victims of crime to be given proper redress for the conduct that has affected them and their property. These provisions are:

- Section 163 of the CPC provides for the promotion of reconciliation in a limited number of cases. This reconciliation may involve a compensation element.
- Sections 164-168 of the CPC deal with a range of issues concerning dealing with property which has been stolen. This includes provisions relating to the restoration of property to its owner.

There does not appear to be any provision of Chapter VI of the *Penal Code* relating to punishments that deal with the rights of victims of crime to restitution or compensation and for such matters to be applied in the sentencing context.

It is likely that such matters may be addressed in provisions relating to the recognition and application of traditional and community processes in the formal court procedures, if this option finds general support – see Issues Paper 4.

It would be appropriate for provisions of the proposed new Penalties and Sentencing Act to deal with –

- Restitution orders
- Compensation for pain and suffering of victims
- Recovery of costs incurred by police and emergency services agencies

Request for Public Comment

The Commission invites views from the public in relation to this issue and these may focus on the following issues:

- Any current legislative provisions or judicial practice which relate to the rights of

victims to restitution of property and compensation for their losses

- Any appropriate power or arrangement for the rights of victims of crime to be safeguarded in this way
- Any impediments to the judiciary playing a role in the trial and sentencing processes to exercise powers and make orders which enhance the rights of victims of crime in this context
- Any other relevant matter

FIJI LAW REFORM COMMISSION

REVIEW OF PENAL CODE AND CRIMINAL PROCEDURE CODE

ISSUES PAPER No. 4

OPTIONS TO MERGE FORMAL COURT PROCEDURES WITH TRADITIONAL AND COMMUNITY JUSTICE SYSTEMS

PART 1 - BACKGROUND

1.1 The Review

Under section 5(2) of the *Fiji Law Reform Commission Act (Cap 26)* the Attorney General and Minister for Justice of Fiji, Senator Qoriniasi Bale, has referred the *Penal Code (Cap 17)* and the *Criminal Procedure Code (Cap. 22)* for review by the Fiji Law Reform Commission.

1.2 Objective

The objective is to comprehensively review the *Penal Code* and *Criminal Procedure Code* to update and recommend changes in relation to:

- Offences
- Penalties/Punishments
- Jurisdiction
- Defences
- Criminal Procedures

The recommendations must be reflective of and responsive to existing local and/or global conditions, circumstances, trends and practices. It is envisaged that the proposals for reforms arising from this Review will provide Fiji with statutes relating to criminal offences and procedures which are suitable to Fiji's current and future needs and circumstances.

The law relating to criminal procedure must:

- Ensure fair trials for persons accused of offences.
- Protect the rights and freedoms of all persons suspected or accused of offences.
- Provide fair, effective, speedy and efficient procedures for the investigation and prosecution of offences, and the hearing of criminal cases.
- Meet the applicable international standards and obligations.

1.3 The Time Frame for the Review

The Commission is to submit its Final Report with measures and recommendations for reform and appropriate draft bills or draft provisions to the Attorney – General and Minister for Justice by the 31st day of December, 2006.

1.4 Project Implementation

This project is being undertaken by the Fiji Law Reform Commission with support from NZAID.

All activities and outputs shall be reviewed from time to time by a Project Management Committee comprising representatives of a range of key stakeholders.

The Executive Chairperson of the Commission, Alipate Qetaki, has assigned two legal officers to work on this Review. The legal officers are Raramasi Salakubou and Cama Tuberi.

1.5 Appointment of Consultants

Pursuant to section 3(6) of the *Law Reform Commission Act* the Attorney-General has appointed Ross Ray QC, David Neal SC and Graham Powell to advise the Commission in this Review. The consultants shall assist in the preparation of the Final Report and Recommendations for Reform, and with the drafting of necessary legislation to achieve the objectives of this Review. They shall also facilitate the public and stakeholder consultation processes, and shall ensure that the views that are expressed are reflected in the drafted outcomes.

PART 2 –PRELIMINARY OBSERVATIONS

2.1 Preliminary Observations

The matters identified in this Paper are intended to promote discussion and feedback. The consultants have expertise in these areas, most notably that of:

- Ross Ray QC who is a barrister in the criminal jurisdiction and became a Queens Counsel in 1996. He is a past Chairman of the Victorian Bar Council and is soon to become President-elect of the Australian Law Council.
- David Neal SC who has been Victorian Law Reform Commissioner and was a key figure in the drafting of the *Criminal Code Act 1995* of the Commonwealth of Australia.
- Graham Powell who is an experienced legislative drafter in Fiji and neighbouring islands in the South Pacific.

However there is much to be learnt and to be considered in the Fiji context and so all views are invited. All experiences shall be instructive and all matters identified and raised shall be taken into account.

2.2 *The Rights and Freedoms under the Constitution of Fiji*

There are a number of provisions of Fiji's Constitution which have a direct bearing on any matter involving the recognition and application of the laws and customs of a particular section of Fiji's society, and in particular those of Fijians, Rotumans and the Banaban community.

These provisions are:

The Right to Equality before the Law

The right of equality before the law in Fiji is clearly stated in section 38. However there are a number of specific clarifications of this right that have direct relevance. These are:

- No law shall breach this right if it “permits a person who has a discretion to institute or discontinue criminal proceedings to take account in the exercise of that discretion of traditional procedures in the State for the settlement of disputes” – section 38(7)(d).
- A law or administrative action taken under any law may limit this right of freedom for the purpose of “providing for the governance of Fijians, Rotumans or of the Banaban community...” – section 38(9)

Customary Laws and Customary rights

In accordance with section 186 the Parliament is obliged to “make provision for the application of customary laws and for dispute resolution in accordance with traditional Fijian processes”. And in doing so the Parliament “must have regard to the customs, traditions, usages, values and aspiration of the Fijian and Rotuman people”.

2.3 *Other Relevant Laws of Fiji*

Criminal Procedure Code – Section 163 Promotion of Reconciliation

The court may encourage the settlement of certain criminal proceedings by facilitating an amicable settlement of proceedings by payment of compensation or otherwise. This may only be done where:

- The offence is one of criminal trespass, common assault, assault causing actual bodily harm or certain malicious injuries offences under the *Penal Code*
- It must be an offence “substantially of a person (sic) or private nature”
- There must be no aggravation

In such cases the proceedings may be ordered to be stayed or terminated.

2.4 *The “Problem Solving – Community Based Courts across the Fiji Islands” Report*

A Report has been recently prepared on behalf of the Great Council of Chiefs by Ratu Filimone Ralogaivau. This identifies the critical issues in this context and offers some constructive solutions. The key features and recommendations of the Report are:

- The Constitution obliges the Parliament to make laws recognising and applying customary laws and dispute resolution based upon traditional Fijian processes.
- The Constitution also requires equality before the law and therefore necessitates solutions that have equal application to all sectors of society throughout the Fiji Islands.
- A separate system of Fijian courts is a matter of history and has no place in the modern Fijian society.
- All reforms of this nature should become part of the current justice system.
- Guidance might be taken from recent developments in Australia relating to the hearing of offences involving aboriginal persons.
- It is specifically noted that while nearly all Australian States have introduced reforms to the justice system of this nature, only Victoria has seen the need to make comprehensive provision for the reforms in its laws.
- Different processes may need to be applied to urban areas and rural areas.

The Commission commends persons interested in the area of law reform to consult this Report.

PART 3 – SOME KEY ISSUES

3.1 *AVOIDANCE OF PARALLEL SYSTEMS*

Most commentators on the former system of Fiji Courts are in agreement that there should not be two parallel systems of justice. All aspects of the implementation of any reforms of this nature should be done within the current court system in Fiji.

Request for Public Comment

The Commission is likely to recommend some reforms of this nature and is likely to attempt to make provision for these in new Criminal Procedure Bill and/or the new Penalties and Sentences Bill. This is likely to be done in a general/facilitative way rather than by detailed prescription of powers and procedures. In other words, a discretion might be given to the various levels of the court system to introduce measures that permit community leaders to play a role in the court processes. The technical and procedural details might be left to the courts to determine and apply as they think appropriate.

The Commission invites views from the public.

3.2 *INCORPORATING REFORMS WITHIN THE CURRENT COURT SYSTEM*

As has been noted in this Paper any reforms of this nature shall avoid the creation of a new court structure. The task is to permit the existing courts to incorporate reforms into their processes and procedures. It is likely that the Australian models shall be used as a guide, and that the reforms shall be limited to matters involving:

- the determination of appropriate sentences
- the diversion of offenders, and especially young offenders from imprisonment and its harmful influences
- notions of restorative justice whereby the victims of crime and the relevant sector of society might be permitted to play a role in determining how particular offenders should be dealt with

Request for Public Comment

The Commission invites views from the public in relation to this issue and these may focus on the following issues:

- The extent to which the reforms might permit the involvement of community representatives in the court process
- The problems that may arise from such reforms and any steps that might be taken to minimize or address their impact
- Any other relevant matter

3.3 *ADMINISTRATIVE AND SUPPORT REQUIREMENTS TO EFFECTIVELY IMPLEMENT A REFORMED APPROACH*

The Ralogaivau Report notes the need to ensure that any such reforms are implemented in a planned manner, and in particular that steps are taken to ensure the maximum benefit is derived from such reforms. The following needs are particularly noted:

- The provision of legal advice to accused persons before they plead guilty and invoke these reformed arrangements
- The allocation of time by the courts for such hearings to be held so as to effectively involve community leaders
- Rigorous selection and training processes for persons who are to play a role in the reformed arrangement
- The collation and presentation of background information about the relevant offenders who are being dealt with
- Training of magistrates to most effectively implement the reformed arrangements
- The identification and authorisation of additional sentencing options
- The determination of workable systems for both urban and rural areas
- An increased appreciation of the effects of drug abuse, child abuse and poverty on criminal behaviour and the means by which these can be addressed within the criminal justice system

Request for Public Comment

The Commission does not under-estimate the resourcing and capacity issues which shall ultimately determine the success or failure of such initiatives. The Commission particularly notes the difficulties currently facing the probation service in Fiji, and the limited numbers of probation officers. However the Commission is likely to recommend that the relevant laws make provision which accommodate such an initiative even though it may be implemented at a later time, and only when the appropriate resources and capacities exist.

The Commission therefore invites views from the public in relation to all aspects of this issue.

3.4 PRECONDITIONS FOR THE REFORMED PROCESSES TO BE APPLIED

The Ralogaivau Report notes that in the South Australian “Nunga Courts” the processes only come into play if the accused person pleads guilty to the offence and consents to the hearing by the Nunga Court.

The Commission feels that this may be too restrictive and may deny a court from having access to the benefits that could flow from involving community leaders in the sentence hearing process. It may also permit an offender to avoid facing, and accounting to his or her community leaders by refusing to consent to the process.

Request for Public Comment

The Commission invites views from the public in relation to this issue and these may have a particular focus on the following matters:

- Whether the reformed arrangements may only apply where there has been a plea of guilty?
- Whether the reformed arrangements may only apply with the consent of the accused?
- Whether the magistrate or judge should have the discretion to apply the reformed arrangements in all cases where he or she sees some possible benefit arising in the effective determination of sentence and diversion from imprisonment?
- Whether an accused person should be able to require that the reformed arrangements be invoked in all or any specific cases?
- Whether community leaders might be able to request that the reformed system be invoked in relation to certain offenders or classes of offence?
- Any other relevant matter

FIJI LAW REFORM COMMISSION
REVIEW OF PENAL CODE AND CRIMINAL PROCEDURE CODE

ISSUES PAPER No. 5

REFORMS TO POLICE POWERS AND PROCEDURES

PART 1 - BACKGROUND

1.1 The Review

Under section 5(2) of the *Fiji Law Reform Commission Act (Cap 26)* the Attorney General and Minister for Justice of Fiji, Senator Qoriniasi Bale, has referred the *Penal Code (Cap 17)* and the *Criminal Procedure Code (Cap. 22)* for review by the Fiji Law Reform Commission.

1.2 Objective

The objective is to comprehensively review the *Penal Code* and *Criminal Procedure Code* to update and recommend changes in relation to:

- Offences
- Penalties/Punishments
- Jurisdiction
- Defences
- Criminal Procedures

The recommendations must be reflective of and responsive to existing local and/or global conditions, circumstances, trends and practices. It is envisaged that the proposals for reforms arising from this Review will provide Fiji with statutes relating to criminal offences and procedures which are suitable to Fiji's current and future needs and circumstances.

The law relating to criminal procedure must:

- Ensure fair trials for persons accused of offences.
- Protect the rights and freedoms of all persons suspected or accused of offences.
- Provide fair, effective, speedy and efficient procedures for the investigation and prosecution of offences, and the hearing of criminal cases.
- Meet the applicable international standards and obligations.

1.3 The Time Frame for the Review

The Commission is to submit its Final Report with measures and recommendations for reform and appropriate draft bills or draft provisions to the Attorney – General and Minister for Justice by the 31st day of December, 2006.

1.4 Project Implementation

This project is being undertaken by the Fiji Law Reform Commission with support from NZAID.

All activities and outputs shall be reviewed from time to time by a Project Management Committee comprising representatives of a range of key stakeholders.

The Executive Chairperson of the Commission, Alipate Qetaki, has assigned two legal officers to work on this Review. The legal officers are Raramasi Salakubou and Cama Tuberi.

1.5 Appointment of Consultants

Pursuant to section 3(6) of the *Law Reform Commission Act* the Attorney-General has appointed Ross Ray QC, David Neal SC and Graham Powell to advise the Commission in this Review. The consultants shall assist in the preparation of the Final Report and Recommendations for Reform, and with the drafting of necessary legislation to achieve the objectives of this Review. They shall also facilitate the public and stakeholder consultation processes, and shall ensure that the views that are expressed are reflected in the drafted outcomes.

PART 2 –PRELIMINARY OBSERVATIONS

2.1 Preliminary Observations

The matters identified in this Paper are intended to promote discussion and feedback. The consultants have expertise in these areas, most notably that of:

- Ross Ray QC who is a barrister in the criminal jurisdiction and became a Queens Counsel in 1996. He is a past Chairman of the Victorian Bar Council and is soon to become President-elect of the Australian Law Council.
- David Neal SC who has been Victorian Law Reform Commissioner and was a key figure in the drafting of the *Criminal Code Act 1995* of the Commonwealth of Australia.
- Graham Powell who is an experienced legislative drafter in Fiji and neighbouring islands in the South Pacific.

However there is much to be learnt and to be considered in the Fiji context and so all views are invited. All experiences shall be instructive and all matters identified and raised shall be taken into account.

2.2 Relevant provisions of the Constitution of Fiji

Regard must be had to the Constitution of the Fiji Islands in relation to many aspects relating to the observance of human rights and guaranteed freedoms. In the context of police powers and practices these include –

Provisions of general application:

- Section 3 – regard must be had to developments in the promotion of particular human rights in the interpretation of provisions of the Constitution

Provisions which relate to the recognition and enforcement of human rights:

- Section 22 – Every person has a right to life and may not be arbitrarily deprived of life.
- Section 23 – Rights of personal liberty are stated in detail.
- Section 25 – A freedom from cruel and degrading treatment is provided for.
- Sections 26 – A freedom from unreasonable searches and seizure is provided for.
- Section 27 - The rights of arrested and detained person are stated in detail.
- Section 28 - Any person charged with an offence must be given adequate time and facilities to prepare a defence and to have the services of a lawyer of their choice. No unlawfully obtained evidence may be used unless it is in the interests of justice for it to be admitted. A trial must not take place in the absence of the accused unless they choose not to attend or behave in such a manner that they should be excluded from the trial. There is a right of appeal to a higher court. No person may be charged with the same offence twice.
- Section 29 - Every person accused of an offence has a right to a fair trial before a court and to have their case determined within a reasonable time.
- Section 34 – Right to Freedom of Movement
- Section 37 – A right to privacy is provided for.
- Section 38 – A right of equality before the law is provided for.

Provision is made in section 41 for the enforcement of these rights. And a Human Rights Commission is constituted under section 42.

2.3 Other Relevant Laws of Fiji

Illicit Drugs Control Act 2004

Section 12 of this Act enables police and customs officers to seek a warrant from a High Court judge to authorise “covert monitoring and recording, by any means, of the conduct and communications, including telecommunications” of suspected persons.

PART 3 – SOME KEY ISSUES

3.1 ASPECTS OF POLICE POWERS WHICH MAY BE EXTENDED OR CREATED UNDER THE NEW LAWS

Initial consultations with stakeholders, and in particular with police investigators, have highlighted the potential need to review and possibly expand certain investigative powers of the police. It is appropriate that any such reforms be placed before the general public for comment before they are considered in detail.

The matters that have been highlighted are as follows:

- Telephone intercepts
- DNA testing of suspects
- Taking possession of documents about which privilege or confidentiality issues may apply
- Freezing bank accounts in fraud cases etc
- Police powers to recover stolen monies

Request for Public Comment

The Commission is determined to give the fullest possible consideration to appropriate powers of police to effectively investigate modern crimes, and the right to make use of modern technologies in the course of their investigations.

The Commission would welcome submissions in this regard. These views may relate to –

- Any additional powers that may be appropriate for consideration.
- Any additional technologies and processes which may assist police investigation of crime that should be considered in this context.
- Any safeguards of human rights and the rights of accused persons which must be generally or specifically considered in this context.

3.2 TELEPHONE INTERCEPTS

As noted above, section 12 of the *Illicit Drugs Control Act 20* enables police and customs officers to seek a warrant from a High Court judge to authorise “covert monitoring and recording, by any means, of the conduct and communications, including telecommunications” of suspected persons.

No other laws have been identified which authorise the interception and recording of communications. It seems however that some informal arrangements are made to permit this to be done. The Commission would welcome any clarification of these matters.

3.3 DNA TESTING

If police are empowered to take DNA samples in the course of their investigations there are some matters and processes that should be applied. The following are matters which should be considered in this context:

- A requirement that a person consent to the test being taken.
- A requirement that appropriate authority be given before a non-consenting person is subjected to DNA testing, and a clear statement of grounds upon which such authority may be given. This may require that the authority is satisfied that the tests shall assist the investigation in a material way and that the person to be tested is sufficiently linked to the commission of the offence.
- Limitations on the testing processes and the persons undertaking tests to ensure that they are done in a scientifically sound manner and are appropriately reported. It may be appropriate that such tests are only undertaken by approved institutions with approved technological capacities.
- A requirement that the results of DNA tests and all identifying documentation be completely destroyed and erased from records upon acquittal and in other appropriate circumstances.

Request for Public Comment

The Commission is likely to recommend that a power be given to police under the re-drafted laws to take DNA samples in accordance with the matters noted above. The views of the public are sought in this regard and these view may have a particular focus on:

- The offences in which DNA testing may be sought.
- The appropriate authority to give approval for involuntary DNA testing of suspects and accused persons.
- The grounds upon which approval may be given for involuntary DNA testing.
- The circumstances which warrant the timely destruction and DNA samples and identifying records.
- Any other matter which may assist the effectiveness of police investigations using DNA testing and related technologies and processes.
- Any other matter which may protect human rights and the rights of accused persons in this context.

3.4 PRIVILEGED AND CONFIDENTIAL DOCUMENTS

Police who wish to conduct searches of records held by solicitors may find themselves embroiled in arguments based upon the right to solicitor/client privilege. There may be other instances also where issues of confidentiality and privacy arise.

There is a justifiable fear that the security of disputed documents might be jeopardized while recourse is made to the courts and professional bodies to determine the existence, extent and effect of the claimed rights to privilege, confidentiality and privacy. The Commission is keen to address the legitimate concerns of all sides in such a debate.

Request for Public Comment

The Commission is likely to recommend that the police be entitled to take custody of documents in the course of an investigation and in accordance with an appropriate warrant or authority, even though they are the subject to a claim of privilege, confidentiality or privacy. Procedures would be applied for them to be held without inspection and in a secure manner until such rights are lawfully determined.

3.5 FREEZING BANK ACCOUNTS/RECOVERING STOLEN MONIES

The police have indicated the need to be able to freeze bank accounts in cases involving fraud. One aim would be to preserve the monies that may have been misappropriated so that they may be restored to their rightful owner.

Similar powers can be exercised under money laundering laws and so the concept is not a new one.

The police are also justifiably frustrated by the prospect of persons convicted of major frauds being able to access the misappropriated funds after their release from custody.

Request for Public Comment

The Commission invites views from the public in relation to this issue and these may focus on the following issues:

- The appropriate authority to grant such orders to freeze accounts
- The grounds upon which orders to freeze accounts may be sought and granted
- Any appropriate powers or procedures that may assist the police to recover misappropriated monies
- Any safeguards that should be provided in relation to such powers
- Any other relevant matter