

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**APPELLATE JURISDICTION**

Criminal Appeal No. HAA 85 & 86 of 2005L

**DHIRENDRA NADAN**

**1<sup>st</sup> APPELLANT**

**AND**

**THOMAS MAXWELL MACCOSKAR**

**2<sup>nd</sup> APPELLANT**

**V**

**DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**AND**

**ATTORNEY GENERAL**

**AMICUS CURIAE**

**AND**

**THE PROCEEDINGS COMMISSIONER, FIJI HUMAN RIGHTS COMMISSION**

**AMICUS CURIAE**

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**SUBMISSION OF THE FIJI HUMAN RIGHTS COMMISSION**

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**Introduction**

My Lord these are the submissions of the Fiji Human Rights Commission [hereinafter referred to as the 'Commission'] before this Honourable Court. The Commission was invited by the Lautoka High Court via letter dated 23 May 2005 to appear as *amicus curiae* in this matter and assist the Court by way of submissions.

## **Facts**

Both Appellants were charged by the Nadi Police with one count of unnatural offence contrary to section 175(c) of the Penal Code and a second count of indecent practice between males contrary to section 177 of the Penal Code. The incidents relating to the charges took place between 24<sup>th</sup> day of March and the 3<sup>rd</sup> day of April 2005.

The Police became involved only when there was an allegation that the first Appellant had stolen money from the second Appellant. The Police took both their statements after which charges were laid and the Nadi Magistrate's Court convicted and sentenced them to two years imprisonment each on both counts.

The matter now before Your Lordship is by way of appeal.

In a letter dated 4 July 2005 Hon. Justice Govind asked the Commission to address the court on the particular issue of the "*constitutionality of sections 175 and 177 of the Penal Code of Fiji*".

### **The Commission addresses three main issues in these Submissions:**

1. Are sections 175 (a) and (c) and 177 of the Penal Code inconsistent with the Constitution (in particular sections 37 and 38 of the Constitution)?
2. Did the learned Magistrate err in law when he sentenced the Appellants in the Magistrates Court?
3. Have the Appellants committed any offence under the laws of Fiji?

**Issue 1:**

**Are sections 175 (a) and (c) and 177 of the Penal Code inconsistent with the Constitution?**

**(1) Section 37 of the Constitution: Privacy**

The Appellants claim that their right to privacy under section 37 of the Constitution was violated when they were charged with the offences of unnatural offence and indecent practices between males under sections 175 (a) and (c) and 177 of the Penal Code.

Section 175 of the Penal Code states

*“Any person who-*

*(a) has carnal knowledge of any person against the order of nature; or*

*(b) has carnal knowledge of an animal; or*

*(c) permits a male person to have carnal knowledge of him or her against the order of nature,*

*is guilty of a felony, and is liable to imprisonment for fourteen years, with or without corporal punishment.”*

Section 177 states:

*“Any male person who, whether in public or **private**, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony, and is liable to imprisonment for five years, with or without corporal punishment.”* (Emphasis added)

Section 37 of the Constitution provides:

*“(1) Every person **has the right to personal privacy**, including the right to privacy of personal communications.*

*(2) The right set out in subsection (1) may be made subject to such limitations prescribed by law as **are reasonable and justifiable in a free and democratic society**”* (Emphasis added)

In international human rights law the right to privacy is protected under Article 17 of the **International Convention on Civil and Political Rights (ICCPR)** [**Annexure 1**] which states as follows:

Article 17

*“(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”*

*“(2) Everyone has the right to the protection of the law against such interference or attacks.”*

On 31 March 1994 the United Nations Human Rights Committee in **Toonen v Australia** (Common. No. 488/1992) (31 March 1994) (50<sup>th</sup> Session), UN H.R. Committee Doc. No. CCPR/C/50/D/488/1992. 1 I.H.R.R. 97 [**Annexure 2**] found that Tasmanian laws prohibiting all sexual activity between men violated the

privacy provision (Article 17) of the International Covenant on Civil and Political Rights.

Mr. Toonen challenged sections 122 (a) and (c) and 123 of the Tasmanian Criminal Code, which criminalised various forms of sexual contact between men, including all forms of sexual contact between consenting adult homosexual men in private. He also challenged the fact that the Tasmanian Criminal Code empowered Tasmanian police officers to investigate intimate aspects of a person's private life and to detain him, if they had reason to believe that he was involved in sexual activities which contravened the above sections.

The United Nations Human Rights Committee was called upon to determine whether Mr. Toonen had been a victim of an unlawful or arbitrary interference with his privacy, contrary to article 17 paragraph 1 of the ICCPR and whether he had been discriminated against in his right to equal protection of the law contrary to article 26.

The Committee held :

*“In so far as article 17 is concerned, it is undisputed that adult consensual sexual activity in private is covered by the concept of ‘privacy’, and that Mr. Toonen is actually and currently affected by the continued existence of the Tasmanian laws. The Committee considers that sections 122 (a) and (c) and 123 of the Tasmanian Criminal Code ‘interfere’ with the author’s privacy, even if these provisions have not been enforced for a decade.*

The Committee held that as a victim of a violation of article 17 paragraph 1 of the Covenant, Mr. Toonen was entitled to a remedy. The Committee decided that an

effective remedy would be the repeal of sections 122 (a) and (c) and 123 of the Tasmanian Criminal Code. Since the Committee found a violation of Mr. Toonen's rights under article 17, paragraph 1 of the Covenant requiring the repeal of the offending law, the Committee did not think it necessary to consider whether there was also a violation of article 26 of the Covenant.

See also **Lawrence et al v Texas** 539 U.S. 2003. [**Annexure 3**]

### *Analysis*

Given the above provisions in the ICCPR, the Constitution of Fiji and relevant case law, Section 177 of the Penal Code is unconstitutional and violates international human rights law. It is to be noted that the Bill of Rights in the Fiji Constitution has its origins in the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights. Section 177 of the Penal Code is therefore in conflict with human rights law in general.

Thus section 177 of the Penal Code should be declared inconsistent with the Constitution and invalid to the extent of the inconsistency.

### **(2) Section 38 (1) of the Constitution: Equality before the law**

Section 38 (1) states as follows:

*“(1) Every person has the right to equality before the law*

The corresponding provision in the **Universal Declaration of Human Rights** (UDHR) [**Annexure 4**] is:

## **Equality**

### Article 1

*“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”*

### *Analysis*

The current sodomy law as it appears in the Penal Code criminalises consensual sex acts between males only, whether done in private or public. It does not criminalise intercourse between females, that is, lesbian sexual activity. The Fiji Human Rights Commission submits that this section and other similar sections of the Penal Code constitute a breach of a person’s right to equality before the law.

### **(3) Section 38 (2) Unfair discrimination**

Section 38 (2) states as follows:

*(2) A person must not be unfairly discriminated against, directly or indirectly, on the ground of his or her:*

*(a) actual or supposed personal characteristics or circumstances, including race, ethnic origin, colour, place of origin, gender, **sexual orientation**, birth, primary language, economic status, age or disability; or*

*(b) opinions or beliefs, except to the extent that those opinions or beliefs involve harm to others or the diminution of the rights or freedoms of others;*

*or on any other ground prohibited by this Constitution.” (Emphasis added)*

The UDHR also protects this right at Articles 2 and 7, as follows:

## Article 2

*“Everyone is entitled to all rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”*

## Article 7

*“All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”*

The corresponding provisions in the **International Covenant on Civil and Political Rights** are:

## **Equality**

### Article 2

*“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”*

### Article 26

*“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion,*

*political or other opinion, national or social origin, property, birth or other status.”*

#### *Analysis*

Section 38 (2) of the Constitution protects every person’s right to be free from unfair discrimination in Fiji. Sections 175 (a) and (c) and 177 of the Penal Code offend against this right on the ground of sexual orientation.

#### **(4) Relevant case law**

Courts internationally have also determined the constitutionality of the offence of sodomy in a number of jurisdictions with similar laws to those of Fiji.

Anti-sodomy laws were dealt with at length in **The National Coalition for Gays and Lesbian Equality and The South African Human Rights Commission v The Minister for Justice, The Minister of Safety and Security and the Attorney General of the Witwatersrand** 1998 (12) BCLR 1517, 1528; (1998) 2 CHRLD 443 (SACC) [**Annexure 5**], where the Coalition of Gays and Lesbian Equality challenged the constitutional validity of the common law offence of sodomy which criminalised anal intercourse between men. They argued that the provisions violated the constitutional guarantees to equality, dignity and privacy.

It is to be noted that South Africa has a Bill of Rights in its Constitution similar to the Bill of Rights contained in the Fiji Constitution and has the same protection against direct or indirect unfair discrimination based on sexual orientation.

In the **National Coalition** case cited above, J Ackermann held that:

1. Gay men are a permanent minority in society and have suffered in the past form patterns of disadvantage. The discriminatory prohibition on sex between men reinforce pre-existing societal prejudices and severely increase the negative effects of such prejudices on their lives.
2. The prohibition on sex between men, but not between women, creates a clear distinction on the basis of gender or sex.
3. The common law offence of sodomy infringes the constitutional right to dignity. Criminalising sodomy has the effect of punishing a form of sexual conduct identified with homosexual men, causing insecurity and vulnerability
4. There being no similar provisions in relation to acts by lesbians or heterosexual couples, the discrimination is based on sexual orientation, is therefore presumed to be unfair and is not justified under section 36(1).
5. Section 20A of the 1957 Act is inconsistent with the Constitution and totally invalid, not just to the extent that it relates to acts committed in private between consenting males who are over the age of consent.
6. The common law offence of sodomy was declared to be inconsistent with the Constitution of the Republic of South Africa, 1996 and invalid.
7. The judge further held that *“in this judgement the conclusion has already been reached that this offence should be declared constitutionally invalid to its entirety. This conclusion has been reached be a direct application of the Bill of Rights to a common-law criminal offence, not by a process of developing the common law.”*

In **S v K** 1997 (9) BCLR 1283 (C); (1997) BHRC 358 [**Annexure 6**], K was convicted of the crime of sodomy with another man and was sentenced to 12 months imprisonment suspended for 3 years.

The matter was taken to the High Court of South Africa for review. It was held that Section 8(2) of the Interim Constitution and section 9(3) of the 1996 Constitution, with their specific reference to sexual orientation as a proscribed ground of unfair discrimination, expanded protection to sexual activity between consenting male adults in public or private so that it was no longer subject to criminal sanction. It was further held that unfair discrimination, could not be regarded as reasonable and justifiable in an open and democratic society based on freedom and equality. The High Court set aside the conviction and the sentence.

Relevant human rights case law decided in other jurisdictions must be considered by the courts of Fiji where appropriate pursuant to section 43 of the Constitution.

Section 43(2) of the Constitution provides:

*“In interpreting the provisions of this Chapter [Bill of Rights], the courts must promote the values that underlie a democratic society based on freedom and equality and must, if relevant, have regard to public international law applicable to the protection of the rights set out in this Chapter.”*

This section has been used by Courts in Fiji when interpreting the Bill of Rights in the past.<sup>1</sup> This Honourable Court must also have regard to public international law when interpreting section 37 and section 38 of the Constitution in terms of the legality or otherwise of section 175 (a) and (c) and 177 of the Penal Code of Fiji.

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<sup>1</sup> State v Mark Mutch [1999] FJHC 149 HAC0008 of 1998; State v Audie Pickering Miscellaneous Action No. HAM 007 of 2001S; State v Timoci Silatolu and Attorney General (Intervener) and Fiji Human Rights Commission (Intervener by leave) Criminal Action No HAC 011 of 2001

The purpose and effect of the Bill of Rights was discussed in the Reeves Report <sup>2</sup>. It was stated on pages 116 and 117 that:

*“The purpose of the Bill of Rights is to protect the rights and freedoms of individuals, and sometimes of groups, from undue interference by the state. It sets standards against which the executive and legislative branches of government should measure their policies, administrative action and legislation. The judicial branch has the responsibility of determining whether the other two branches have acted consistently with those standards. This means that the validity of both the laws made by parliament and the government’s administrative actions can be tested in the courts.”*

Given international human rights laws, the Constitution, and case laws cited above, the Fiji Human Rights Commission respectfully submits that the offence of sodomy under the Penal Code is contrary to sections 37 and 38 of the Constitution as it interferes with the right to privacy and treats gay men differently from gay women in the Penal Code. It also unfairly discriminates against persons on the ground of their sexual orientation.

**(5) Limited Application of some aspects of the Fiji Penal Code in the current human rights environment**

The Penal Code of Fiji was adopted in 1945 from United Kingdom when Fiji was a British Colony. Fiji retains all the common law offences from the United Kingdom of 1945. Sodomy was then an offence in the United Kingdom and this was incorporated into the laws of Fiji.

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<sup>2</sup> Sir Reeves P, Vakatora T. R, Lal, B. V, 1996, Towards a United Future Report of the Fiji Constitution Review Commission, Parliament of Fiji, Parliamentary Paper No. 34 of 1996, pp 116, 117.

In 1967 in England and Wales<sup>3</sup>, and in 1980 in Scotland<sup>4</sup>, male sexual activity between consenting adult males in private otherwise known as ‘sodomy’, was decriminalised. Fiji has not yet repealed this provision of the Penal Code, but the Constitutional protection of sexual orientation makes this law in the Penal Code obsolete.

## **Issue 2:**

### **Did the learned Magistrate err when he sentenced the Appellants pursuant to the Penal Code in the Magistrate’s Court?**

It is submitted that the learned Magistrate sentenced the Appellants without giving proper consideration to the fact of supremacy of the Constitution in Fiji’s legal system.

The Fiji Human Rights Commission is of the opinion that had the learned Magistrate considered the relevant provisions of the Constitution or requested the Human Rights Commission to give its views he may have arrived at a different decision.

Section 2 of the Constitution states

*“(1) This Constitution is the supreme law of the State.*

*(2) Any law inconsistent with this Constitution is invalid to the extent of the inconsistency.”*

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<sup>3</sup> By the Sexual Offences Act 1967

<sup>4</sup> By the Criminal Justice (Scotland) Act 1980

Section 3 further states:

*“In the interpretation of a provision of this Constitution:*

*(a) a construction that would promote the purpose or object underlying the provision, taking into account the spirit of this Constitution as a whole, is to be preferred to a construction that would not promote that purpose or object; and*

*(b) regard must be had to the context in which this Constitution was drafted and to the intention that constitutional interpretation take into account social and cultural developments, especially:*

*(i) developments in the understanding of the content of particular human rights; and*

*(ii) developments in the promotion of particular human rights.”* (Emphasis added)

Section 21 of the Constitution further provides:

*“(4) In considering the application of this Chapter to particular legislation, a court must interpret this Chapter contextually, having regard to the content and consequences of the legislation, including its impact upon individuals, groups or communities.*

*(5) This Chapter applies to all laws in force at the commencement of this Constitution.*

Section 195 (e) of the Constitution provides that:

*“All written laws in force in the State (other than the laws referred to in subsection (1)) continue in force as if enacted or made under or pursuant to this Constitution and all other law in the State continues in operation.”*

Section 195(3) also provides that

*“Subject to section 2, written laws referred to in paragraph (2)(e) or (f) are to be construed, on and from the commencement of this Constitution, with **such modifications and qualifications as are necessary to bring them into conformity with this Constitution.**”* (Emphasis added)

The Commission submits that had the learned Magistrate considered the above sections of the Constitution, or requested the Commission to intervene, he would have concluded that the Penal Code sections criminalising sodomy in Fiji were contrary to the Constitution and would not have sentenced the Appellants under these particular sections.

In case of any doubt the learned Magistrate should have referred the matter to the High Court for clarification regarding the constitutionality of the sections 175 (a) and (c) and 177 of the Penal Code when read together with sections 37 and 38 of the Constitution.

The jurisdiction of the High Court is quite clear under section 120 (2) of the Constitution.

The section stipulates:

*“The High Court also has original jurisdiction in any matter arising under this Constitution or involving its interpretation.”*

Subsection (4) further provides:

*“If in any proceedings in a subordinate court any question arises as to the interpretation of this Constitution and the member presiding in the proceedings considers that a substantial question of law is involved, the member presiding **must** refer the question to the High Court”.* [Emphasis added]

The Commission submits that the Magistrate’s Court in the first instance does not have jurisdiction to declare sections 175 (a) and (c) and 177 of the Penal Code provisions contrary to or inconsistent with the Constitution. The learned Magistrate ought to have referred the matter to the High Court for determination of whether or not these sections of the Penal Code were contrary to the Constitution.

The Commission further submits that this Honourable Court set aside the convictions of both the Appellants under the inherent powers of this Court as prescribed under the Constitution.

### Issue 3:

#### Have the Appellants committed any offence under the laws of Fiji?

##### (1) Whether the Appellants can be charged with another offence?

The Commission is of the view that the Appellants were charged with the wrong offence. Based on their confessions, statements and subsequent admission in the Magistrate Court the proper charge to be laid against them would have been that of ‘trafficking in obscene publications’ under section 188 (1) (a) of the Penal Code.

Section 188 of the Penal Code provides:

*“(1) Any person who-*

*(a) for the purpose of or by way of trade or for the purpose of distribution or public exhibition, makes, produces or has in his possession any one or more obscene writing, drawings, prints, paintings, printed matter, pictures, posters, emblems, photographs, cinematograph films, or any other obscene objects, or any other object tending to corrupt morals; or*

*(b) for any of the purposes above-mentioned imports, conveys or exports, or causes to be imported, conveyed or exported, any such matters or things, or in any manner whatsoever puts any of them in circulation; or*

*(c) carries on or takes in any business, whether public or private, concerned with any such matters or things, or deals in any such matters or things in any manner whatsoever, or distributes any of them or exhibits any of them publicly, or makes a business of lending any of them; or*

*(d) advertises or makes known by any means whatsoever with a view to assisting the circulation of, or traffic in any such matters or things, that a person is engaged in any of the acts referred to in this section, or advertises or makes known how, or*

*from whom, any such matters or things can be procured either directly or indirectly; or*

*is guilty of a misdemeanour, and is liable to imprisonment for two years or to a fine of two hundred dollars”. (Emphasis added)*

Both Appellants in the Magistrate Court admitted that the photographs were taken to be sold over the Internet.

Dhirendra Nadan in his mitigation before the learned Magistrate stated “...*He said he will sell nude photos of mine and his on Internet and give me part of profit. He also said he will make movie and sell and give me some money...I accept that these photos were taken by us in nude to sell on Internet and in movies to make money”*

In his sentencing remarks the learned Magistrate had this to say “..*Nude pictures were taken to be sold in Australia on Internet. Calculated to make money.’*”

Thomas MacCosker in his mitigation accepted that the 18 photographs were taken by him and when questioned by the Magistrate he agreed that the photos were to be sold on internet.

Court: “*Is it this time (true) that you promised Nadan to send money to him after photos sold on Internet”*

Accused: *Yes – I told him that*

In his sentencing remarks the Magistrate said the following:

*“These offences were committed after careful calculation of making money by selling nude photos on Internet.”*

After the accuseds admitted before the Magistrate that the photographs were taken and were to be sold on Internet in Australia the Magistrate should have directed that the accused be charged under section 188 of the Penal Code.

Section 188 of the Penal Code provides:

*“(1) Any person who-  
... for the purpose of distribution or public exhibition, makes, produces or has in his possession any one or more obscene... photographs... or any other object tending to corrupt morals is guilty of a misdemeanour, and is liable to imprisonment for two years or to a fine of two hundred dollars.*

In this case the elements of the offence were clear as the photographs that were taken by one of the Appellants were intended for the specific purpose of sale in Australia over the Internet.

In **State v Mark Lawrence Mutch** [1999] FJHC 149 [Annexure 7], which involved sexual exploitation of children where an expatriate had come to Fiji and sexually exploited young vulnerable children by producing pornographic materials. He was charged with rape and indecent assault on children of a young age. He first assisted them by paying their school fees and also supporting their families financially thus gaining their trust and confidence.

The trial judge referred to the UN Convention on the Rights of the Child (CRC) and section 43(2) of the Constitution and stated *“let the message be very clear to*

*people like Mutch that any kind of sexual exploitation of children will not be tolerated in the Republic of the Fiji Islands...*”

The Commission submits that sexual exploitation of adults is also an objectionable offence by virtue of section 188 (1) of the Penal Code.

The Commission in its *amicus* role submits that this Honourable Court has the power to direct law enforcement officers that the Appellants be charged under section 188(1) of the Penal Code.

Section 123 of the Criminal Procedure Code provides:

*“A person who has been once tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, **while such conviction or acquittal has not been reversed or set aside, not be liable to be tried again on the same facts for the same offence.**”* (Emphasis Added)

Section 124 further provides that:

*“A person convicted or acquitted of an offence may afterwards be tried for any other offence with which he might have been charged on the former trial under subsection (1) of section 120.”*

Section 120 of the Criminal Procedure Code under ‘joinder of counts in a charge of information’ stipulates

*“(1) Any offences, whether felonies or misdemeanours, may be charged together in the same charge or information **if the offences charged are founded on the same***

*facts or form, or are part of, a series of offences of the same or a similar character.* (Emphasis added)

The Commission submits that once the convictions are set aside the Appellants should then be charged with *'traffic in obscene publications'* (section 188 of the Penal Code) under section 124 of the Criminal Procedure Code.

The Commission submits that the Police during their investigations focused only on one aspect: that of sexual activity between the Appellants. The officers failed to consider section 188 of the Penal Code when they investigated the offences alleged to have been committed by the Appellants.

Section 319 of the Criminal Procedure Code contains further powers of the Supreme Court (now High Court).

It stipulates:

*“(1) At the hearing of an appeal, the Supreme Court shall hear the Appellant or his barrister and solicitor, if he appears, and the respondent or his barrister and solicitor, if he appears, and the Director of Public Prosecutions or his representative, if he appears, and the Supreme Court may thereupon confirm, reverse or vary the decision of the magistrate's court, or may remit the matter with the opinion of the Supreme Court thereon to the magistrate's court, or may order a new trial, or may order trial by a court of competent jurisdiction, or may make such other order in the matter as to it may seem just, and may by such order exercise any power which the magistrate's court might have exercised:*

*Provided that-*

*(a) the Supreme Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the Appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred;*

*(b) the Supreme Court shall not order a new trial in any appeal against an order of acquittal.*

*(2) At the hearing of an appeal whether against conviction or against sentence, the Supreme Court may, if it thinks that a different sentence should have been passed, quash the sentence passed by the magistrate's court and pass such other sentence warranted in law, whether more or less severe, in substitution therefore as it thinks ought to have been passed.”*

*(Section substituted by 13 of 1969, s. 39.)*

Section 335 of the Criminal Procedure Code vests further powers in the Supreme Court. It provides that the Court shall have power, if it thinks fit-

*“(a) to cause the case to be sent back for amendment or restatement, and thereupon the same shall be amended or restated accordingly, and judgment shall be delivered after it has been so amended or restated;*

*(b) to remit the case to the magistrates' court for rehearing and determination”*

**(2) International human rights law and trafficking in pornography and indecent publications**

The provisions contained in the Penal Code are supported and fortified by international human rights law against trafficking and sexual exploitation. The Court's attention is respectfully drawn to a number of relevant international human

rights instruments and documents in this regard, which are attached as annexures as follows:

1. *International Convention for the Suppression of the Circulation and Traffic in Obscene Publications*, (ratified by Fiji in 1971) [**Annexure 8**]
2. *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others* [**Annexure 9**]
3. Office of the High Commissioner for Human Rights ‘*Note on the twenty-fifth session of the Working Group on Contemporary Forms of Slavery of the Sub-Commission on the Promotion and Protection of Human Rights*’ [**Annexure 10**]
4. ‘*What is Human Trafficking?*’ [**Annexure 11**]
5. Asia-Pacific Forum of National Human Rights Institutions and Advisory Council of Jurists *Consideration of the Issue of Trafficking Final Report 2002* (CD Rom). [**Annexure 12**]

### *Analysis*

Section 188 (1) of the Penal Code does not conflict with human rights provisions of the Constitution because offences committed under this section are considered as human rights violations in breach of international human rights law. This section of the Penal Code will apply to the activities engaged in by the Appellants. Given the almost insurmountable problems faced by the international community in attempting to control trafficking in pornography and sexual exploitation of vulnerable groups of people, especially those who are impoverished, the Fiji courts should deal severely with the Appellants within the law. In addition, there should be a clear signal given to foreign visitors that our courts do not take kindly to the sexual exploitation of Fiji citizens as attempted by the second Appellant (see also statements made by the court in **State v Mark Lawrence Mutch** (cited above))

### (3) **Double jeopardy**

The Commission submits that charging the Appellants again for offences arising out of the same offence will not amount to double jeopardy. Under the Constitution and the Penal Code a person cannot be charged again for an offence for which he or she has previously been convicted or acquitted.

Section 28 (1) (k) of the Constitution stipulates

*“Every person charged with an offence has the right not to be tried again for an offence he or she has previously been convicted or acquitted.”*

The Commission submits that had the Police Officers conducted the investigations properly and had not focused only on section 175 (a) and (c) and 177 of the Penal Code, which are in contravention of the Constitution, both Appellants would have been charged with offences under section 188 of the Penal Code.

### **Conclusion**

The Fiji Human Rights Commission submits that the offence of sodomy under section 175 (a) and (c) and 177 of the Penal Code is contrary to the Constitution, Bill of Rights and other international human rights law, and is invalid. This is because it discriminates against persons of different sexual orientation. Penalising private sex acts between consenting adults also offends against the Privacy provisions in the Constitution. It is the submission of the Commission that this Honourable Court declare sections 175 (a) and (c) and 177 of the Penal Code inconsistent with the Constitution and invalid to the extent of inconsistency. The

Commission submits that the convictions of both Appellants cannot stand because consensual sexual activity between males does not constitute an offence in light of the Constitution

The Commission further submits that the Appellants should immediately be charged with trafficking in obscene publications pursuant to section 188 (1) of the Penal Code.

The Commission respectfully advises that the court should be cognizant of the fact that trafficking in sex is a universal social problem and there should be a clear message sent out to would-be perpetrators from overseas, as well as locals, that such trafficking is against human rights law in Fiji and offends against the right of vulnerable people and victims to be free from sexual exploitation and oppression.

Your Lordship these are the submissions of the Fiji Human Rights Commission.

**Dated this 1<sup>st</sup> day of August 2005**

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*Dr. S. Shameem and Ms. Deveena Sudhakar-Herman*  
*Counsel on behalf of*  
**THE PROCEEDINGS COMMISSIONER**  
**FIJI HUMAN RIGHTS COMMISSION**

**IN THE HIGH COURT OF FIJI**  
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**SUBMISSION OF THE**  
**FIJI HUMAN RIGHTS COMMISSION**

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**THE PROCEEDINGS COMMISSIONER**  
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**LEVEL 2 CIVIC TOWERS**  
**SUVA**