IN THE SUPREME COURT OF FIJI
ORIGINAL JURISDICTION

MISCELLANEOUS ACTION NO. 0001 OF 2024

IN THE MATTER of Section 91(5) of the Constitution of the Republic of Fiji

IN THE MATTER of a reference by Cabinet for an opinion from the Supreme Court on matters concerning the interpretation and application of sections 105(2)(b), 114(2), 116(4) and 117(2) of the Constitution of the Republic of Fiji

Coram	:	**The Hon. Mr. Justice Brian Keith** **Judge of the Supreme Court**
		The Hon. Mr. Justice Terence Arnold **Judge of the Supreme Court**
		The Hon. Mr. Justice William Young **Judge of the Supreme Court**
Counsel	:	**Mr F. Haniff and Mr T. Tuitoga** For the Solicitor General's Office
		Mr A. M. Daubney KC and Mr R. Naidu For the Fiji Law Society
		Mr S. Leweniqila and Ms S. Mataitoga For Judicial Services Commission
		Mr P. Sharma For Fiji Human Rights & Anti-Discrimination Commission
		Mr A. J. Singh and Ms P. Prasad For Justice Alipate Qetaki
Date of Hearing	:	**19 June 2024**
Date of Opinion	:	**28 June 2024**

OPINION OF THE COURT

[1] This is the opinion of the Court, to which all three of us have contributed. Accompanying this opinion is a summary of it, which has been prepared for the benefit of the press and the public. This summary must be read in conjunction with the full reasons of the Court, which are set out below.

Introduction

[2] Section 91(5) of the *Constitution of the Republic of Fiji 2013* provides that the Cabinet may seek an opinion from the Supreme Court "on any matter concerning the interpretation or application of this Constitution". On 5 April 2024, the Cabinet filed an Originating Motion under this section seeking the Court's opinion on three questions.

[3] These questions arise from two features of the Constitution:

(a) The first feature is that section 105(2)(b) of the Constitution provides, among other things, that a person is not qualified for appointment as a judge if he or she has "been found guilty of any disciplinary proceeding involving legal practitioners, whether in Fiji or abroad …" (we will refer to this as the "disciplinary proceeding disqualification").

(b) The second feature is that the Constitution provides that to qualify for appointment to various named public offices (including the office of Director of Public Prosecutions), a person must be qualified for appointment as a judge (we will refer to this as the "judicially appointable requirement"). The effect of this is that the disciplinary proceeding disqualification applies to these offices as well.

[4] The three questions arising from these two features of the Constitution are:

(a) Whether a legal practitioner who has been found by the Independent Legal Services Commission to have engaged in unsatisfactory professional conduct

or professional misconduct under section 121(1) of the Legal Practitioners Act 2009 is ineligible:

(i) to be appointed as a Judge under s 105 of the Constitution; or

(ii) to hold any of various public offices to which the judicially appointable requirement applies.

(b) Whether in light of the findings of the Independent Legal Services Commission in *Chief Registrar v Alipate Qetaki*,[1] Justice Alipate Qetaki is qualified to hold office as a Judge of the Court of Appeal?

(c) Whether in light of the Independent Legal Services Commission's findings in *Chief Registrar v John Rabuku*,[2] Mr John Rabuku is qualified to hold the office of Director of Public Prosecutions?

The disciplinary proceedings

[5] We will not give a detailed account of the disciplinary proceedings against Justice Qetaki or Mr Rabuku. But a brief description is necessary to give context to the discussion which follows.

Justice Qetaki

[6] Justice Qetaki was admitted as a barrister and solicitor in Fiji in 1977 and spent most of his career working in the public sector in legal and other roles. In March 2016 he decided to establish a private consultancy practice. To do that, he needed to obtain a practising certificate and to open a trust account. To open a trust account, Justice Qetaki needed the Attorney-General's approval.[3] He did write to

1 *Chief Registrar v Alipate Qetaki* [2017] FJILSC 9.
2 *Chief Registrar v John Rabuku* [2013] FJILSC 6.
3 Under the Trust Accounts Act 1996, approval had to be sought from the Minister responsible for the administration of the Act, which was, as we understand it, the Minister of Justice, not the Attorney-General. However, the advice at the time was that the Attorney-General's approval was required. Given that the Attorney-General was also then the Minister of Justice, no point was taken about this.

the Attorney-General in late April 2016 seeking approval, but by that stage a trust account had already been opened.

[7] To explain, Justice Qetaki had applied to the Chief Registrar for a practising certificate on 6 March 2016. The Chief Registrar had advised him of the requirements for establishing a trust account. Justice Qetaki then approached the Bank of the South Pacific to open an account. The Bank advised him by email on 11 March that, among other things, he would need to provide a copy of the Attorney-General's approval before the Bank could open the account. Justice Qetaki forwarded this email to the Legal Practitioners' Unit, headed by the Chief Registrar.

[8] Justice Qetaki obtained a conditional practising certificate, a copy of which was emailed to the Bank. On 8 April, the Bank emailed him again, saying that he would need to provide a copy of the Attorney-General's approval. However, on the same day despite not having received a copy of any approval, the Bank opened a trust account for Justice Qetaki's consultancy, thereby breaching its legal obligations (which were reflected in its internal policies). Shortly after, the Bank asked Justice Qetaki to place funds into the account, which he did (still without the necessary approval). The Bank advised the Legal Practitioners Unit that it had opened the account. It was after this (on 20 April) that Justice Qetaki wrote to the Attorney-General seeking his consent to open a trust account.

[9] Ultimately, on 13 May 2016, the account was closed, and the bulk of the funds were returned to Justice Qetaki.

[10] The Bank was prosecuted for opening a trust account in breach of its legal obligations. It pleaded guilty and was convicted and fined $1,500.00.[4]

[11] Justice Qetaki was charged with two counts of professional misconduct, to which he ultimately pleaded guilty. In a lengthy judgment on sanctions, the Independent Legal Services Commissioner traversed the background in some detail. He accepted that Justice Qetaki had not breached the Act intentionally and would not

[4] *State v Bank of the South Pacific* [2016] FJMC 131.

have breached it at all had the Bank not opened the account in breach of its statutory obligations. He also accepted that Justice Qetaki had kept the "Regulator" (ie, the Chief Registrar and the Legal Practitioners Unit) informed of what he was doing. Further, the account was open for only one month and, apart from the deposit, there were no material transactions on it. Given that Justice Qetaki's level of culpability was low and that there was no harm, the Commissioner concluded that no sanction should be imposed.

[12] Relevantly, in his formal orders, the Commissioner:

(a) Found that both counts of professional misconduct had been proven by Justice Qetaki's plea of guilty;

(b) Determined that because the level of seriousness was low, no sanction would be imposed on Justice Qetaki and his name would not be entered in the Discipline Register; and

(c) Ordered Justice Qetaki to pay $1000 by way of costs to each of the Commissioner and the Chief Registrar.

Mr Rabuku

[13] Mr Rabuku faced one allegation of professional misconduct. A client had made a complaint against him. The Chief Registrar required Mr Rabuku to provide an explanation within a specified timeframe under s 105 of the Legal Practitioners Act 2009. When Mr Rabuku failed to comply, the Chief Registrar issued a further notice under s 108 reminding Mr Rabuku of the requirement and advised that if the failure to comply continued, he would be liable to be dealt with for professional misconduct. When Mr Rabuku did not respond within the timeframe, a professional misconduct allegation was made against him to the Independent Legal Services Commissioner.

[14] Mr Rabuku admitted the allegation. The Commissioner regarded Mr Rabuku's failure to respond as required as "very serious indeed". He said that Mr Rabuku had displayed "a complete lack of remorse" and had sought to shift the blame for his non-compliance onto his client.

[15] By way of penalty, the Commissioner publicly reprimanded Mr Rabuku, suspended him from practice for three months and fined him $500.

The Constitutional provisions at issue

[16] The relevant constitutional provisions fall into two categories – those relating to the disciplinary proceeding disqualification and those relating to the judicially appointable requirement. We deal with each in turn.

(i) The disciplinary proceeding disqualification

[17] Qualification for judicial appointment is addressed in section 105 of the Constitution. Sections 105(1) and (2) provide:

> *Qualification for appointment*
>
> (1) The making of appointments to a judicial office is governed by the principle that judicial officers should be of the highest competence and integrity.
>
> (2) A person is not qualified for appointment as a Judge unless he or she—
>
> (a) holds, or has held a high judicial office in Fiji or in another country prescribed by law; or
>
> (b) has had not less than 15 years post-admission practice as a legal practitioner in Fiji or in another country prescribed by law, *and has not been found guilty of any disciplinary proceeding involving legal practitioners whether in Fiji or abroad,* including any proceeding by the Independent Legal Services Commission or any proceeding under the law governing legal practitioners, barristers and solicitors prior to the establishment of the Independent Legal Services Commission.
>
> (Emphasis added.)

There is a similar, but not identical, provision dealing with the appointment of Magistrates: see section 105(3).

[18] Three points about these provisions require emphasis. First, the fundamental principle governing appointments to the judiciary is found in section 105(1), namely, that judicial officers should be of the "highest competence and integrity". This is an important statement of principle. It links back to the reference in section 3(1) of the Constitution to the "values that underlie a democratic society based on human dignity, equality and freedom".[5] An independent judiciary of the highest calibre and probity is critically important to the proper functioning of a democratic society. Equally important is public perception − the public must have confidence in the independence, competence and integrity of the judiciary.

[19] Second, the disciplinary proceeding disqualification in relation to eligibility for appointment as a judge or magistrate was introduced for the first time by the 2013 Constitution. Earlier constitutional or statutory provisions dealing with qualification for judicial appointment identified two alternative paths to judicial appointment − the holding of previous judicial office or having practised for an identified number of years.[6] Section 105(2) follows this pattern by identifying two qualification paths – the holding of "high judicial office" or 15 years post-admission legal practice – but then adds the new disciplinary proceeding disqualification to the legal practice path.

[20] In the sense that it does not purport to identify all the circumstances that might mean a person should not be appointed as a judge, section 105(2) is incomplete. For example, a person who has held high judicial office in a prescribed overseas country but has committed a significant criminal offence, may qualify for appointment under section 105(2)(a) but may not be suitable for appointment to the Fijian judiciary given the "highest competence and integrity" principle articulated in section 105(1). So, meeting the requirements of section 105(2) does not necessarily mean that a person will meet the standard set in section 105(1). Moreover, depending on how it is interpreted, the disciplinary proceeding

5 Section 3 is quoted at para [30] below.
6 See 1970 Constitution, s 90(3); 1997 Constitution, s 130; Administration of Justice Decree 2009, s 15.

disqualification may not mesh precisely with the principle stated in section 105(1), in the sense that someone who meets the standard set out in section 105(1) may not qualify for appointment if the disciplinary proceeding disqualification is interpreted as applying to *any* adverse finding in a disciplinary process (broadly construed).

[21] Finally, the critical words that we have italicised in the extract from section 105(2) - "has not been found guilty of any disciplinary proceeding involving legal practitioners whether in Fiji or abroad" - do not make sense as a matter of English. A disciplinary proceeding is a process, not an outcome. The words "disciplinary proceeding" do not identify the nature of the adverse finding made in that process that triggers ineligibility for judicial office. The issue for the Court is how these words from section 105(2)(b) are to be interpreted. We note that the same words appear elsewhere in the Constitution. The disciplinary proceeding disqualification is explicitly applied to eligibility to hold certain other offices, in particular, that of Attorney-General[7] and that of legal practitioner member of the Judicial Services Commission,[8] in the same language as in section 105(2)(b).

(ii) The judicially appointable requirement

[22] Under the Constitution, to be eligible for appointment to several public offices, a person must be qualified to be appointed as a judge. Examples are the offices of Solicitor-General[9] and the Director of Public Prosecutions.[10] In other instances, to be eligible for appointment a person must either already be a judge or must be qualified to be appointed as a judge. Examples are Chairperson of the Human Rights and Anti-Discrimination Commission,[11] Chairperson of the Electoral Commission,[12] Chairperson of the Public Service Disciplinary Tribunal,[13] Chairperson of the Accountability and Transparency Commission,[14] and the Independent Legal Services Commissioner.[15]

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7 2013 Constitution, s 96(2)(b).
8 2013 Constitution, s 104(1)(d)(ii).
9 2013 Constitution, s 116(4).
10 2013 Constitution, s 117(2).
11 2013 Constitution, s 45(2)(a).
12 2013 Constitution, s 75(6).
13 2013 Constitution, s 120(3).
14 2013 Constitution, s 121(3).
15 2013 Constitution, s 114(2),

[23] The effect of applying the judicially appointable requirement to eligibility for appointment to these public offices is that the disciplinary proceeding disqualification applies to them, at least in respect of people who are not already judges.[16]

[24] In the result, then, either directly or indirectly, the Constitution applies the disciplinary proceeding disqualification to a significant range of public offices.

Approach to interpretation and application of the Constitution

[25] We received written and oral submissions from the Government of Fiji, the Judicial Services Commission, the Fiji Law Society, the Human Rights and Anti-Discrimination Commission and Justice Alipate Qetaki. Mr Rabuku chose not to participate in the proceedings. We thank all participants for their submissions, which we have found helpful.

[26] The participants addressed the approach the Court should adopt to interpreting and applying the Constitution, referring to this Court's decision in *Qarase v Chaudhry*[17] and to various provisions in the Constitution. We begin with this Court's judgment in *Qarase* and then address the relevant provisions in the Constitution.

(i) Qarase v Chaudhry

[27] In *Qarase* this Court was required to interpret and apply the 1997 constitution. It set out its approach in the following passages cited by the participants:

> 62. Statutory and constitutional interpretation must always take as its point of departure the natural and ordinary meaning of the words appearing in the provision to be construed and read according to their context. … Sometimes, as in this case, the words so read will yield only one construction which may be called "the plain reading of the provision". …
>
> 63. Construction builds upon the natural and ordinary meaning of the words in a constitutional provision. The way in which

[16] For those who are already judges, s 105(2)(b) would not render them ineligible for appointment, although there may still be an issue of competence and integrity under s 105(1).

[17] *Qarase v Chaudhry* [2003] FJSC 1.

> the words, taken together, are to be read will often involve selection from among a number of possible readings. That selection must have regard to the context which includes the whole of the document identified as the *Constitution (Amendment) Act 1997.* It must also have regard to the interpretive principles which are found in the Constitution itself and which apply to the whole of its text. … The purpose or object underlying the provision to be construed, the spirit of the Constitution as a whole, context, in the extended sense of the context in which the Constitution was drafted, and social and cultural developments relating to particular human rights, all have a part to play by virtue of s 3. …
>
> 64. Construction is a multi-dimensional process. It is not appropriate to approach a text on the basis that some kind of ambiguity must first be found to exist in a specific provision before taking into account the whole of its context and other relevant principles and considerations. At the very least context must be considered in the first instance.
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> 65. This is of particular significance when interpreting a constitution. A basic rule of interpretation is that the nature of the document being construed is itself a matter to be considered …
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> …
>
> 67. A narrow literalism is not an appropriate way to interpret a constitution. Such a text, perhaps more than any other, must be interpreted by reference to the natural and ordinary meaning of its words, but not literalistically, and in its total context as well as by reference to the principles which it lays down for its own interpretation.

[28] We take four relevant points from these passages:

(a) First, the starting point is the natural and ordinary meaning of the language at issue, construed in its context. This may produce a single "plain reading" of the relevant provision, which will resolve the issue of interpretation.

(b) Second, in considering the natural and ordinary meaning of the language used, the Court must take into account the interpretive directions contained in the constitution, the purpose of the provision under consideration and the constitution's broader context.

(c) Third, taking account of context in ascertaining meaning is not dependant on finding an ambiguity in the language being interpreted. Particularly in a constitutional setting, context is *always* important in the interpretative process.

(d) Fourth, the Court must not take a narrow, literalistic approach to interpreting a constitution, ie, an approach which interprets the language in isolation rather than in light of its overall purpose and context and of the constitutionally mandated principles of interpretation.

[29] We accept these propositions and turn to consider the interpretative principles in the Constitution itself.

(ii) Relevant constitutional provisions

[30] Section 3(1) of the Constitution provides:

> *Principles of constitutional interpretation*
>
> (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.

The significant feature of this direction is that the process of interpretation or application of the Constitution requires a consideration of both the purpose and objects of the Constitution *as a whole* and the values underlying a democratic society based on dignity, equality and freedom. In other words, the Constitution requires that a contextual approach be taken, rather than one which simply looks at the meaning of words in isolation from their overall setting. As we have said, an independent, well-qualified and trustworthy judiciary is vital to a functioning democracy.

[31] In addition, to the extent that the provisions of the Bill of Rights in Chapter 2 of the Constitution are engaged, there are further relevant interpretive provisions. Sections 7(1) and (5) provide:

(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.

….

(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.

As this language indicates, a broad, contextual approach to interpretation/application must be taken where the provisions of the Bill of Rights are in issue. Part of the context to be considered is the impact of the provision under consideration on individuals or groups.

[32] Further, as with many other constitutions, the Constitution provides that it is the supreme law of the State – see section 2(1). Section 2(2) goes on to say that subject to the provisions of the Constitution, "any law inconsistent with this Constitution is invalid to the extent of the inconsistency". Section 3(2) qualifies that to some extent. It provides:

> 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 the Constitution.

A court must, then attempt to reconcile the apparently inconsistent provisions.

[33] Such "inconsistency" provisions pose something of a challenge in Fiji given the short-lived nature of recent constitutions. Since becoming independent in 1970, Fiji has had four constitutions – the 1970 constitution, the 1990 constitution, the 1997 constitution and the 2013 constitution, along with periods where it was unclear what the constitutional position was. These constitutional changes and uncertainties resulted from coups and similar political upheavals, spanning the period 1987 to 2009.

[34] The Constitution was promulgated against the background that:[18]

(a) There was no extensive public consultative process prior to its adoption; rather, it was the work of a small group of officials.

(b) When it was promulgated, Fiji had an extensive body of statutory law. It is not clear that to what extent there was close consideration of how the Constitution (or particular provisions in it) would affect that existing statutory law (or elements of it). Put another way, it cannot be assumed that all instances of inconsistency were identified at the time, much less that there was a deliberate decision that particular constitutional provisions should prevail over relevant existing statutory provisions.

These features may, in some settings, weaken the notion of constitutional supremacy, or at least require the Court to consider how to mesh what appear to be inconsistent provisions so as to avoid problematic outcomes.

(iii) Proportionality as a constitutional value

[35] Besides the general interpretative directions just mentioned, there is further guidance in Chapter 2 of the Constitution. That Chapter shows that there is another relevant value embedded in the Constitution, namely proportionality. We see proportionality as an important constitutional value in Fiji, as it is in other comparable jurisdictions.

[36] Proportionality analysis attempts to weigh restrictive measures against the benefits those measures seek to achieve in order to determine whether there is an appropriate balance between the measure and the objective. A highly restrictive measure aimed at achieving a particular objective will be disproportionate if the objective can equally well be achieved by a less restrictive measure. In colloquial terms, the issue is whether the ends justify the means.[19]

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[18] For a discussion of the background see, for example, Regan, Kirkby & Kant "'Between Two Worlds': The Origins, Operation, and Future of the 2013 Fiji *Constitution*" (2023) Journal of Pacific History https://doi.org/10.1080/00223344.2023.2271124.

[19] For a recent comprehensive overview of proportionality analysis, see Vicki C Jackson "Constitutional Law in an Age of Proportionality" (2015) 124 Yale Law Journal 3094.

[37] Chapter 2 of the Constitution contains numerous explicit and implicit references to proportionality. There are two explicit references. The first is in section 11(1):

> *Every person has the right to freedom* from torture of any kind, whether physical, mental or emotional, and *from* cruel, inhumane, degrading or *disproportionately severe treatment* or punishment.
>
> (Emphasis added.)

The second is in section 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;
>
> (Emphasis added.)

[38] Apart from these provisions, various sections state that particular rights and freedoms may be subject to "such limitations as are necessary". For example, section 6(5)(c) provides that the rights and freedoms set out in Chapter 2 may be limited by limitations which are not expressly set out or authorised, but which are "necessary" and have some legal basis. The Chapter goes on to provide that certain rights and freedoms may be limited where necessary to achieve certain specified purposes, for example, freedom of speech (section 17(3)) freedom of assembly (section 18(2)) and freedom of movement (section 21(7)). The reference to the concept of necessity in such provisions means that a proportionality analysis is required.

[39] Mr Sharma for the Human Rights and Anti-Discrimination Commission drew our attention to s 32 of the Constitution. That confers on everyone a limited right to "full and free participation in the economic life of the State, which includes the right to choose their own work, trade, occupation, profession or other means of livelihood". Although this right is limited or qualified in nature, we consider that it has some relevance to the interpretation of the disciplinary proceeding disqualification.[20]

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[20] We discuss the relevance of proportionality at paras [86]–[88] below.

Three preliminary points

[40] Before we address the critical issue in the case – the meaning of the disciplinary proceeding disqualification – we should address three arguments raised in the course of submissions that we do not accept. These were arguments raised by Justice Qetaki, the Judicial Services Commission and the Human Rights and Anti-Discrimination Commission. We begin with that raised by Justice Qetaki.

(i) Misuse of disciplinary process

[41] Where, as in the present case, constitutional provisions depend on the application of other processes (in this instance, statutory professional disciplinary processes), the underlying assumption should be that those processes will be undertaken independently, in good faith and with good cause. In this case, one of those affected, Justice Qetaki, has submitted that during the period prior to and after the promulgation of the Constitution, professional disciplinary and other processes were used improperly against lawyers who challenged the actions of the then government, citing *Attorney-General of Fiji v Naidu*[21] as an example. Justice Qetaki claims that he admitted the two charges of professional misconduct "out of fear of the powers of the then Attorney-General", and that it was "a plea of convenience … to have the matter disposed of as quickly and conveniently as possible to avoid the ire of the Government of the day".

[42] An allegation of misuse of disciplinary and other processes in this way by the Government is, of course, serious. Obviously, such misuse may have harmful distortionary effects on the operation of the Constitution and more generally on the rule of law. But this is not an allegation that the Court can resolve in the present case. The issue is outside the scope of the terms of the Reference and would require a lengthy factual enquiry of a type that this Court could not carry out. We must therefore disregard this allegation and proceed on the assumption that by admitting the charges, Justice Qetaki was acknowledging that what he had done amounted to professional misconduct.[22]

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21 *Attorney-General v Naidu* [2022] FJHC 735.

22 See further at paras [67]-[72] below.

(ii) The impact of uncertainty on the Judicial Services Commission's operations

[43] As we noted earlier, Fiji has had several constitutions since independence, with the current constitution having been promulgated relatively recently, which may cause some difficulties in the way the supremacy provisions of the Constitution operate. The Judicial Services Commission (JSC) raised an argument reflecting this.

[44] The JSC's submission was that whether a wide interpretation of the disciplinary proceeding disqualification should be adopted or a narrower one was ultimately a matter of policy for the Government, especially given that the disqualification had been introduced for the first time in the Constitution. The JSC argued that the Legal Practitioners Act had not been updated to reflect the introduction of the disciplinary proceeding disqualification and to ensure the Act's consistency with section 105 of the Constitution.

[45] Moreover, the JSC argued that there was a constitutional direction in section 104(8) of the Constitution concerning the JSC's independence and freedom from direction by others. The JSC submitted:

> … in the absence of a clear and express power that displaces the JSC's independence under section 104(8), that it is not bound by the '*qualification for appointment'* in section 105(2) and further, that if it was the intention of those that wrote the Constitution that the JSC be bound by the '*qualification for appointment*' provision in section 105, that section 104 would have provided as much.

The JSC went on to submit that, in the interests of certainty and transparency, a legislative framework supporting section 104 of the Constitution, and the work of the JSC, was required.

[46] The JSC may be right that there is a need for further integration between the Constitution and other legislation, perhaps even for the enactment of new legislation. That is not something about which we express a view.

[47] But we cannot accept the JSC's submission that it is not bound by s 105(2). Section 104(8) of the Constitution provides:

> In the performance of its functions or the exercise of its authority or 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*.
>
> (Emphasis added.)

[48] The Constitution comes within the definition of "written law";[23] but even if it did not, the clear terms of s 2 apply. Section 2(1) provides that the Constitution is the supreme law of the State; section 2(3) goes on to say:

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

Moreover, under s 2(4), the courts can enforce duties under the Constitution to ensure they are performed.

[49] Accordingly, in relation to a provision such as the disciplinary proceeding disqualification in s 105(2)(b), the JSC is entitled to reach a "good faith" view as to as to its interpretation and application (subject, of course, to any contrary view expressed by the courts); but it is not free to act inconsistently with the provision where it obviously applies.

(iii) The relevance of "forgiveness" legislation

[50] In its submissions, the Human Rights and Anti-Discrimination Commission (HRADC) emphasised the Rehabilitation of Offenders (Irrelevant Convictions) Act 1997. That Act is intended to assist with the rehabilitation of offenders by removing restrictions on, among other things, their ability to work. It does this by providing that convictions are "irrelevant" either where there is no direct connection between the conviction and a particular position or job or where the rehabilitation period has expired. The HRADC argued that the passage of time since Justice Qetaki and Mr Rabuku were found guilty of misconduct exceeds the

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[23] "Written law" is defined in section 163(1) of the Constitution to mean "an Act, Decree, Promulgation and subordinate law made under those Acts, Decrees or Promulgations". The Constitution was introduced by the Constitution of the Republic of Fiji (Promulgation) Decree 2013.

statutory rehabilitation period, so that the disciplinary findings against them should be treated as "irrelevant".

[51] The short answer to this submission is that the Act applies only to criminal offending. As we discuss further below,[24] disciplinary proceedings are not criminal proceedings.

[52] This brings us to the meaning of the disciplinary proceeding disqualification.

The meaning of the disciplinary proceeding disqualification

[53] The critical issue for the Court is the meaning to be attributed to the words "found guilty of any disciplinary proceeding involving legal practitioners whether in Fiji or abroad" in s 105(2)(b). The Government and the Fiji Law Society submitted that the "guilty" pleas entered by Justice Qetaki and Mr Rabuku before the Legal Services Commissioner to the professional misconduct charges against them meant that they had been "found guilty" of disciplinary offences in disciplinary proceedings. This was enough to satisfy the disciplinary proceeding disqualification. It was irrelevant that the Commissioner decided to impose no sanction on Justice Qetaki because his culpability was low and his misconduct minor. Equally, the relatively minor nature of Mr Rabuku's misconduct was irrelevant.

[54] As we have said, we must interpret the language used in its context, which includes the fact that it appears in the Constitution. We must do so against the background that, as written, the language does not make sense as a matter of ordinary English. We must consider whether (taking Justice Qetaki's case as an example) it is likely that the disciplinary proceeding disqualification was intended to operate to exclude from consideration for judicial appointment a person against whom no sanction was imposed in light of the minor nature of his professional misconduct and the low level of his culpability. In considering this, we must bear in mind that the disciplinary proceeding disqualification applies not only to the holding of judicial

[24] See para [56] below.

office but also to the holding of a number of other public offices. Moreover, it applies to disciplinary proceedings "abroad".

(i) Disciplinary proceedings "abroad"

[55] The reference to a disciplinary proceeding "whether in Fiji or abroad" in s 105(2)(b) is important. Under section 105(2)(b), a person who has had 15 years post-admission legal practice in Fiji "or in another country prescribed by law" is qualified for judicial appointment provided he or she is not caught by the disciplinary proceeding disqualification. The other countries "prescribed by law" for the purposes of section 105(2)(b) are identified in section 5A of the High Court Act 1875 and include Australia and New Zealand. Because it is important to have some feel for the nature of typical professional disciplinary regimes, we will briefly identify elements of the disciplinary regimes in New South Wales and New Zealand and then describe in more detail the disciplinary regime in Fiji.

[56] The traditional model for disciplinary proceedings involves a process similar to that in criminal proceedings (even though disciplinary proceedings are classified as civil, eg proof is to the civil standard).[25] There will be a charge (with particulars) laid before the disciplinary tribunal; there will be a prosecutor; the accused practitioner will be entitled to legal representation; the practitioner may elect to admit or dispute the charge; where the charge is disputed, there will be a hearing with witnesses and submissions; the tribunal will ultimately make a determination, either finding the charge proved or not proved. If the charge is proved, the tribunal will consider what sanction(s) should be imposed on the practitioner (including whether they should lose the right to practice). Although disciplinary proceedings are civil and are for the protection of the public rather than for the punishment of errant practitioners, they commonly utilise the language of criminal proceedings – charges, prosecutors, findings of guilt and so on.

[57] The disciplinary regimes in both New South Wales and the New Zealand contain a disciplinary tribunal along the traditional lines just described. But they also

[25] See, for example, the discussion in *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1.

contain a lower level process, which operates as a filter. In short, they involve a two-tier structure.

[58] To explain, complaints are dealt with in the first instance by an officer[26] or body[27] that is not a traditional disciplinary tribunal and need not hold hearings in the traditional sense. The relevant officer or body has the power to deal with low level complaints (including by imposing a limited range of sanctions) but may refer more serious matters to the traditional disciplinary tribunal. When such a referral is made, the officer or body acts as the prosecutor.

[59] To take the New Zealand Standards Committees as an example, their functions include conducting investigations either in response to complaints or on their own motion; promoting the resolution of cases by negotiation, conciliation or mediation; making final determinations in relation to complaints; and laying and prosecuting charges before the Layers and Conveyancers Disciplinary Tribunal.[28] In relation to complaints, a standards committee may decide to take no action for a variety of reasons, including that the subject matter of the complaint is "trivial", and may discontinue an investigation if it considers that in the circumstances "any further action is unnecessary or inappropriate".[29] Standards committees may conduct hearings, but they are generally "on the papers".[30] Following an investigation and hearing, a standards committee may refer the matter to the Disciplinary Tribunal, take no further action or determine that there was been unsatisfactory conduct by the practitioner concerned.[31] Where it makes an "unsatisfactory conduct" determination, there are various remedies available to it. These include ordering that an apology be given, reprimanding or censuring the practitioner involved, ordering the payment of compensation or the refund of fees paid, incorporating the terms of an agreed settlement in a final determination,

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26 In New South Wales, the NSW Legal Services Commissioner: see Legal Profession Uniform Law 2014 (NSW).

27 In New Zealand, Standards Committees: see the Lawyers and Conveyancers Act 2006, Part 7.

28 Lawyers and Conveyancers Act 2006 (NZ), section 130.

29 Section 138.

30 Section 153.

31 Section 152. "Unsatisfactory conduct" is defined in section 12.

imposing a fine of up to $15,000 and requiring the practitioner to take advice or practical training or to open his or her practice to inspection.[32]

[60] There is a broadly similar structure in New South Wales, where the NSW Legal Services Commissioner performs the filtering function and acts as prosecutor where there is a reference to the Disciplinary Tribunal.[33]

[61] Where a practitioner from New South Wales or New Zealand is charged with disciplinary misconduct before the relevant disciplinary tribunal and is found guilty and sanctioned, he or she will not qualify for judicial appointment in Fiji as a result of the disciplinary proceeding disqualification. However it is interpreted, the disqualification would apply in such a case.

[62] However, what is the position where a practitioner is dealt with by a standards committee or the NSW Legal Services Commissioner and is not referred to the Disciplinary Tribunal? If some form of finding or order is made against the practitioner by the Committee or the Commissioner, does that fall within the disciplinary proceeding disqualification?

[63] In his submissions for the Fiji Law Society, we understood Mr Daubney KC to say that an otherwise qualified New South Wales practitioner would not be disqualified in these circumstances because the process before the NSW Legal Services Commissioner is not a "disciplinary proceeding". That approach has some attraction as it would disqualify only those who have been found guilty as a result of having gone through a disciplinary tribunal process, which deals with the more serious cases of professional misconduct. In that situation, there is a clear link between the disciplinary proceeding disqualification and the s 105(1) objective of Fiji having judicial officers "of the highest competence and integrity".

[64] However, it is not self-evident that this is the correct interpretation, especially given that both the NSW Commissioner and a New Zealand standards committee can make findings of unsatisfactory conduct against practitioners and can impose at

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32 Section 156.

33 See Legal Profession Uniform Law, Part 5.4. Disciplinary Matters

least some remedies that look like disciplinary sanctions, for example, fines. We return to this at paragraphs [84]–[85] below.

(ii) The Legal Practitioners Act 2009

[65] We now describe the disciplinary scheme under the Legal Practitioners Act 2009.

[66] Sections 81 and 82 of the Act address the terms "unsatisfactory professional conduct" and "professional misconduct". They provide:

> 81. For the purposes of this Act, "unsatisfactory professional conduct" includes conduct of a legal practitioner …, occurring in connection with the practice of law that falls short of the standards of competence and diligence that a member of the public is entitled to expect of a reasonably competent or professional legal practitioner ….
>
> 82. (1) For the purposes of this Act, "professional misconduct" includes—
>
> (a) unsatisfactory professional conduct of a legal practitioner …, if the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; or
>
> (b) conduct of a legal practitioner …, whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law, that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice ….
>
> ….

Section 83(1)(h) provides that without limiting sections 81 and 82, a legal practitioner's conduct that contravenes the Trusts Account Act 1996 is capable of being "unsatisfactory professional conduct" or "professional misconduct".

[67] We pause here to recall that both Justice Qetaki and Mr Rabuku pleaded guilty to the charges of professional misconduct against them. In Justice Qetaki's case, the two allegations of professional misconduct arose out of the same failure – namely, to obtain the necessary consent before his trust account was opened – and the finding of professional misconduct against him was based on his plea.

[68] We should emphasise that a legal practitioner's contravention of a provision of the Trust Accounts Act 1996 does not automatically amount to professional misconduct. The effect of the opening words of section 83(1) is that such a contravention is only *capable* of amounting to professional misconduct. Whether such a contravention does indeed amount to professional misconduct depends on the particular circumstances of the case. Section 82(1) places the bar relatively high. It gives two examples of the kind of conduct which would amount to professional misconduct, namely conduct which "involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence" and conduct which would "justify a finding that the practitioner is not a fit and proper person to engage in legal practice".

[69] In these circumstances, we ask: how should the Commissioner have approached Justice Qetaki's case? Take a criminal case by way of analogy. Where a defendant pleads guilty, but then advances mitigation which, if accepted, amounts to a defence to the charge, the judge cannot proceed on the basis of the guilty plea, unless the defendant withdraws that part of his mitigation which amounts to a defence. If the defendant declines to do so, the judge must proceed on the basis that the defendant has pleaded not guilty.

[70] That applies to disciplinary proceedings as well. What the Commissioner should therefore have done was to consider whether the particular circumstances of Justice Qetaki's contravention of the Trust Accounts Act really did amount to professional misconduct, even though Justice Qetaki had admitted that it had. The Commissioner did not address that aspect at all; rather, he simply stated that he found the charges proven "by [Justice Qetaki's] guilty plea".

[71] In our view, had the Commissioner addressed the question of Justice Qetaki's guilt, he would have concluded that Justice Qetaki's contravention of the Trust Accounts Act did not justify a finding of professional misconduct. Even though the description of "professional misconduct" in s 82 is inclusive rather than exhaustive, it is difficult to see how the` non-compliance with the Trust Accounts Act requirement amounted to anything comparable to a substantial or consistent failure to maintain appropriate standards or justify a "not a fit and proper person" finding.

It was a single incident, it occurred only because the Bank breached its obligations, the trust account was open only for a short period and it was never operated in any meaningful sense.

[72] That said, this Reference is about the proper interpretation of the Constitution. Whether the Commissioner erred in law in accepting Justice Qetaki's admission of guilt is ultimately beside the point. As stated earlier, we must proceed on the basis that, by his plea, Justice Qetaki acknowledged that his actions constituted professional misconduct. The same is true in the case of Mr Rabuku.

[73] Returning to the Legal Practitioners Act, while it contains a two-tier structure that bears some resemblance to that found in the New South Wales and New Zealand schemes, the opportunity for an initial filtering of complaints leading to an informal resolution is much more limited. Section 109 provides that the Chief Registrar (who is the official who generally receives complaints) may take one of three steps:

(a) summarily dismiss a complaint in certain circumstances;[34]

(b) attempt to resolve the matter, including through mediation;

(c) commence disciplinary proceedings before the Commission.

[74] The point to be emphasised is that while the Chief Registrar has the power to dismiss a complaint that is "vexatious, misconceived, frivolous, or lacking in substance",[35] there is no explicit power to deal informally with complaints that are minor or trivial in nature. The Chief Registrar "may take such efforts as it sees fit to facilitate the resolution of the matter in question, including mediation",[36] but this power appears to be directed more at disputes between clients and lawyers or between lawyers than at regulatory matters of the type at issue in the *Qetaki* and *Rabuku* cases. It seems, then, that there is little or no scope for low level resolutions

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34 See section 110(1). Despite a summary dismissal, a complainant may pursue the complaint before the Independent Legal Services Commission: section 110(4).

35 Legal Practitioners Act, sections 109(1)(a) and 110(1)(b).

36 Section 109(1)(b).

of some minor regulatory infractions, such as can occur under the New South Wales and New Zealand schemes.

[75] If the Chief Registrar decides to commence disciplinary proceedings against a practitioner, he or she makes an application to the Independent Legal Services Commission. The procedure to be followed thereafter is specified in ss 111 – 120. It is along traditional disciplinary tribunal lines.

[76] Section 121(1) provides for the kind of orders that can be made if:

> the Commission is satisfied that the legal practitioner … has engaged in professional misconduct or unsatisfactory professional conduct …

We note that the "is satisfied" standard in a disciplinary context does not equate to the stand of proof in criminal cases, ie beyond reasonable doubt.[37] For this reason the expression "found guilty" in s 105(2)(b) may be misleading as it utilises the language of the criminal law. Under the Act, being "satisfied" at the conclusion of a hearing that a practitioner has engaged in misconduct is a prerequisite to the imposition of orders in the nature of disciplinary sanctions; it is not a distinct procedural step like the entry of a conviction in a criminal case. The orders provided for in section 121(1) are in standard form, and include striking off, suspension, reprimand, fine, requirements to pay compensation and restrictions and limitations on practice. Some of the orders correspond more or less closely to those that can be made by a standards committee in New Zealand.

[77] As to costs, section 124 provides:

> (1) After hearing any application for disciplinary proceedings under this Act, the Commission may make such orders as to the payment of costs and expenses as it thinks fit against any legal practitioner … .
>
> …
>
> (3) Without limiting subsection (1) the Commissioner may—

[37] See, for example, *Z v Dental Complaints Assessment Committee*, above n 25, per McGrath J (with whom Blanchard and Tipping JJ agreed), at [94]-[118].

(a) without making any finding adverse to a legal practitioner …, and

(b) if the Commission considers that the application for disciplinary proceedings was justified and that it is just to do so,

order that legal practitioner … to pay to the Commission and the Registrar such sums as the Commission may think fit in respect of costs and expenses of and incidental to the proceedings, including costs and expenses of any investigation carried out by the Registrar.

The important feature of this section for present purposes is that it makes it clear that an award of costs against a practitioner is not a disciplinary sanction.

[78] In relation to the Discipline Register, section 126 provides:

(1) The Commission shall publicise and make public any order made against a legal practitioner … in an application for disciplinary proceeding, in any way the Commission considers appropriate; provided that the Commission may withhold the publication of any order if the Commission is of the view that there are exceptional circumstances which warrant against any publication.

(2) The Commission must keep a Discipline Register of all orders made against legal practitioners … . The Register must contain -

(a) the full name of the legal practitioner … against which orders in an application for disciplinary proceedings were made;

(b) the address of the legal practitioner … against which orders in an application for disciplinary proceedings were made;

(c) the particulars of the application for disciplinary proceedings;

(d) the actual orders made against the legal practitioner …; and

(e) such other particulars as prescribed by rules or regulation.

(3) The Discipline Register may be kept in a form decided by the Commission, and must be available for public inspection.

…

> (5) The Discipline Register shall not contain any records in relation to applications for disciplinary proceedings in which the Commission has not found the legal practitioner … to have engaged in professional misconduct or unsatisfactory professional conduct.

[79] As we have said, the Independent Legal Services Commissioner found the two professional misconduct charges against Justice Qetaki proved by his plea of guilty. He then went on to order that his name not be entered in the Discipline Register. The basis for this appears to be as follows. Section 121 identifies the orders that the Commissioner may make where satisfied that a legal practitioner has engaged in professional misconduct. The orders referred to do not include the power to award costs, which is dealt with separately in s 124 in a way which makes it clear that an order for costs is not a disciplinary sanction. The obligation under s 126(2) to keep a Discipline Register refers to "orders" made by the Commissioner. Given the structure of the relevant provisions, the word "orders" is best construed as a reference back to the list of orders set out in s 121(1), none of which were made against Justice Qetaki.

[80] An important point that emerges from the foregoing description is that the Legal Practitioners Act simply does not provide the type of filter mechanisms that both the New South Wales and New Zealand Acts provide. It is improbable that allegations of professional misconduct of the type advanced against Justice Qetaki and Mr Rabuku would have been referred to the disciplinary tribunals in the New South Wales and New Zealand regimes; rather, they would likely have been dealt with at the filtering stage in both jurisdictions. If this is correct, it raises the uncomfortable possibility that professional misconduct which would not be disqualifying if it was dealt with in New South Wales or New Zealand would be disqualifying in Fiji simply as a result of the process adopted to deal with it.

(ii) Disciplinary procedure disqualification interpreted

[81] As we have said, the words "found guilty of any disciplinary proceeding involving legal practitioners whether in Fiji or abroad" do not make literal sense.

Accordingly, some interpretative effort is required to determine their meaning. The two principal options are to interpret them as meaning:

(a) found guilty of professional misconduct in any disciplinary proceeding involving legal practitioners whether in Fiji or abroad; or

(b) sanctioned for professional misconduct in any disciplinary proceeding involving legal practitioners whether in Fiji or abroad.

[82] On the first meaning, which is essentially that contended for by the Government and the Fiji Law Society, the disciplinary proceeding disqualification would apply in cases dealt with in what could be characterised as a "disciplinary proceeding" even though the relevant misconduct did not warrant any disciplinary sanction. On the second, it would apply only where a disciplinary sanction has been imposed. Justice Qetaki would be subject to the disciplinary proceeding disqualification only on the first meaning; Mr Rabuku would be within the disciplinary proceeding disqualification on both meanings.

[83] We consider that the second meaning is that one that should be given to the words. The essential reason for this is that we consider that this interpretation is necessary to give effect to the approach to interpretation set out by this Court in *Qarase*, which we accept. The words must be given an interpretation that is consistent with the directions in ss 3 and 7 of the Constitution, and which sits most comfortably within their context, which includes both s 105(1) and the concept of proportionality.

[84] Before we explain this conclusion, however, we should address the meaning of the words "disciplinary proceeding" – are they limited to proceedings before a traditional-style disciplinary tribunal, as we understood Mr Daubney to argue, or could they include the lower-level and less formal processes of bodies such as standards committees or the NSW Legal Services Commissioner, at least in some cases?

[85] We consider that the words should be interpreted as referring to proceedings before traditional-style disciplinary tribunals. There are three reasons for this:

(a) First, the use of the term "found guilty" in section 105(2)(b) carries with it the connotation of a formal, court-like process of the type used by disciplinary tribunals. It is not apt when applied to most of the work carried out by filtering bodies.

(b) Second, this interpretation is consistent with the structure of the Legal Practitioners Act, under which the only way a person can be "found guilty" of professional misconduct is through the formal disciplinary process operated by the Independent Legal Services Commissioner.

(c) Third, this interpretation is consistent with the context, which is a mandatory disqualification from judicial and other appointments. The court-like processes of a traditional disciplinary tribunal are best suited to such a context.

This means that a matter dealt with by, for example, a standards committee in New Zealand would not fall within the disciplinary proceeding disqualification in s 105(2)(b). However, it is possible that such a matter could be taken into account under section 105(1) when the Judicial Services Commission considers whether the practitioner involved meets the "highest competence and integrity" standard for judicial appointment. That said, the only disciplinary process contemplated by the Legal Practitioners Act in relation to practitioners in Fiji is a process akin to a traditional disciplinary tribunal.

[86] We now explain why we consider that the second of the two meanings identified in paragraph [81] above is the correct one. As we have said, proportionality is a value which is embedded in the Constitution, Chapter 2 in particular. While the various provisions relating to proportionality referred to in our earlier discussion are not directly controlling, they illustrate that the Constitution recognises proportionality as an important value. Proportionality analysis seeks to ensure that restrictions on rights and freedoms are justified, rather than arbitrarily imposed. The emphasis on proportionality brings section 3(1) into play:

> 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.

Because proportionality is one of the values underlying the Bill of Rights and Fijian society, the Court must seek to promote it or, put another way, to avoid disproportionality to the extent possible.

[87] Section 105(1) is, in effect, a statement of purpose to be achieved by, amongst other things, the disciplinary proceeding disqualification. So, in proportionality terms:

(a) the object to be achieved is having a judiciary "of the highest competence and integrity";

(b) one means of achieving that is through the disciplinary proceeding disqualification;

(c) the disciplinary proceeding disqualification limits a person's ability to seek an occupation of their choice, for which s 32 of the Constitution provides some protection.

[88] The question then becomes whether any disadvantage or prejudice associated with the adoption of each of the two possible meanings of the disciplinary proceeding disqualification is proportionate to the object of promoting the s 105(1) purpose, ie, whether the particular meanings go further than necessary to achieve the objective sought. In this case, it is arguable that both meanings result in disproportionate outcomes, in the sense that both will disqualify from judicial appointment people who might meet the section 105(1) standard; but of the two, the second is less disproportionate than the first. Complying with s 3(1) requires that we chose the second meaning if at all possible.

[89] The interpretation of 105(2)(b) that the Government and the Fijian Law Society urged upon us would lead to the exclusion of people who would otherwise meet the s 105(1) requirement for judicial appointment. Mr Daubney KC pointed out that the 15 year practice requirement in s 105(2)(b) will have the same effect. We accept that, but it is not a reason to accept the meaning of the disciplinary

proceeding disqualification for which he contends. The meaning of the 15 year requirement is plain and does not admit of any alternative interpretation. That is not the case with the disciplinary proceeding disqualification.

[90] The meaning supported by the Government and the Law Society will also result in section 105(2)(b) operating more unevenly across jurisdictions than it needs to (depending on how disciplinary processes work in different prescribed countries). We think it undesirable and unintended that conduct that would not prevent a foreign lawyer from becoming a judge in Fiji because it was not dealt with in a "disciplinary proceeding" would prevent a local lawyer from becoming a judge because, in Fiji, it was dealt with in a "disciplinary proceeding".[38]

[91] Mr Daubney argued that the interpretation of the disciplinary proceeding disqualification which we prefer would replace an objective test with a subjective one and should not be adopted for that reason. But the disciplinary proceeding disqualification is inherently indeterminate, in the sense that it is not obvious what it means. As we have noted, there is indeterminacy as to what constitutes a "disciplinary proceeding" just as there is indeterminacy in what amounts to a "disciplinary sanction". But, as Professor H L A Hart pointed out many years ago, that is the nature of legal rules – they have a central core of application surrounded by a penumbra of uncertainty, ie, an area where their application is not certain.[39]

Opinion

[92] In our opinion, the words "found guilty of any disciplinary proceeding involving legal practitioners whether in Fiji or abroad" should be interpreted to mean "sanctioned for professional misconduct in any disciplinary proceeding involving legal practitioners whether in Fiji or abroad". Accordingly, we answer the questions in the Reference as follows:

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38 We note that even on the interpretation which we favour, there is scope for uneven application of the disciplinary proceeding disqualification given the limited scope for low-level, informal resolution of matters of professional discipline under the Legal Practitioners Act 2009. Arguably, this highlights the point made by the JSC about the need for the updating of the Act.

39 See H L A Hart *The Concept of Law* (Clarendon Press, 3rd ed, 2012).

Question:

(a) Whether a legal practitioner who has been found by the Independent Legal Services Commission to have engaged in unsatisfactory professional conduct or professional misconduct under section 121(1) of the Legal Practitioners Act 2009 is ineligible:

(i) to be appointed as a Judge under s 105 of the Constitution; or

(ii) to hold any of various public offices to which the judicially appointable requirement applies.

Answer:

A legal practitioner who the Independent Legal Services Commission is satisfied has engaged in unsatisfactory professional conduct or professional misconduct under section 121(1) of the Legal Practitioners Act 2009 will be disqualified from judicial appointment by the disciplinary proceeding disqualification in section 105(2)(b) of the Constitution only if sanctioned for the misconduct.

Question:

(b) Whether in light of the findings of the Independent Legal Services Commission in *Chief Registrar v Alipate Qetaki*,[40] Justice Alipate Qetaki is qualified to hold office as a Judge of the Court of Appeal?

Answer:

Justice Alipate Qetaki is qualified to hold office as a Judge of the Court of Appeal in terms of section 105(2)(b) because he was not sanctioned for professional misconduct.

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[40] *Chief Registrar v Alipate Qetaki* [2017] FJILSC 9.

Question:

(c) Whether in light of the Independent Legal Services Commission's findings in *Chief Registrar v John Rabuku*,[41] Mr John Rabuku is qualified to hold the office of Director of Public Prosecutions?

Answer:

Mr John Rabuku is not qualified to hold the office of Director of Public Prosecutions because he is not qualified to be a judge, as required by section 117(2) of the Constitution. He is not eligible for judicial appointment by virtue of the disciplinary proceeding disqualification in section 105(2)(b) because he was sanctioned for professional misconduct in a disciplinary proceeding.

The Hon. Mr. Justice Brian Keith
Judge of the Supreme Court

The Hon. Mr. Justice Terence Arnold
Judge of the Supreme Court

The Hon. Mr. Justice William Young
Judge of the Supreme Court

[41] *Chief Registrar v John Rabuku* [2013] FJILSC 6.