Report on Investigation into circumstances and facts involving the deportation of Fiji Times publisher Evan Hannah and Fiji Sun publisher Russell Hunter

1.0 Introduction

On May 4 2008, under the letterhead of the Office of the Leader of Opposition, Mr Mick Beddoes, writing as Leader of the Opposition, requested the Ombudsman, pursuant to section 158 (1) and (2) of the Constitution, to investigate **'the reasons and circumstances leading to the deportation of Fiji Times Publisher Hannah and Fiji Sun Publisher Hunter and determine the extent to which their rights were breached by the authorities'.**

In his letter Mr Beddoes wrote that his complaint was on behalf of Mr Hannah and Mr Hunter, as well as himself.

2.0 Jurisdiction of the Ombudsman: Relevant Law

2.1 Section 158 of the Constitution

Section 158 states:

(1) Subject to this Part, the Ombudsman

(a) must investigate action, being action that relates to a matter of administration, taken either before or after the commencement of this Constitution, by a department or by a prescribed authority, and in respect of which a complaint has been made to the Ombudsman; and

(b) may of his own motion or at the request of a member of Parliament, investigate any action, being action that relates to a matter of administration, taken either before or after the commencement of this Constitution by a department or a prescribed authority.

(2) Complaints under this section in relation to action that relates to a matter of administration may be made:

(a) by any person or body whose interests are affected by the action, not being a person or body:

(i) established for a public purpose by, or in accordance with, an Act; or
(ii) who is, or whose members are appointed by the President or Minister; or

(b) by a member of the Parliament on behalf of such a person or body

Since the action complained of was an action authorized by a Minister, section 158 (5) of the Constitution was also considered:

Section 158 (5) states:

The Ombudsman is not authorized to investigate:

(a) action taken by a Minister, except if:

(i) the action relates to a request for access to information held, or allegedly held, by the Minister; and

(ii) a law made by Parliament giving members of the public rights of access to official documents of the Government and its agencies confers a right to complain to the Ombudsman in respect to that action

(b) action taken by a judge

(c) action taken by any body or person with respect to the appointment of a person to, or the removal of a person from, a public office, the taking of disciplinary action against the holder of a public office or the pension entitlement of a person who is or was the holder of a public office.

2.2 Application of section 158 to the Complaint

Clearly the Ombudsman, by Constitution [section 158 (3)], is not authorized to investigate any action taken by the Minister. Under the circumstances, Mr Beddoes complaint would normally be marked 'out of jurisdiction' in the Ombudsman's file and closed.

However, in his letter, Mr Beddoes had also requested an investigation to 'determine the extent to which (Hannah and Hunter's) rights were breached by the authorities'. This phrase invoked the procedures of another constitutional authority, the Human Rights Commission.

Accordingly, the complaint letter was forwarded to the Human Rights Commission for its assessment.

3.0 Human Rights Commission's Jurisdiction

3.1 Procedural jurisdiction

The complaint was accepted under section 25 of the Human Rights Commission Act (HRC Act) 10/99.

Pursuant to section 27 (1) of the HRC Act,

> the Commission must investigate any complaint received by it, unless before commencing or during an 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 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 for 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 of 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.

During initial investigations into whether Mr Beddoes' complaint had substance, the Commission was informed, through media reports, that Mr Hannah's removal was the subject of court proceedings. However, the Commission decided not to invoke section 27 (1) (c) of the HRC Act and decline the complaint on this ground; instead it decided to inquire generally into this matter of its own initiative given the public and international interest in the removals of both Hunter and Hannah.

Furthermore, preliminary inquiries revealed that, at the time the complaint was lodged, only Mr Hannah's case was before the courts; Mr Hunter's case was not then the subject of court proceedings, though apparently this is now the case. Since Mr Beddoes had linked the two removals in his complaint letter, the actions taken by the Minister on Mr Hannah could not be expunged from the Hunter investigations.

In any event, the Constitutional provision under which the Commission investigated whether there was any substance in the complaint was section 30 Freedom of Expression, which includes freedom of the press and other media. The removals were said to have breached freedom of the press. The Commission decided that, irrespective of section 27 (1) (c) of the HRC Act, which would have permitted it not to accept the complaint on behalf of Mr Hannah, it would inquire generally into both removals and investigate whether the complaint had substance. Presumably, Mr Beddoes had pursued his complaint as a rights concern in appreciation of separation of powers.

The Commission therefore found no legal impediment to investigating whether the complaint had substance as a rights issue.

3.2 Relevant human rights law: substantive jurisdiction

The Bill of Rights provision that the Commission identified as being directly relevant to the complaint was section 30.

Section 30 of the Constitution states:

> (1) Every person has the right to freedom of speech and expression, including
>
> (a) freedom to seek, receive and impart information and ideas; and
> (b) freedom of the press and other media
>
> (2) A law may limit, or may authorize the limitation of, the right to freedom of expression in the interests of:
>
> (a) national security, public safety, public order, public morality, public health or the orderly conduct of national or municipal elections;
> (b) the protection or maintenance of the reputation, privacy, dignity, rights or freedoms of other persons, including:
>
> (i) the right to be free from hate speech, whether directed against individuals or groups; and
> (ii) the right of persons injured by inaccurate or offensive media reports to have a correction published on reasonable conditions established by law;

(c) preventing the disclosure, as appropriate, of information received in confidence;

(d) preventing attacks on the dignity of individuals, groups or communities or respected offices or institutions in a manner likely to promote ill will between races or communities or the oppression of, or discrimination against, any person or persons;

(e) maintaining the authority and independence of the courts;

(f) imposing reasonable restrictions on the holders of public offices in order to secure their impartial and confidential; or

(g) regulating the technical administration of telecommunications;

but only to the extent that the limitation is reasonable and justifiable in a free and democratic society.

(3) In this section:

hate speech means an expression in whatever form that encourages, or has the effect of encouraging, discrimination on a ground proscribed by section 38.

Most provisions in the limitation part of section 30 appear also in ordinary legislation, such as the Public Order Act and law on communications, as well in other constitutional provisions, for example, on independence of the courts in Fiji.

In view of section 30 of the Constitution the Commission considered that the removal of the publishers of two of Fiji's mainstream newspapers had a bearing and effect on freedom of the press and the media.

The Commission concluded that the complaint fell within the juridiction of the Human Rights Commission's mandate pursuant to section 42 of the Constitution and the Human Rights Commission Act 10/99. Whether the complaint had substance was the next issue for consideration, and required preliminary investigation.

3.3 Preliminary investigations: procedures

The Commission undertook preliminary investigations by interviewing the relevant Interim Government Ministers as well as other State agencies on the circumstances and facts surrounding the removals of Mr Hannah and Mr Hunter.

These investigations elicited documents and correspondence relevant to the issue.

Relevant constitutional provisions were then applied to the facts at hand to consider whether, and to what extent, Constitutional rights had been breached in the removals, that is, to determine substance.The Commission pursued investigations into substance pursuant to section 34 of the Human Rights Commission Act.

3.4 Material Facts confirmed

On February 26th 2008 Fiji Sun Publisher, Russell Hunter, having been taken from his home by law enforcement officers on February 25th, was put on a plane to Australia.

On May 2 2008 the publisher of the Fiji Times, Evan Hannah was put on a plane to Seoul and thence to Australia. Law enforcement officers had taken him from his home on May 1.

3.4.1 Reasons given by the authorities for the removals

On May 6th, in relation to Mr Hannah's removal, the chairman of the Fiji Media Council, Daryl Tarte, told Radio New Zealand International:

> 'The Prime Minister has made it quite clear that they will not, he will not elaborate on the reasons for the deportation, except to say there was a breach of national security. He will not explain what specifically that breach was. But my implication I understand it to mean it's the general editorial policy of the Fiji Times".

The official reason given to the Media Council and to the public for the removals was 'national security'. The Minister concerned provided no other details or explanations.

The Human Rights Commission then made a formal request to the relevant Interim Ministers to respond to Mr Beddoes' complaint and provide the Commission with 'reasons and circumstances' leading to the removals. Documentary evidence relating to the removals of Hunter and Hannah was then provided to the Commission.

The Commission subsequently undertook follow-up investigations with other state agencies and was provided with additional evidence. The Commission also obtained secondary evidence through its own sources.

3.4.2 Documents tendered to the Commission in relation to the removals

Documents were provided to the Commission by the Interim Prime Minister, the Interim Minister of Defence, National Security and Immigration, and the Interim Attorney-General and Minister of Justice. Additional evidence was provided by other sources.

(a). Evidentiary material provided to the Commission in relation to the removal of Russell Hunter

- Email correspondence between Russell Hunter and Victor Lal

Email message dated February 2nd 2008 9.40 am from Russell Hunter (Russell@fijisun.com.fj) to Victor Lal (victor_lal@yahoo.co.uk):

> "We'd be most willing to publish. The registrar says we have to apply in writing before he will consider releasing the documents. We refuse to do so because it would give him a precedent to delay or deny release of public documents. The registry has a history of seeking to deny media access to public documents".

Email message (reply) dated February 2nd 2008 10.30 am from Victor Lal to Russsell Hunter:

> "Justices Jitoko and Jiten (who no longer have tea with the other judges) are already with me, and now Gates, Naz and Byrne have sunk further into the trap by their own leaks".

This February 2nd 2008 email exchange between Lal and Hunter was in relation to the affidavit of Justice Nazhat Shameem in the case of Fatiaki v Bainimarama & Others (Civil Action No HBC 370 of 2007). The affidavit had already been officially released to the Fiji Times, upon its request, in October 2007 through Justice Shameem's counsel, Mishra Prakash and Associates.

In response to Fiji TV's question about the emails, broadcast on 29th February 2008, Lal said the e-mails were 'a personal exchange' between the publisher and Lal. When Fiji TV then asked Lal in what context he had made reference to the judges in his emails to Hunter he replied:

> " We were second-guessing or playing a guessing game as to if Mr Chaudhry went to court, how judges were going to re-act. We weren't planning a revolution against the judiciary".

Lal lives abroad. He continues to write for the Fiji Sun.

Hunter was removed on February 26th. He appears to be associated still with the Fiji Sun because three months later, on May 21st , the Chief of staff of the Fiji Sun, Cheerianne Wilson, told Dr Jim Anthony in response to his request that the Fiji Sun publish his letter to the editor (on another matter), that:

> "Russell has said that it be published as is".

Dr Anthony then replied to Ms Wilson:

> "Interesting to know that Russell (I presume you mean Russell Hunter) is still calling the shots from wherever he now is".

A copy of this e-correspondence was forwarded to the Commission. According to Dr Anthony, Ms Wilson did not reply to his query.

Clearly, if Russell Hunter is still 'calling the shots' at the Fiji Sun despite his removal, as is apparent from Cheerianne Wilson's email to Dr Anthony, the Fiji Sun owners, CJ Patel, Fijian Holdings, Vinod Patel and Ba Provincial Holdings, will be aware of it.

During the investigations the Commission was informed that Hunter, then a senior employee of the Fiji Times, had also been told to leave Fiji in 1999. He had appealed the decision of the relevant Minister at the time and lost his appeal in the High Court. He then appealed to the Court of Appeal while still remaining and working in the country. The events of 2000 intervened and Hunter moved from the Fiji Times to the Fiji Sun and remained in the country until he was removed in 2008.

(b) Evidentiary material provided to the Commission in relation to the removal of Evan Hannah

On February 6th 2008 (barely five days after the Hunter /Lal email exchange), an email message was sent by a John Cameron to the partner, Florence Fenton, of Munro Leys. Munro Leys are lawyers for the Fiji Times.

The email message from Cameron to Fenton read:

> From a QC mate in Melbourne:
>
> > 'The lady you speak of has brains but no sense. Her judgment is, in my view, limited. She had a short career at the bar here, but it was not glorious'.
>
> And from the Shorter Oxford:
>
> > 'Scut 1. A short erect tail, especially that of a rabbit, hare or deer'.
>
> And a sure indicator of the proximity of arse-holes.
>
> j.c.

Florence Fenton forwarded John Cameron's message to the following recipients:

> To: Imrana Jalal mailto:Imrana@RRRT.ORG.FJ; gleung@howardslaw.com.fj; cc baravilala@unfpa.org
>
> Sent: Wednesday, February 06, 2008.
>
> Subject: Scutt
>
> > From my mate John Cameron BUT FYEO please....so funny so had to share
>
> Florence T. Fenton
> Partner

Apparently unbeknownst to the sender and recipients, the message was also eventually forwarded to the Attorney General, Aiyaz Saiyed-Khaiyum who, in turn, forwarded it to Justice Jocelynne A. Scutt, to whom the message referred.

Justice Scutt then forwarded the message to the Acting Chief Justice. On 13th February, she also wrote to the Secretary General of the United Nations, as well as the Secretary General of the Commonwealth. In her letters Justice Scutt wrote:

> "Individuals are of course entitled to communicate as they wish to colleagues, whatever the lack of refinement of those communications and however scurrilously they seek privately to defame others. One would hope that this sort of conduct did not occur; however, sadly enough one realizes it does.

> However, I would be surprised if the United Nations would approve, or its rules and regulations be silent upon, the use of United Nations internet and email addresses for the circulation of scurrilous, inaccurate and defamatory communications.
>
> Regrettably, I draw to your attention that two of the recipients of this material carry United Nations e-mail addresses and I believe they are employed by the United Nations and/or their organizations receive funding from them....
>
> As a longtime and strong supporter of the United Nations, I am truly shocked, distressed and astounded that United Nations e-mail addresses should be used and abused in this way- that is, to abuse citizens and residents of any nation. That United Nations resources should be used for the purpose of attacking a sitting member of the judiciary I find astonishing"

In her letter to the Commonwealth Secretariat, Justice Scutt also added:

> "Perhaps the Commonwealth Secretariat may have a view and at least will take this conduct into account when having regard to the situation confronting members of the judiciary in Fiji".

On 11th April 2008, Justice Scutt received a response from UNFPA, the employer of Wame Baravilala to whom the Cameron email message had been copied by Fenton. In her letters to the UN Secretary General and the Commonwealth Secretariat, Justice Scutt had not mentioned the fact that Baravilala is Fenton's spouse. However, UNFPA would have been aware of it.

The UNFPA response to Justice Scutt on her complaint was as follows:

> " In as far as the email address of baravilala@unfpa.org is concerned, *i.e.* the address to which the subject email was copied I am able to confirm that a staff member of UNFPA is associated with that address. However, please be informed that, upon inquiry, the staff member has pointed out that he was merely copied on the email message; he had not requested to be copied. Furthermore, the staff member let us know that he "did not find the content amusing" and, therefore, had deleted the message and had not forwarded it to any third party."

The letter, which was signed by Sean Hand, Director, Division for Human Resources, UNFPA concluded:

> " I trust these explanations put this matter to rest in as far as it relates to UNFPA. Thank you for bringing this matter to the attention of the United Nations".

The UNFPA response to Justice Scutt's complaint would not have alleviated her distress. There appeared to be no alternative remedy that Justice Scutt could have pursued in relation to the objectionable email.

One of two other persons forwarded John Cameron's email message by Florence Fenton was Imrana Jalal, employee of another UN body, UNDP. Imrana Jalal is married to Sakiusa Tuisolia, former Airports Fiji Limited Chief Executive Officer who, on February 11th 2008, was charged with 22 counts of False Pretences and 22 counts of Abuse of Office by the Fiji Independent Commission Against Corruption (FICAC).

Unlike UNFPA, UNDP did not respond to Justice Scutt's complaint to the United Nations Secretary-General.

The other person to whom the email was forwarded was Graham Leung, partner in Howards law firm. Howards' other partners are Ratu Joni Madraiwiwi and Wylie Clark. Clark is the stepson of (until very recently) Secretary General of the Pacific Island Forum, Greg Urwin.

In fact, Graham Leung was the recipient of a number of relevant emails during February and March 2008. Just a few weeks after the email message from Cameron referred to above was disseminated by Fenton, another email mentioning Justice Scutt by name appeared. Dated Tuesday March 11 2008 it was sent by a Kellam@supremecourt.vic.gov.au to Graham Leung at his gleung@howardslaw.com.fj address. The message appeared to be in reference to a document Leung had requested the addressee to comment on, and read:

> "GL
>
> Pretty punchy but not defamatory although I would be tempted to remove the following re Scutt: "Notwithstanding her powerful political patrons, Judge Scutt chose to trespass the public domain and was pilloried for her indiscretion"
>
> Good luck
>
> mbk

The Human Rights Commission telephoned the Victorian Supreme Court to establish the identity of 'mbk' and was informed that the initials were of a judge of the Supreme Court of Victoria, Murray Kellam. According to Wikipedia, Justice Kellam is also, apparently, an 'Officer of the Order of Australia'.

On the same day, that is Tuesday March 11th , Graham Leung also emailed Matt Wilson, a public relations manager, and speech writer for Laisenia Qarase when he was Prime Minister, on address ew@samba.com.fj : (ew refers to Emelita Wilson, formerly Fiji's Electoral Commissioner and Matt Wilson's spouse). Emelita Wilson passed on Leung's message to Matt Wilson. The message from Leung to Matt Wilson read as follows:

> "Hi Matt
>
> This is the draft so far. The media part is quite weak and I would like that strengthened. We discussed. If I could have something by early Thursday I would then try and get the FT to run for Sat.
>
> Regards
>
> GL"

The reply from Emelita Wilson was:

"Received and passed to MW

> Em"

The email evidence shows that an article or articles, a paragraph of which was disrespectful enough of Justice Scutt to warrant a suggestion by Victorian Supreme Court Justice Kellam that it be removed, as well as in reference to the media, was in the pipeline for publication in the Fiji Times. Graham Leung obtained views prior to publication. Those consulted by Leung were a judge of the Supreme Court of Victoria and Matt Wilson, ousted Prime Minister Laisenia Qarase's speech writer.

The Interim Government had apparently also been secretly forwarded a copy of the article intended for publication. A few days later, just before the Saturday, when presumably the article was due for publication, Fiji Times publisher, Evan Hannah and Fiji Times lawyers, Munro Leys, represented by Jon Apted, were invited to a discussion with the Interim Attorney-General.

What the article said and whether it was actually published has not been verified.

Earlier on March 11th, that is, on the day that the email exchanges between Graham Leung, Justice Murray Kellam and Matt Wilson (via Emelita Wilson) took place, another email was sent to Graham Leung. This message was from Pacific Centre for Public Integrity's Executive Director, Angenette Heffernan, a client of John Cameron. It was sent from address angie.heffernan@gmail.com to Graham Leung at gleung@howardslaw.com.fj , as follows:

> "Bula
>
> Hope you can help. Do you know what Bar is John Edward Byrne a member of in Australia. PCPI will be lodging a formal complaint today with them and the State Legal Services Commission regarding Australian lawyers taking up unconstitutional appointments on the bench as well the regime. I've just had enough of these creeps! I am surprised that the FLS has not taken this course…
>
> Your response if you know will be most welcome.
>
> Cheers
>
> angie"

The following day, on 12th March, Heffernan also sent a message to another law firm, Fa and Company, at address facompany@connect.com.fj copied to LaurelV@fnpf.com.fj, that is, Laurel Vaurasi, member of Fiji Law Society Council and employee of the Fiji National Provident Fund. The message read:

> "Bula
>
> Please find attached a copy of PCPI's letter that was faxed across today to the Victoria LSC. We have formally lodged a complaint for investigation against Judge Scutt and other Australian lawyers who are currently holding unlawful positions on the bench and in the regime.
>
> Similar letters have been sent to the Victoria Attorney General seeking support for amendment to existing state and federal LPA that them (sic) allow them to regulate the conduct of Australian lawyers abroad. We are hoping that the FLS, if it has not already done so would formally write to the appropriate Australian Legal Authorities to look into this issue. I am happy to write a formal letter to the FLS, seeking your immediate attention on this issue.
>
> Vinaka
>
> angie"

Attached to the email message was a letter, written under Pacific Centre for Public Integrity letterhead, addressed to a 'Ms Victoria Marles, Legal Services Commissioner, Office of the Legal Service Commissioner', Melbourne. The salient points in that letter are as follows:

> " ..I am formally raising our complaint against Dr Jocelyn Scutt, a current member of the Victoria Bar Association. Dr Scutt was recently appointed a puisne judge of the Fiji High Court in November 2007....
>
> Given the nature of the Dr Scutt's appointment, we are seeking the support of the Commission to conduct an investigation into the professional conduct of Dr Jocelyn Scutt, a current member of the Victorian Bar Association who by accepting to serve as a judicial officer on the Fiji Bench, had knowingly accepted an unlawful position in a constitutionally unlawful regime..
>
> Dr Scutt is not the first Australian lawyer serving under this illegal installed regime. Other Australian Legal professionals include Mr John Edward Byrnes, a Judge of the Fiji High Court and Fiji Court of Appeal, Mr Gerard McCoy, legal adviser to the Office of the Attorney General, and Mr Anthony Harold Gates, the unlawfully appointed Acting Chief Justice, who holds dual British and Australian citizenship...
>
> Dr Scutt and other fellow Australians who have accepted unlawful positions in the Fiji military installed regime in our view have failed in their duty to uphold and protect the law as mandated by their oath. This raises in our view serious concerns regarding the role of Australian lawyers working in places like Fiji to undermine democracy and the rule of law...."

As though this reprehensible series of defamatory statements by a non-lawyer such as Heffernan, declaring 'the law' to an Australian Legal Services Commissioner and to the Victoria Bar Association, were not enough, Heffernan, in an earlier paragraph of the same letter, made sweeping and disreputable statements about 'two' governments of the Melanesian Region:

> " The Pacific region, particularly the Melanesian region is known for its vulnerability to political turmoil, brought about through political and administrative corruption and maladministration.
>
> The case of Julian Moti is a classic example of state collusion between two Pacific governments to prevent the extradition of an Australian lawyer wanted by Australian federal authorities on sex related charges. We raise this example, because such incidents may become common in the future with Australian legal practitioners being provided with employment and protection by corrupt governments in the Pacific"

The Heffernan letter, parts of which are quoted above, is somewhat long-winded, repetitive, and ungrammatical, and cannot (indeed should not) be reproduced in full in this report but the general idea of its focus is evident from the excerpts quoted. What is curious though is that, while Executive Director of Pacific Centre for Public Integrity, Heffernan, was emailing letters to the Australians about the 'illegal regime', and indeed, was involved in a series of court cases on the topic, her organization's Chairperson, Suliana Siwatibau, had joined the Interim Government's National Council for Building a Better Fiji (NCBBF). This type of political legerdemain and machination, where one NGO was engaging on both sides of the fence, is clearly unacceptable –especially from an organization with the words **'Public Integrity'** in its title.

On March 12th the web was spun wider still, implicating the New Zealand Government. Former New Zealand High Commissioner to Fiji, Michael Green, from address Micheal.Green@mFAT.govt.nz sent an email to Graham Leung at gleung@howardslaw.com.fj discussing the main legal issues in the Qarase constitutional case and giving legal opinions on an important element of the case. The Commission's investigations reveal that Michael Green is still an employee of the New Zealand Foreign Affairs and Trade Ministry despite being declared persona non-grata by the Fiji Government in 2007. He was reported to have been interfering in Fiji's internal affairs. It appears that in March 2008 he was still interfering in Fiji's internal affairs. The Commission recommends that this matter should be referred to the New Zealand Government through the Ministry of Foreign Affairs and be placed on the table as part of the Forum Working Group agenda on Fiji.

Later that month, there were concerns expressed by Howards, with some indignation, about the 'hacking' of their computers. On March 29th Howards' partner, Wylie Clark, when asked by the Fiji Times how they knew their computers had been 'hacked', reported that they had received evidence that their emails had been unlawfully accessed as a result of questions from some media services in relation to emails emanating from their office which they said they had copies (sic).

The Fiji Times quoted Clark as saying:

> "We have also been provided with copies of the emails that were addressed to a specific recipient and they have clearly been accessed without our knowledge and consent and that of the recipient".

Unsavoury email correspondence about the judiciary and individual judges involving lawyers, UN agencies and an NGO , and attacks on the judiciary through formal letters and derogatory media statements and articles, were taking place during the Qarase constitutional case, March 4th -20th 2008. New Zealand Government's Green by email also directly offered a legal opinion in support of the applicant in the Laisenia Qarase case.

The conspiracy to cripple the administration of justice in Fiji by these persons, institutions and organizations proceeded unabated in April. On April 27th 2008, carrying on distastefully in a similar vein to Heffernan, her lawyer, John Cameron, published an opinion piece in the Sunday Times under the title **'Fiji's new judges must be challenged: When is a judge not a judge'**. In the article Cameron instructs Fiji lawyers as to the proper course of action in the current situation, as follows:

> " ...it is not simply the right of counsel to challenge such orders (of a judge who does not have the authority, presumably of a 'lawful' appointment), but as officers of the court their duty to do so, by seeking recusal of usurpers, before orders are made, and the right of parties affected to seek constitutional relief from them, if made after a request to stand down is refused."

Cameron's Fiji Times article carried a number of serious errors of law. The Fiji Times should have obtained independent legal advice before publishing it.

This is the same person who, on February 6th 2008, had sent the first disgraceful email message denigrating Justice Scutt to Florence Fenton of Munro Leys, lawyers for the Fiji Times. Cameron had come full circle, from expressing personal vituperative remarks against a fellow Australian, and a female colleague, in February, to publicly laying down a formal blueprint, somewhat resembling a 'final solution' for dealing with the judiciary, by the end of April.

The email threads investigated for this report reveal the most objectionable and embarrassing public display of personal vendetta that the Commission investigators have ever encountered in their human rights careers. This type of concerted conspiracy, engaged in by lawyers, including of the Fiji Times, the publishers and an NGO, was specifically targeted at a female judge much more than against her male colleagues in the same position.

It is the Commission's firm view that the nexus between interference with the administration of justice and the firm of Munro Leys will need further investigation by the relevant authorities. This view is fortified by the fact that an earlier Fiji Human Rights Commission independent report titled Freedom and Independence of the Media in Fiji revealed that (another) Munro Leys partner, Richard Naidu, contrary to the constitutional provisions on conflict of interest under section 156, had facilitated the registration of the Duavata Initiative Company of the SDL Party, with the (then) Prime Minister and senior Cabinet members as directors. On February 27th, by letter, the Commission reported this deviation from constitutional provisions by a legal practitioner to the Fiji Law Society for its investigation.

This report notes for the record that the President of the Fiji Law Society and one of the Society's Council members, Laurel Vaurasi, were both sent email messages by Heffernan seeking support for her vilification campaign against Justice Scutt. The Commission recommends further investigation by relevant authorities on whether the FLS provided that support; if so, due to its conflict of interest, the Society will not be able to investigate or institute hearings related to the Commission's referral to it of the Duavata Initiative matter. Clearly the Interim Government should also consider whether the Legal Practitioners' Act, which currently gives sole responsibility to the Society to represent lawyers on the Judicial Services Commission, and indeed, to issue (the mandatory) practicing certificates, should be reviewed. The unfortunate monopoly that the Society has in relation to legal practice in Fiji must also be considered from the perspective of remarks made by Justice Hickie in his recent decision in Heffernan v Hon. John Byrne and Ors (Civil Appeal No. ABU0027 OF 2008). On page 41 of the judgment, Justice Hickie supports a former President of the Fiji Law Society's suggestion to 'set up a Bar Association'. Justice Hickie noted that it was 'time to further develop this idea'. The Commission so recommends.

The next media item in the Fiji Times against the administration of justice appeared on May 3rd 2008. The article, by Australian Justice Robert French, also of the Fiji Supreme Court, would have been in the pipeline for print while Evan Hannah was being removed from Fiji on May 2nd. The article was innocuously titled **'Judges face a legal dilemma'**, and appeared under Justice French's by-line. The article expressed his concern, albeit with considerable jurisprudential vagueness, about the 'implicit bargain' that judges appointed by the 'interim government' now had with that government.

Besides being self-serving (Justice French made an approach in it to have his appointment renewed), the article made some serious mistakes in the law. First, Justice French completely overlooked the different constitutional provisions established for appointment of different types of judges in Fiji and, second, in his analysis, he appears to have completely mis-understood the legal principle submitted in the Qarase case. These errors would have been picked up had the Fiji Times received independent legal advice on the article before printing it because the matter that Justice French wrote about not only was wrongly interpreted, it was also before the court for judgment.

The Commission recommends that Justice French should be requested by His Excellency the President of Fiji to consider his position on our Supreme Court. The Commission recommends this course as an initial step. The constitutional provisions on removal of judges (section 138 of the 1997 Constitution) should be contemplated only if Justice French declines such a request to consider his position.

4.0 Other Findings

In May and June 2008, public harassment of Justice Scutt, and other judges, gathered speed. In late May Justice Scutt was again publicly harangued by Heffernan, as well as by two other seemingly 'new' players entering the field: coordinator of the Fiji Women's Crisis Centre, Shamima Ali, and the Fiji Women's Rights Movement (FWRM's founder and advisor is Imrana Jalal, and its Trustees are listed as Wame Baravilala, Chandra Reddy and Lisa Apted).

At issue was the invitation given to Justice Scutt in her personal capacity by the International Federation of Women Against Fundamentalism and Inequality and Greek League of Women's Rights, to speak at two conferences in London and Athens respectively. On Monday 29th May, Heffernan, again somewhat ungrammatically, launched her attack on Justice Scutt on Fijilive, the on-line news service owned by Yashwant Gounder, spouse of Fiji Women's Crisis Centre's Shamima Ali:

> "A human rights advocate in Fiji has called on three international bodies to retract their decision to invite a high court judge to speak at a conference in Greece.
>
> Pacific Centre for Public Integrity (PCPI) director Angie Heffernan wrote to the Women's Federation of World Peace International (WAFE) and the Greek League of Women's Rights asking them to reconsider their invitation to Justice Jocelynn Scutt.
>
> Justice Scutt has been invited to speak at the joint WFWP and WAFE meeting on Institutional Violence Against Women in Athens, Greece next month...

> ' I am writing to you to respectfully request that your organization withdraw your invitation to Dr Jocelyn Scutt, whom we have been informed has been invited to speak on the 14 June at your conference on the theme: Institutional Violence against Women, taking into account traditional and cultural constraints in 'developed' and 'developing' countries.
>
> We understand she will be speaking on developments in Fiji and Australia. Dr Jocelyn Scutt is currently purporting to act as a Judge of the Fiji High Court of Appeal after accepting an unconstitutional appointment' "

The following day, May 30th the Fiji Times online news reported the same story, adding a few additional objectionable remarks on the judiciary by Heffernan.

Then on June 2 2008, Shamima Ali and Heffernan were mentioned as sources of information about Justice Scutt in the Fiji Sun, at page 3:

> "Women's organizations in (Fiji) were lobbying with their international partners to try and stop her from speaking at the meetings. Pacific Centre for Public Integrity executive Angie Heffernan wrote to the respective organizations inviting Justice Scutt to try and get them to withdraw their invitations.
>
> The Fiji Women's Crisis Centre said there were women in Fiji well-versed in development issues facing women who could have been invited to make the presentation.
>
> Centre Coordinator, Shamima Ali said the judge did not have the mandate of the women in the country to speak on women's issues in Fiji and Australia.
>
> The Fiji Women's Rights Movement said it was 'inappropriate' for a person appointed by the Interim Government to go and speak on behalf of women "

Also on June 2 at page 16, the Fiji Times provided more space to Shamima Ali:

> " 'there are enough people who have knowledge and experience in Fiji and who can do that and who can represent development issues in Fiji in that context'.
>
> Ms Ali said the invitations were made (sic) to her in her experience in these issues before she became a judge in Fiji.
>
> 'As a judge she should be totally independent' she said.
>
> 'If people are deprived through lack of development, how will she address this- given the fact that she is a government employee and a member of the judiciary.
>
> She is an appointee of the military regime' "

On Tuesday June 3rd on page 2, the Fiji Sun once again used Ali as a source:

> " A non-government organization still hopes to stop a High Court judge from speaking on Fiji at a women's conference in Greece.
>
> The Fiji Women's Crisis Centre said it hadn't received any reply from Greece but with the support of other women's organizations within the region and around the world, it was optimistic that the invitation to Justice Jocelyn Scutt would be withdrawn.
>
> FWCC Coordinator, Shamima Ali said NGOs in Fiji would continue to oppose the appointment of Justice Scutt to speak on 'sexual harassment and new technologies'.
>
> 'First of all she doesn't have the mandate of the women in this country and that in itself speaks volumes as she will be going to Athens as a representative of women in Fiji' said Ms Ali.
>
> She said there were a lot of professional women in the country who had the knowledge and experience to talk on both issues.
>
> 'So many women in the country can represent us on the two topics and it doesn't have to be someone appointed by the military regime', said Ms Ali.
>
> 'Even if she is going to speak at the conference, I believe there will be so many questions waiting for her from women's support groups on her involvement with the military led Government ' "

Even though Heffernan and Ali were factually wrong on the appointment of Justice Scutt (she was appointed by His Excellency the President and not by 'a military-led Government' as they claimed) the media published their statements anyway.

From a human rights perspective, the treatment of Justice Scutt by these 'human rights and women's advocates' not only breached her human rights, it was avowedly anti-feminist in its approach. Ali and Heffernan, aided by the media who published them, violated Justice Scutt's freedom of opinion and expression, and her freedom of movement by lobbying to have the international women's organizations withdraw the invitation given to her to speak in her personal capacity. To have a 'woman activist' such as Ali damage the reputation of a feminist jurist of such stature to this extent is outside the bounds of lawful conduct. Justice Scutt would be well within her rights to sue Ali, as well as Heffernan, for defamation. Beyond that, such verbal assaults would be a matter for the Commissioner of Police to investigate further.

The public of Fiji was stunned by these women's brutal attack on a new Judge of the Fiji High Court. A letter writer, Nick Wilson, in the Daily Post of June 5th finally expressed the thought in the public's mind in relation to Shamima Ali's frenzied attacks. He wrote:

> " ...Ms Ali says that Justice Scutt does not have the mandate to represent the women of Fiji. Tell me Ms Ali, who in Fiji has the mandate to speak on behalf of our women? You! I don't think so! What have you done for our women here in Fiji to improve their ways or standard of living...
>
> ..I always viewed women as ambassadors of a higher culture because you women no matter what the situation is, women always do their utmost to bring comfort and a perfect assurance to whatever responsibilities under their care.
>
> But unfortunately I cannot say or feel the same for you because of your continuous objection and negative attitude, not only to to women('s) affairs but also for other matters that fate has felt to deny you, your participation..."

Much as the Commission would like to define the reaction of mainly three NGOs (two of them women's groups) to the events of December 2006 and the administration of justice in 2007 and 2008 as 'pro-democracy' activism, it finds itself unable to do so. It is doubtful whether the particular individuals involved in such harassment are sufficiently up to speed with new definitions and manifestations of 'democracy' in the 'developing' world. Instead the evidence shows that these activities (apparently with United Nations collusion) in the events post December 2006 were personally motivated.

But there appears to be more to it than that.

4.1 Albert Einstein Institution: relevance to Mr Mick Beddoes' complaint

During its investigations, the Commission found a more sinister element in play against the administration of justice in Fiji. The source was a document, called 'The Anti-Coup' written by the Washington-based Albert Einstein Institution. The document had been circulated on December 7th 2006 from a UNICEF (Fiji) email address. The Commission found a nexus between the contents of the document and the pattern of harassment of the judiciary by NGOs, some lawyers, and the media in 2007 and 2008.

The document was sent by email on Wednesday December 6th 2006 at 1.46 pm to number of recipients by UNICEF's Mereia Carling, daughter of deposed Foreign Affairs Minister Kaliopate Tavola. The original sender was Jamila Raqib, jamila@aeinstein.org , Executive Director of the Institute. The message had initially been sent to email address info@aucklandfiji.org.nz , and read:

> Dear Friends
>
> Greetings. I am writing to you from the Albert Einstein Institution in Boston Massachusetts (United States).
>
> Given recent political developments in Fiji, I am sending you a link for our publication, the Anti-Coup by Gene Sharp. It details measures that civilians, civil society, and governments can take to prevent and block these seizures of power. It also contains specific legislative steps and other measures that governments and non-governmental institutions can follow to prepare for anti-coup resistance.

The message was signed by Jamila Raqib.

Jamila Raqib's message and attachment was forwarded by Mereia Carling from address mcarling@unicef.org on December 7th 2006 at 12.55 PM to the following, in the order below:

> A. Heffernan, Aids Taskforce; Albert Cerelala; Anna Padarath; Koila Costello-Olssen; Rev Aquila Yabaki; Sala Bakalevu; Citizen Constitutional Forum; Cema Bolabola; chand_b@usp.ac.fj; Hugh Govan; Seinimili T; femlinkcmc@connect.com.fj; Sharon Bhagwn Rolls; (NGO) FTUC; FWCC; Gina Houng Lee; Imrana Jalal; Jenny Cakusa; Jone; Judith Ragg; Kevin Barr; Lice Mavono; Lionel Gibson; Aisake Casimira; Masimeke Latianara; Michelle Reddy; Mika Bulavakarua; Rokosiga Morrison; naeemah@fwrm.org.fj; Lua Radrodro; Newf; Sandy unwired; Piccolo; Poni; Ponipate Ravula; ratumeli@connect.com.fj; Sandra Bernklau; Swasti S. Chand; Chantelle Khan; Kesaia Seniloli; (NGO) Fiji-I-Care; Shaista Shameem; Sekope Tamanitioakula; Tagi Qolouvaki; Virisila Buadromo; Wadan Narsey; SarahP@spc.int; GeorgeT@spc.int; Virisila Buadromo; Imrana Jalal; barbara malimali; Vukidonu Qionibaravi; Peter Sipeli; Marlene Dutta; Tara Chetty.

The message from Carling read:

> Subject: Fw: preventing and blocking coup
>
> The link below provides an 'anti-coup' 'guide' from the Albert Einstein Institution. I havn't read the whole thing in depth, but it is interesting reading. Civil society are doing much of the recommended non-violent actions. A small chapter on 'international pressure' which says that this, in the form of sanctions, my not be effective rather, the most successful defence primarily depends on non-cooperation and defiance within the attacked country.

Regards,

Mereia

I have this in soft copy if anybody prefers me to send it direct.

It will be noted that two of the recipients were Fiji Human Rights Commission staff.

The Commission researched the Albert Einstein Institution only after finding a pattern in the harassment of the judiciary while investigating Mr Beddoes' complaint. It discovered some disconcerting facts about the Institution. The Albert Einstein Institution, something of a misnomer according to independent reports, specializes in 'non-violence as a form of warfare'. The principal and President of the Board of Directors of the Institution are listed on the Institution's website as Col. Robert Helvey, formerly of the US Defence Intelligence Agency (DIA). Another principal listed is Edward Atkeson, Major-General US Army. Major General Atkeson served as Deputy Chief of Staff Intelligence, US Army Europe and later as a member of the National Intelligence Council under the Director of Central Intelligence. The third principal is listed as Peter Ackerman (advisor). Ackerman was for 15 years the right hand man to Michael Milken the 'Junk-Bond King" who in 1990 was formally indicted on 98 counts of racketeering and securities fraud and sentenced to 10 years imprisonment and a $200 million fine. But before Milken's imprisonment, Ackerman moved to London where he joined the International Institute for Strategic Studies.

In 2005 French writer Thierry Meyssan wrote that the Institution was part of CIA subversion efforts. Meyssan said its founder, Gene Sharp, had formulated a theory on 'non-violence as a political weapon'. Sharp is reported to have first helped NATO and then CIA train the leaders of the soft coups of the last 15 years.

In 2007 the President of Venezuela Hugo Chavez publicly accused the Albert Einstein Institution of being behind a 'soft coup' attempt in Venezuela. The Institution denied involvement in the Venezuela attempted coup but admitted that it had met with the Cuban-born opposition leader Robert Alonso shortly before Colombian paramilitaries were discovered training at his estate in El Hatillo, a few short miles from Caracus. When interrogated they admitted that their mission was to assassinate Chavez.

The Institution's association with individuals from the United States' DIA and reportedly also CIA, and the circulation of its documents among the United Nations staff and NGOs in Fiji, gives the Commission cause for serious concern. It also, disturbingly, recalls the badges of honour that the US Government handed out to Fiji Women's Crisis Centre's Shamima Ali and Fiji Women's Rights Movement's Virisila Buadromo in 2007 and 2008.

The Commission recommends that immediate steps should be taken by the security services to further investigate these links between the Albert Einstein Institution, the US Government and Fiji NGOs. Other names on the distribution list of the Institution and UNICEF should be questioned. Both UNDP and UNICEF heads should be interviewed also, keeping in mind the diplomatic immunity provisions of the Vienna Convention, which in any case cannot be used as a shield to avoid scrutiny by any UN member State for breaches of national security and safety.

The relentless assault on the judiciary of Fiji, which continued as this Report was being finalized, has all the hallmarks of an Albert Einstein Institution 'grand strategy' for 'coups'. At page 21 of the document circulated to the civil society groups on December 7th 2006, under the title 'the civilian defenders aims' the document spells out strategies to ensure complete collapse of all aspects of governance. The evidence accumulated for this Report and the judgments in the Heffernan cases show that the judiciary was included in the strategy for collapse.

However, Fiji's judiciary is not without teeth. Through judgments it has already given clear and unequivocal statements that it will resist any attempts to undermine the independence and authority of the courts. In a stinging judgment in the case of Heffernan v Hon. John Byrne & Ors (Misc Civil Action No HBM 105 OF 2007 HC) in October 2007, a case where another of Heffernan's lawyers, Ratu Joni Madraiwiwi, unbelievably, requested Justice Pathik to recuse himself from hearing the case on the grounds that he 'had not been constitutionally appointed and (his) age', Justice Pathik wrote:

> 'I have never in my fifty years as a legal practitioner, of which 35 years as a judicial officer with 15 years of which as a Judge, had seen or presented to Court such nonsense which is much worse when this has come from some senior counsel who are firing bullets from behind the curtain and sending a very junior and inexperienced solicitor to appear before me with no proper instructions and who is unable to argue the objections raised. These counsel have sent him to do the dirty work.

> I will not tolerate such stupidity. I have to keep the dignity of the court and will not allow counsel to get away lightly from their stupidity and their conduct at the bar and towards the Bench for their contemptuous behaviour towards the Court....
>
> ..If all counsel involved in this case think that by this kind of behaviour before the Court they will cripple the Court system they should think twice before they dig their own grave"

In his April 11th 2008 substantive decision in the same matter, Heffernan v Hon. John Byrne & Ors, Justice Pathik said:

> ' It is incomprehensible that some counsel appear before Judges to have their cases heard and at the same time do not want to recognize them, as has happened in the case of two Respondents who are very senior and experienced judges who are duly appointed judges under the hand of the President of the Republic of Fiji Islands. If some lawyers do not accept the serving Judges and judges, then they should not seek audience before them. They should not say, "If your Lordship pleases" when they appear before a Judge.
>
> The actions of the applicant in joining the two judges as parties to this action, which must have been on the advice of counsel signed by one Dr Cameron who has never turned up in person to face the Court, is the worse case of **abuse of process** of the court and amounts to a **frivolous** and **vexatious** proceeding. (Judge's emphasis).

In the Court of Appeal in another matter involving the same applicant and respondents, Heffernan v Hon. John Byrne, Hon. Anthony Gates, and Hon Aiyaz Saiyed-Khaiyum (Civil Appeal No. ABU0027 OF 2008), this time for an application for a Stay as well as Leave to Appeal from an interlocutory decision of Pathik J made on 24th October 2007, Justice Hickie made observations in his Ruling about the process that had been used by Heffernan and her lawyers to bring the cases to court:

> " In particular, I am alarmed at why the Appellant would be seeking a Stay as well as Leave to Appeal the inevitable costs orders (which followed from the failed interlocutory recusal application before Pathik J of 24 October 2008) for which costs had been ordered not against her but against her Solicitor? In addition, no attempt has been made at payment since then by her Solicitor to satisfy those Orders.
>
> What I found even more astounding was that the Appellant (obviously on legal advice) has commenced hopeless and duplicated applications in the High Court (rather than pursuing the appeal proceeding from Byrne J to the Full Court of Appeal)...
>
> ..Without a doubt, this case will be cited to future law students as everything NOT to do in conducting litigation.. (para 43)
>
> ..The Heffernan cases have all the hallmarks of vexatious litigation.. (para 57)

> ..As a Judge of this Court, I have a responsibility, however, to stop any abuse of the Court process as well as to protect other members of the community from such actions. Clearly, the Appellant bringing two additional applications in the High Court seeking Constitutional Redress rather than appealing to the Full Court of Appeal the Orders of His Lordship Byrne J, sitting as a single Judge of Appeal, is an abuse of the Court process and must be stopped... (para 65)

In his Decision, at pages 33-39 Justice Hickie puts specific and pertinent questions about the involvement of PCPI's Chairperson and John Cameron in Heffernan's proceedings before the court. At page 39 (para 73 (a) Hickie J asks:

> 'Who is directing the litigation?'.

At paragraph 76-77 of his Decision, Hickie J writes:

> " Third, I note that during his appearance before me, I had to stop and warn Mr (Dorsami) Naidu when he attempted to make, what I perceived, were denigrating remarks about Justice Pathik.....
>
> Mr Naidu's questionable remarks follow in the footsteps of what can only be described as the most disgraceful submissions I have ever read a practitioners submit to a Court (as were made by Dr Cameron on 19 June 2007 to Justice Byrne in the Court of Appeal and upon which Justice Byrne rules on 30 July 2007) which then formed the basis of the subsequent Constitutional Redress Application heard before Justice Pathik. To make such outlandish statements without any foundation about members of the judiciary is totally unacceptable and would normally be dealt with severely by the profession's governing body. It does not bode well, however, for the legal profession in this country if this is the standard of accepted behavior from senior members of the profession presumably supported by the Law Society as, when Justices Byrne and Pathik forwarded their respective judgments to the Law Society, and I stand to be corrected, no action was taken against either Dr Cameron or Mr Naidu"

These judgments from Pathik J and Hickie J illustrate how persistent the attempt to cripple the administration of justice by Heffernan and her lawyers, Cameron, Madraiwiwi, Dorsami Naidu, as well as the Fiji Law Society by turning a blind eye to the antics of its senior members, had become. Clearly non-lawyers were also involved in the conspiracy. The blueprint for bringing the judiciary to its knees appeared to have been sourced from the Albert Einstein Institution and was disseminated to the NGOs listed in the email message of Mereia Carling of UNICEF.

PCPI, a not for profit organization, should be investigated pursuant to the provisions of the Company's Act. The registration of PCPI under the Act requires it to comply not only with its compliance provisions but also with the Constitution of Fiji. A company registered in Fiji cannot act in a manner that is ultra-vires the Constitution. Justice Hickie's judgment shows serious disregard by PCPI of the very fabric of constitutional judicial authority and independence.

The Directors of PCPI, as listed in its registration documents, are Aisake Casimira, Suliana Siwatibau, Lionel Gibson, Fei Tevi, Apolosi Bose and Sir Arnold Amet. Former Directors included Tupou Draunidalo, Sandra Bernklau, Angenette Heffernan, and Stanley Simpson. These names are well-known in Fiji as current or former UNDP staff, current Amnesty International (London) staff, a former Chief Justice of Papua New Guinea, media personnel, and a number of civil society activists who are, simultaneously, also members of other NGOs. Inter-locking directorates of civil society groups in Fiji are also evident from registration documents. The problem is compounded by the fact that many of these NGOs do not up-date their records with the Registrar of Titles as required under the Companies Act and the Charitable Trusts Act.

In his judgment, Justice Hickie had noted that the 'Heffernan cases' would bankrupt the applicant, Heffernan and her organization if not stopped. She already owes $130,000 in costs to the respondents in the case. But the matter is even more serious when one considers who will actually bear responsibility for these costs if Heffernan cannot. To what extent will the Directors of the PCPI, as an organization registered under the Companies Act, be liable for the actions of one of their employees? Human rights law, which includes ensuring independence of the courts, is quite clear on the matter; it makes employers and principals vicariously liable in a human rights breach. Where human rights is concerned employers and principals are liable for 'anything done or omitted to be done by a person as an employee, whether or not it was done with the employer or principal's knowledge or approval'. Section 24 of the Human Rights Commission Act outlines the general principle of vicarious liability in human rights law. This should be seriously considered by PCPI and its directors. They may be vicariously liable for costs incurred by one of their employees.

In addition to the actions that can be taken in relation to PCPI's abuse of the courts, it is recommended that the relevant Ministry should also immediately inquire into whether the NGOs FWCC and FWRM are acting pursuant to the provisions of the Charitable Trusts Act under which they are registered. FWCC, in its registration documents, provides a Constitution. The objects of the FWCC all relate to the main Object 2.1, that is 'to provide a support and counseling service for women and children who have been victims of rape, sexual assault and domestic violence'. The actions of FWCC's Coordinator are well outside the parameters of her organization's Constitution.

The registration documents also reveal that FWCC has not up-dated the Registrar's Office of changes in its Board membership. The previous change was recorded in 1998 and listed Cema Bolabola, Ruth Lechte, Bernadette Rounds-Ganilau and Miles Young as its Board of Trustees. However, the Commission has received reliable information that the Board now also includes Devenesh Sharma (immediate past President of the Fiji Law Society and also lawyer in a number of Qarase's SDL Party and related cases) and Rev Aquila Yabaki (Executive Director of CCF), neither of whom are listed in the registration documents. Again, the issue of interlocking directorates among the NGOs is of serious concern; the potential for conflict of interest is obvious.

The Fiji Women's Rights Movement is also registered under the Charitable Trusts Act. Its Trustees, as already noted, are listed as Ms Lisa Apted, Ms Chandra Reddy and Dr Wame Baravilala (last up-dated in 2002). FWRM's recorded objective is to publicly address all issues affecting women's human rights.

It is the Registrar's duty to consider whether, by actively harassing, vilifying and defaming a female, moreover an expert in feminist jurisprudence and senior member of the Fiji judiciary, the Women's Crisis Centre and Fiji Women's Rights Movement are complying with the relevant sections of the Charitable Trusts Act. Section 13 (1) (c), (d) and (e) of the Act are pertinent in this regard. These organizations' incorporation under the Act appears to be at risk.

The issue of funding of Fiji's NGOs is also a matter of concern. Unlike Government agencies, NGOs do not reveal their funding source to the public. Such lack of transparency in financial reporting is unacceptable. NGOs have a tax exemption status but in order to claim this privilege, they must be able to show compliance with the Act or Acts under which they are registered. All entities must produce annual reports and financial statements for the public record but NGOs do not seem to be as transparent in this regard; on the other hand they expect statutory bodies and government agencies to be transparent and accountable. The Commission recommends that Government review the relevant legislations so that such double standards are not maintained.

The Commission's recommendation that NGOs should be transparent with their funding sources is based on Justice Hickie's observation and queries in his judgment in the Heffernan case (paras 69-71):

> "..(c) Ms Heffernan has mentioned in her affidavit of 12 September 2007 that the Centre is **supported by funding from donor agencies such as AusAid and NZAid.** Have the various donor agencies which provide such funding to the Centre been advised of Ms Heffernan's various legal proceedings? If so, have they been approached to provide funding for any of the outstanding legal costs awarded against her to date? If so what has been their response?
>
> (d) Is Ms Heffernan aware that her ultimate application for Constitutional Redress before Pathik J failed completely and that costs were awarded against her personally and on an indemnity basis for all three Respondants, which at this stage, until they are taxed, stand in excess of $130,000 (less the costs previously ordered to be paid personally by Mr Naidu on 24 October 2007 and 19 February 2008?)
>
> As mentioned, I wonder whether AusAid and NZAid, ans whoever else has been funding Ms Heffernan and her various activities, are aware of these matters? I will be forwarding to AusAid and NZAid a copy of this judgment "
>
> (Judge's emphasis)

The Commission's inquiries into the funding sources of the NGOs mentioned in this report revealed only that AusAid, NZAid and European Union are three of the main sources of funding for NGOs and Non-state Actors in general, with project support also variously provided by the US Government, Misseror, UK-based Conciliation Services and OXFAM. Indeed, the funding source of most NGOs in Fiji is a mystery and not readily available to the public.

This state of affairs would be unacceptable in other countries. In the United States, strict rules apply to ensure that NGOs are transparent and accountable. Most nonprofit organizations are legally obligated to make certain documents readily available to the public on the basis that accountability for a nonprofit organization means worthiness of public trust and fulfillment of qualifying factors for tax exemption. It is mandatory for a nonprofit organization to complete a Form 990, an annual information return that NGOs file with the Inland Revenue Service (IRS) which provides information that allows the IRS to determine whether or not the organization continues to fufill the requirements for the tax-exempt status.

The USA Tax payer Bill of Rights II stipulates that a nonprofit, also called a 501 (c) (3) organization, is obligated to give a copy of Form 990 to anyone requesting it. A 501 (c) (3) organization cannot be an action organization exclusively or may not participate in any political campaign activity for or against political candidates. Any lobbying it does is strictly controlled by guidelines and permissible number of hours per week. This is carefully calculated so that a nonprofit organization can continue to be guaranteed a tax-exemption status.

The Commission recommends that the Ministry of Justice immediately review the appropriate pieces of legislation to ensure that NGOs are accountable to the public.

To summarize the investigation section of the report, clearly, the threat to the administration of justice in Fiji is real and of grave concern. The threat comes from two Australian judges, Justices Kellam and French, and an Australian lawyer, John Cameron. It implicates local lawyers, Florence Fenton, and Graham Leung and firms Munro Leys and Howards, and other members of the Fiji Law Society as well. NGOs, headed by Heffernan, Ali and Buadromo, as well as three UN staff, Jalal, Baravilala and Carling are also directly and indirectly implicated in this web of conspiracy to bring the justice machinery to its knees.

A number of those involved seem to be encouraged in part by personal and pecuniary reasons and as a tactic of subterfuge, that is, allegedly to avoid being scrutinized for irregular and questionable activities during the Qarase period and perhaps even earlier. The 'non-violent warfare' being waged may be pursuant to the Albert Einstein Institution's blueprint and may include violent engagements as well. These must all be investigated as a matter of immediate concern because the security of the people of Fiji appears to be compromised.

The Fiji Sun, Fiji Times and Fijilive are directly implicated in the conspiracy against the administration of justice. They have published inaccurate, unsavoury and, in many cases, defamatory news items, opinion pieces and longer articles written by Victor Lal, John Cameron and Robert French. Unless immediately and urgently curbed, such concerted efforts will lead to breaches of law and order and safety and security of the people of Fiji. The culprits cannot seek refuge in freedom of information or freedom of the press and other media. Section 30 of the 1997 Constitution makes it clear that defamation, inaccurate and offensive reports, and insensitive news items are prohibited in Fiji. The assertion of freedom of expression and the media is not sufficient to overturn the constitutional protection against violations of the rights and freedoms of others.

The Commission next considered whether international law supported Fiji's constitutional provisions in cases where 'national security' is invoked by the executive government. National security law is often applied to immigration cases in jurisdictions such as Australia, New Zealand, the United Kingdom and the United States, and provides a long line of precedents from 1916 to the present.

4.0 The relevant law that applies to the circumstances of the removals of Hunter and Hannah.

The main constitutional law that applies in the particular situation under investigation is 'national security and defence of the realm' which is, in turn, related to the notion of 'prerogative power of the Head of State', and immigration law, which is a branch of ministerial prerogative.

4.1 National security: the law related to immigration

The limitation of 'national security' that appears in practically all sections of the Bill of Rights provisions of the Fiji Constitution is not so much a 'limitation' as a public interest protection. The Bill of Rights protects the individual against the might of the State; however individual rights cannot be claimed at the expense of the rights of other individuals or the public. Rights and limitations both appear as part of the continuum of liberties in Fiji- in an interpretation of the Bill of Rights the most interesting aspect is the means by which the rights of individuals and the rights of the public can be balanced.

It has been noted already that Section 30 freedom of information, and the press and media are balanced with, *inter alia,* national security. National security is not defined in the Constitution; however, international human rights law accommodates 'national security' or public order, as a limit on individual freedoms. Article 29 of the Universal Declaration of Human Rights, states:

1. Everyone has duties to the community in which alone the free and full development of his personality is possible.

2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect or the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

The State of Fiji recently publicly renewed its commitment to the Universal Declaration of Human Rights in relation to the right to equality in the electoral system

Courts in a number of jurisdictions have considered the issue of 'national security'. The earliest relevant decision was that of the Privy Council in the case of The Zamora [1916] 2 A.C. 77. In a judgment delivered by Lord Parker, the court said at age 107:

> "Those who are responsible for national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a Court of law or otherwise discussed in public"

The Zamora was cited with approval by the House of Lords in the case of Council of Civil Service Unions and Ors v Minister for the Civil Service [1984] All ER 935 at 945.

> "The question is one of evidence. The decision on whether the requirements of national security outweigh the duty of fairness in any particular case is for the government and not for the courts; the government alone has access to the necessary information, and in any event, the judicial process is unsuitable for reaching decisions on national security"

Lord Diplock said conclusively, at page 953 of the judgment:

> " ...so the crucial point of law in this case is whether procedural impropriety must give way to national security when there is a conflict between (1) on the one hand, the prima facie rule of 'procedural impropriety' in public law, applicable to case of legitimate expectations that a benefit ought not to be withdrawn until the reason for its proposed withdrawal has been communicated to the person who has theretofore enjoyed that benefit and that person has been given an opportunity to comment on the reason, and (2) on the other hand, action that is needed to be taken in the interests of national security, for which the executive government bears the responsibility and alone has the access to sources of information that qualify it to judge what the necessary action is.
>
> To that there can, in my opinion, be only one sensible answer. That answer is Yes.

This House of Lords decision appears to have been followed in immigration cases in other jurisdictions where national security has been given by the executive government as a reason for a removal or deportation.

An example is Australia. In 2007, Mohammed Haneef, a 27 year old suspect in the failed United Kingdom bombing attempts was detained by Australian immigration authorities after his visa was cancelled on 'character grounds'. Haneef had been charged with providing assistance in the form of a mobile phone chip to the group behind the failed bombing attempts. The court which granted Haneef bail said the prosecution had failed to show any direct link between Haneef and the plot.

But after the court's decision, Australian Immigration Minister Kevin Andrews used his powers under the Migration Act to cancel Haneef's visa stating that the decision was made on the grounds of 'national interest'. Haneef was then detained at the notorious Villawood Detention Centre until his next court date. The Minister had stepped in and overturned the decision of the Brisbane Court.

In September 2007, Glenn Nicholls of Swinburne University in Australia wrote that:

> 'the compliance section of Australia's Department of Immigration enforces the departure of 10,000 people yearly. By international standards this is a very high number relative to the population. Australia's deportations are well ahead of the United Kingdom and Canada. The Migration Act has been used to circumvent the courts"
>
> http://australianreview.net/digest/2007/election/Nicholls.html

In the New Zealand Supreme Court case of Attorney-General v Ahmed Zaoui & Ors SC CIV 19/2004 [2005] NZSC 38, the court said:

> "...the person in question must be thought on reasonable grounds to pose a serious threat to the security of New Zealand; the threat must be based on objectively reasonable grounds and the threatened harm must be substantial".

Importantly, in the 2001 House of Lords case of Secretary of State for the Home Department v Rehman cited in the Zaoui case referred to above, Lord Slynn said:

> "The Secretary of State, in deciding whether it is conducive to the public good that a person should be deported, is entitled to have regard to all the information in his possession about the actual and potential activities and the connections of the person concerned. He is entitled to have regard to the precautionary and preventative principles rather than to wait until directly harmful activities have taken place, the individual in the meantime remaining in this country. In doing so he is not merely finding facts but forming an executive judgment or assessment"

Fiji's Immigration laws are clear on the definition of 'prohibited immigrants'. Section 13 (2) (g) of the Act states that a non-citizen can be declared a member of a prohibited class if he or she:

> ..prior to or after entry into the Fiji Islands, as result of information received from any ...source, the Minister considers reliable, is deemed by the Minister to be a person who is or has been conducting himself in a manner prejudicial to the peace, defence, public safety, public order, public morality, public health, security or good government of the Fiji Islands;

The original Immigration Act (Cap 88) contained a non-justiciable clause. The 2008 Immigration Act (Amendment) Promulgation re-introduced non-reviewability by way of an amendment to section 13 (2) (g) of the 2003 Act by adding the following paragraph:

> "Provided that and notwithstanding anything contained in this Act, the decision of the Minister made under this paragraph shall be final and conclusive and shall not be questioned or reviewed in any court"

Whether this clause is in keeping with the original non-reviewable clause in Cap 88 is an interesting question given courts' decisions in recent immigration cases in other jurisdictions.

4.2 Relevant constitutional provisions

The next question is whether the Constitution will assist Hunter and Hannah in challenging the Minister's decision to remove them from Fiji. The Constitution makes provision explicitly for a right of appeal but only for persons charged with an offence; the relevant provision is section 28 (1) (l). Section 29, access to courts and tribunals, may assist implicitly but not automatically for immigration matters, as other sections of the Constitution reveal.

Section 23 (1) (i) permits deprivation of personal liberty:

> 'for the purposes of preventing the unlawful entry of the person into Fiji or of effecting the expulsion, extradition or other lawful removal of the person from the Fiji Islands'

However, Section 27 (1) states that every person who is arrested or detained has the right:

> (e) to challenge the lawfulness of his or her detention before a court of law and to be released if the detention is unlawful

Section 38 (1) states that every person has the right to equality before the law and section 38 (7) states that a law is not inconsistent with (*inter alia*) section 38 (1) on the ground that it:

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

Clearly, the correct interpretation of Section 27 (1) and 38 (1) and (7) will be the key to resolving whether Hannah and Hunter could have successfully challenged their detentions prior to removal. In any event, the Privy Council and House of Lords decisions, as well as recent actions in Australia where a Minister over-rode a decision of a court, and New Zealand where the 'reasonable grounds' test was used by the Supreme Court in the Zaoui case will be relevant.

In addition, the 2008 Immigration Promulgation by the President of Fiji to oust the court's jurisdiction in immigration cases will be particularly pertinent from the perspective of the exercise of the prerogative, which is solely based in Fiji on defence of the realm.

In the UK Court of Appeal case of R v Secretary of State for the Home Department ex parte Hosenball, [1977] 3 ALL ER 452 Lane LJ, completely on point, said at page 8:

> "There are occasions, though they are rare, when what are more generally the rights of an individual must be subordinated to the protection of the realm. When an alien visitor to this country is believed to have used the hospitality extended to him so as to present a danger to security, the Secretary of State has the right and, in many cases, has the duty of ensuring that the alien no longer remains here to threaten our security"

A similar attitude prevails in the United States. Under current statutory law, non-citizens who have not been admitted into the United States are entitled to the fewest statutory safeguards against the use of 'secret' evidence. If the Attorney-General determines, based on 'confidential information', that a non-citizen at the border poses a national security risk, he can be removed without appearing before a judge, let alone seeing or challenging the evidence against him. Only those who have lawful permanent residence status have basic due process rights.

In the British case of Conway v Rimmer [1968] AC 910 at page 952, the Court said:

> "(I)f the Minister's reasons are of a character which judicial experience is not competent to weigh, then the Minister's view must prevail."

Of course, in the Fiji case of Hannah and Hunter, it may be said by lawyers for the publishers that the Minister 'is not a properly appointed Minister' as has become a mantra for NGOs and the media since December 2006. But for that issue, we will have to await the decision in the Qarase case. At present, that question does not assist the removed publishers.

The judgment of Justice Hickie in the Heffernan case also makes an important link between court proceedings and the media. In considering allegations of bias against Justice Byrne by John Cameron and 'media hype', including 'exaggeration and misinformation which has been coming out of Ms Heffernan and Dr Cameron for the past 16 months..' Justice Hickie said (paras 86-88):

> "I also note that a number of scurrilous accusations were previously made by Dr Cameron in his submissions of 19 June 2007 against Justice Byrne.
>
> As we know, such allegations whilst making great headlines in the print media, are long on hype but short on facts. Courts, if there are to be places of justice, must rely on facts not hype".

4.3 Administration of Justice and Contempt Proceedings

There is one other legal point that must be raised at this juncture, namely, the definition of the phrase 'interference with the administration of justice'. In a media case similar in fact to the issues raised in this Report, Attorney-General v Blundell and Ors [1942] NZLR 287, Myers C.J. initially quoting Lord Atkin's judgment in Ambard v Attorney General for Trinidad and Tobago [1936] A.C. 322 said:

> " Everyone will recognize the importance of maintaining the authority of the Courts in restraining and punishing interferences with the administration of justice, whether they be interferences in particular civil or criminal cases, or take the form of attempts to descrecate the authority of the Courts themselves". Of course, as was pointed out by His Lordship, whether the authority and position of an individual Judge or the due administration of justice is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune....
>
> The contempts are admitted by the parties concerned to be of a grave character. Now as far as the first of the two passages is concerned, it is on its face a very grave and baseless attack upon the administration of justice; but it is made worse by the fact that at the very time of the publication there was pending before the Court of Appeal very important litigation affecting the rights of workers and employers in a certain industry..." (the subject of the contemptuous publication).

The New Zealand case of Taylor v Attorney-General [1975] 2 NZLR 675 is also significant in relation to contempt of court, as is Solicitor General v Radio Avon Ltd [1978] 1 NZLR 225. In the Radio Avon case, the point was made that one class of contempt is an act done to bring a Court or a judge into contempt, or to lower his/her authority. The second class of contempt is calculated to interfere with the due process of justice.

Finally, section 124 of the 1997 Constitution must be an important consideration:

> The Supreme Court, the Court of Appeal and the High Court have power ro punish persons for contempt of court in accordance with the law.

Order 52 of the High Court Rules establishes the procedure for committal for contempt of court.

The Commission has found that a clear case of contempt exists, both to bring individual judges into disrepute and to 'cripple' (Pathik J in the Heffernan case) the administration of justice, by the concerted and conspiratorial actions of the people mentioned in this investigations report. The Commission recommends that the Ministry of Justice should not hesitate to consider bringing contempt of court proceedings in relation to these findings.

5.0 Conclusion

In answer to Mr Mick Beddoes' question on whether the 'deportation' of Mr Hunter and Mr Hannah invoked any human rights and the 'extent to which they were breached by the authorities' the Fiji Human Rights Commission, having examined the evidence and reasons provided to it by the authorities, concludes in the negative.

The Constitution provides limitations to freedom of expression and the press and other media on the grounds *inter alia* of the administration of justice and national security.

The preliminary investigations show that the two newspapers employing the publishers were involved with their lawyers and NGOs in deliberately undermining the judiciary at various times between December 5th 2006 and June 2008. The harassment of the judiciary and interference with the administration of justice and administration of the courts continue to take place.

In the Fiji Sun case, the specific words used in the Lal/Hunter February communication that were designed to tarnish the reputation of the judiciary were: ' Justice Jitoko and jiten (who no longer have tea with the other judges) are with me, and now Gates, Naz and Byrne have sunk further into the trap by their own leaks'.

And further, by Lal's TV interview, where he stated: 'we were second-guessing or playing a guessing game as to if Mr Chaudhry went to court, how judges were going to react" . These comments impute bias and corruption to the judges named in the email message and news item.

Hunter was removed from Fiji. When Lal next returns to Fiji he should be charged for contempt of court under the relevant provisions of the Constitution.

In the Fiji Times case, there was a pattern of harassment of judges through its law firm, as well as by John Cameron, Graham Leung, two Australian judges, and three NGOs which received full media coverage of their inaccurate and objectionable statements of persecution of a particular female judge. Two UN staff, who were sent the objectionable messages against the judge, took no action in support of the judiciary despite being employed by the United Nations.

Hannah was removed just a day before Justice Robert French's legal opinion, which was wrong on constitutional law, was published in the Fiji Times.

The case law cited in this Report makes it clear that (i) national security is the sole responsibility of the State to establish, and to punish if breached, and (ii) interference with the proper administration of justice and judges constitutes the serious offence of Contempt of Court.

The intention behind the planned interference with the judiciary is to 'cripple' the administration of justice presumably in accordance with the Albert Einstein Institution's methodology for collapse of the essential elements of law and order. This is being done both for pecuniary and personal reasons by those involved as well as in support of foreign governments' interference with the internal affairs of Fiji. The connection between the Einstein Institution and the Department of Intelligence Affairs, the United States Armed Forces and the Central Intelligence Agency is of specific concern.

Human Rights law cannot be invoked to protect people who seek such protection in order to bring the administration of justice, one of the central arms of law and order and the security of the people of Fiji, to its knees. In such circumstances public interest, public order, public safety, and the rights and freedoms of others outweigh the individual rights claimed.

Thus the Commission finds no substance in the allegation that the rights of Hannah and Hunter were breached. On the contrary, their removals appear to have been long overdue.

The Commission now forwards its findings to Mr Beddoes.

Pursuant to its mandate, the Commission also makes a number of recommendations for further action by agencies of the State. Under section 34 (6) (b) of the Human Rights Commission Act, the Commission has the power to:

> refer any complaint, and if it considers appropriate, the result of the investigation to another competent authority.

The Commission makes these recommendations because it considers that the people and organizations implicated in this Report threaten the administration of justice to such an extent that Fiji's core law and order mechanism is at risk. Members of the judiciary who have been attacked and harassed have, unfortunately, been left to fend for themselves. Clearly this is unacceptable. Judges are usually unable to speak up publicly even to defend themselves. The executive is hampered by the separation of powers doctrine and is also prevented from speaking on behalf of judges. Nevertheless, the Attorney General, as Minister of Justice, has made valiant attempts to defend the judiciary since 2007 but they have been, of necessity, in response to particular incidences. Given the relentless nature of the attacks, a sustained and collaborative effort is now required to protect the administration of justice in Fiji.

The Human Rights Commission's recommendations are based on the proposition that without an immediate, united and concerted action on the part of all those who are forwarded this Report, there will be further erosion of the authority and independence of the courts in Fiji by the individuals, institutions and organizations implicated. If not stopped immediately, the impact that this will ultimately have on law and order is beyond contemplation.

These recommendations are therefore made with public safety in mind.

6.0 Recommendations

The Commission recommends:

1. That the owners of the Fiji Times and Fiji Sun and other media implicated in this Report be considered for committal for contempt of court for the persistent attacks on the judiciary and administration of justice in relation to the matters outlined in this report. The Attorney General is so informed.

2. That the Interim Government inform the Governments of New Zealand, Australia and the United States as to the findings in relation to these countries and request an immediate apology and a guarantee of non-repetition of the behaviour engaged in by their citizens and agencies, as outlined in these findings.

3. That judges who are the subject of the communications between Lal and Hunter, are respectfully requested to recuse themselves from hearing cases relating to the removal of Hunter, and judges who are the subject of derogatory articles and media statements are similarly requested to recuse themselves from any contempt proceedings that may ensue in relation to these statements and articles.

4. That His Excellency the President be advised, through the appropriate Minister, that Justice Robert French be requested to consider his position on the Supreme Court of Fiji.

5. That the President of the relevant Bar Association and/or Law Society of Australia be officially communicated with by the Attorney General in relation to the actions of Dr Cameron against Justice Jocelynne Scutt and other judges in the Heffernan cases.

6. That the Chief Justice of Australia or relevant authority, which may include the Governor-General of Australia, be communicated with in relation to the opinion provided by Justice Kellam to Graham Leung, with a view to instituting an appropriate inquiry.

7. That the Legal Practitioner's Act of Fiji be reviewed to introduce an alternative mechanism for disciplining legal practitioners and that those implicated in this report be charged under the relevant disciplinary provisions.

8. That NGOs implicated in this Report be investigated for non-compliance with their respective legislation and appropriate action taken.

9. That the tax-exemption status of NGOs implicated in this report be reviewed.

10. That all NGOs in Fiji be required to publish the sources of their funding in an annual report, giving outputs and outcomes of their objectives for tax exemption purposes, which would be publicly available.

11. That the NGO Coalition of Human Rights be convened, at the request of the Registrar of Titles, for a special meeting to consider actions it will take in respect of NGOs identified in this Report as harassing members of the judiciary and interfering with the administration of justice.

12. That further investigations be conducted (with appropriate constitutional safeguards) by the relevant authorities on the possible criminal nature of some of the actions engaged in by those implicated in this Report.

13. That the United Nations agencies in Fiji be called for a briefing by the relevant Minister(s) on the issues pertaining to UN staff in this Report.

14. That Fiji's security services investigate the links between the Albert Einstein Institution and NGOs in Fiji post-December 2006.

The Human Rights Commission requests the Ministries and agencies concerned to provide a report to the Commission on the completion of their investigations.