IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

HBJ No. 5 of 2025

IN THE MATTER of section 5 of the Fiji Independent Commission Against Corruption Act 2007 ("**FICAC Act 2007**"), section 44 of the Interpretation Act 1967 and sections 16, 81, 82, 112 of the Constitution of the Republic of Fiji 2013 ("**Constitution**");

AND

IN THE MATTER of the decision of the First Respondent, acting on the advice of the Second Respondent, to revoke the appointment of the Applicant as the Commissioner of the Fiji Independent Commission Against Corruption ("**FICAC**") on 2 June 2025.

BETWEEN : **BARBARA PAULINI BRIAR MALIMALI** of Flagstaff, Suva, Fiji, Legal Practitioner.

APPLICANT

AND : **THE PRESIDENT OF THE REPUBLIC OF FIJI** of Government House, Suva

FIRST RESPONDENT

AND : **THE PRIME MINISTER OF THE REPUBLIC OF FIJI,** of Government Buildings, Suva

SECOND RESPONDENT

AND : **THE ATTORNEY-GENERAL OF FIJI**, Attorney-General's Chambers, Suvavou House, Suva

THIRD RESPONDENT

SUBMISSIONS ON BEHALF OF THE APPLICANT, BARBARA PAULINI BRIAR MALIMALI, IN SUPPORT OF APPLICATION FOR JUDICIAL REVIEW

May it please the Honourable Court, these are the submissions in support of the Applicant's application for Judicial Review.

1. To make the reading of our Submissions easier, we have divided them into sections with headings and subheadings, a species of Table of Contents

2. The submissions have been sectioned into the following:

INTRODUCTION

3. On Wednesday, the 4th of June 2025, the applicant BARBARA PAULINI BRIAR MALIMALI filed an Application for Leave to Apply for Judicial Review pursuant to Order 53 Rule 3(2) of the High Court Rules 1988 to apply for Judicial Review and received leave to review the following decisions of the Respondents:

   (a) the decision of the First Respondent on 2 June 2025, acting upon the advice of the Second Respondent, to revoke the appointment of the Applicant as the Commissioner of Fiji Independent Commission Against Corruption ("**FICAC**") with immediate effect. **(Revocation Decision)**

   (b) the decision of the Second Respondent on or about 2 June 2025, to advise the First Respondent to revoke the appointment of the Applicant as the Commissioner of FICAC. **(Revocation Advice Decision)**

   (each a **Decision** and together, **Decisions).**

4. The Notice set out the following **RELIEFS** that were being sought:

   (a) Orders of *certiorari* to remove into this Court and quash each and every Decision;

   (b) A Declaration that each and every Decision is unlawful, unconstitutional, unreasonable, unfair and contrary to the fundamental principles of natural justice, invalid, irregular, null and void and of no effect;

   (c) An Order that the Applicant is restored to the office of the Commissioner of Fiji Independent Commission Against Corruption with effect from 2 June 2025 without loss of salary or other benefits;

   (d) General damages, including damages for distress, humiliation and injury to feelings and for injury to reputation, and in the alternative to Order (c), loss of income, including future income and loss of earning capacity;

   (e) special damages including in the alternative to Order (c) loss of income from 2 June 2025;

   (f) exemplary and/or aggravated damages;

   (g) interest;

   (h) costs on a solicitor/client indemnity basis; and

(i) such further or other relief as this Honourable Court deems just.

5. The **GROUNDS** upon which the Applicant seeks relief against the Respondents are as follows:

Revocation Decision

(a) The First Respondent, in purporting to revoke the appointment of the Applicant on the advice of the Second Respondent, acted unreasonably, irrationally, *ultra vires*, illegally, unfairly and contrary to the fundamental principles of natural justice, and disproportionately in the purported exercise of its powers having regard *inter alia* to section 5 of the FICAC Act 2007, section 44 of the Interpretation Act 1968 and sections 2, 6, 16, 81, 82 and 112 of the Constitution in that:

(i) the First Respondent acted unfairly and in breach of natural justice and in breach of section 16 of the Constitution in failing to provide the Applicant with the allegations contained in the report of the Commission of Inquiry and providing to the Applicant an opportunity to be heard, to enable the First Respondent to determine whether the revocation of appointment was warranted in the circumstances, and thereby failed to conduct sufficient (or any) prior inquiry about the circumstances.

(ii) the First Respondent acted under the advice of the Second Respondent, a person with no authority to advice the First Respondent to revoke the appointment of the Applicant.

(iii) the First Respondent acted ultra vires, and contrary to the Constitution by purporting to act under sections 81 and 82 of the Constitution, when these sections do not provide the First Respondent with the authority to revoke the appointment of the Applicant, nor revoke the appointment of the Applicant on the advice of the Second Respondent.

(iv) Any executive authority of the First Respondent is limited by the Constitution and any written law, which in the Applicant's case is section 5 of FICAC Act 2007, section 44 of the Interpretation Act 1967, and section 112 of the Constitution.

(v) under section 82 of the Constitution (which in any event is not applicable as it does not confer any power to remove or suspend the Applicant from office), in the exercise of his powers, the First Respondent acts only on the advice of the body or authority prescribed by the Constitution for a particular purpose as the body or authority on whose advice the First Respondent acts in that case. The Second Respondent is not prescribed under the Constitution or under any written law as a person or body with the constitutional or legal authority provide

any advice to the First Respondent with respect to the appointment or removal or suspension of the Applicant as the Commissioner of FICAC.

(vi) the First Respondent acted *ultra vires* and contrary to section 5 of the FICAC Act 2007 and section 44 of the Interpretation Act 1967, which expressly provides that the Commissioner of FICAC can be appointed (and removed or suspended) by the First Respondent only the advice of the Judicial Services Commission, and no other person including the Second Respondent.

(vii) the First Respondent acted *ultra vires* and contrary to section 112 of the Constitution, which the First Respondent had expressly stated in the Applicant's letter of appointment that any process for removal of the Applicant will be pursuant to section 112 of the Constitution. Under section 112 Constitution, the Applicant can only be removed by the First Respondent on the advice of a tribunal or a medical board, and no one else. In this regard, the First Respondent has acted *ultra vires* the Constitution in removing the Applicant on the advice of the Second Respondent.

(viii) the First Respondent acted unreasonably, unfairly and irrationally and *ultra vires* the Constitution, including in particular sections 16(1) and 112 in all the circumstances.

Revocation Advice Decision

(b) The Second Respondent, in advising the First Respondent to revoke the appointment of the Applicant, acted illegally, unreasonably, irrationally, *ultra vires*, unfairly and contrary to the fundamental principles of natural justice, and disproportionately in the purported exercise of its powers having regard *inter alia* to section 5 of the FICAC Act 2007, section 44 of the Interpretation Act 1968 and sections 2, 6, 16, 81, 82 and 112 of the Constitution in that:

(i) the Second Respondent has no authority under the Constitution or any written law to advise the First Respondent to revoke the appointment of the Applicant.

(ii) the Second Respondent acted *ultra vires*, and contrary to the Constitution namely sections 81 and 82 of the Constitution by advising the First Respondent to revoke the appointment of the Applicant, when these sections do not provide the Second Respondent with the authority to advise the First Respondent to revoke the appointment of the Applicant.

(iii) under section 82 of the Constitution (which in any event is not applicable as it does not confer any power to remove or suspend the Applicant from office), in the exercise of his powers, the First Respondent acts only on the advice of the body or authority prescribed by the Constitution for a particular purpose as the body or authority on whose advice the First Respondent acts in that case. The Second Respondent is not prescribed under the Constitution or under any

written law as a person or body with the constitutional or legal authority provide any advice to the First Respondent with respect to the appointment or removal or suspension of the Applicant as the Commissioner of FICAC.

(iv) the Second Respondent acted *ultra vires* and contrary to section 5 of the FICAC Act 2007 and section 44 of the Interpretation Act 1967, which expressly provides that the Commissioner of FICAC can be appointed (and removed or suspended) by the First Respondent only the advice of the Judicial Services Commission, and no other person including the Second Respondent.

(v) the Second Respondent acted *ultra vires* and contrary to section 112 of the Constitution, which the First Respondent had expressly stated in the Applicant's letter of appointment that any process for removal of the Applicant will be pursuant to section 112 of the Constitution. Under section 112 of the Constitution, the Applicant can only be removed by the First Respondent on the advice of a tribunal or a medical board, and no one else. In this regard, the Second Respondent has acted *ultra vires* the Constitution in usurping the powers vested in a tribunal or a medical board in advising the First Respondent to revoke the appointment of the Applicant.

(vi) the Second Respondent acted unfairly and in breach of natural justice and in breach of section 16 of the Constitution in failing to provide the Applicant with the allegations contained in the report of the Commission of Inquiry and providing to the Applicant an opportunity to be heard, and thereby failed to conduct sufficient (or any) prior inquiry about the circumstances.

(vii) the Second Respondent acted unreasonably, unfairly and irrationally and *ultra vires* the Constitution, including in particular sections 16(1) and 112 in all the circumstances.

6. Leave to apply for Judicial Review was granted on 21/07/25 and within 14 days, the Motion for Judicial Review and the Affidavit in Support were filed and served.

BRIEF BACKGROUND and CHRONOLOGY

7. The Applicant is a legal practitioner, having been first admitted to the Supreme Court of New South Wales, Australia in July 1997 and then subsequently the High Court of Fiji in October 1997.

8. The Applicant returned to Fiji in 1996 and had various roles in Government including Graduate Trainee and Legal Officer at the Attorney-General's Chambers before being seconded to and remaining with the Inland Revenue Department (later FIRCA/FRCS).

9. The Applicant had various legal positions in government until she left in 2007-2008 and joined the private bar.

10. The Applicant was a member of the private bar and opened her own law firm, styled as Pacific Chambers in 2010.

11. The Applicant was also a part-time consultant and full-time assistant lecturer at the University of the South Pacific at various times and for various periods until the end of the 1st Semester of 2024.

12. On or about July or August 2023, the Applicant was appointed as the Acting Chairperson and then Chairperson of the Electoral Commission of Fiji ("**ECF**").

Chronology

04/09/24 - the Applicant was appointed as the Commissioner of the Fiji Independent Commission Against Corruption ("**FICAC**"), to commence on 05/09/24.

05/09/24, the Applicant took up her appointment as Commissioner FICAC

30/10/24 – COI Appointed

18/11/24 – Meet and Greet with the COI Commissioner and Counsel Assisting at Bali Towers

06/01/25 – Oral Hearings began

10/01/25 – Gazettal of the COI including TOR and timeline from 29 October 2024 to 31 January 2025

14/02/25 – Opinion prepared on the instruction of Commission of Inquiry into the appointment of the Commissioner of the Fiji Independent Commission Against Corruption.

18/02/25 – Meeting with PS OPM and Letter from the CJ to OS regarding the suspension of the Applicant

19/02/25 – OS to HE, Qionibaravi gave evidence in the COI

21/02/25 – Gazettal of the Extension of the provision of the Report of the COI from 21 February 2025 to 17 March 2025

25/02/25 - Review and Feedback on Letter of Counsel Assisting the Commission of Inquiry into the Appointment of the Commissioner of the Fiji Independent Commission Against Corruption, dated 24 February 2025.

01/05/25 - First Respondent was provided a copy of the COI Report

14/05/25 - First Respondent was provided a copy of the COI Report

21/05/25 - First Respondent was provided a copy of the COI Report

28/05/22 – PM renders advice to the President pursuant to s82 of the Constitution to suspend Malimali
29/05/25 – Commissioner of Inquiry, Ashton-Lewis gave an interview to a community radio station on the Gold Coast, Australia
29/05/25 – Applicant given a letter of suspension by Ms. Qionibaravi
02/06/25 – PM renders advice to the President to revoke Malimali's appointment
02/06/25 – Applicant found out about the revocation of her appointment via Facebook with the Letter of Revocation of Appointment from the President delivered to the law offices of Waqanika Law, after that.
04/06/25 – Application for leave to apply for judicial review filed
09/06/25 - Commissioner of Inquiry, Ashton-Lewis gave another interview to a community radio station on the Gold Coast, Australia.
21/07/25 – Leave granted.

13. It is pursuant to the grant of leave that these further submissions are being provided. We adopt the submissions that were made pursuant to the application for leave and add hereto.

THE NOTICE OF OPPOSITION

14. The Notice of Opposition was filed on 12 June 2025.

15. The Grounds are:

1. The Application of leave to apply for judicial review is frivolous and baseless as it does not show any arguable case against the Respondents in that, the Applicant is seeking leave to judicially review the decision of the President of the Republic of Fiji ('**the President**') on 2 June 2025 to revoke the Applicant's appointment as FICAC Commissioner.

2. The decision to terminate the Applicant's appointment was lawful, proper and made in accordance with the Constitution, relevant statutes, and the prerogative powers of the President.

3. The Applicant lacks standing to bring this application, or in the alternative is misconceived in law.

4. There was no procedural impropriety or breach of natural justice in the making of the decision.

5. The application discloses no arguable grounds or serious issue to be tried and should be dismissed in limine.

6. Further or in the alternatives, the reliefs sought are inappropriate, excessive and not supported by the facts or law.

7. The Respondents reserve the right to file detailed submissions and affidavits in response to the Applicant's claim in due course.

16. It is noted that Notice of Opposition which was filed on 12/06/25 only refers to the First Respondent. Therefore, it can be taken that by 12/06/25 there was No Opposition in relation to the actions and advice of the Second Respondent.

THE EVIDENCE

17. The evidence before this Court is to be found in –

(a) The Affidavit of Barbara Paulini Briar Malimali sworn and on 4 June 2005 ("**the Malimali Supporting Affidavit**");

(b) The Supplementary Affidavit of Barbara Paulini Briar Malimali sworn and filed on 10 June 2005 ("**the Malimali Supplementary Affidavit**");

(c) The Affidavit of Josefa Mainavolau sworn and filed on 27 June 2025 ("**the Mainavolau Affidavit**");

(d) The Affidavit of Barbara Paulini Briar Malimali in Reply sworn and filed on 4 July 2025 ("**the Malimali Reply Affidavit**");

(e) The Second Supplementary Affidavit of Barbara Paulini Briar Malimali after the Grant of Leave on 21 July 2025 filed on 04 August 2025 ("**the Malimali Second Supplementary Affidavit**");

(f) The Affidavit of Lesi Korovavala in Opposition sworn and filed on 13 September 2025 ("**the Korovavala Affidavit**");

(g) The Affidavit of Adi Vukidonu Qionibaravi in Opposition sworn and filed on 16 September 2025 ("**the Qionibaravi Affidavit**");

(h) The Affidavit of Barbara Paulini Briar Malimali in Reply to the Affidavits of Lesi Korovavala and Vukidonu Qionibaravisworn and on 4 June 2005 ("**the Malimali Second Reply Affidavit**").

18. The Malimali Supplementary Affidavit was not referred to in the Mainavolau Affidavit.

THE KOROVAVALA AND QIONIBARAVI AFFIDAVITS

19. On 17/09/25, Waqanika Law was served with the Affidavit in Opposition of the Respondents, that were deposed by the Permanent Secretary in the Prime Minister's Office and the Official Secretary to His Excellency, the President.

20. The Qionibaravi and Korovavala Affidavits are similar in content and refer to the prerogative power of the President to bypass the constitutionally mandated role of the JSC and the Attorney-General and to act on the advice of the Prime Minister (who has no constitutionally mandated role with regard to the appointment, suspension or termination) of the Commissioner of FICAC.

THE APPLICATION FOR JUDICIAL REVIEW

Legal Framework of this case and the 2013 Constitution

21. This Application requires this Court to consider and apply various provisions of the Constitution. The Constitution contains a number of provisions about how it is to be applied and interpreted.

22. The Supreme Court in *In the Matter of a reference by Cabinet for an opinion from the Supreme Court on a matter concerning the interpretation and application of sections 159 and 160 of the Constitution of the Republic of Fiji* [2025] FJSC 20; Miscellaneous 1 of 2025 (29 August 2025) recognised the 2013 Constitution as the legally effective Constitution of the Republic of Fiji except for the limitations in Chapter 11 in relation to a referendum on the amendment to the Constitution (i.e. parts of ss159-160).

23. After laying out the Preamble to the 2013 Constitution the Supreme Court at Paragraphs 92 and 93 of the Opinion, which binds this Cour as well as all offices of the state including the Office of the President and Prime Minister stated:

> *[92] Section 3(1) provides:*
>
> *Any person interpreting or applying this Constitution must promote the spirit, purpose and objects of this Constitution as a whole, and the values that underlie a democratic society based on human dignity, equality and freedom.*

[93] The fact that the Preamble begins with the words "We the people of Fiji" and the reference in s 3(1) to "values that underlie a democratic society" show that democracy is a value that is fundamental to the 2013 Constitution. So too are equality (s 1(a) and (d)), the rule of law (s 1(b)) and an independent court system (s 1(c)). In the present context, we see the values of "civic involvement" (s 1(e)) and "good governance" (s 1(f)) as having particular significance.

24. The other legislation that is relevant to this case is the FICAC Act, in particular the appointment provisions relating to the Commissioner. The FICAC Act is recognised in s115 of the Constitution and its appointment provisions are not in conflict with the Constitution.

Founding Principles, Constitutional Supremacy and Interpretation

25. Section 1 sets out the values on which the Fijian State is founded. It provides –

"The Republic of Fiji

1. *The Republic of Fiji is a sovereign democratic State founded on the values of –*
   (a) common and equal citizenry and national unity;
   (b) respect for human rights, freedom and the rule of law;
   (c) an independent, impartial, competent and accessible system of justice;
   (d) equality for all and care for the less fortunate based on the values inherent in this section and in the Bill of Rights contained in Chapter 2;
   (e) human dignity, respect for the individual, personal integrity and responsibility, civic involvement and mutual support;
   (f)good governance, including the limitation and separation of powers;
   (g) transparency and accountability; and
   (h) a prudent, efficient and sustainable relationship with nature."

Supremacy of the Constitution

26. Section 2(2) of the Constitution states:

Supremacy of the Constitution

2.– (1) This Constitution is the supreme law of the State.

(2) Subject to the provisions of this Constitution, any law inconsistent with this Constitution is invalid to the extent of the inconsistency.

27. Section 2(3) of the Constitution states:

(3) This Constitution shall be upheld and respected by all Fijians and the State, including all persons holding public office, and the obligations imposed by this Constitution must be fulfilled.

(4) This Constitution shall be enforced through the courts, to ensure that--

(a) laws and conduct are consistent with this Constitution;

(b) rights and freedoms are protected; and

(c) duties under this Constitution are performed

Interpretation of the Constitution

28. Section 3(1), which sets out the interpretation, so far as relevant states -

Principles of constitutional interpretation

3.–(1) Any person interpreting or applying this Constitution must promote the spirit, purpose and objects of this Constitution as a whole, and the values that underlie a democratic society based on human dignity, equality and freedom.

29. Section 3(2) of the Constitution states:

Principles of constitutional interpretation

3.–(1) ...

(2) If a law appears to be inconsistent with a provision of this Constitution, the court must adopt a reasonable interpretation of that law that is consistent with the provisions of this Constitution over an interpretation that is inconsistent with this Constitution.

Bill of Rights

30. Section 6, which applies to enforcement of the Bill of Rights, so far as relevant provides -

6.–(1) This Chapter binds the legislative, executive and judicial branches of government at all levels, and every person performing the functions of any public office.

(2) The State and every person holding public office must respect, protect, promote and fulfil the rights and freedoms recognised in this Chapter.

.....

(7) Subject to the provisions of this Constitution, laws made, and administrative and judicial actions taken, after the commencement of this Constitution, are subject to the provisions of this Chapter."

Interpretation of Bill of Rights

31. Section 7, which applies to the interpretation of the Bill of Rights, provides-

Interpretation of this Chapter

7.–(1) In addition to complying with section 3, when interpreting and applying this Chapter, a court, tribunal or other authority–

(a) must promote the values that underlie a democratic society based on human dignity, equality and freedom; and

(b) may, if relevant, consider international law, applicable to the protection of the rights and freedoms in this Chapter.

(2) This Chapter does not deny, or prevent the recognition of, any other right or freedom recognised or conferred by common law or written law, except to the extent that it is inconsistent with this Chapter.

(3) A law that limits a right or freedom set out in this Chapter is not invalid solely because the law exceeds the limits imposed by this Chapter if the law is reasonably capable of a more restricted interpretation that does not exceed those limits, and in that case, the law must be construed in accordance with the more restricted interpretation.

(4) When deciding any matter according to common law, a court must apply and, where necessary, develop common law in a manner that respects the rights and freedoms recognised in this Chapter.

(5) In considering the application of this Chapter to any particular law, a court must interpret this Chapter contextually, having regard to the content and consequences of the law, including its impact upon individuals or groups of individuals.

Executive and Administrative Justice – the right to executive and administrative justice

32. Section 16(1) of the Constitution states:

Executive and administrative justice

16.–(1) Subject to the provisions of this Constitution and such other limitations as may be prescribed by law–

(a) every person has the right to executive or administrative action that is lawful, rational, proportionate, procedurally fair, and reasonably prompt;

(b) every person who has been adversely affected by any executive or administrative action has the right to be given written reasons for the action; and

(c) any executive or administrative action may be reviewed by a court, or if appropriate, another independent and impartial tribunal, in accordance with law.

Independence of the JSC

33. Section 104 relates to the Judicial Services Commission and in particular Section 104(8) emphasizes the independence of the JSC when it states:

(8) In the performance of its functions or the exercise of its authority and powers, the Commission shall be independent and shall not be subject to the direction or control of any person or authority, except by a court of law or as otherwise prescribed by written law.

Removal of judges

34. Section 112 of the Constitution deals with the removal of magistrates, judges and those appointed on the advice of the Judicial Services Commission.

Removal of judicial officers for cause

112.–(1) A Judge, Magistrate, Master of the High Court, the Chief Registrar or any other judicial officer appointed by the Judicial Services Commission may be removed from office for inability to perform the functions of his or her office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour, and may not otherwise be removed.

(2) Removal of a Judge, Magistrate, Master of the High Court, the Chief Registrar or any other judicial officer appointed by the Judicial Services Commission from office must be by the President pursuant to this section.

(3) If the President, acting on the advice of the Judicial Services Commission, considers that the question of removing a Judge, Magistrate, Master of the High Court, the Chief Registrar or any other judicial officer appointed by the Judicial Services Commission from office ought to be investigated, then–

(a) the President, acting on the advice of the Judicial Services Commission, shall appoint–

(i) in the case of alleged misbehaviour–a tribunal, consisting of a chairperson and not less than 2 other members, selected from amongst persons who hold or have held high judicial office in Fiji or in another country; and

(ii) in the case of alleged inability to perform the functions of office–a medical board, consisting of a chairperson and 2 other members, each of whom is a qualified medical practitioner; 65

(b) the tribunal or medical board enquires into the matter and furnishes a written report of the facts to the President and advises the President of its recommendation whether or not the Judge, Magistrate, Master of the High Court, the Chief Registrar or any other judicial officer appointed by the Judicial Services Commission should be removed from office; and

(c) in deciding whether or not to remove a Judge, the President must act on the advice of the tribunal or medical board, as the case may be.

(4) The President may, acting on the advice of the Judicial Services Commission, suspend the Judge, Magistrate, Master of the High Court, the Chief Registrar or any other judicial officer appointed by the Judicial Services Commission from office pending investigation and pending referral to and appointment of a tribunal or a medical board under subsection (3), and may at any time, revoke the suspension.

(5) The suspension of the Judge, Magistrate, Master of the High Court, the Chief Registrar or any other judicial officer appointed by the Judicial Services Commission from office under subsection (4) ceases to have effect if the President determines that the Judge, Magistrate, Master of the High Court, the Chief Registrar or any other judicial officer appointed by the Judicial Services Commission should not be removed from office.

(6) The report of the tribunal or the recommendations of the medical board, as the case may be, made under subsection (3) shall be made public.

(7) This section does not apply to the Chief Justice or the President of the Court of Appeal.

FICAC and the Constitution

35. Section 115 of the Constitution deals with the Fiji Independent Commission Against Corruption and states:

Fiji Independent Commission Against Corruption

115.–(1) The Fiji Independent Commission Against Corruption established by the Fiji Independent Commission Against Corruption Promulgation 2007 continues in existence.

(2) The Commission shall consist of a Commissioner, Deputy Commissioner and such other officers as may be appointed by law.

(3) The authority, functions and responsibility of the Commission shall be prescribed by written law, and a written law may make further provisions for the Commission.

(4) Without prejudice to subsection (3), the Commission may–

(a) investigate, institute and conduct criminal proceedings;

(b) take over investigations and criminal proceedings that fall under its responsibility and functions as prescribed by law, and which may have been initiated by another person or authority; and

(c) discontinue, at any stage before judgment is delivered, criminal proceedings instituted or conducted by it.

(5) The powers of the Commissioner and the Deputy Commissioner may be exercised by him or her personally, his or her delegate, or through other persons acting on his or her instructions.

(6) In the performance of its functions or the exercise of its authority and powers, the Commission shall be independent and shall not be subject to the direction or control of any person or authority, except by a court of law or as otherwise prescribed by written law.

(7) In exercising its powers and performing its functions and duties, the Commission shall be guided by the standards established under the United Nations Convention Against Corruption.

(8) The Commission may regulate its own procedure and may make such rules and regulations as it deems fit for regulating and facilitating the performance of its functions.

(9) The Commission shall provide regular updates and advice to the Attorney General on any matter relating to its functions and responsibilities.

(10) The Commissioner and the Deputy Commissioner have the authority to appoint, remove and discipline all staff (including administrative staff) in the Commission.

(11) The Commissioner and the Deputy Commissioner have the authority to determine all matters pertaining to the employment of all staff in the Fiji Independent Commission Against Corruption, including–

(a) the terms and conditions of employment;

(b) the qualification requirements for appointment and the process to be followed for appointment, which must be an open, transparent and competitive selection process based on merit;

(c) the salaries, benefits and allowances payable, in accordance with its budget as approved by Parliament; and (d) the total establishment or the total number of staff that are required to be appointed, in accordance with the budget as approved by Parliament.

(12) The Commissioner and the Deputy Commissioner shall be entitled to such remuneration as determined by the President acting on the advice of the Judicial Services Commission following consultation by the Judicial Services Commission with the Attorney-General, and any such remuneration must not be varied to their disadvantage, except as part of an overall austerity reduction similarly applicable to all officers of the State.

(13) The salaries, benefits and allowances payable to any person employed in the Commission are a charge on the Consolidated Fund.

(14) Parliament shall ensure that adequate funding and resources are made available to the Commission, to enable it to independently and effectively exercise its powers and perform its functions and duties.

The FICAC Act – Appointment of the Commissioner

36. Section 5 of the Fiji Independent Commission Against Corruption Act 2007 (No.11 of 2007), which came into effect on 4 April 2007 states:

Office of Commissioner

5 (1) The Commissioner shall be appointed by the President on the advice of the Judicial Services Commission following consultation by the Judicial Services Commission with the Attorney General.

(2) Deleted.

(3) The Commissioner shall hold office on such terms and conditions as determined by the President acting on the advice of the Judicial Services Commission following consultation by the Judicial Services Commission with the Attorney General.

(4)...

(5)...

37. The Applicant was appointed by the former President of the Republic of Fiji, Ratu Wiliame Maivalili Katonivere to the position of Commissioner of FICAC on 04/09/24.

38. Pursuant to clause 7 of the terms and conditions that were attached to the Letter of Appointment ("**BM 1**"), Removal is the same as that is prescribed for judges:

> *7. Removal for Cause: Procedure for Cause: Procedure for removal of Commissioner shall be the same as what is prescribed for removal of Judges in Section 112 of the Constitution of the Republic of Fiji.*

39. The Commissioner of FICAC is similar to the role of the Solicitor General and the Director of Public Prosecutions as they are Independent Officers and Offices.

40. The Reeves Report at Page 420 made the following proposal in relation to the SG and DPP, who at the time were appointed by the JLSC (the forerunner to the JSC):[1]

> *12.119 We therefore propose that, like the Solicitor-General, the Director of Public Prosecutions should be appointed by the Constitutional Offices Commission recommended in Chapter 14. Before making the appointment, that Commission should consult the Attorney-General. The Director of Public Prosecutions should continue to be a person qualified to be appointed as a judge of the High Court. As in the case of the Solicitor-General and for the same reasons, the appointment should be for a fixed term of sufficient length to ensure independence.*

The role of the President of the Republic

41. We now turn to the statutory framework and the role of the President beginning with Section 81 of the Constitution, which states:

> *Part A–THE PRESIDENT*
> *The President of Fiji*
> *81.–(1) This section establishes the office of the President.*
> ***(2) The President is the Head of State, and the executive authority of the State is vested in the President.***
> *(3) The President shall perform the ceremonial functions and responsibilities as the Commander-in-Chief of the Republic of Fiji Military Forces.*
> *(4) The President shall open each annual session of Parliament with an address outlining the policies and programmes of the Government. President acts on advice.*

The President acts on advice

42. Section 82 of the Constitution states:

> *82. In the exercise of his or her powers and executive authority, the President acts only on the advice of Cabinet or a Minister or of some other body or authority prescribed by this Constitution for a particular purpose as the body or authority on whose advice the President acts in that case.*

[1] ch12.pdf

43. As per Section 5(1) of the Fiji Independent Commission Against Corruption Act 2007 (No.11 of 2007), which came into effect on 4 April 2007 states:

> *5 (1) The Commissioner shall be appointed by the President on the advice of the Judicial Services Commission*

44. Section 44 of the Interpretation Act 1967 states:

> *Power to appoint to include power to suspend, dismiss, etc., and to appoint, etc.*
>
> *44. Where by or under any written law a power or duty is conferred or imposed upon any person or authority to make any appointment or to constitute or establish any board, commission, committee or similar body, then, unless a contrary intention appears, the person or authority having such power or duty shall also have the power to remove, suspend, dismiss or* ***revoke the appointment****, of, and to re-appoint or reinstate, any person appointed in the exercise of the power or duty, or to revoke the appointment, constitution or establishment of, or dissolve, any board, commission, committee or similar body appointed, constituted or established, in exercise of such power or duty, and to re-appoint, reconstitute or establish the same:*

45. The President is the Appointing Authority and his appointment of the Commissioner FICAC is only to be made on the advice of the JSC and the endorsement of the Attorney General.

46. The Prime Minister is not the office or the person who renders advice on the appointment or suspension or termination or the revocation of the appointment of the Commissioner FICAC.

47. The Prime Minister, by tendering this advice, was overreaching and acted ultra vires.

48. Furthermore, based on the radio interview of Commissioner of Inquiry David Ashton-Lewis, the Prime Minister and the President appear to have acted, and both the Prime Minister and the President acted ultra vires.

49. They both acted in breach of the rules of natural justice and s16 of the Constitution.

50. For the avoidance of doubt, s115(2) of the Constitution clearly states that:

> *(2) The Commission shall consist of a Commissioner, Deputy Commissioner and such other officers* ***as may be appointed by law.***

51. The law referred to in s115(2) of the Constitution is the Fiji Independent Commission Against Corruption Act 2007 (No.11 of 2007), which came into effect on 4 April 2007 and Section 5(1) of that Act clearly states that:

> ***5 (1) The Commissioner shall be appointed by the President on the advice of the Judicial Services Commission.***

The Role of the Prime Minister

52. The role of the Prime Minister is set out in Section 92 of the Constitution, which states:

> *Office of the Prime Minister*
> *92.–(1) The Prime Minister is the head of the Government.*
> *(2) The Prime Minister shall keep the President generally informed about the issues relating to the governance of Fiji.*
> *(3) The Prime Minister–*
> *(a) appoints Ministers with such titles, portfolios and responsibilities as the Prime Minister determines from time to time;*
> *(b) dismisses Ministers; and*
> *(c) by notice published in the Gazette, assigns to any Minister or to himself or herself responsibility for the conduct of a specified part of the business of the Government, including responsibility for the general direction and control over a branch or branches of the public service or over a disciplined force and responsibility for the implementation and administration of each Act, provided however that the responsibility for any part of the business of Government that is not specifically assigned shall remain with the Prime Minister.*
> *(4) The Prime Minister shall appoint a Minister to act in the office of the Prime Minister during any period, or during all periods, when the Prime Minister is absent from duty or from Fiji or is, for any other reason, unable to perform the functions of office, and a notification of the appointment of the Acting Prime Minister must be published in the Gazette. 5*

53. The Constitutionally mandated role of the Prime Minister does not extend to the appointment and dismissal of the Commissioner of FICAC. He can only appoint and dismiss Ministers.

54. The Constitutionally mandated role of the Prime Minister does not extend to taking over the jurisdiction of the Judicial Services Commission.

55. To answer the question about the Prime Minister's role in the appointment and dismissal of the Commissioner of FICAC, the answer is, NONE.

56. With greatest respect, it is submitted that the Prime Minister does not have a role in the appointment or dismissal of the Commissioner of FICAC and by doing so, the Prime Minister breached the constitution and the FICAC Act.

Sharma v The President of the Republic of Fiji or the Sharvada Sharma case

57. In *Sharma v The President of the Republic of Fiji* [2024] FJHC 49; HBJ10.2021 (27 January 2024)[2], the applicant, was the Solicitor-General and the First and Second Respondents were the President and the Judicial Services Commission (**"JSC"**) respectively.

58. In the *Sharma* case, after receiving a complaint from the Supervisor of Elections (**"SOE"**), the Second Respondent made a request to the First Respondent to suspend Mr. Sharma and appoint

[2] Sharma v The President of the Republic of Fiji [2024] FJHC 49; HBJ10.2021 (27 January 2024)

a tribunal for inquiry into the complaint of the SOE. Thereafter, Mr. Sharma was removed from his post without the appointment of a tribunal for inquiry. The removal of the Applicant was made by the President on the advice of the JSC. The advice to remove was based on a legal opinion. The independent legal opinion was sought by the Judicial Services Commission ("JSC") who then relied on it to advice the President to remove the Applicant. The removal was communicated by the First Respondent on the purported advice of the Second Respondent through a 'memo'.

59. The Sharma case is eerily similar to the case before the Court except the time between suspension and revocation or termination was four (4) days and without the Commission of Inquiry and trial by media. The Sharma decision was delivered on 27/01/24, a little bit over a year after the Government led by the First Respondent.

60. At paragraphs 37-42, the Court stated:

> 37. *Application for Judicial Review is sought against six decisions that resulted the removal of the Applicant from the position of Solicitor-General of Fiji. The office of the Solicitor-General is guaranteed security of tenure and as well as security of remuneration under the Constitution as same as judicial officers.*
>
> 38. *The office of Solicitor-General is established in section 116 of the Constitution. This contains inter alia responsibilities, term of office, authority, remuneration and removal.*
>
> 39. *The removal of Solicitor General is similar to removal of judicial officer contained in section112 of the Constitution.*
>
> 40. *Said provisions are contained in Chapter 5 of the Constitution which deals with 'Judiciary' in Part B of Chapter 5 under 'Independent Judicial and Legal Institution'. The Constitution had provided independence not only to the judiciary, but also to other specified institutions and the post of Solicitor General is one such independent position.*
>
> 41. *Section 2 of the Constitution deals with the supremacy of the Constitution and all persons holding 'public office' must comply with the obligations under the Constitution.*
>
> 42. *First and second Respondents who derive authority from the Constitution, are obliged to act consistently with the provisions contained in the Constitution regarding the suspension as well as removal of Applicant as Solicitor General. Section 2 of the Constitution states,*
>
> ***"Supremacy of the Constitution***
>
> ***2.-(1) This Constitution is the supreme law of the State.***
>
> ***(2) Subject to the provisions of this Constitution, any law inconsistent with this Constitution is invalid to the extent of the inconsistency.***

(3) This Constitution shall be upheld and respected by all Fijians and the State, including all persons holding public office, and the obligations imposed by this Constitution must be fulfilled.

(4) This Constitution shall be enforced through the courts, to ensure that –

(a) laws and conduct are consistent with this Constitution;

(b) rights and freedoms are protected; and duties under this Constitution are performed.

(5) ..." (emphasis added)

61. Based on Section 2 of the Constitution, which was reaffirmed in the *Sharma* case, the First and Second Respondents, who are public office holders, derive their authority from the Constitution and therefore they must comply with the provisions of the Constitution.

62. In this case, the Second Respondent is the Prime Minister, and the same principle applies as the Prime Minister, derives his authority from the Constitution (s92).

63. At Paragraphs 55-57 the Court discussed the removal provisions of judges:

(7) This section does not apply to the Chief Justice or the President of the Court of Appeal." (emphasis added)

55. Following is deducible from Section 112 of the Constitution as regards to Applicant which is equally applicable to judicial officer and they are:

- *(i) Only First Respondent can remove Applicant, but it is mandatory to follow the procedure in Section 112 of the Constitution in terms of Section 116(10) of the Constitution.*
- *(ii) Frist Respondent 'may' suspend Applicant, upon advice of second Respondent. This is discretionary and decision to suspend is not instinctive.*
- *(iii) Since first Respondent is bound to act on advice of second Respondent regarding suspension from post, the discretion needs to be exercised by second Respondent before advising to suspend.*
- *(iv) Suspension from post can be revoked at any time by first Respondent. This is again on the advice of second Respondent in terms of Section 82 of the Constitution.*
- *(v) ...*

- *(vi) The suspension of the post of Applicant, was contingent on appointment of a tribunal to investigate misbehaviour. First Respondent can remove suspension at any time upon advice by second Respondent.*
- *(vii) Removal of Applicant, by first Respondent on a ground of misbehaviour, is only upon advice of the tribunal appointed in terms of Section 112(3) (a) (i) of the Constitution.*
- *(viii) It is mandatory that the Report of the tribunal is made public in terms of Section 112(6) of the Constitution.*
- *(ix) So the reasoning and finding and recommendation to first Respondent, regarding alleged misbehaviour including process adopted for investigation, are made public through report of the tribunal appointed for transparency and procedural fairness guaranteed under Bill of Rights Chapter in section 16 (1) of the Constitution.*

56. *It is mandatory for first and Second Respondents to follow the provision contained in Section 112 for removal of Applicant. The provisions for removal of a judicial officer is exclusive and also exhaustive. Independence of judicial and other institutions is paramount in the interpretation in Section 112 of the Constitution.*

57. *The transparency is the key to such removal as advice to removal which must only come from the tribunal, or medical board, is made public. The overriding consideration is openness and impartiality so the report of tribunal or medical board, is open to public for scrutiny.*

64. At paragraph 260, the Court stated that:

> 260. *Applicant is not a judicial officer or part of judicial branch of government but part of executive, but the protection for removal similar to 'judicial officer' in terms of Section 112.*

65. In this case, the Judicial Services Commission was removed from the equation by the First Respondent and instead took advice from the Second Respondent, who is not recognised at law, as a person or office that renders advice to the First Respondent in relation to the suspension of the Applicant or the removal of the Applicant.

66. In fact, upon discussion in the *Sharma* case, the advice for removal for misbehaviour can only go from the Tribunal to the First Respondent.

67. The First and Second Respondents acted on the basis of the COI Recommendation and the opinion of Phillip Joseph KC. If the Commissioner of Inquiry found some misbehaviour by the Applicant, then the correct process to follow would have been:

- The Report of Commissioner Ashton-Lewis to have been provided to the JSC;
- The JSC to look at that Report and can recommend that a Tribunal is to be appointed pursuant to s112;
- Allegations of misconduct would be sent to the Applicant and the Applicant would be given an opportunity to respond;
- The JSC could advise the President to appoint a Tribunal and to suspend the Applicant;
- If at the end of the Tribunal hearing, the Applicant was found guilty of misbehaviour, then the Tribunal could advise the President to terminate the appointment.

68. The advice for removal for misbehaviour would only come from the Tribunal to the President; not even the JSC.

69. As per paragraph 59 of the Sharma decision, the Court stated:

> *The advice for removal of Applicant is from the tribunal, which is an ad hoc body prescribed in the Constitution. There is no other body or person who can advise first Respondent regarding removal of Applicant or a judicial officer.*

70. In this case, no allegation of misbehaviour was put to the Applicant, no tribunal was set up to inquire into any misbehaviour and the JSC was left out of the process of the suspension and later, the removal of the Applicant.

71. The First Respondent used *s81(2) and 82* and the exercise of **"executive authority"** to justify the removal of the Applicant.

72. In the Commission of Inquiry on the Courts Report by Commissioner The Honourable Sir David Beattie. GCMG, GCVO, QSO, QC, LLD. 8 August 1994, which is simply referred to as the Beattie Report, Commissioner Beattie, recommended in relation to the removal of judicial officers that the position as stated at s109 of the Constitution continues.

73. The Report of the Fiji Constitution Review Commission[3], commonly known as the Reeves Report, had studied the Beattie Report thoroughly and adopted with some modifications, all the recommendations in the Beattie Report, which affected the 1990 Constitution ,dealing with the courts and the administration of justice.

74. At page 460 of the Reeves Report in relation to the 'Removal of a judge', the Commission stated:

> 13.116 Under section 109 of the Constitution, judges may be removed only by the President, and then only on the recommendation of a specially constituted tribunal. The grounds for removal are inability to perform the functions of the office (whether due to infirmity or some other cause) or misbehaviour. If the President considers that the question of removing a judge from office on such a ground ought to be investigated, he is required to constitute a tribunal consisting of not less than three persons who hold or have held high judicial office in Fiji or some other country. The tribunal is required to inquire into the matter and report its findings to the President. If it recommends removal, the President must remove the judge from office.
>
> 13.117 The Beattie Commission recommended the continuation of this arrangement which it likened to the position in Western Samoa where a judge can be removed by the Head of State only on an address of the Legislative Assembly adopted by two-thirds of its members. In our view the position in Western Samoa is significantly different from that in Fiji. In Western Samoa the decision is in the hands of the legislature. In Fiji. the legislature is not involved. In deciding that the question of removing a judge ought to be investigated, and in appointing the members of a tribunal for that purpose, the President is required to act on the advice of the Cabinet or a Minister. Experience elsewhere has shown that such an arrangement is open to abuse.

75. Interestingly enough, the Reeves Commission raised the issue that in appointing a tribunal to look at the misconduct allegations of a judge, experience has shown that requiring the President to act on the advice of the Cabinet or a Minister is open to abuse.

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[3] P Vakatora, TR and Lal, BV 1996, *The Fiji Islands: Towards a united future,* Report of the Fiji Constitutional Review Commission, Parliament of Fiji, Parliamentary Paper No. 34, Fiji Government Printer, Suva,

76. The Reeves Commission in 1997, about 29 years ago, warned about the possible abuse where, essentially, politicians, give advice to the President on appointment of members of the tribunal that is tasked with investigating allegations of misconduct by a judicial officer.

77. At paragraph 13.118, the Reeves Commission made a further recommendation, that once the President receives the Report from the Tribunal, the Report should be submitted to Parliament and the judicial officer can only be removed when each House adopts a resolution to that effect, with ¾ of its members present and voting.

78. The 1997 Constitution does not have the added requirement that Paragraph 13.118 recommended but in relation to removal, s138(3) states that if the President considers that the question of removing a judge from office ought to be investigated for misbehaviour, then the President appoints a tribunal, consisting of a chairperson and not less than 2 other members, selected by the President from among persons who hold or have held high judicial office in Fiji or in another country prescribed by the Parliament. This meant that the President could choose his tribunal from amongst current or former judges of Fiji and the common law world (my inclusion).

79. With the 2013 Constitution, s112 has been expanded to include the provision that the President makes the appointment of the Tribunal members on the advice of the JSC.

80. Given that Section 112 of the Constitution prescribing the procedure for removal of judges also applies to independent constitutional officers, the Applicant respectfully submits that it is critical that the strict independence of this exclusive constitutional procedure must be upheld. Therefore, it is unconstitutional for the Prime Minister to usurp the role of the Tribunal under section 112, and it is equally unconstitutional for the President to take over the role of the tribunal and himself make a decision to terminate without there being a complaint for misbehaviour.

81. Section 112 was activated in the case of the Director of Public Prosecutions, Christopehr Pryde. The Tribunal, appointed under Section 112 of the Constitution of Fiji, was chaired by Justice Anare Tuilevuka, with Justice Chaitanya Lakshman and Justice Samuela Qica as the other members.

82. According to the 'Report to His Excellency the President from the Investigating Tribunal into the allegations against the suspended Director of Public Prosecutions - Mr. Christopher Pryde', dated 23 December 2024:

- Mr Pryde was suspended on April 13, 2023, by then President Ratu Wiliame Katonivere pursuant to s112(4) of the Constitution.
- The decision to suspend Mr. Pryde was made on the advice of the Judicial Services Commission (JSC) after then Attorney-General and present Acting Attorney General and Justice Minister Siromi Turaga lodged a complaint against him.
- The complaint revolved around a conversation Mr Pryde had with former attorney-general Aiyaz Sayed-Khaiyum on February 28 during a social function hosted by the Japanese Ambassador at his official residence.
- The JSC then wrote to the President, pursuant to Section 112(3) of the Constitution, and recommended the appointment of a tribunal to investigate the allegation and to consider the question of whether or not Mr Pryde ought to be removed from office.
- The tribunal was later convened and sworn in before President Ratu Katonivere on March 5, 2024.
- The Tribunal appointed 2 investigators to assist, a counsel assisting and some secretariat staff to assist.
- The Tribunal noted section 138(5) of the Constitution that the Tribunal is independent and not subject to the directions or control of any person or authority, except as otherwise provided under the Constitution.
- The Tribunal's ADVICE TO THE PRESIDENT was:

  In the Tribunal's unanimous opinion, the two allegations that were made against Mr. Christopher Pryde, were not made out.

  The Tribunal hereby advises His Excellency the President that Mr. Pryde, for the reasons stated above, ought not to be removed.

83. Furthermore, the court is invited to take judicial notice of the fact that the Investigating Tribunal into the allegations against the suspended Director of Public Prosecutions was sitting and operational at the time that the COI was starting up, therefore, the President at least would have known that for independent officers like the DPP, Solicitor General and the Commissioner FICAC, Section 112 of the Constitution kicks in.

84. In relation to the Second Respondent, the Prime Minister, in the Applicant's 2nd Supplementary Affidavit after leave was granted, she deposed:

85. **On 21/07/25, after the Leave Ruling was handed down by the honourable court, the Second Respondent, in an interview given to FijiLive, which was posted at 8.22pm, with the headline: *"Let JSC deal with FICAC issue, says Rabuka,"* the Prime Minister is reported to have said and is recorded as saying:**

"...the best way forward to have handled the suspension which led to the termination of FICAC Commissioner Barbara Malimali was to rescind her appointment and let the Judicial Services Commission make another appointment."

And then:
"it would be a costly exercise and time to suspend Malimali, set up a Tribunal and have the tribunal sit and decide on the matter. The best thing that the State can do is to rescind her appointment and send it back to the JSC."

86. The Prime Minister's comments indicate that he knows and knew the process but decided that it was too costly to go through the process.

87. They decided to subvert the constitutionally mandated process and do a "revocation of appointment".

88. Given the clear breach of and failure to comply with section 112, the Applicant submits that this Court finds that the Applicant was denied natural justice and procedural fairness.

PREROGATIVE POWERS

89. Both Korovavala and Qionibaravi claim that the President has prerogative powers that can be exercised.

90. De Smith's Judicial Review at page 126 explains what prerogative powers are and they are:[4]

> Prerogative powers are residual powers-new ones cannot be created, and they "remain in existence to the extent that Parliament has not expressly or by implication extinguished them." Despite the uncertainly about the definition of prerogative powers it has long been clear that "the King hath no prerogative, but that which the law of the land allows him."

91. Further:

> the existence of a prerogative power is ultimately a question for the determination of the courts, not mere assertion by government.

[4] Woolf, Jowell, Le Suer (Eds.), *De Smith's Judicial Review*, Sixth Edition, Sweet & Maxwell, London, 2007.

92. Taylor in the 4th Edition of *Judicial Review: A New Zealand Perspective*[5] in discussing the distinction between prerogative powers and common law powers says that it is a controversial one with some courts preferring the Diceyan view and others the Blackstonian view, which are:

Dicey defines the prerogative as "every act which the executive government can lawfully do without the authority of an Act of Parliament."

Blackstone said that the prerogative included only "those rights which the King enjoys alone, and not those he enjoys in common with any of his subjects."

93. Taylor states:

> While both definitions are circular and assume that the Crown has the powers of a natural person, they point to a fundamental question of whether the Crown does have such powers. The Crown, as distinct from the monarch, personally is a non-natural entity. It follows that the Crown has only the powers which are given it by statute or are inherent in government as government (the Blackstonian prerogative). Any other powers require explicit allowance to the Crown at common law by judicial decision.

94. Canada has adopted the Diceyan view.

95. Dr Peta Stephenson in her article, 'The Relationship between the Royal Prerogative and Statute in Australia'[6] that the judges have preferred to the Blackstonian view and in her article she used,

> the term 'prerogative' as Blackstone used it – to describe those rights, powers, immunities and privileges that belonged exclusively to the Monarch, that have since been inherited by the Crown in right of the Commonwealth of Australia.

96. Furthermore, Stephenson's article points out that Australian judges has followed and quoted with approval the basic constitutional principle laid down by the House of Lords in *Attorney-General v De Keyser's Royal Hotel Ltd ('De Keyser')* [1920] AC 508 which was:[7]

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[5] Graham Taylor, *Judicial Review: A New Zealand Perspective*, Fourth Edition, Lexis Nexis, Wellington, 2018, Page 42.

[66] Peta Stephenson, 'The Relationship between the Royal Prerogative and Statute in Australia' (2021) 44(3) *Melbourne University Law Review* (advance), page 10.

[7] Ibid 17

That principle is that, when prerogative power of the Executive Government is directly regulated by statute, the Executive can no longer rely on the prerogative power but must act in accordance with the statutory regime laid down by the Parliament.

97. What Stephenson and others are debating about is the displacement principle where there is a conflict between prerogative powers and statute. In her conclusion, she writes:[8]
While it is the duty of the court 'to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have', it is also the role of the court to apply and enforce constitutional limits on executive power.

The courts are not interpreting statutes in the abstract but against a background of constitutional principles. The displacement principle set out in *De Keyser*, and incorporated in Australia, operates to ensure that the prerogative powers of the executive government remain subject to the control of the Parliament. Courts should, where possible adopt an interpretive approach that honours this principle.

98. In *Laisenia Qarase and Ors v Josaia Voreqe Bainimarama and Ors* [2009] FLR 215, one of the issues that the Court had to determine the prerogative powers of the President to dismiss the Prime Minister under the 1997 Constitution. For ease of reference, the relevant provisions of the judgement will be stated below.

99. At page 242, paragraph 124, the Court states:

124. We should perhaps add that the above discussion also deals with the point that there is an absence of any reference to the prerogative. Quite apart from anything else, s.2 of the Fiji Constitution makes clear that any law inconsistent with the Fiji Constitution is invalid to the extent of the inconsistency, and that would include the prerogative if it permitted dismissal of the Prime Minister otherwise than as set out in the Fiji Constitution.

100. At page 243, paragraph 127:

127. However, in relation to the specific subject matter of the power of the President to dismiss the Prime Minister, the Fiji Constitution is quite explicit in providing a narrow basis for the exercise of those powers. In relation to the defence of the realm, s.87 provides that the President is the Commander in Chief of the Military Forces. As to the other points made, in our respectful opinion, this is far too narrow a view. It has

[8] Ibid 40-41

a compact [s 6-7]. It deals with questions of citizenship [s.8-s.20]. It contains a Bill of Rights which binds the legislative, executive and judicial branches of government at all levels, and all persons performing the functions of any public office which includes provisions dealing with protection against compulsory acquisition of property [s.40]. The manner in which the legislative power may be exercised is strictly controlled, including absence of any discretion vested in the President to refuse to assent to a Bill duly presented for his or her assent [s.46(2)]. The Senate has a limitation on its powers with respect to money Bills which has the consequence that a power of dismissal arising because supply was blocked by the upper house would not arise [s.49]. There are the provisions in relation to Executive Government previously referred to including limits to the term of office of the President to 5 years plus a further term of 5 years [s.91]. The President and Vice President may be removed from office [s.93]. It is expressly provided that Governments must have the confidence of the House of Representatives [s.97], not, as Dicey would have it, the confidence of the nation. The prerogative of mercy, a well recognised example of the exercise of prerogative power is also dealt with in the Fiji Constitution [s.115] as is the appointment of Ambassadors [s.149].[84] ***It is clearly provided that the President acts on advice, and that the Fiji Constitution prescribes the circumstances in which the President may act in his or her own judgment [s.96].(emphasis mine).***

101. At page 243, paragraph 128:

128. All of the above is inconsistent in our opinion with the continued existence of the prerogative in the President at least in relation to these subject matters, or with the President retaining reserve powers to dismiss the Prime Minister which are not found expressly in the Fiji Constitution. To the contrary, and as specified in s.2, there is a clear intention expressed to exclude laws inconsistent with the Fiji Constitution. Whilst there may be room for the implication of other powers pursuant to s.85, or possibly s.86, of the Fiji Constitution, that is of no relevance to this inquiry.

102. The statements by the Court, though they related to the 1997 Constitution, would also apply to the 2013 Constitution in that the President does not have prerogative powers nor reserve powers and below is a table with a snapshot of how the President's powers have been watered down over the course of 3 Constitutions.

Power	1990	1997	2013
Appointment of PM	S83(2) The President, acting in his own deliberate judgment, shall appoint as Prime Minister the Fijian member of the House of Representatives	S98 The President, acting in his own judgment, appoints a Prime Minister the member of the House of Representatives who, in the President's	S93(2) (2) After a general election, the member elected to Parliament who is the leader of one political party which has won more than 50% of

	who appears to him best able to command the support of the majority of the members of that House.	opinion, can form a government that has the confidence of the House of Representatives.	the total number of seats in Parliament assumes office as the Prime Minister by taking before the President the oath or affirmation of allegiance and office (which the President must administer) as set out in the Schedule.
Dismissal of PM	(1)If a resolution of no confidence in the Government is passed by the House of Representatives and the Prime Minister does not within three days resign from his office the President shall remove the Prime Minister from office unless, in pursuance of section 80 of this Constitution, Parliament has been or is to be dissolved in consequence of such resolution.	109.-(1) The President may not dismiss a Prime Minister unless the Government fails to get or loses the confidence of the House of Representatives and the Prime Minister does not resign or get a dissolution of the Parliament. (2) If the President dismisses a Prime Minister, the President may, acting in his or her own judgment, appoint a person as a caretaker Prime Minister to advise a dissolution of the Parliament.	94.–(1) The Prime Minister may only be dismissed by a motion of no confidence, which must also propose the name of another member of Parliament to be the Prime Minister.
President acts on advice	Not in the Constitution but **31.Establishment of office of President** There shall be a President and Commander-in-Chief of Fiji who shall be appointed by the Bose Levu Vakaturaga and who	96.-(1) Subject to subsection (2), in the exercise of his or her powers and executive authority, the President acts only on the advice of the Cabinet or a Minister or of some other body or authority prescribed by this Constitution for a	82. In the exercise of his or her powers and executive authority, the President acts only on the advice of Cabinet or a Minister or of some other body or authority prescribed by this Constitution for a particular purpose as the

	shall hold office for a period of five years. **32.The President's Council** (1)There shall be a President's Council to be convened at the invitation of the President to advise him on any matters of national importance. (2)The Council shall be composed of the President as Chairman and such members, being citizens of Fiji, that the President may appoint in his own deliberate judgment.	particular purpose as the body or authority on whose advice the President acts in that case. (2) This Constitution prescribes the circumstances in which the President may act in his or her own judgment	body or authority on whose advice the President acts in that case.
Emergency Powers	S163 (1)If the President is satisfied that a grave emergency exists whereby the security or economic life of Fiji is threatened, he may issue a Proclamation of Emergency.	S187(1) Parliament may make a law conferring power on the President to proclaim a state of emergency	S154 the PM on the advice of COMPOL and Commander RFMF can declare a state of emergency
Appointment of Judges	S103(2) The puisne judges of the High Court shall be appointed by the President acting after consultation with the Judicial and Legal Services Commission.	132(2) The judges of the Supreme Court, the Justices of Appeal (including the President of the Court of Appeal) and the puisne judges of the High Court are appointed by the President on the recommendation of the	106(2) The Judges of the Supreme Court, the Justices of Appeal and the Judges of the High Court are appointed by the President on the recommendation of the Judicial Services Commission following

		Judicial Service Commission following consultation by it with the Minister and the sector standing committee of the House of Representatives responsible for matters relating to the administration of justice.	consultation by it with the Attorney-General.
Removal of judges	S109(2) A judge shall be removed from office by the President in pursuance of the next following subsection. (3)If the President considers that the question of removing a Judge from office for inability as aforesaid or misbehaviour ought to be investigated, then - (a)the President shall appoint a tribunal which shall consist of a chairman and not less than two other members, selected by the President from among persons who hold or have held high judicial office in Fiji or in any other country as may be prescribed by the President; (b)that tribunal shall enquire into the matter and report on the facts thereof to the President and advise the President	S138(3) If the President considers that the question of removing a judge from office ought to be investigated, then: (a) the President appoints: (i) in the case of alleged misbehaviour a tribunal, consisting of a chairperson and not less than 2 other members, selected by the President from among persons who hold or have held high judicial office in Fiji or in another country prescribed by the Parliament; and (ii)...; (b) the tribunal or medical board enquires into the matter and furnishes a written report of the facts to the President and advises the President whether or not the judge should be removed from office; and (c) if the tribunal or medical board advises that the judge	S112(3) If the President, acting on the advice of the Judicial Services Commission, considers that the question of removing a Judge, Magistrate, Master of the High Court, the Chief Registrar or any other judicial officer appointed by the Judicial Services Commission from office ought to be investigated, then– (a) the President, acting on the advice of the Judicial Services Commission, shall appoint– (i) (ii) in the case of alleged misbehaviour– a tribunal, consisting of a chairperson and not less than 2 other members, selected from amongst persons who hold or have held high judicial office in Fiji or in another country; (b) the tribunal or medical board enquires into the matter and furnishes a

	whether that judge should be removed from office, and (c)if the tribunal so advises, the President shall remove the judge from office.	should be removed from office, the President may remove the judge from office	written report of the facts to the President and advises the President of its recommendation whether or not the Judge, Magistrate, Master of the High Court, the Chief Registrar or any other judicial officer appointed by the Judicial Services Commission should be removed from office; and (c) in deciding whether or not to remove a Judge, the President must act on the advice of the tribunal or medical board, as the case may be.

103. Chapter 9 of the Reeves Report deals with 'Institutions of Government', one of which is the Office of the President.

104. At Pages264-266, the Report discusses the President's role and function and that the President's role is ceremonial and symbolic and any residual common law powers of the Crown are exercisable mainly though Minister.

105. For ease of reference, the parts of the Reeves Report that refers to the role and function of the President are quoted below:[9]

The President's role and functions

Head of State

9.3 7 The 1990 Constitution made the minimum changes to the 1970 provisions about the office of Governor-General. The existence of that office implied that the Sovereign was the Head of State. Similarly, the creation of the office of President in 1987 implied that the holder of that office would assume that role. We consider, however, that the Constitution should provide expressly that the President is the Head of State of the Republic of the Fiji Islands.

[9] ch9.pdf

Commander-in-Chief

9.38 Section 31 of the 1990 Constitution describes the office as that of "President and Commander in Chief'. Again, that is a reflection of fact that the 1970 Constitution constituted the office of "Governor-General and Commander in Chief'. The title reflects, iil part, the modern role of the British monarch as nominally the supreme commander of the armed forces and also the fact that ·colonial Governors were usually authorised to exercise some of the prerogative powers of the Crown to organise and dispose of the armed forces in the colony.

9.39 It must be assumed that any residual common law powers of the Crown in this and other fields are to be regarded as part of "the executive authority of Fiji" vested in the President by section 82(1) and exercisable mainly through ministers. Moreover, in countries comparable with Fiji, most if not all aspects of the governance of the armed forces are now comprehensively provided for by statute. That is presumably a matter which will be looked at closely in the current Defence Review.

9.40 In any event, it is clear that, in contrast to the position in the United States of America, the coupling of the office of Commander-in-Chief with that of President does not confer legal powers in relation to the armed forces on the holder of the office. The title of Commander-in-Chief is purely honorary. It is well-understood that it conveys no power of actual command over the military forces. We understand that there is a general desire to continue to designate the President as Commander-in Chief. The Constitution should so provide.

The role of the President under a parliamentary system of government

9.41 The President's role and functions are greatly affected by another of the Commission's early recommendations: that the Fiji Islands should retain the parliamentary system of government. This means that most executive power will continue to rest with the Cabinet. For the most part, the President will be bound to act on the advice of ministers. The holder of the office will not be what is sometimes called an «executive President" who combines the role of Head of State with that of head of the government. In consequence, the President's office closely resembles that of the former Governor-General.

The symbolic value of the office President

9.42 Like many who made submissions, the Commission attaches importance to the symbolic value of the office of President. In a multi-ethnic society like that of Fiji, the office of President should be seen as exemplifying the unity of the nation. The holder of the office should not be involved in party politics and should be able to command the loyalty of the members of all communities. Although the office of President has been in existence only since 1987, such an expectation is already strong. The question is whether the Constitution should refer expressly to the symbolism of the office of President of the Republic.

9.43 There are two examples of such provisions among Pacific constitutions. The Constitution of Vanuatu provides that "the head of the Republic shall be known as the President and shall symbolise the unity of the nation". Similarly, although Tuvalu is a monarchy, its constitution provides that «.,. the office of Head of State is a symbol of the unity and identity of Tuvalu, and the Head of State is entitled to proper respect accordingly".

9.44 The Commission considers that, in view of the proposals made below about eligibility to be President, the Constitution should provide expressly that the office of President symbolises the unity of the Republic, Such a provision will be an important signal not only to the people of the Fiji Islands and the person elected to fill the office, but also to the Government, about the advice it might tender on the way in which the President should carry out the duties of the office.

The President as the personification of the state

9.45 In most countries the Head of State performs formal functions reflecting the fact that this is the highest constitutional office in the land. The President attends all state occasions, receives foreign dignitaries and makes state visits to other countries. He or she signs the credentials of the Republic's ambassadors and receives those of ambassadors accredited to the Fiji Islands, and may also perfonn other formal actions in relation to the conduct of foreign affairs. As the fount of honour, the President confers decorations on citizens who have made a notable contribution to the country.

9.46 In exercising these formal functions, the President acts generally in accordance with the advice of ministers, but within the constraints inherent in the office, is likely to be left considerable latitude, for example in the content of speeches. The exception is the President's speech at the beginning of a new session of Parliament. That document is produced under the direction of the Cabinet to outline the Government's policies and proposals for the coming year.

9.47 The presidential functions arise from the nature of the office of Head of State. They do not need to be provided for specifically in the Constitution, unless it is desired to make provision about how they will be exercised. Other functions will be discussed in later chapters. They include assent to legislation; the appointment of the Prime Minister, other Ministers, judges and other high officers; the summoning, prorogation and dissolution of Parliament and the issue of writs for elections; the exercise of the prerogative of mercy and the power to refer questions as to the effect of the Constitution to the Supreme Court. In exercising most, but not all, of these powers, the President is again required to act in accordance with the advice of ministers, or another constitutional body.

9.48 In Chapter 12, we discuss the matters on which the President acts in his or her "own deliberate judgment". Even then, the President takes account of conventions about the way in which the parliamentary system works in practice. The essence of the President's "reserve" powers is that they are a backstop - there only to ensure that the Prime Minister and other political leaders themselves act constitutionally.

9.49 Under the Constitution, the Prime Minister is required to keep the President informed concerning the general conduct of the government of Fiji, a duty corresponding to that owed to the Sovereign in Britain. The reference to this duty implies that, in his or her confidential discussions with the Prime Minister, the President has the right "to be consulted ... to encourage ... to warn", to quote the well-known words of the 19th century commentator, Walter Bagehot. The President is in a position to exercise considerable influence, rather than power.

9.50 In the Fiji Islands, as in most other countries with a parliamentary system of government, the President's functions are influenced by the way in which the office of Head of State has evolved historically. The role of the President under

the Constitution should continue to parallel closely the former role of the holder of the office of Governor-General. In exercising that role, the President should take account of the express constitutional provision already recommended, that the office of President symbolises the unity of the nation. The nature of the President's role should be reflected in the arrangements for choosing the holder of the office.

106. In relation to paragraph 9.48, under s109 of the 1997 Constitution, the President can only dismiss the Prime Minister unless the Government fails to get or loses the confidence of the House of Representatives and the Prime Minister does not resign or get a dissolution of the Parliament. (2) If the President dismisses a Prime Minister, the President may, acting in his or her own judgment, appoint a person as a caretaker Prime Minister to advise a dissolution of the Parliament.

That is essentially what happened in the year 2000, when Mahendra Chaudhry was taken hostage, so the President appointed Ratu Tevita Momoedonu to be Caretaker Prime Minister and advised on the dissolution of Parliament.

107. By the time the 2013 Constitution was promulgated, the President was taken out of the equation for the dismissal of the Prime Minister because section 94 states:

94.–(1) The Prime Minister may only be dismissed by a motion of no confidence, which must also propose the name of another member of Parliament to be the Prime Minister.

108. At Page 390 of the Reeves Report , paragraph 12.6:[10]

THE EXECUTIVE AUTHORITY OF THE REPUBLIC

12.6 The Cabinet, Ministers acting under the authority of the Cabinet, and, through them, the departments and other government agencies, are the main instruments through which executive authority is exercised. The President is involved only when, under the Constitution or some other law, he or she is required personally to perform some formal act. Even then, the President ordinarily acts on the advice of Cabinet or a Minister.

109. The Reeves Commission recommendations at Pages 392 and 393 are:

RECOMMENDATIONS

369. The Constitution should continue to vest the executive authority of the Republic of the Fiji Islands in the President, and provide for its exercise in accordance with the following rules: (a) The President, the Cabinet, or a Minister authorised by the Cabinet, as well as a department or other government agency acting under the direction and control of a Minister, should be empowered to exercise the executive authority of the Republic.

(b) To the extent that the executive authority of the Republic is exercised by the President, he or she should be required to act only in accordance with the advice of the Cabinet or a Minister, except in those cases

[10] Ibid (n1)

where the President is required by the Constitution to act on the advice of, or after consultation with some other person or body, or in the President's own deliberate judgment.
(c) The Cabinet should be collectively responsible to Parliament for any advice given to the President by the Cabinet or a Minister (except advice given by the Prime Minister about the appointment or responsibilities of Ministers or the dissolution of Parliament) and for all things done by or under the authority of any Minister in the execution of the Minister's office.

370 The Constitution should continue to require the Prime Minister to keep the President informed concerning the general COD duct of the government of the Republic, and to supply such other information about any particular matter relating to the conduct of government as the President may request.

110. The plain and ordinary meaning of all of this is that the President does not have prerogative powers and cannot act in his own deliberate judgement on any matter. He acts on advice.

Does the President have the Executive Authority to ignore the Constitution and revoke the appointment of the Applicant?

111. In discussing this contentious point, one can have recourse to the Australian case of *Jarratt v Commissioner of Police for NSW* [2005] HCA 50[11] which:

> *"... concerned the application of the requirements of natural justice to the removal of Mr Jarratt ("the applicant") from the office of Deputy Commissioner, Field Operations and Development, within the Police Service of New South Wales, and the consequences of a failure to comply with those requirements.*
>
> *The applicant was appointed (in fact, re-appointed) to the office of Deputy Commissioner on 5 February 2000 for a term of five years. He was removed on 12 September 2001, with effect from 14 October 2001. The removal was by the Governor of New South Wales, acting under s 51 of the Police Service Act 1990 (NSW)[1] ("the Act") upon a recommendation of the Commissioner (pursuant to s 51(1)(a)) submitted with the approval of the Minister for Police (pursuant to s 51(1A)). The removal was said in a media release from the Commissioner to be on the ground of "performance", by which was obviously meant non-performance. The applicant complained that he was given no opportunity to be heard on the substance of any criticisms of his performance before a recommendation was made that he be removed. Whatever room there might have been for factual argument about that matter, no such argument was advanced on behalf of the respondents in these proceedings. Rather, their case was simply that the applicant was not entitled to such an opportunity."*

112. Paragraphs 61-63 of the Judgement discussed the Respondents' position and that was that the applicant held the position "at pleasure" and that they were entitled to dismiss at pleasure. Those may not be the words used here but Ground 1 of the Notice of

[11] Jarratt v Commissioner of Police (NSW) [2005] HCA 50 - BarNet Jade - BarNet Jade

Opposition filed, assumes that the President has prerogative powers in relation to the termination of the Commissioner FICAC.

"The respondents' case

61. *As indicated by their Notice of Appeal to the Court of Appeal, the respondents' case at trial was that, because the applicant had held a position "at pleasure", there could be no case for denial of procedural fairness by the Commissioner and no award of damages by reason of the wrongful deprivation of office. Nor did the respondents contend that the acceptance by the applicant of the compensation payment awarded by the Remuneration Tribunal represented his election between remedies or otherwise barred his claim to damages.*

62. *The respondents took their stand at trial on the basis that there had been an entitlement to dismiss at pleasure and they were not to be drawn into questions of justification and damages. Any deficiency in the evidence which now may be seen as adversely affecting the respondents' interests in those matters falls at their feet. In this Court, the respondents do not contend the contrary.*

63. *The Court of Appeal held that (i) the "dismissal at pleasure principle" applied; (ii) it was not displaced by the scheme of the Act and (iii) the peremptory dismissal of the applicant did not involve any invalid or unlawful act. The respondents support and the applicant challenges these holdings. It is convenient now to consider the "dismissal at pleasure principle", and then to return to the terms of the Act."*

113. At paragraphs 79-80, the "at pleasure" principle does not have a place in modern day New South Wales or Australia and one might add, Fiji"

79. *It is unnecessary to express a concluded opinion upon the question of persistence in New South Wales of the "at pleasure principle" in respect of appointments made by the executive government under the power conferred by s 47 of the Constitution Act and otherwise not supported by statute. The powers of appointment and removal of the applicant were created by the Act. Nor is it necessary to determine whether the implied term identified by Griffith CJ continues to have any vitality. This is because the term is expressed, necessarily so, as being controlled by statute.*

80. *It should be added that the use in argument in the appeal of the term "the prerogative" was inapt. Lord Diplock's remark that what is involved with the "prerogative" is "a residue of miscellaneous fields of law in which the executive government retains decision-making powers that are not dependent upon any statutory authority"[80] indicates why. This litigation arises from exercises of statutory powers by the Commissioner and then by the executive government of the State of New South Wales.*

114. At Paragraphs 84-85:

84. *The essential dispute was seen by the Court of Appeal as being whether "the common law dismissal at pleasure principle [was] not qualified by a common law implication of procedural fairness". That, however, posits a false conflict.*

85. *The applicant held, and was dismissed from, a statutory office, not one created under what appears to be the obsolete or at least obsolescent prerogative power recognised by s 47 of the Constitution Act. By necessary implication, the prerogative found in s 47, and which might have been employed*

to create the applicant's position as Deputy Commissioner as one at pleasure, was abrogated or displaced by the Act itself[84]*. Speaking in Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority*[85] *of the principle laid down in Attorney-General v De Keyser's Royal Hotel*[86]*, McHugh J said*[87]*:*

"That principle is that, when a prerogative power of the Executive Government is directly regulated by statute, the Executive can no longer rely on the prerogative power but must act in accordance with the statutory regime laid down by the Parliament."

115. In His Excellency's letter to the Applicant dated 29/05/25 (**"BM5"**), His Excellency states:

Pursuant to s81(2) and 82 of the Republic of Fiji ('Constitution'), and upon receipt of the advice of the Honourable Prime Minister, you are hereby suspended forthwith, with pay as Commissioner of Fiji Independent Commissioner Against Corruption (FICAC), pending investigations by the Fiji Police Force into allegations raised against you in the Final Report of the Commission of Inquiry appointed to inquire into your appointment as FICAC Commissioner.

Upon receipt of this letter, you are required to immediately handover all official property including but not limited to office laptop, mobile telephone and keys in your possession to the Acting Commissioner of FICAC Ms Lavi Rokoika immediately upon receipt of this letter of suspension.

116. At about 5.30pm on Monday, 02/06/25, the Fiji Government Facebook page and there was a post of a Statement from the Prime Minister (**"BM 8"**) stating:

STATEMENT FROM THE PRIME MINISTER HON. SITIVENI RABUKA

RECOMMENDATION OF THE COMMISSION OF INQUIRY (COI) APPOINTED TO INQUIRE INTO THE APPOINTMENT OF THE FICAC COMMISSIONER

His Excellency the President has today informed me that he has reviewed his of 29 May 2025 with regard to the suspension of Ms. Barbara Malimali as Commissioner of the Fiji Independent Commission Against Corruption (FICAC) and the recission of the appointment of Mr. Lisiate Fotofili as the Acting Deputy FICAC Commissioner and his return to his substantive position in the Judiciary and taken further decisions.

After careful consideration, His Excellency has decided to:

rescind Ms. Barbara Malimali's suspension and also revoked her appointment as Commissioner of FICAC. This is to implement the first recommendation in Chapter 8 of the COI Report in accordance with the legal advice from Professor Phillip Joseph KC.

117. The decision of the President as relayed by the Prime Minister on Facebook, states that that the President made the decision after careful consideration. However, later on the evening on Monday, 02/06/25, a letter ("**BM9**") was delivered to the offices of Waqanika Law stating:

Re: REVOCATION OF APPOINTMENT

My letter to you dated 29 May 2025 was sent to you in error and is to be disregarded and replaced with this letter.

Pursuant to s81(2) and 82 of the Republic of Fiji ('Constitution'), and upon receipt of the advice of the Honourable Prime Minister, your appointment as Commissioner of Fiji Independent Commissioner Against Corruption (FICAC), is hereby revoked with immediate effect.

Upon receipt of this letter, you are required to immediately handover all official property including but not limited to office laptop, mobile telephone and keys in your possession to Ms Lavi Rokoika whom I have appointed as the Acting FICAC Commissioner.

118. The decision of the President as relayed by the Prime Minister via the Fiji Government Facebook Page, was done publicly and the reasons for the termination were made known in that Statement. Some parallels can be drawn with what happened to *Deputy Commissioner of Police Jeffrey Thomas Jarratt* and what happened to the Applicant in this case. At Paragraph 8 of the Ruling:

"8.The removal of a Deputy Commissioner of Police is a public event. The applicant was not removed without explanation. The public were told that the applicant's performance was unsatisfactory. This was bound to have an adverse effect on the applicant's reputation. In its nature, it is a charge that a person might wish to answer. Any answer the applicant gave would almost certainly have gone before the Minister, and the Governor, and would probably have become public. The Governor-in-Council would act on the Minister's advice, but, in the circumstances of a case such as the present, it would be wrong to assume that there could be no purpose in giving the office-holder an opportunity to be heard. Furthermore, in Malloch v Aberdeen Corporation[17], Lord Wilberforce pointed out that the rigour of the "at pleasure" rule may make it all the more important, in some circumstances, for a person whose career, or pension rights, may be affected, to have an opportunity to state his or her case. His Lordship went on to say that, while courts will respect the right, for good reasons of public policy, to dismiss without assigned reasons, this should not prevent

them from examining the statutory framework and the context to determine whether there is a right to be heard."

119. Ground 2 of the Notice of Opposition states:

> *2. **The decision to terminate the Applicant's appointment was lawful, proper and made in accordance with the Constitution, relevant statutes and the prerogative powers of the President.***

120. S115(2) of the Constitution and s5(1) of the Constitution are the relevant provisions and being clear in their wording and meaning, the appointment, suspension and termination of the Commissioner of FICAC can only be made by the President on the advice of the JSC.

121. Therefore, at the risk of sounding ridiculously simplistic, the prerogative powers (if any exists) of the President do not apply to the appointment, suspension and termination of the Commissioner of FICAC.

122. The decision to terminate was not lawful as not even the President can terminate, without the advice of the JSC.

<u>The Duty of Candour</u>

123. At this juncture, we must repeat what we said in our leave submissions about the Duty of Candour. The Malimali Reply Affidavit that was filed and sworn on 04/07/25 specifically refers to the duty of candour that is reposed in the Respondents and how they failed to meet that duty.

124. In judicial review proceedings, a defendant public authority has a duty of candour to disclose all relevant evidence that may assist the Court.

125. In *Graham v Police Service Commission* [2011] UKPC 46, Sir John Laws for the Privy Council said at [18], page 6 –

> *"It is well established that a public authority, impleaded as respondent in judicial review proceedings, owes a duty of candour to disclose materials which are reasonably required for the court to arrive at an accurate decision."*

126. In the NZ *case of A(SC 70/2022) v Minister of Internal Affairs* At paragraph 142, page 413, the Respondent accepted that there was a duty of candour and utmost good faith on the Minister, given the *ex parte* nature of the decision. Similarly here, the First Respondent had a duty of candour as the person making the decision and the Second Respondent had a duty of candour given that he had no statutory or constitutional role in relation to the Commissioner of FICAC, to disclose what they based their decision on.

127. In the Qionibaravi and Korovavala Affidavits, they annexed Professor Phillip Joseph KC's 2 opinions, one of which was to give his view of the Counsel Assisting's opinion dated 24/02/25.

128. However, neither Korovavala not Qionibaravi annexed the Letter requesting the first opinion nor the Letter of Ms. Janet Mason dated 24/02/25.

129. The letters of the Pime Minister dated 23/05/25 was also not attached.

130. Respectfully, the Respondents have failed to meet this duty and, with respect, it is submitted that any doubt about the relevant facts must be resolved in favour of the Applicant.

HOW DID THE RESPONDENTS ACT IN BREACH OF THE RULES OF NATURAL JUSTICE?

131. The Commissioner of FICAC's appointment and revocation can only be done on the advice of the JSC and not any other body as referred to in the preceding paragraphs and they are repeated here.

132. As the Applicant can only be removed in the same way as a judicial officer in accordance with the Constitution, the question that has to be asked is: was it done here?

133. The Prime Minister usurped the role of the JSC and rendered advice to the President, and that advice is ultra vires and unconstitutional.

134. Various decisions of the Privy Council on equivalent constitutional provisions relating to removal of judges in other Commonwealth jurisdictions provide a useful guide for us.

135. In *Rees v Crane* [1994] 1 All ER 833, a senior puisne judge of the High Court of Trinidad and Tobago brought judicial review procedures to challenge his suspension and referral to the President for the question of his removal to be investigated as being in breach of the equivalent provision of the Trinidad and Tobago to our section 112, and in breach of natural justice. The case went all the way to the Privy Council, which held that the equivalent of JSC in Trinidad and Tobago denied the judge an opportunity to be heard and did not act fairly.

136. Though not on the same issue, in the NZ *case of A(SC 70/2022) v Minister of Internal Affairs* [2024] 1 NZLR 372, the Appellant in that case, was a New Zealand Citizen, and who was previously detained by the Turkish authorities on the suspicion of travelling to Syria to join ISIL. She eventually returned to NZ and when she made new travel arrangements, the acting Minister of Internal Affairs suspended her passport for 10 days. During that time, the NZ Security Intelligence Service (NZSIS) produced a briefing paper advising the Minister of Internal Affairs that the appellant intended to travel for the purpose of engaging in or facilitating a terrorist act. It detailed her previous attempt to travel to Syria and her intention to live under ISIL and marry an ISIL fighter. She had been translating and transmitting what the NZIS thought to be ISIL propaganda. The fear was that if she travelled to ISIL-controlled territory, she would provide practical support and technical knowledge to ISIL.

The Minister was advised that cancelling her passport, which would prevent her from travelling there, would prevent or effectively impede her ability to facilitate terrorist acts. The Minister cancelled her passport for 12 months.

137. The Appellant challenged the cancellation of her passport on 3 grounds and for our purpose, the one of interest is:

> "... (c) Was the Minister's process unfair or unreasonable?
>
> At paragraph 21, Page 385, the Court refers to the Minister's Affidavit:
>
> *[21] On 30 August 2017, the Minister swore at affidavit for these proceedings, describing his decision-making process (the Minister's affidavit). The Minister deposed that, during the briefing, he read the briefing paper while the NZIS personnel talking him through, and highlighted relevant information from the References. He deposed that the process just noted was the usual procedure in cases involving classified information. He said he was well versed in the importance of the decision and the matters of which he had to be satisfied.*

138. In contrast with this case, neither Qionibaravi nor Korovavala explain the decision making process of the First Respondent and the Second Respondent.

What was the alleged misconduct on the part of the applicant?

139. In the *Sharma case* the alleged misconduct had happened in the conduct of relating representing SOE in a court case. The allegation had come nearly after one month from judgment of that case after the court held against SOE.

140. In this case, no allegation had been made known to the Applicant prior to the suspension and then revocation of appointment.

141. Qionibaravi refers to the opinion of Philip Jospeph KC and the recommendations of the COI as the basis for the revocation of appointment but neither document were provided to the Applicant before the decision to suspend and then to revoke her appointment.

142. It is submitted that by relying on the opinion of Phlip Joseph KC and the recommendations of the COI rather than what is stated in the Constitution makes the President's actions unlawful, unconstitutional and ultra vires.

143. The 2 opinions referred in Paragraph 7 of her Affidavit and which were Annexure **'VQ4'** were:

- Opinion prepared on the instruction of Commission of Inquiry into the appointment of the Commissioner of the Fiji Independent Commission Against Corruption. This opinion is dated 14 February 2025.
- Review and Feedback on Letter of Counsel Assisting the Commission of Inquiry into the Appointment of the Commissioner of the Fiji Independent Commission Against Corruption, dated 24 February 2025. This opinion is dated 25 February 2025.

144. The 2nd "opinion" which was a review of Ms. Mason's letter to the First and Second Respondents states at Paragraph 3:

> 3. **I advise that the view expressed to the COI on 19 February 2025 by the President's Official Secretary, Ms. Vukidonu Qionibaravi, was insupportable at law. Ms. Qionibaravi opined that s82 of the Constitution authorised the Judicial Services Commission (JSC) to advise HE on matters relating the FICAC Commissioner's suspension.**
> 4. **I endorse the view set out in the Letter that HE cannot act on any recommendation of the JSC in relation to FICAC appointments, suspension, o dismissals.**

145. Unfortunately, Ms. Mason's letter to the First and Second Respondents dated 24 February were not disclosed to us, before or during these proceedings.

146. We can only assume that based on Paragraph 3 of Philip Joseph KC's Review and Feedback that Ms. Qionibaravi told the COI that the President only acts on the advice of the JSC when it relates to the Commissioner FICAC.

147. At Paragraphs 24 and 25 of her Affidavit, Ms. Qionibaravi merely says that the President acted on the "opinions" of Philip Jospeh KC but is silent in her affidavit about how his view of s82 is different from her view, as the Official Secretary to the President.

148. Ms. Qionibaravi's silence in her affidavit about the differing opinion with that of the KC Philip Joesph, indicates that this is a matter that should have been ventilated a bit more or gone for another opinion and definitely given to the Applicant for her views.

149. It is submitted that it is concerning when a body such as the COI, which is investigative in nature, disagrees with the opinion or the view of a senior civil servant who was called to give evidence and seeks to engage at the Fijian taxpayers' expense a "Review and Feedback" of the Counsel Assisting's letter to the President and PM, by a KC.

150. It is submitted that as the COI is an investigative body, not a court, if they disagreed with the view expressed by the Official Secretary, then they should have just placed it in their report and made recommendations.

151. At Paragraph 6 of Philip Joseph KC's Review and Feedback he states that parts of sections 5(1), (2), 6(1)(2) and 7(1)(2) of the FICAC Act 2007 were enacted in contravention of the 2013 Constitution and he advised that those sections could be validly severed without altering the pith and substance of those sections.

152. To that extent, we agree that sections of a statute can be severed without altering the substance of those sections because that is what the Supreme Court did in the recent Reference. It is noted that this Review and Feedback was done on 25 February, about 6 months before the Supreme Court's opinion.

153. Where we disagree with the Philip Joseph KC's Review and Feedback and where he advises them in effect to act illegally was at Paragraph 7, where he agrees with Mason that:

> **7.I endorse the steps recommended in the Letter to resolved the current impasse. These steps are to have the PM advise the HE to suspend the FICAC Commissioner forthwith, revoke the interim appointment of Mr. Fotofili as Acting Deputy Commissioner, and appoint Ms. Laite Bokini-Ratu as Interim Acting Deputy Commissioner. It is also recommended that the PM take immediate steps to amend the FICACA, in the manner specified.**

154. These "opinions" provided to the COI were dated 14 and 25 February respectively.

155. The First Respondent did not act on these "opinions" until about 3 months later and during that time, it did not give the Applicant an opportunity to read and respond to those 2 "opinions" or to Ms. Mason's letter containing recommendations on the FICAC Act and the suspension of the Applicant. The Applicant throughout that time, only received information via what Ms. Mason said to the media and the Applicant regularly wrote to the First Respondent's Office to make enquiries.

156. It is submitted that there was no 'urgency' or 'necessity' to deny the Applicant her right to respond before suspension from her post and then the revocation of her appointment a few days later, especially as she had been performing the functions of the Commissioner of FICAC since 5th September 2024 (a period of almost 9 months).

157. Furthermore, the First Respondent did not adduce evidence to support 'urgency' or 'necessity' to suspend or terminate (revoke) the Applicant's appointment.

158. Ms. Qionibaravi, did not provide any evidence to explain why the First Respondent did not provide the Applicant with the COI Report nor with the Opinion of Philips Joesph KC, especially as the First Respondent had first received a copy of the COI Report on the 1st of May.

159. However, Ms. Qionibaravi did say at Paragraph 19 of he Affidavit that the First Respondent **'was not obliged to provide a copy of the COI Report to the Applicant before revoking her appointment.'**

160. Ms. Qionibaravi provided a Redacted copy of the COI Report as VQ10. Even the Court has not been provided with the full COI Report.

161. The First Respondent waited for about a month to act on the report and did so without giving the Applicant an opportunity to respond.

162. Furthermore, there is a process where misconduct is alleged and that process is provided for in s112 of the Constitution.

Illegality

163. Korovavala in his Affidavit from Paragraphs 7 – 11 refers to the COI's findings about the Applicant in a case in Tuvalu and at Paragraphs 12-13 refers to the Applicant's Practicing Certificate Applications in Fiji and whether the Tuvalu incident had been and at Paragraphs 14-15 whether the Tuvalu incident had been disclosed to the JSC.

164. If those were the basis for the Applicant's "unfitness" for the role of the Commissioner of FICAC, then those allegations should have been put to the Applicant to respond to. This has only been made known to the Applicant during these proceedings through the Affiadvits of Korovavala and Qionibaravi.

165. Korovavala deals with the Suspension and Revocation and Paragraphs 16 – 23 of his Affidavit and at Paragraph 16, he states that to support the process of suspension and revocation on the advice of the PM, they relied on 2 legal opinions. The Legal Opinions annexed as LK5 are:

- Opinion prepared on the instruction of Commission of Inquiry into the appointment of the Commissioner of the Fiji Independent Commission Against Corruption. This opinion is dated 14 February 2025.
- Review and Feedback on Letter of Counsel Assisting the Commission of Inquiry into the Appointment of the Commissioner of the Fiji Independent Commission Against Corruption, dated 24 February 2025. This opinion is dated 25 February 2025.

166. Both opinions were sought by the COI and presumably addressed to the COI although the letters or emails that attached the "opinions" were not provided by either Ms. Qionibaravi or Dr. Korovavala.

167. At Paragraph 21 of his Affidavit, Dr. Korovavala stated that:

> **21. The HPM, having further considered the findings and recommendations contained the COI Report, and in order to safeguard the integrity of FICAC as well as to preserve and maintain public confidence in the Constitutional Office, acted upon he Legal Opinions provided to him and on 2 June advised HEP that the appointment of the applicant be revoked with immediate effect.**

168. It is submitted that the reasons for the Second Respondent's recommendation for Revocation **"in order to safeguard the integrity of FICAC as well as to preserve and maintain public confidence in the Constitutional Office"** are not contained in the letter dated 02/06/25 from the Prime Minister to the President.

169. **Furthermore, an important omission in the rendering of advice for revocation lies in the fact that the Prime Minister in his letter to the President did not state which section of the Constitution nor any other law that he was acting under.**

170. In relation to the appointment, suspension, dismissal of the Commissioner of FICAC, neither the Constitution nor any other written law mentions the Prime Minister. The FICAC Act 2007 deals with the appointment of the Commissioner and that Act does not mention the Prime Minister having any role in the appointment, suspension or dismissal of the Commissioner. As the Reeves Report pointed out in relation to judges, worldwide experience has shown that the involvement of politicians in the process, presents its own set of problems.

171. Furthermore, Dr. Korovavala refers to the FICAC Commissioner's Office as a Constitutional Office thus the process for suspension and removal can only be done in accordance with the constitution; not in contravention of the constitution, as happened here.

172. In relation to Paragraph 27 of Dr. Korovavala's Affidavit, whilst he concedes that he met with the Chief Justice, the Chief Justice's letter dated 18/02/25 to the Official Secretary to the President states at Paragraph 1:

This morning I met the Permanent Secretary of the Hon. Prime Minister's Office regarding suggested advice on the suspension of FICAC Commissioner Ms B. Malimali during the remaining proceedings of the Commission of Inquiry.

173. The Chief Justice then stated how he had met with the applicant and she agreed to step down voluntarily and he highlighted the possible negative ramifications of government if the procedures set out in the 2013 of the Constitution are not followed.

174. From this letter, it is obvious that Dr. Korovavala met with the Chief Justice to discuss the suspension of the Applicant. If that is not "attempting to influence", then we submit that Dr. Korovavala's definition is very fluid.

175. As a matter of interest, at the time that Dr. Korovavala met with the Chief Justice on 18/02/25, the original Terms of Reference of the COI had expired on 31/01/25. Ms. Qionibaravi gave evidence before the COI on 19/02/25. The extension of time in which to write the Report was Gazetted on 21/02/25. The oral hearing of the COI continued without there being an extensions for the oral hearing.

176. The combined actions of the First and Second Respondents were illegal.

Local cases where due process was allegedly not followed by the decision maker

177. There has been no case similar to this case in Fiji and so case law is scarce so they only thing we can do is resort to looking at judicial review cases where the Permanent Secretary or the PSC has made decisions. Two such cases are *Shankaran v Permanent Secretary for the Ministry of Education, Heritage and Arts*, [2022] FJHC 622; ERCC 2 of 2020 (4 October 2022),and *Alvin Raju and Nazmeen Raju v The Permanent Secretary for the Ministry of Education, Heritage and Arts*, ERCC 06 OF 2021 (25 March 2025).

178. In *Shankaran v Permanent Secretary for the Ministry of Education, Heritage and Arts*, [2022] FJHC 622; ERCC 2 of 2020 (4 October 2022), which was referred to by Tuilevuka J in *Alvin Raju and Nazmeen Raju v The Permanent Secretary for the Ministry of Education, Heritage and Arts*, ERCC 06 OF 2021 (25 March 2025), where his lordship said:
Wati J held that the Ministry's decision actually penalized the teacher in question, which penalties were imposed without following due process, and denied her an equal employment opportunity. She then declared the Ministry's decision null and void.

179. In the *Shankaran case*, the applicant was a teacher by profession and in 2019, whilst holding the position of Acting Vice Principal of Bucalevu Secondary School, she was tasked by the Principal to investigate complaints made against a teacher. She investigated and furnished the Principal with a Report. On 10 November 2019, the teacher who was investigated lodged a complaint with the Ministry (MEHA) about the applicant. A response was sought from the applicant and she responded. The former PS MEHA was satisfied that the allegation against the plaintiff was well founded and therefore amounted to a breach of confidentiality under the employment contract, the Civil Service Code of Conduct under the Civil Service Act 1999, and the Ministry's Social Media Policy 2019. The PS was satisfied of the allegation against the plaintiff which is grounds for summary dismissal, however the former PS exercised her discretion to only issue a final warning letter and restraint her from holding an acting position in 2020. The plaintiff only acted as the Vice Principal and not a Principal and an acting appointment does not guarantee substantive appointment to that position. The plaintiff's appointment for AVP had expired on 22 November 2019. She was given a final warning letter and was informed that she would not be considered for any acting role in 2020.

180. Wati J in *Shankaran* at Paragraphs 31-33 made the following findings:

> 31. *In this case, the defendant arrived at a finding that the plaintiff was guilty and instead of summarily dismissing the plaintiff it considered it proper to issue a final warning letter. Did the defendant then have to obtain the agreement of the Minister? I find the answer in the affirmative. If the final warning letter was a substitute to summary dismissal, then again the agreement of the Minister was essential. The defendant had found the plaintiff guilty for which she could have been summarily dismissed. The Minister had to be in agreement with the findings of the defendant and agree to issuing a final warning letter instead. There is no provision in the law which allows MEHA to make and implement any decision without having the agreement of the Minister.*

32. *Let me now examine whether the final warning letter amounts to a discipline penalty. The contents of the warning letter clearly indicates that the PS MEHA found the plaintiff guilty of the allegations and considered it prudent to warn her not to repeat such conduct in future. I find that the final warning letter is equivalent to reprimanding the plaintiff for her conduct and warning her from repeating any such behavior. Reprimand is one of the discipline penalties outlined in the Civil Service (General) Regulations 1999. I find that MEHA could not have imposed the final warning letter without the disciplinary action procedure outlined in Reg. 22 of the* ***Civil Service (General) Regulations 1999.***

33. *It is not disputed that MEHA does not have the powers to discipline staff. If it wishes to discipline any staff, it has to have the agreement of the Minister responsible for MEHA to institute the disciplinary action. The PSDT will then hear the charges against the worker and arrive at a suitable penalty and direct the PS to implement the same as per Reg. 22 of the* ***Civil Service (General) Regulations 1999***

181. Then at Paragraph 55:

55. *In the final analysis I find that MEHA had acted contrary to its powers in issuing the final warning letter against the plaintiff and restraining the plaintiff from an acting role in the year 2020. Such acts amounts to a penalty which can only be imposed on the plaintiff by PS MEHA if the Minister responsible for MEHA agrees or by the PS MEHA upon directions issued by the PSDT pursuant to a disciplinary action heard and determined upon the agreement of the Minister.*

182. In the *Alvin Raju and Nazmeen Raju case*, the plaintiffs had made a complaint against the principal. An investigation panel was appointed and they went to the school to 'investigate the plaintiffs' complaint against the principal, the principal was interviewed and made some disparaging allegations against the defendants, the panel believed the principal, and recommended action against the defendants, the defendants were not given a chance to refute the allegations by the Principal".[12]

183. Although Tuilevuka J found that the Employment Relations Court had no jurisdiction to consider the application before it, his lordship made some observations in the *Alvin Raju and Nazmeen Raju case* which are relevant to this case.

30.Based on all the above cases, I express the following views:
(i)

...

(v) while, generally, a Government Ministry's Permanent Secretary has a discretion to make or revoke an acting appointment, the revocation of an acting appointment, may, if taken purportedly as a disciplinary sanction without due process, amount to a denial of a career development opportunity in an exceptional case.

[12] Above n. at paragraph 20.

184. Wati J and Tuilevuka J's judgements indicate that the Courts will uphold an application where due process has not been followed, even in acting appointments.

185. In both cases referred to above, they involved final determinations by the PS of MEHA without going through the disciplinary process.

186. In this case, the Commissioner of Inquiry's Recommendation and the Opinions of Phillips Joseph KC were acted on by both the Prime Minister and the President without first providing the Applicant with the Report and the Opinion and giving her the opportunity to respond to it.

187. Further, both the President and the Prime Minister in their deliberate judgement chose to not adhere to Section 5 of the FICAC Act.

188. At the risk of being repetitive, the First Respondent (the President) should have referred the allegations contained in the COI Report to the JSC, who would have had to consider it and if needed, to recommend to the President to set up a Disciplinary Tribunal to look into the allegations raised in the COI Report.

189. It is submitted that the applicant was denied due process.

REGIONAL CASES

190. In a case that is a little similar to this case from the National Court of Papua New Guinea is the case of *Lupari v Somare* [2008] PGNC 121; N3476 (22 September 2008)[13]

191. The facts of Lupari are:

> On 12th April 2007, the National Executive Council (NEC) of the Independent State of Papua New Guinea appointed Lupari to the position of Chief Secretary for a period of four years. On 20th July 2007 he executed a Contract of Employment with the State, effective from 12th April 2007. On 28th April 2008, NEC revoked his appointment. The procedure adopted in effecting the revocation, is set out below:-
>
> *(a) On 24th April 2008, at its meeting held at Madang, NEC considered a Statutory Business Paper No. 33/08. Amongst other related decisions made at this meeting, NEC decided to revoke the plaintiff's appointment.*
>
> *(b) On 24th April, 2008, the First Defendant advised the Head of State, in writing, of the decision.*

[13] Lupari v Somare [2008] PGNC 121; N3476 (22 September 2008)

(c) On 28th April 2008, the Head of State issued an instrument of revocation which was published in the National Gazette on the same day.

When Mr. Lupari took the case to court, then the reasons for the revocation of his appointment was made known via the Affidavits of the Prime Minister, Sir Michael Somare and the Secretary to the NEC, Ms Winnie Kiap.

192. The grounds for Judicial Review in the Lupari case were similar to this one.

193. The first ground was denial of natural justice in that the revocation was done under an incorrect provision of the Constitution and other relevant legislation and in the alternative, if it was done under the correct provision, '*then the exercise of the respective powers were unlawful and in breach of the procedures*'.

194. The Judgement states in relation to this ground that:

(vi) Section 19 of the Prime Minister & NEC Act establishes the Office of the Chief Secretary. It does not deal with the revocation of the Chief Secretary. In so far as the Head of State purports to exercise purported powers pursuant to an aggregate or net effect of those provisions, the decisions of the Head of State in revoking the appointment of the Plaintiff is null and void and of no effect.

*2.2 [If assuming] **Revocation of Appointment** was done under correct provisions of the Constitution and the Public Services (Management) Act and its Regulation and Contract of Employment.*

If assuming that the NEC and the Head of State meant to exercise their respective powers to recommend and revoke the Plaintiff's appointment under the correct law, viz, Section 193(1C) of the Constitution and Section 31C of the Public Services (Management) Act 1995, then the exercise of the respective powers were unlawful and in breach of the procedures set out therein for the following reasons:-

(i) Section 193(1C) of the Constitution provides that the Head of State shall revoke the appointment of a Departmental Head "...acting with, and in accordance with, the advice of the National Executive Council given in accordance with a recommendation by the Public Service Commission following procedures prescribed by or under an Act of Parliament."

(iii) In this case, the revocation was not initiated under Section 193(1C) of the Constitution nor Section 31C of the Public Services (Management) Act 1995 for the following reasons:-

*(aa) There was no "**recommendation**" by the Public Service Commission (PSC) to the NEC for the revocation of the Plaintiff's appointment as Chief Secretary to government; and*

*(ab) The procedures under Section 31C of the Public Services (Management) Act, in order to enable a valid and lawful "**recommendation**" by the PSC, were not complied with in full or at all.*

195. The Public Services (Management) Act 1995 of Papua New Guinea provides a procedure for revocation of appointment for Heads of Departments and sets out the steps to be undertaken. The steps to be undertaken indicate that once a request for a revocation of appointment is made by the NEC to the PSC, the PSC sends it to the their HR to investigate the allegations. The HR Head has to provide a report to the PSC within 30 days. The PSC considers the report and if one of its recommendations is revocation, the National Executive Council shall advise the Head of State to revoke the appointment.

196. That process is very similar to the one undertaken for judicial offices under s112 in Fiji.

197. Injia DCJ in Lupari found:

> *45. In the present case, the provisions of the contract of employment must be read subject to s 31 C of PSM Act and s 193 1C of the Constitution. These provisions are expressed in mandatory terms. They impose a constitutional duty and statutory duty on NEC to consult and obtain the PSC recommendations on matters of appointment and* ***revocation of appointment*** *of a person to the office of Chief Secretary or Secretary of a Department and this process must precede any decision by NEC to advice the Head of State. In this case, it is clear that that process was not followed in revoking the plaintiff's appointment. I find that the revocation of his appointment was in breach of the provisions referred to.*

198. Similarly, the constitutional and statutory duty on the President to obtain the JSC's recommendations on matters of appointment or revocation of appointment of the Commissioner of FICAC are mandatory.

NO ALLEGATIONS MADE AGAINST THE APPLICANT FOR HER TO RESPOND TO

199. The Applicant submits that the President acted on the advice of the Prime Minister who as is evident from the Transcript marked as **"BMM1"** was acting on the advice of Supreme Court Judge David Edward Ashton-Lewis, who had been appointed as the Commissioner of Inquiry.

200. It is evident from the interview (see transcript), which has been widely circulated in Fiji that, the Commissioner of Inquiry Ashton-Lewis, advised the Prime Minister to act on his (Ashton-Lewis) recommendations before circulating the Commission of Inquiry Report. He stated in his interview that:

> *In addition, during the interview, Commissioner Lewis made the following statements: "Now I found there were nine people who had done things such as lied under oath. That's called perjury. I found that nine of them obstructed the course of justice and that they also perverted the course of justice in the appointment of this particular woman... The rest of the evidence shows she was so important because she would do evil people's designs..." "Now I don't know how they're going to do it, because lawyers listening to this, if Judge Clive Wall is listening, you can't injunct the state. You can't injunct the head of state.*

So to try to – and this is only going to be released on the order of the President, yes, and he will act on the advice of the Prime Minister. And so you can't injunct the President in Fiji. It's just impossible. So I don't know what they're going to try and do. And interestingly enough, if you went to those people... ***So what the Prime Minister on my advice has been – act on the recommendations, then release it. Yes, because you've cut the ground from under them – it's already gone out into the public of those people, those nine, what has happened to them? And then, then release it."*** *(emphasis mine).*

201. The Letter of Suspension that was delivered to the Applicant on 29/05/25 (and later withdrawn) stated that the reason for the suspension was:

> *"... you are hereby suspended forthwith, with pay as Commissioner of Fiji Independent Commissioner Against Corruption (FICAC), pending investigations by the Fiji Police Force into allegations raised against you in the Final Report of the Commission of Inquiry appointed to inquire into your appointment as FICAC Commissioner."*

202. Furthermore, it is clear from the Letter dated 29/05/25 and the radio interview of David Ashton-Lewis of the same date that the President was acting on the recommendations which are in the COI Report, which was made available to the public via an announcement on the Government's Facebook page by the Prime Minister on the 1st of July 2025. The Court is referred to Paragraphs 26 and 33 of the Malimali Reply Affidavit that was sworn and filed on 04/07/25

203. The Applicant was denied the right to natural justice and the right to be heard on whatever allegations that were apparently raised against her.

204. The Applicant cannot argue or defend against something that she is not privy to. It would be like arguing with the wind.

205. It is submitted that the Applicant also relies on the uncontested Malimali Supplementary Affidavit that was sworn and filed on 10/06/25 as proof of the facts relied on.

BIAS/PRE-DETERMINATION

206. It is submitted that there was bias on the part of the Second Respondent and that he recommended the appointment of an old friend and associate to be the sole Commissioner of Inquiry.

207. In her 2nd Supplementary Affidavit, the Applicant deposed:

> As Ashton-Lewis said in his dreadful interview on the community radio station on 29/05/25:

Now I found there were nine people who had done things such as lied under oath. That's called perjury. I found that nine of them obstructed the course of justice and that they also perverted the course of justice in the appointment of this particular woman... The rest of the evidence shows she was so important because she would do evil people's designs..."

*"Now I don't know how they're going to do it, because lawyers listening to this, if Judge Clive Wall is listening, you can't injunct the state. You can't injunct the head of state. So to try to – and this is only going to be released on the order of the President, yes, and he will act on the advice of the Prime Minister. And so you can't injunct the President in Fiji. It's just impossible. So I don't know what they're going to try and do. And interestingly enough, if you went to those people... **So what the Prime Minister on my advice has been – act on the recommendations, then release it. Yes, because you've cut the ground from under them – it's already gone out into the public of those people, those nine, what has happened to them? And then, then release it." (emphasis mine)***

208. In her 2nd Supplementary Affidavit, the Applicant deposed that:

41.Since the filing of my first and second affidavits, Commissioner Ashton-Lewis has continued to speak on The Judge - 4CRB. During the interview on 19/06/25, Commissioner Ashton-Lewis had the following to say:

At 01:11 in relation to the leak of the report says that he is aware of leak and is in 2 minds about it. In one way he is happy because the public has a right to know

At 03:31 he encouraged everyone to read the Report

At 04:52 he says in relation to the leak, "well, whilst it's sad, it's probably sped up the process, that the public have a right to know."

At 04:56
"I'm sad because the people who appeared in the Commission of Inquiry Report were entitled to a full copy of the report on the day that it was handed in to both the President and the Prime Minister. Now that hasn't happened and I'm sad over that. But if they are reading the Press, they now have access to the full report and I hope eventually that they will get hard copies of the full report."

*42.This follows from his earlier interview marked **"BMM 1"**. In his interview, Commissioner Ashton-Lewis said:*

"... Trumped up charges would be laid and trumped up decisions would be made. Now, when Sitiveni Rabuka came back into office two years ago, the pressure on him was clean up this body. Its shortened name is FICAC, Fiji Independent Commission Against Corruption. Would you please clean it up and make it do its job properly?
Well a woman was appointed to it, who was universally seen as corrupt and she was universally seen as someone who would protect high ranking people and any complaints made against them would be closed or decided quickly, not on full evidence, and they would be found to have nothing to answer to.

So the pressure on the prime minister over the last two years was, could you please investigate this commission, and this woman, she is unsuitable for the job. She is unqualified for the job by dint of her background, and no one trusts her. Well, no one other than those who wanted her to get in."

209. In an interview on19/06/25, marked **"BMM 1"** Commissioner of Inquiry Ashton-Lewis said:

"... Trumped up charges would be laid and trumped up decisions would be made. Now, when Sitiveni Rabuka came back into office two years ago, the pressure on him was clean up this body. Its shortened name is FICAC, Fiji Independent Commission Against Corruption. Would you please clean it up and make it do its job properly?

Well a woman was appointed to it, who was universally seen as corrupt and she was universally seen as someone who would protect high ranking people and any complaints made against them would be closed or decided quickly, not on full evidence, and they would be found to have nothing to answer to.

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210. In an interview given to the Fiji Sun newspaper, the Commissioner of Inquiry, Ashton-Lewis, told them that in October 2024, the Second Respondent, the Prime Minister, called him and asked him if he would be interested in being the Commissioner of Inquiry.

211. The recorded interviews of Commissioner of Inquiry Ashton-Lewis on 4GB Radio and his interview with the Fiji Sun Newspaper indicate that:

- At the very least, he was on friendly terms with the Prime Minister;
- That the Prime Minister had Ashton- Lewis' phone number and called him and asked him to be the COI;
- That the Prime Minister disagreed with the JSC's recommended appointee as the Commissioner of FICAC;
- That he was asked to look for "crocodiles in the pond", presumably the political pond;
- That Ashton-Lewis advised the Prime Minister to act first on his recommendations before releasing the report.

212. All these points are evidence that there was Bias on the part of the Second Respondent against the Applicant and used the Commission of Inquiry Process and the Commissioner to carry out his purpose. There was malafides on the part of the Second Respondent.

213. Although it may not be the strongest ground for judicial review, it is submitted that with the other grounds, it makes a strong case for a successful judicial review.

The Blue Pencil Principal

214. Our reading of Philip Joseph KC's opinion is that in his view sections 5-7 of the FICAC Act were inconsistent with Section 81(2) of the Constitution and should be struck down.

215. Respectfully, the learned Professor, KC and author did not advise the COI that in order for a section of any stature including the Constitution, to be struck down, it needs to be taken to court and only a court can make that kind of declaration.

216. The Blue Pencil principle, which originates from English common law, is a legal principle that allows courts to modify or remove unreasonable clauses from contracts while preserving the valid terms. This principle was propounded by the House of Lords in *Nordenfelt vs. Maxim Nordenfelt Guns and Ammunition Co Ltd*, [1894] AC 535 where the question turned upon a restraint of trade clause in an 1888 covenant made between the appellant and the respondent company that for a period of 25 years the appellant would carry on any business except on behalf of the company in the trade or business of manufacture of guns, gun mountings or carriages, gunpowder explosives or ammunition or in any business competing or liable to compete in any way with the respondent. The prohibition was not confined to English or British soil but 'to every part of the surface of the globe available for the purpose of carrying on the process of manufacture." The appellant later entered into agreement with other manufacturers of guns and ammunition. The respondent company brought an action against the appellant to enforce the covenant by injunction.[14]

217. The appellant, Nordenfelt prior to March 1886 had obtained patents for improvements in quick-firing guns and carried on amongst other things, the business of manufacturing of such guns and ammunition. In March 1886, Nordenfeldt registered a limited liability company, which was to take over his business so on 5th March 1886, the appellant Nordenfeldt entered into an agreement with the Nordenfeldt Guns and Ammunition Company to purchase all the goodwill of the appellant's business along with stock, plants, patents and for the appellant to act as managing director for 5 years. The sale was completed and the appellant was paid in cash and paid-up shares. In July 1888, negotiations were entered into for the amalgamation of the Nordenfeldt Company and the Maxim Gun Company and for the transfer of their business and assets into the new company, to be called the Maxim-Nordenfledt Guns and Ammunition Company. On 3rd July the Nordenfeldt company agreed to procure the appellant to enter into the agreement which was embodied in the 12 September 1888 agreement. The appellant signed the 3rd July agreement as the MD of Nordenfeldt Company. The respondent, Maxim-Nordenfledt Guns and Ammunition Company was incorporated on 17th July 1888 and on 8th August 1888, the agreement dated 3rd July 1888 was adopted by the company. The appellant argued that the covenant for the sale of goodwill only applied to the first company and not to the respondent. He also argued that the covenant was general in that it was unlimited in space and area. The House of Lords did not accept the arguments of the appellant and dismissed his appeal.

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[14] *Nordenfelt vs. Maxim Nordenfelt Guns and Ammunition Co Ltd*, [1894] AC 535 at 536

218. The Blue Pencil Principle allows the court to sever specific provisions which are deemed unreasonable or against public policy without invalidating entire agreements, the doctrine fostered fairness and equity in contractual relationships.

219. The Blue Pencil doctrine or principle has developed since then but the two mainstays are that it applies largely to contracts and that it grants Courts the authority to strike out or put a blue pen through the offending clauses of a contract.

220. In Fiji, the blue pencil principle of striking out offending parts of a legislation are found in the Constitution, specifically sections 2(2) and 2(3).

221. Therefore, if any party is of the view that sections 5-7 of the FICAC Act is unconstitutional, then the proper recourse is through the courts as only the courts can rule that a particular section of a legislation is invalid.

222. In this case, the only way to properly challenge s55-7 is to go the Court and the President cannot arbitrarily decide that section 5-7 of the FICAC Act are unconstitutional and therefore invalid.

223. In addition, the Prime Minister cannot of his own motion decide that sections 5-7 of the FICAC Act are unconstitutional and therefore invalid and advise the President to that effect.

THE IMPUGNED DECISIONS OR DECISIONS SSOUGHT TO BE QUASHED

224. The discussions in the preceding paragraphs relate to the impugned decisions and we will not repeat them except to say that they form the basis for the submission that the impugned decisions of both the President and the Prime Minister are to be declared invalid and null and void.

225. The Court is asked to review the following decisions of the Respondents:

(c) the decision of the First Respondent on 2 June 2025, acting upon the advice of the Second Respondent, to revoke the appointment of the Applicant as the Commissioner of Fiji Independent Commission Against Corruption ("**FICAC**") with immediate effect. **(Revocation Decision)**

(d) the decision of the Second Respondent on or about 2 June 2025, to advise the First Respondent to revoke the appointment of the Applicant as the Commissioner of FICAC. **(Revocation Advice Decision)**

Revocation Decision

226. As discussed extensively in the preceding paragraphs, the First Respondent only acts on advice and in the case of the Commissioner of FICAC, he acts on the advice of the JSC.

227. The First Respondent, in purporting to revoke the appointment of the Applicant on the advice of the Second Respondent, acted unreasonably, irrationally, *ultra vires*, illegally, unfairly and contrary to the fundamental principles of natural justice, and disproportionately in the purported exercise of its powers having regard *inter alia* to section 5 of the FICAC Act 2007, section 44 of the Interpretation Act 1968 and sections 2, 6, 16, 81, 82 and 112 of the Constitution and we pray that the Court declares the decision to revoke the appointment null and void and quashed.

228. We pray that the Court declares the decision to revoke the appointment unlawful and the revocation of the Applicant's appointment is declared illegal and contrary to law.

Revocation Advice Decision

229. As discussed extensively in the preceding paragraphs, the First Respondent only acts on advice and in the case of the Commissioner of FICAC, he acts on the advice of the JSC.

230. The Second Respondent, in advising the First Respondent to revoke the appointment of the Applicant, acted illegally, unreasonably, irrationally, *ultra vires*, unfairly and contrary to the fundamental principles of natural justice, and disproportionately in the purported exercise of its powers having regard *inter alia* to section 5 of the FICAC Act 2007, section 44 of the Interpretation Act 1968 and sections 2, 6, 16, 81, 82 and 112 of the Constitution in that:

(viii) the Second Respondent has no authority under the Constitution or any written law to advise the First Respondent to revoke the appointment of the Applicant.

(ix) the Second Respondent acted *ultra vires*, and contrary to the Constitution namely sections 81 and 82 of the Constitution by advising the First Respondent to revoke the appointment of the Applicant, when these sections do not provide the Second Respondent with the authority to advise the First Respondent to revoke the appointment of the Applicant.

(x) under section 82 of the Constitution (which in any event is not applicable as it does not confer any power to remove or suspend the Applicant from office), in the exercise of his powers, the First Respondent acts only on the advice of the body or authority prescribed by the Constitution for a particular purpose as the body or authority on whose advice the First Respondent acts in that case. The Second Respondent is not prescribed under the Constitution or under any written law as a person or body with the constitutional or legal authority provide any advice to the First Respondent with respect to the appointment or removal or suspension of the Applicant as the Commissioner of FICAC.

(xi) the Second Respondent acted *ultra vires* and contrary to section 5 of the FICAC Act 2007 and section 44 of the Interpretation Act 1967, which expressly

provides that the Commissioner of FICAC can be appointed (and removed or suspended) by the First Respondent only the advice of the Judicial Services Commission, and no other person including the Second Respondent.

(xii) the Second Respondent acted *ultra vires* and contrary to section 112 of the Constitution, which the First Respondent had expressly stated in the Applicant's letter of appointment that any process for removal of the Applicant will be pursuant to section 112 of the Constitution. Under section 112 of the Constitution, the Applicant can only be removed by the First Respondent on the advice of a tribunal or a medical board, and no one else. In this regard, the Second Respondent has acted *ultra vires* the Constitution in usurping the powers vested in a tribunal or a medical board in advising the First Respondent to revoke the appointment of the Applicant.

(xiii) the Second Respondent acted unfairly and in breach of natural justice and in breach of section 16 of the Constitution in failing to provide the Applicant with the allegations contained in the report of the Commission of Inquiry and providing to the Applicant an opportunity to be heard, and thereby failed to conduct sufficient (or any) prior inquiry about the circumstances.

231. The letter from the Second Respondent to the First Respondent advising on the revocation of appointment does not state which section of the Constitution or any written law that he is drawing on to render that particular advice.

232. We pray that the Court declares that The Second Respondent, in advising the First Respondent to revoke the appointment of the Applicant is declared illegal and contrary to law.

DAMAGES

233. The Constitutional provisions in issue are not just aimed at protecting an individual judge or Commissioner of FICAC. Similar provisions are enshrined in Constitutions all over the world in the public interest to guarantee to the people that judicial and other independent officers who are charged with important functions in the public interest are able to discharge those functions independently without undue interference from anyone, especially politicians.

234. The Applicant has been financially affected by the actions of the Respondents, apart from the damage to her professional and personal reputation and status. The damage to her reputation continues with the regular attacks via Facebook as per Paragraph 30 of the Malimali Reply Affidavit and the uncontested Supplementary Affidavit that was sworn and filed on 10/06/25.

235. In relation to the damage and loss she has suffered, the Applicant deposed in the Malimali Second Supplementary Affidavit filed on 04 August 2025 that:

36. *Sadly for me, the effect of Ashton-Lewis speaking with the tacit approval of the Prime Minister is that it has caused me so much reputational harm, ill will and ruined future career prospects.*

37. *The COI is only an investigation, it does not have the force of law, yet the findings and recommendations have been given such gravitas by the First and Second Respondents, that they were willing to breach the Constitution and the FICAC Act and the rules of natural justice to give Ashton-Lewis' recommendations in relation to me, force and effect.*

38. *The damage to my mental health would probably severe if I did not have such strong religious convictions and if I did not have the support of my small circle of close friends, legal fraternity colleagues, family, faith family and my 4 dogs and 1 cat.*

39. *I also have a pastoral counsellor, whom I speak with regularly for support, since 5 September 2025, when I took up the Office of Commissioner FICAC. My pastoral Counsellor is Reverend Wilfred Regumamada of the Methodist Church of Fiji.*

40. *For me, some mornings, it is hard for me to get out of bed because when I go the supermarket, to the coffee shops and even whilst taking my walk along the seawall, I can see and feel people looking at me. Unlike other "bad news" that hit the media or social media, which become one-week wonders, I have become an infamous "one year wonder" especially on social media. People may not say anything negative to my face when they see me in person but the knowing look is there in their eyes. Some even look judgemental.*

41. *The news about my sacking and my corrupt character have not only made the news locally but regionally and therefore, any prospects I have of trying to get a similar position in the region, are sunk, as a simple google search will throw up these interviews in Australia and New Zealand and Fiji.*

42. *The First and Second Respondents in terminating or revoking my appointment in such a public manner (via Facebook) and not restricting Ashton-Lewis from speaking about the COI Report before I had been given an opportunity to read it, let alone challenge it, have damaged my future employment prospects.*

236. The Applicant has also provided evidence of some of the Facebook posts and comments made about her during the COI and during the Court case.

237. In one instance, as the Applicant deposed and provided evidence of, a member of the Methodist Church in Fiji, questioned her appointment and counsel's appointment to the Constitution Review Committee of the Methodist Church because of this case and how it might affect the Methodist Church, of which she is a member. That news eclipsed the

sentence of Justin Ho and his co-accused in what is Fijis' longest sentence to date and in Fiji's biggest drug case to date.

238. Whilst the First and Second Respondents refute the Applicant's statements that she has suffered reputational harm and emotional damage and mental health stress as a result of the comments on social media and from Alexandra Forwood, Rajendra Chaudhry and even the public comments during the COI of Ms. Mason and after the COI of Commissioner of Inquiry Ashton-Lewis, are not their responsibility.

239. At Paragraph 50 of his Affidavit, Dr. Korovavala states that any reputational harm caused to the Applicant flow from Independent Findings of the COI. However, it is submitted that the adverse comments flowed during the COI hearings especially after Ms. Mason's almost daily updates and the news on their attempts to have the Applicant suspended to when the COI Report was released to the public via the Government Facebook.

240. Furthermore, Dr. Korovavala omits from his affidavit the fact that this Judicial Review Application was MADE BEFORE THE COI REPORT WAS MADE PUBLIC on 1 July 2025.

241. The Applicant only accessed the COI Report almost a month after this JR Application was made.

242. Therefore, the reputation harm and emotional and mental stress caused by cyberbullying were already in progress before the COI Report was made public and also made available to the Applicant.

243. It is submitted that damages for emotional distress caused by cyberbullying and the negative and derogatory remarks on social media should be awarded. It is conceded that this head of damages is difficult to quantify but the Court is invited to make an award to signal the Court's aversion to cyberbullying and the shaming of people, especially public figures, like the Applicant, who stand to lose a lot more than the ordinary "person on the Nasese bus".

244. Furthermore, the PS to the OPM himself, Dr. Korovavala, refereed in his affidavit to the FICAC Commissioner's Office as a Constitutional Office and that being the case, it comes with a lot more responsibility on the part of the Respondents to ensure that such an office is given procedural rights and right to natural justice and the protection of the law. When those responsible, like the 3 Respondents, trample on the rights of a constitutional office holder, and allow a trial by media to take place, decisive action needs to be taken and that can only happen when the Court says "enough is enough".

245. Vindicatory damages are also appropriate in this case as the 2 highest offices in the land are bound by the Constitution and have to follow it, but chose not to. Furthermore, they continued to ignore the Constitution in spite of being advised by the Chief Justice of Fiji, in writing, that any actions they take have to be in compliance with the Constitution.

246. As state above, if the KC opined that sections 5-7 of the FICAC Act contravene the Constitution, then only the Courts can strike down those provisions. By doing what they

252. These are the submissions on behalf of the Applicant in support of her application to have the Revocation Decision and the Revocation Advice Decision quashed and declared null and void and of no legal effect.

DATED at Suva this day of 2025

WAQANIKA LAW

Per:.....
Solicitors for the Applicant

TANYA. M. WAQANIKA
BARRISTER & SOLICITOR
COMMISSIONER FOR OATHS
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TO: The Respondents and/or their Solicitors.