

## ETHNIC AND SOCIAL JUSTICE

8.1 This chapter reviews sections 18 and 21 of the 1990 Constitution, dealing with affirmative action generally and with the protection and enhancement of Fijian and Rotuman interests. It also reviews certain other provisions about the representation of the various communities in the public service, the judicial and legal service, and on the Police Service Commission.

8.2 These matters were frequently raised in submissions. Few other topics gave rise to such a complex interplay of differing perceptions about

- the present circumstances of the different communities,
- the philosophy of giving state assistance to individuals by reason of their membership of a particular community or other group,
- the principles on which appointments should be made to the public service and other aspects of the service of the state,
- how programmes for the benefit of particular communities or groups are to be reconciled with the right to equality before the law and freedom from discrimination on the constitutionally prohibited grounds,
- the desirable balance between the resources used for those purposes and other social justice programmes for the needy members of all communities,
- the question of whether the assistance given to enhance the position of particular communities and groups achieves the desired purpose,
- what non-governmental organisations could do on a voluntary basis to increase the equality of access for members of all communities to all sectors of the economy.

8.3 Some submissions, specially by groups representing women, also drew attention to inequalities between the economic and social status of women and men. They urged that these inequalities, which give rise to much the same issue as ethnic inequalities, should also be addressed in the Constitution. We therefore look at how the Constitution can give women, as well as communities, greater access to economic and social justice.

8.4 In the following sections of this chapter, the Commission describes the relevant provisions of the 1990 Constitution and analyses the perceptions and principles just mentioned. It then sets out its conclusions, and its recommendations for meeting the following needs:

- programmes to assist all communities and groups in the diverse society of the Fiji Islands to fulfil their aspirations for social justice and opportunities for participation in all sectors of the economy;
- measures to ensure that these programmes are as effective and as widely-acceptable as possible;
- efficient public and other state services, in which appointments and promotions are based on individual merit;
- corrective mechanisms, should the decisions on individual appointments and promotions result in overall imbalances;
- support on a voluntary basis from non-governmental organisations in partnership with Government.

In these ways, and through the further provisions recommended in Chapter 14, the Constitution should still provide fully for all the needs of communities now being addressed through the provisions of the 1990 Constitution providing for racial quotas and affirmative action.

#### THE 1990 PROVISIONS

8.5 Two new sections dealing explicitly with affirmative action were included in the 1990 Constitution. Section 21, entitled *Protection and enhancement of Fijian and Rotuman interests*, authorises and directs Parliament to put in place affirmative action programmes for the benefit of Fijians and Rotumans. The authorisation arises from the fact that the section overrides everything in Chapter II, including the right to freedom from discrimination in section 16 already discussed in Chapter 7.

8.6 The directive takes the form of the requirement in section 21(1) that “Parliament *shall*, with the object of promoting and safeguarding the economic, social, educational, cultural, traditional and other interests of the Fijian and Rotuman people, *enact laws* for those objects and *shall direct the Government* to adopt any programme or activity for the attainment of the said objects” (emphasis added). A duty is laid on the government to comply with those directions. It is not clear whether any such directions can be given in the absence of a law.

8.7 The remaining provisions of section 21 authorise the Cabinet, in carrying out any direction of Parliament given under subsection (1), to give directions to Departments, Commissions or public authorities for the reservation of scholarships and other training opportunities and business permits or licences, and generally for the attainment of the objects of the section. The Cabinet is to act in consultation with the Bose Levu Vakaturaga or the Council of Rotuma, as appropriate. The section is based on Article 153 of the Malaysian Constitution, but does not contain the safeguards for non-indigenous groups provided for in that article.

8.8 Section 18 was also inserted, presumably with the object of making it clear that affirmative action programmes for groups other than Fijians and Rotumans were not precluded. It reads as follows:

Nothing contained in section 16 of this Constitution shall preclude the enactment of any law or any programme or activity that has as its object and purpose the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, sex, place of origin, political opinions, colour, religion or creed.

The section follows, almost word for word, section 15(2) of the *Canadian Charter of Rights*. Section 18 authorises laws, programmes and activities that would otherwise be discriminatory and unconstitutional under section 16.

8.9 The 1990 Constitution also contains specific provisions which seek to secure a minimum 50% representation of Fijians and Rotumans in departments and among the holders of judicial and legal offices - a sharply focussed form of affirmative action. Section 127(10)(b) reproduced the provision in the 1970 Constitution which had required the Public Service Commission to

ensure that, so far as possible each community in Fiji receives fair treatment in the number and distribution of offices to which candidates of that community are appointed on entry.

A corresponding provision, section 124(3)(b), was inserted, requiring the Judicial and Legal Services Commission to observe the same duty in selecting candidates for entry into the public service. These provisions required the principle of proportionality - the representation of each community in proportion to its share of the total population - to be applied at entry level in the legal services of the state.

8.10 However, under the 1990 Constitution, the two Commissions had also to apply another, potentially conflicting rule. Sections 124(4) and (5) and 127(11) and (12) require each Commission respectively to ensure that, at each level of

department or office, including judicial office, those holding office should comprise not less than 50% Fijians and Rotumans and not less than 40% members of other communities. Where either Commission cannot comply with this requirement, it may, with the Prime Minister's concurrence, appoint other suitably qualified persons. The provisions are expressed to override Chapter 2 (the Bill of Rights).

8.11 The Constitution lays down no requirements as to the ethnicity of the members of the Judicial and Legal Services Commission or the Public Service Commission. In contrast, another new provision, section 128(2), requires the Chairman and at least one other member of the Police Service Commission to be Fijian. There are, however, no constitutional requirements about the ethnic composition of the Police Force. The need for the Chairperson and at least one other member of the Police Service Commission to be Fijian is presumably designed to make sure that Fijians and Rotumans are adequately represented in the Police Force also.

## THE PERCEPTIONS OF INJUSTICE AMONG COMMUNITIES AND GROUPS

### **Indigenous Fijians and Rotumans**

8.12 The introduction of the provisions just described into the 1990 Constitution was a response to indigenous Fijians who perceived that they were lagging behind other communities in terms of their achievements in some sectors, notably education, commerce and participation at the higher levels of the public service. They were well-represented in the Police Force and had always predominated in the Military Forces. There was a strong feeling that special measures were required to help them catch up in those areas in which they were under-represented.

8.13 In discussing how the Constitution should take account of that perception, the Commission would like to stress that indigenous Fijians and Rotumans, like other Pacific Island peoples and indigenous peoples in other parts of the world, have been faced with the need to make great adjustments as they move from their traditional subsistence economy to the money economy. In saying this, we do not undervalue the many admirable qualities engendered by the traditional way of life. They include the shared commitment to the community as a whole, the leadership given by the chiefs at all levels and their desire to secure the well-being of their people, and the capacity to work cooperatively.

8.14 We are not suggesting that these community-centered values necessarily stand in the way of the individual enterprise often thought to be the mainspring of

the money economy. We are confident that Fijians and Rotumans will develop their ability to harness their collective, as well as their individual, energies so they can play a full part in the social and economic life of the Fiji Islands.

8.15 A 1994 analysis of Fiji Pine Limited's working relationship with landowners in the pine industry discussed the techniques which had been successfully adopted to bridge gaps between the expectations of the landowners and the realities of commercial profitability. In commending the model for possible application to other development projects, the following key elements were identified:

- the existence of a firm legal base for landowner participation in the commercial enterprise;
- use of the Fijian traditional system, bringing together land ownership, respect for and allegiance to chiefs, the existence of blood ties and traditional methods of dispute resolution, for the purpose of expanding pine plantations and resolving disputes;
- the Government's commitment and assistance;
- the company's innovative approach;
- the ability of the Native Land Trust Board to provide security of tenure of the native lands required for pine plantations on terms and conditions tailored to the requirements of the industry.

8.16 This analysis illustrates that there are tensions between the desire to hold on to all that is good in the old way of life and also to enjoy fully the benefits of the new. It shows that, with imagination and goodwill, these tensions can be accommodated constructively. We wish to stress, however, that the tensions would be present, even if the Fiji Islands had not become the home of other ethnic communities, and Fijians and Rotumans were seeking, on their own, to make their way in the modern world.

8.17 It is hard to envisage the Fiji Islands without the variety of human resources and productive assets now contributing to its economic, social and cultural life. At the material level, the country would have less capacity to generate wealth, a smaller range of available goods and services, and government would have considerably reduced revenue from which to provide the infrastructure, the development capital and the social services which people have come to expect. As it is, the Republic has many advantages stemming from the diversity of its society.

8.18 Some indigenous Fijians perceive the visible signs of the success of some members of other communities as proof that the different communities have been treated unequally. The tangible assets, like houses and cars, of some Indo-Fijians and general voters, and their access to disposable income, as well as their educational achievements, and the Indo-Fijian dominance of the locally-owned retail sector, present a contrast with the qualifications, life-style and access to sources of cash income of most, though by no means all, indigenous Fijians and Rotumans.

8.19 Increasingly, however, there are indications that the standard of living of these communities is improving. This shows that the traffic in income- and wealth-generating activity is not all one way. It is human nature for people to undervalue their own assets and advantages and overvalue what they do not have but see others as enjoying. The different ways in which landowners and tenants look at the value of land ownership and of the right to use the land is a good example. Each group tends to think that the right they do not enjoy is more valuable than the right they possess.

8.20 The nature and relative size of the economic contributions made by the different communities and the distribution of wealth among them, has never been fully analysed, but it is much more complex than is often realised. No community has good reason to feel that its own contribution is either less significant or more significant than that of other communities. The fact is that all communities in Fiji are economically interdependent.

8.21 People fail to take account of the long time it takes to build up a successful business. Most of today's relatively large and profitable commercial enterprises started several generations ago as small family businesses. And of those small businesses, only a handful have expanded to become nationwide concerns. However, new patterns of commercial activity are emerging, sometimes through Fijian entrepreneurial activity, sometimes through their participation in joint ventures and sometimes through their equity investment in existing companies. That said, it is still important to consider how the remaining inequalities of indigenous Fijians and Rotumans in the commercial and other sectors can best be tackled. We return to that question below.

### **Indo-Fijians**

8.22 Indo-Fijians have their special concerns. We have already discussed the impact of the electoral arrangements under the 1990 Constitution on the self-confidence and self-respect of that community. In Chapter 16 we discuss the

concerns arising from the uncertainty about whether the agricultural leases soon to expire will be renewed.

8.23 Here, we refer to other concerns of the Indo-Fijian community. One is the growing ethnic imbalance in the public service and other aspects of the service of the state. Historically, Indo-Fijians have been well-represented in the public service and the police and barely represented in the armed forces. Since 1987, their numbers in all three services have decreased markedly. In 1985, Fijians made up 46.4% of established public servants, Indo-Fijians 48% and general voters and expatriates 5.6%. The corresponding figures as at 27 October 1995 were Fijians, 57.32%, Indo-Fijians 38.57% and general voters and expatriates 4.11%. In 1995, of the 31 permanent secretaries, 22 were Fijians, 6 were Indo-Fijians and 3 were general voters.

8.24 It is not clear whether the significant drop in the number of Indo-Fijians, specially at the higher levels, is directly attributable to the constitutional provisions, or flows from them by affecting the attitudes of the employing authority and potential candidates alike. The employing authority has the duty of promoting Fijians to equip them to hold senior positions. As a result, some Indo-Fijians may consider that their former opportunities for advancement in the public service are now restricted. Therefore they may seek other types of employment. Another factor, at least in the armed services, appears to be the occupational preferences of Indo-Fijians as a group, although we were assured that the few Indo-Fijians serving in the Republic of Fiji Military Forces are fine soldiers. Yet another factor is the outflow of well-qualified Indo-Fijians who emigrate to other countries.

8.25 The police and the armed forces are, of course, the agencies through which the state is permitted to use force to ensure the enforcement of the law. In addition to raising questions about whether Indo-Fijians have the opportunity to be fairly represented in those services, the present ethnic imbalance gives rise to natural, though not well-founded concerns about their impartiality. In a multi-ethnic country it is desirable that, in the interests of both equity and reassurance to all communities, all branches of the state services should be broadly representative of the population as a whole.

8.26 The submissions of Indo-Fijians also expressed concern about the growing poverty among sections of the Indo-Fijian community. We have already mentioned that the latest study of income levels and poverty shows that, among Fijian and Indo-Fijian households, each group has a roughly comparable percentage living in poverty, though there are some differences, depending on what measure

of poverty is used and whether the household is urban, or in a village or settlement. Although Indo-Fijian households had higher incomes than did Fijian households, incomes were significantly less equally distributed among Indo-Fijian households. Ethnic differences in incomes are attributable, at least in part, to the differences between the incomes of *all* households in urban, as compared with rural, areas. However, since 1977, when the previous survey was made, the margin of advantage for households in urban areas has declined.

8.27 The submissions referred to the impact of poverty among Indo-Fijians evident in the growing number living in the squatter settlements in peri-urban areas. They also brought out the bitter disappointment suffered by able Indo-Fijian students from poor families who are not awarded one of the relatively few scholarships available for that community, but see Fijian students who have obtained lower marks receive scholarships, without regard to whether or not their families could afford to give them tertiary education.

### **General voters**

8.28 Submissions from members of the general voters community emphasised its artificial nature, consisting as it does of the Pacific Islands communities in Fiji as well as all other communities and groups that are not Fijian, Rotuman or Indo-Fijian. Within the community there is great diversity in the educational and living standards of its members and their opportunities for advancement. Some groups in this community do not have security of tenure over the land on which they are living. They are among the most disadvantaged in the Fiji Islands.

### **Women**

8.29 On the whole, submissions by and about women concentrated on the gender inequality inherent in the present provisions about citizenship, some inadequacies in the laws affecting women, and cultural factors that affect the ability of women to play a full part in family, community and national decision-making. There was little emphasis on the need for affirmative action and social justice programmes for the benefit of women, but some submissions identified gender inequalities which needed to be addressed in this way.

8.30 Reference was made to the inadequacy of maternity leave, and the absence of paternity leave and also of family support benefits, particularly for women as the heads of single-parent families. There was a need for education programmes so that men, in particular, would have a greater awareness of the role and needs of women. It was also suggested that the matrimonial laws should provide adequate



protection for divorced women and their children and a more equal sharing of matrimonial property on a basis that recognised the monetary value of women's domestic contribution to the household - a topic, it was suggested, that deserved separate consideration by a suitable body.

8.31 Other submissions stressed the need to recognise the equality of women at all stages of education and to discourage the stereotyping of men and women by thinking of them as suited to some vocations but not others. Indo-Fijian girls and women were said to be doubly discriminated against in the award of scholarships because they faced both gender bias and racial discrimination. It was urged upon us that women and men should have equal remuneration and treatment, particularly in terms of access to promotion to senior positions in the public and the private sector.

8.32 The remedies were seen as including changes in government policies as well as the strengthening of the Ministry of Women's Affairs to bring it into closer touch with women at the grass roots level. It was suggested that special schemes should be implemented to enhance women's social and economic well-being and support the work of the voluntary organisations already working on behalf of women. There should be equal pay for work of equal value, for both men and women. There was also a need to ensure that the health and strength of workers are not abused, and that people are not forced by economic necessity to do work unsuitable to their physical capacity.

#### THE JUSTIFICATION FOR SOCIAL JUSTICE AND AFFIRMATIVE ACTION PROGRAMMES

8.33 In this section we seek to show why it is in the interests of all communities to deal with these perceived problems and imbalances in the Fiji Islands. Governments in most parts of the world have long accepted that social inequalities among their populations need to be redressed by state-funded programmes. Such programmes are directed to securing for everyone adequate access to education, health care and housing, as well as to a minimum cash income. This applies specially to the poor in urban areas who do not have ready access to the produce of the land and the sea. Some programmes, such as basic education and health care, are often available to all, irrespective of individual income levels. Others are likely to be means-tested, and available only to those whose need is greatest.

8.34 It is only comparatively recently that governments have also become concerned about ethnic inequalities. In all multi-ethnic societies, there is a tendency for different ethnic groups to engage in different occupations, have different levels

of education, and receive different incomes. Commentators have identified as one explanation for these differences the different cultural attitudes of ethnic groups, whether to education, or the performance of particular types of work, or to the ambition to venture forth from the community or into new occupations. Another explanation has sometimes been the existence of barriers imposed by the dominant group in society to the economic and social mobility of the less dominant group. In some countries those barriers have been the result of racial discrimination.

8.35 The concern with ethnic inequalities is a reflection of the broad concern most governments have about social inequalities. However, social scientists have identified at least two reasons why ethnic inequalities may be more dangerous:

- Differences among ethnic groups tend to be seen as an indication of differences in opportunities, proof that society has allocated *access* to education, employment and other opportunities unfairly.
- When ethnic differences lead to ethnic conflict, the result is often more disruptive to the social order than conflicts between the wealthy and the poor.

8.36 The conclusion of one commentator is that:

no democratic political system can long tolerate a social order in which the major educational, income and occupational divisions are along ethnic lines. The question is not whether but how these divisions can be bridged.

That statement is a generalisation of the more explicit comments in a paper on Malaysia that was prepared for the Commission's use:

A threat to national stability arises when one group, especially a racial group, perceives itself to be economically disadvantaged, and another group, especially a racial group, is perceived to dominate the economic life of the nation. This threat is made more pronounced when the disadvantaged group regards itself as the rightful "owners" of the country. ... [I]f the economic imbalances had been left unrectified, the threat to national stability would have been very real and serious. The need to restructure the Malaysian society is an imperative which most fair-minded Malaysians will not dispute.

8.37 The Commission concludes that there is an equally strong need for the Government of the Republic of the Fiji Islands to put in place programmes which aim to reduce inequalities between different ethnic communities. These inequalities relate especially to the educational qualifications and participation at all levels of commercial activity by indigenous Fijians and Rotumans. However, there are areas in which other ethnic communities are disadvantaged. All communities have their rich and their poor.

8.38 For this reason, social inequalities should not be neglected. The point was made many times in the submissions that poverty is not distributed on the basis of ethnicity. Nor are the disadvantages suffered by women, the disabled and the elderly. Some submissions expressed this by urging that affirmative action programmes should be based on need, not race. But this is to overlook the reasons why it is necessary to achieve ethnic justice, as well as social justice, in the Fiji Islands. The focus of the discussion should not be whether one purpose is more meritorious than the other, but what proportion of the total available resources should be devoted to each.

8.39 The Commission therefore proposes that the Constitution should place on Government the duty to put in place affirmative action programmes not only for the benefit of the Fijian and Rotuman people, but also for other ethnic communities, and for women, and for all other disadvantaged citizens or groups in the Republic of the Fiji Islands. In the next section we look at how such a provision can be made consistent with the international standards. Guidance is also obtainable from the terms in which some other countries have made provision for affirmative action and social justice programmes in their constitutions.

#### ETHNIC AND SOCIAL JUSTICE AND FREEDOM FROM DISCRIMINATION

8.40 Constitutions authorise and sometimes require programmes for the benefit of particular groups for two reasons. First, it may be desired to place on government a clear duty to develop and fund the programmes in question. Secondly, programmes to improve the economic and social status of a particular community or group, as distinct from individual members of society who are disadvantaged, need to be authorised as an exception to the general rule that there must be no discrimination on the grounds of race, ethnic origin, sex or gender, or other prohibited ground of discrimination.

#### **The international standards**

8.41 The international community has taken a very cautious approach to affirmative action as a departure from the principle of equality. It is not mentioned at all in the *Universal Declaration of Human Rights* or the *International Covenant on Civil and Political Rights*. As well as requiring equality in according human rights and fundamental freedoms to all members of society, those instruments specifically recognise the right of everyone to equal access to public service in their country. This confirms that any action in the Republic of the Fiji Islands ensuring that the representation of ethnic communities in the various aspects of

state service is in proportion to their numbers in the total population would indeed be a form of affirmative action based on race or ethnicity.

8.42 The *Convention on the Elimination of All Forms of Racial Discrimination*, to which the Republic of Fiji is a party, not only permits, but also requires “special measures” to secure the adequate advancement, development and protection of “certain racial groups and individuals belonging to them”, but only for the purpose of securing them the equal enjoyment of “human rights and fundamental freedoms”. Such measures “shall not be deemed racial discrimination” if they do not lead to the maintenance of unequal or separate rights for different racial groups “after the objectives for which they were taken have been achieved”.

8.43 The *Convention on the Elimination of All Forms of Discrimination Against Women*, to which Fiji is also a party, makes a distinction between “special measures ... aimed at protecting maternity” which are not to be considered discriminatory and are not subject to a time limit, and “temporary special measures aimed at accelerating *de facto* equality between men and women”. These are not to be considered discrimination as defined in the *Convention* so long as they do not entail the maintenance of unequal or separate standards. They are to be discontinued when the objectives of equality of opportunity and treatment have been achieved.

8.44 The provision just mentioned is based on the corresponding provision in the *Convention on the Elimination of All Forms of Racial Discrimination*, but in its different setting it has an entirely different effect. The temporary special treatment of women in a manner different from men is not to be considered discrimination *against women* if it is aimed at accelerating *de facto* equality. The *Convention* fails, however, to deal with the question of whether it is discrimination *against men*, though the intention must be that it is not.

8.45 Both *ILO Convention 169 on Indigenous and Tribal Peoples* and the draft *Declaration on the Rights of Indigenous Peoples* require states to take “special measures” for the benefit of such peoples in certain specified contexts. The question of whether these special measures are to be temporary or permanent, and how they are to be justified in relation to the equality rights of the population as a whole, is not addressed. Certainly, the benefits or rights referred to are seen as those of the group rather than of its individual members.

8.46 There is an implication that indigenous peoples are vulnerable groups who need special measures to be able to enjoy access to the rights and benefits already enjoyed by other members of society (as well as having the right to preserve their own culture as far as consistent with human rights norms). The assumption

appears to be that these special measures will not involve discrimination against other members of the society. Overall, neither instrument attempts to address the situation where there is a marked disparity between the levels of education, occupation and income of an indigenous people, in comparison with those of other ethnic groups, and the indigenous people wish to become full participants in the economy.

### **National constitutions**

8.47 The Constitutions of Malaysia, India and Papua New Guinea direct the state to take certain types of action for the benefit of particular groups. Rather than merely authorising it, these provisions *require* appropriate remedial action to be taken by the state.

8.48 Article 153 of the *Malaysian Constitution* charges the Yang di-Pertuan Agong [the Head of State], acting on the advice of the Cabinet, with the responsibility of safeguarding “the special position of the Malays and natives of any of the States of Sabah and Sarawak and the legitimate interests of other communities”. The article provides for the indigenous peoples to be given access to a reasonable proportion of publicly funded scholarships and training opportunities and business permits and licences where these are required. The article also provides explicitly for the reservation of a reasonable proportion of places in the public service and by inference authorises general programmes benefiting Malays. However, the awards to Malays and members of other indigenous communities in Malaysia are not to deprive any person of any public office, scholarship or other educational opportunity, or licence or permit to which that person is already entitled.

8.49 Section 46 of the *Indian Constitution* provides that the State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, the Scheduled Castes and the Scheduled tribes, and shall protect them from social injustice and all forms of exploitation. Section 335 requires the claims of members of the Scheduled Castes and the Scheduled Tribes to be taken into consideration, consistently with the maintenance of efficiency of administration, when making appointments to services and posts in connection with the affairs of the Union or of a State.

8.50 Directive Principle 2, *Equality and participation*, in the *Constitution of Papua New Guinea* calls, among other things, for all persons and governmental bodies of Papua New Guinea to ensure that, as far as possible, political and official bodies are broadly representative of citizens from the various areas of the country.

8.51 Both the interim and final constitutions in South Africa, the *Canadian Charter of Rights* and the *New Zealand Bill of Rights Act* authorise, rather than require, special measures for disadvantaged individuals and groups, and do so in much less specific terms than the provisions just summarised. All three formulations seem to have been influenced by the United States jurisprudence. In the face of a constitutional requirement that all people shall be entitled to “the equal protection of the laws” without exception, the courts there have justified different treatment for African Americans, Hispanics and women, on the ground that it is a remedy for past discrimination.

8.52 None of the constitutional formulations is very specific about the relationship of affirmative action to the right to freedom from discrimination or to equality. The majority simply state, expressly or by implication, that those rights do not prevent or preclude the special measures. The New Zealand formula states that the measures “do not constitute discrimination”, presumably meaning discrimination against any non-benefiting person or group.

8.53 Finally, all the constitutions referred to specify the purposes of affirmative action in general terms. Only the South African formula, which describes the object of affirmative action as the full and equal enjoyment of all rights and freedoms, appears to provide a basis for an eventual determination that affirmative action measures for a particular group are no longer justified because equality has been achieved.

#### THE NEED FOR NEW CONSTITUTIONAL PROVISIONS IN FIJI

8.54 On the basis of its analysis of the need for affirmative action and social justice programmes in Fiji, and the way in which these questions have been dealt with in the international instruments and the constitutions of comparable countries, the Commission considers that the Constitution should include new provisions for this purpose. Sections 18 and 21 should be repealed, but their thrust should be retained and amplified in a single, comprehensive provision.

8.55 We put forward the following draft as a basis for discussion:

# **Social justice and affirmative action**

- (1) The Government of the Republic of the Fiji Islands shall establish programmes which are reasonable and necessary to ensure for the Fijian and Rotuman people and other ethnic communities, and for women as well as men, and for all other disadvantaged citizens or groups of citizens, effective equality of access to
  - (a) education and training,

- (b) land and housing,
  - (c) participation in commerce and all aspects of service of the Republic of the Fiji Islands at all levels, and
  - (d) other opportunities, amenities or services essential to an adequate standard of living.
- (2) A programme for the purposes of this section is valid notwithstanding the fact that it confers privileges or advantages on persons or members of a group on one or more of the grounds on which discrimination is prohibited by section # (Right to equality under the law and freedom from discrimination), if the programme complies with subsections (3) and (4).
- (3) The programme must be authorised by an Act of Parliament which specifies:
- (a) the goals of the programme and the identity of the persons or groups it is intended to benefit;
  - (b) the means by which those persons or members of the benefited group are to be assisted to achieve the goals;
  - (c) the performance indicators for judging the efficacy of the programme in achieving its goals;
  - (d) if the programme is for the benefit of a group, the criteria for the selection of the members of the group who will be entitled to participate in the programme.
- (4) The participants in a programme for the benefit of a group must be selected without discrimination on any ground referred to in section #, other than a ground relevant to their membership of the group or the application of the selection criteria.
- (5) The administering department or other agency must monitor the efficacy of the programme by reference to the specified performance indicators. The responsible Minister must make an annual report to Parliament on the results revealed by the monitoring.
- (6) Unless it has sooner expired in accordance with its terms or has been repealed, an Act authorising a programme for the purposes of this section expires on the tenth anniversary of its entry into force, but the programme may be reenacted, subject to compliance with subsection (2), unless the benefited persons or groups have demonstrably ceased to be in need of such a programme.

- (7) No programme for the purposes of this section shall, of itself or in its effect, deprive any person not entitled to its benefits of any position or seniority in any aspect of the service of the Republic; place in an educational or training institution, scholarship or other financial support; right to carry on any business or profession; or to enjoy any other opportunity, amenity or service to which that person has already become, and would otherwise remain, entitled.

# **Definitions**

In this Chapter, “service of the Republic of the Fiji Islands” means service in any capacity on appointment by the President, the Cabinet, a Minister, a Commission or any public officer, or by resolution of Parliament or any Committee of Parliament, or by or on behalf of any local authority, whether or not the appointee is remunerated wholly or partly by public money, but does not include service as a member or employee of a body provided for in an Act referred to in section # (*Entrenched legislation*).

We now comment on the purpose and effect of these provisions.

**Subsection (1): Duty to establish programmes**

8.56 The first point to note is the mandatory nature of the direction in subsection (1):

“The Government of the Republic of the Fiji Islands shall establish programmes ...”.

In this respect it maintains the duty at present laid on Parliament and the Cabinet by section 21 of the 1990 Constitution. We have not mentioned Parliament because the parliamentary system of government is based on the expectation that the government of the day will command the necessary majority both to enact the required legislation establishing a particular programme and to secure approval for its funding in each financial year.

8.57 A “programme” means a particular scheme of assistance for a targeted group, like scholarships for tertiary education, access to subsidised housing or “soft” loans, or subsidisation of school fees, to mention a few examples. It includes all facets of the particular scheme and its funding.

*Programmes to be reasonable and necessary*

8.58 The programmes concerned are required to be “reasonable and necessary” for the purposes mentioned. The word “reasonable” gives the government the responsibility of determining what kinds of programmes will achieve the desired



purposes, and how much the state can afford to spend on them. As part of the Constitution, the section will become supreme law. Its application will therefore be capable of being tested in the courts. However, the use of the word “reasonable” does not invite the courts to become closely involved in supervising the exercise of the government’s judgment about the merits of a particular programme or the amount of funding it receives.

8.59 The word “necessary” focuses on the link between particular programmes and the purposes they are to achieve. It suggests a requirement to address all needs, and, if need be, to set priorities among them, but without giving preference to some purposes and ignoring others. Again, the association of the word “necessary” with the word “reasonable” suggests that it is not the role of the courts to second-guess the government’s judgment about whether or not a particular programme is “necessary”. The provision as a whole is susceptible to political rather than judicial supervision. Only a failure by a government to address a manifest need of a particular community or group would be likely to invite the remedial intervention of the courts by way of a direction to government to reconsider its policies.

#### *Global budgeting*

8.60 As foreshadowed, subsection (1) treats programmes for the benefit of “the Fijian and Rotuman people and other ethnic communities” on exactly the same basis as programmes for the benefit of “women” and of “other disadvantaged citizens or groups of citizens”. This has the practical advantage of ensuring that, when the government is preparing its budget, it will look first at the total resources available for all these purposes. The second step will be to make decisions about the amounts to be devoted to programmes for each purpose. The third step will be to allocate those amounts among the particular programmes - if there is more than one - for that purpose. Such a procedure should help the Government to comply with the duty under the recommended *Compact* to take full account of the interests of all communities and base affirmative action and social justice programmes on an allocation of resources that is broadly acceptable to all ethnic communities.

#### *Limitation of the right to freedom from discrimination*

8.61 There is also a technical reason for dealing with the needs of all the groups mentioned in the same way. Programmes for ethnic communities or groups and for women must be authorised as justified limitations of the recommended right to equality under the law and freedom from discrimination on a prohibited ground. Those prohibited grounds include “race”, “ethnic origin” and “sex or gender”. The Commission has also recommended that discrimination be prohibited on the

grounds of “economic status”, “age” and “disability”. It is scarcely possible to think of a social justice programme whose beneficiaries would not be described by reference to one or more of those characteristics.

8.62 For all practical purposes, the effect is to do away with the distinction, between “affirmative action” for ethnic communities and women and “social justice” for disadvantaged groups. However, it will still be necessary to take account of the basis on which it is justifiable to give privileges or advantages to individuals as members of a disadvantaged group, as distinct from giving them to disadvantaged individuals. We come back to that question below.

### *Achieving effective equality of access*

8.63 Subsection (1) describes as the purpose of the required programmes the need to ensure for all the groups mentioned “effective equality of access” to the opportunities, amenities and services described. That short expression is intended to convey several ideas.

8.64 The term “effective equality” indicates that the object is equality of result, not equality of opportunity. For example, all children may in theory be entitled to receive secondary education, but children from the remoter rural areas often have considerable practical difficulties in attending secondary school. Programmes to make sure that qualified children from the remoter areas are in fact, as well as theory, able to receive and profit from secondary education would achieve their “effective equality of access” to that social good.

8.65 By “access” we are not thinking merely of the initial entry into an educational institution, a job or a commercial venture. We have in mind the ongoing support, financial and otherwise, that is necessary to achieve the equality of result already mentioned. The special, state-funded help should cease when it has achieved its intended purpose. The individual concerned has achieved the objectives and is now able to compete on equal terms with everyone else.

8.66 The help given to particular individuals should also cease if it is misused, or it becomes evident that, despite the help, the individual is not going to achieve the desired objectives. Selection for a particular programme does not guarantee success. (This should not be seen as wholly negative because even the opportunity to participate may provide reassurance to the individual and community concerned that access is not being unfairly denied.) The guidelines for measuring success should be set beforehand and made clear to the recipient, but, inevitably, it will often be necessary to exercise a discretion, and perhaps to make a hard decision.

The integrity of the programme will depend on the ability to administer it properly. We discuss later the need to evaluate the programme itself.

*The objectives of the programme*

8.67 Subsection (1) refers specifically to some of the objectives most likely to require affirmative action programmes. "Education and training" obviously deserve special mention. So do "land and housing", and "participation in commerce and all aspects of service of the Republic of the Fiji Islands at all levels". The list is not exhaustive. Programmes may also be necessary to ensure effective equality of access to "other opportunities, amenities or services essential to an adequate standard of living". What those might be is essentially a matter for political judgment.

8.68 The Government's duty to ensure effective equality of access for a particular community to the things mentioned does not mean that every individual member of that community will necessarily be entitled to that access. Nor does it mean that one community will be entitled to that access in exactly the same way as another community. For example, effective equality of access to land does not mean that all communities should become land owners. The objective will have been achieved even if most Fijians are landowners and most Indo-Fijians are tenants, as long as Indo-Fijians, as a community, are not excluded from reasonable, though not necessarily proportionate, participation in land-based activities.

8.69 The inclusion of a reference to "land" as well as to "participation in commerce" signals that the need of the Indo-Fijian community for reasonable access to land is as much a national issue as the need of the Fijian and Rotuman communities for reasonable access to participation in commercial activity. Both may need to be the object of affirmative action programmes.

*Service of the Republic of the Fiji Islands*

8.70 The expression "service of the Republic of the Fiji Islands" has been separately defined. As well as including appointments to the public service, the police and the armed forces, it includes Government appointments to state-owned enterprises and statutory bodies, except as a member or employee of bodies established by or under the entrenched Acts. This means, for example, that it does not apply to appointments to the Fijian Affairs Board or the Native Lands Trust Board, or the employees of Provincial Councils. The definition includes the service of local authorities. We discuss below the policy which should govern the access of all communities and other groups, such as women, to the service of the state in the various capacities coming within the definition.

**Subsection (2): Need to fulfil conditions**

8.71 This provision makes the necessary link between the authorisation of affirmative action and the right to equality under the law, and freedom from discrimination on a prohibited ground. It authorises the limitation of that right for the purpose of putting in place affirmative action and social justice programmes. These may benefit certain persons, communities and groups, identified by reference to a characteristic, such as their race or ethnic origin, their sex or gender, or their economic status, which is normally a prohibited ground for conferring privileges or advantages. However, as in other cases where a constitutionally protected right may be limited, conditions are imposed. Those conditions are laid down in subsections (3) and (4).

**Subsection (3): Authorisation by Act**

8.72 The first condition for the validity of a programme is that it be authorised by an Act of Parliament. In principle, all limitations of rights must be authorised by "law". Here we specify "an Act", rather than a regulation or order under an Act, because the thrust of our recommendations about affirmative action is that the necessary programmes should be regarded as addressing national issues and problems. Therefore, Parliament should have the opportunity to approve particular programmes as well as to make sure that there is an overall balance among the various purposes for which affirmative action programmes are put in place.

*Goals and means of achieving them*

8.73 Subsection (3) sets out the things for which the authorising Act must provide. Paragraph (a) concerns the goals to be achieved by the programme and the persons or groups it is intended to benefit. For example, its purpose may be to enable indigenous Fijians to undertake small business enterprises, generally, or in relation to a particular activity, say fishing. This must be specified. Paragraph (b) requires the Act to specify the means through which the goals are to be achieved. They might include access to loan finance for the purchase of boats, access to market research about the species which can be sold at a profit on the local or overseas market, training both in marketing and in business management, and access to ongoing business advice.

*Performance indicators*

8.74 Paragraph (c) requires the Act to set out the performance indicators for judging the efficacy of the programme in achieving its goals. The term "performance indicators" describes the standards by which the success or otherwise

of non-commercial public sector activities may be judged. It is a substitute for “profitability”, the basic test for judging the success of commercial activities. Specifying performance indicators has the advantage of allowing those designing and administering the programme themselves to decide on appropriate criteria for judging the efficacy of the programme.

8.75 Because the application of performance indicators should be capable of being audited, to see if the results claimed are “true and fair”, performance indicators should be as objective as possible. They often focus on the *number* of successful outcomes achieved within a certain period of *time*. There is a danger, however, in pursuing objectivity at the expense of over-simplification. We do not suggest that performance indicators should be mechanistic or always quantifiable. Rather, they should provide as fair and consistent a way as possible of judging the success or otherwise of the programme, remembering always that its beneficiaries are *people*, and what people consider to be of benefit to them can be regarded as successful.

#### *Selection criteria*

8.76 Paragraph (d) applies only to programmes under which disadvantaged *groups*, as distinct from disadvantaged *individuals*, are to benefit. It touches on one of the most difficult issues of all in designing affirmative action programmes. How are the members of the targeted group to be selected? It is here that a sense of conflict between individual and group rights sometimes emerges.

8.77 If individuals are the beneficiaries, it is usually assumed that the benefits should go to the most disadvantaged. If groups are the beneficiaries, then the most disadvantaged members of the group are not necessarily those who will be in the best position to profit from the assistance available to the group. In the case of business enterprise, or access to land for sugar cane growing, for example, the individuals most likely to succeed are probably those with the best education, training or experience, and some capital of their own to invest - the “proven track record” as it is often called. If the goal is success for the group as a whole, it may sometimes be best to concentrate on those most likely to achieve that success without regard to the fact that, as individuals, they already have advantages.

8.78 The Commission considers that the Constitution should not seek to predetermine the answers to these difficult questions about eligibility. It should do only two things: make sure that the selection criteria under a particular programme are specifically addressed, and require them to be applied in a non-discriminatory way, among members of the eligible group. That requirement is laid down in subsection (4).

**Subsection (4): No discrimination in selecting participants**

8.79 This subsection allows the identity of the benefited group to be specified by reference to prohibited grounds of discrimination, and also the identity of the individuals who will be eligible to benefit from the programme. However, it forbids discrimination in the application of the selection criteria themselves. To some extent, the grounds on which it is permissible to discriminate will be a matter of definition. If the Act provides that the programme is to benefit "Fijians" wishing to go into business, then, in selecting the Fijians who are to receive assistance under the programme, there must be no discrimination between male and female Fijian applicants. If, however, the programme is to benefit "Fijian women", then it will apply only to female Fijians, but there may be no discrimination among that group on the grounds of "age" or "place of origin".

8.80 Similarly, if the selection criteria include, say, "a minimum cash contribution of \$F5,000, then a person's "economic status" will be relevant to the application of this requirement. So will "age", if the programme is for persons "over 30", or "under 70". The purpose is not to prevent prohibited grounds of discrimination from being taken into account when relevant. It is to reassure all individuals and communities that, once Parliament has determined the targeted group and the criteria for selecting the members of the group who are to benefit, there will be no discrimination behind the scenes in the process of selecting the individuals who become entitled to assistance.

**Subsection (5): Monitoring and reporting**

8.81 This subsection sets constitutional requirements for monitoring the efficacy of affirmative action and social justice programmes. Initially, the duty is laid on the administering department or other government agency. It must keep and analyse relevant data on the basis of the specified performance indicators. The analysis should lead to useful information about the efficacy of the programme. The responsible Minister must include this analysis in his or her annual report to Parliament.

8.82 Such a report should provide a firm basis for future policy decisions about whether the particular programme is sound and how other programmes should be designed. It will be important for politicians not to gild the lily in presenting the results, or make political capital out of apparent failures, particularly in the short term. Programmes to achieve what is, in effect, social engineering, usually need to run for a long period before their utility can be gauged. The objective is to help Government and Parliament to put in place effective and widely supported programmes.

### **Subsection (6): Sunset clause**

8.83 This subsection provides that the Act authorising a particular programme will automatically lapse after 10 years, unless it has already expired or been repealed. The programme may be re-enacted, with or without amendment. The purpose is to enable Government and Parliament to assess the results achieved by the programme during the previous 10 years, and make a deliberate decision on whether or not it should be renewed.

8.84 Renewal is permitted “unless the benefited persons or groups have demonstrably ceased to be in need of such a programme”. That will obviously be a matter for political judgment, taking into account the duty laid on Government by subsection (1). The test is whether the programme continues to be “necessary” for one or more of the specified purposes. The submissions urged that the Constitution should make provision for both the monitoring and the automatic expiry of affirmative action programmes so that they cannot be “captured”, either by the bureaucracy or the targeted group.

### **Subsection (7): Existing rights not affected**

8.85 This subsection provides the reassurance to persons not entitled to benefit from a particular programme that its application to others will not deprive them of any right to which they have already become entitled. It refers specifically to any position or seniority in any aspect of the service of the Republic, place in an educational or training institution, scholarship or other financial support, right to carry on any business or profession or to enjoy any other opportunity, amenity or service to which that person has already become, and would otherwise remain, entitled.

Corresponding provision is included in the section of the *Malaysian Constitution* that was the model for section 21 of the 1990 Constitution but was omitted from section 21 itself. Again, some of those making submissions sought the inclusion of such a guarantee.

### **Equality of access to the service of the Republic of the Fiji Islands**

8.86 The Commission received a number of submissions about the basis on which persons should be selected to serve the state in all its various aspects. Some supported the existing allocations as between Fijians and other ethnic communities. A number wished to go further in specifying that certain senior positions should always be held by Fijians. Other submissions considered that the overriding objective was the efficiency of all departments, services, and other

bodies. They supported appointments and promotions on the basis of merit. But some of them, too, thought that equity required positions at all levels to be distributed roughly in proportion to the representation of the particular community in the population as a whole. The Commission has weighed the various arguments.

8.87 First, we understand that the present requirement in section 127(11) of the 1990 Constitution that

each level of each department in the public service shall comprise not less than fifty percent Fijians and Rotumans and not less than forty percent of the members of other communities

is impracticable in its application. Presumably the Prime Minister has to exercise his dispensing power under section 127(12) on many occasions.

8.88 Secondly, any provision about the ethnic composition of the public service or other aspects of the service of the state, or about the ethnicity of the holders of particular offices, cuts across the right of all citizens to have access, on general terms of equality, to public service in their country, clearly stated in the international instruments. No provision about the ethnicity of particular office-holders, or the proportions in which ethnic communities are to be represented in the various branches of the public service would be consistent with the international standards. However, the absence of proportionality is likely to be a good indication that temporary remedial measures are required for the purpose of achieving effective equality of access.

8.89 In any event, the requirement of proportionality gives an almost impossible task to those responsible for making appointments. How is the appointing authority to decide whether to choose one, rather than the other, of two candidates of different ethnicity who have comparable qualifications? And if their qualifications are not comparable, when is it required to pass over the better qualified, and appoint the person who is clearly a second choice, in order to help maintain proportionality? Even if entry-level proportionality can be achieved, that will be of little comfort if differences in qualifications mean that the appointees from one ethnic community are more likely to be promoted than the members of another.

8.90 The responsibility of recruiting and promoting staff is always a difficult one, whether in the public or the private sector. Attempts in both sectors in recent years to base the decisions on objective performance measures have largely come to nothing. The modern approach in the state sector as well as the private sector is to make the selection on the basis of merit, but with conscious regard for the need to provide equal opportunities for men and women, and members of all ethnic communities.



8.91 For that reason the question of whether there should be a right of appeal against decisions about appointments or promotions in the public sector is controversial. We discuss that question further in Chapter 13. In any event, we are satisfied, for the reasons just explained, that the appeal procedure is not the correct avenue through which to pursue the goal of ethnic proportionality. The issue should be tackled in a different way.

8.92 To achieve efficiency, public service managers and those responsible for the recruitment and promotion of the members of other state services need to be free to make appointments and promotions on merit and without discrimination on a prohibited ground. This means that there should be no reservation of particular positions for members of a particular ethnic community. Nor should there be provisions specifying the proportions in which particular ethnic communities should be represented. However, the Constitution should require the need for broad proportionality, along with other factors, to be taken into account in recruiting and promoting the members of all state services and in managing those services. In Chapter 14 we make proposals to give effect to this approach.

#### *Redressing imbalances*

8.93 Here we emphasise that if, in the public service and other state services, there is a significant imbalance in the distribution of positions, at the various levels, among the different communities, it will be necessary to look at the reasons. Similarly, it will be necessary to look at the reasons for imbalances as between men and women. No society can afford to make any section of its population feel that they are unfairly excluded from access to positions in the service of the state.

8.94 One reason for imbalances may be occupational preferences. Some groups or communities, generally speaking, may have a preference for some types of work and not others. This should be accepted, but should not be allowed to become a stereotype, effectively excluding individual members of a community or group who, contrary to the general trend, seek employment in a particular type of work.

8.95 Another possible reason may be discrimination on a prohibited ground. This is an allegation that is easy to make and difficult to prove. It should not be made lightly, because the very making of it is likely to exacerbate race relations. But if there is good reason to think that discrimination is taking place, the matter can be tackled through negotiations at the industrial relations level, questions or debate in Parliament, and, if necessary, action in the courts.

8.96 A third reason for imbalances, and we believe the most likely, may be a

lack of suitably qualified applicants from all communities and groups. Among Fijians, the causes are likely to lie in their levels of education, training and experience: matters which are already being remedied through affirmative action measures to bring their performance levels up to those of other communities. Among Indo-Fijians, the causes may lie in the absence of access to tertiary education for the children of families who cannot afford to fund it, as well as a lack of confidence about being welcome, and doubts about the long-term career prospects, including opportunities for promotion to the highest levels.

8.97 These last-mentioned causes should be dealt with through affirmative action programmes. These should be aimed at ensuring that members of all communities and groups will be well-equipped to compete on a basis of equality for state sector employment and promotion. The focus should be on increasing the pool of well-qualified applicants of both sexes and from all communities. We propose the inclusion in the Constitution of a provision that will point to the need to take appropriate affirmative action in respect of particular ethnic communities if they are found to be under-represented in any aspect of the service of the state, or at any level of that service.

8.98 The proposed provision takes the form of an interpretation section which would accompany the provision on affirmative action. Our draft reads as follows:

**# Equality of access to the service of the Republic of the Fiji Islands**

An ethnic community is to be taken as having effective equality of access to an aspect of the service of the Republic of the Fiji Islands, or any level of that service, only if it is represented there in a number broadly proportionate to its number in the adult population as a whole, unless its under-representation is demonstrably due to the community's occupational preferences.

8.99 Although we do not think it feasible to make similar constitutional provision concerning the under-representation of women, the question of whether there is a need to establish affirmative action programmes to equip more women for appointment and promotion in the service of the state should be kept under constant review. All employing authorities should be alert to the existence or development of ethnic or gender imbalances in the services for which they are responsible. Although individual appointments and promotions should be on merit, employing authorities should take all reasonable steps to make sure that there is a good supply of applicants from all communities. Recruitment campaigns can legitimately target particular communities or groups, though without excluding other applicants.

## SUPPORT FROM CIVIL SOCIETY

8.100 The Commission received submissions from a number of non-governmental organisations on the question of affirmative action for disadvantaged communities and groups. Many of them would be willing and able to enter into useful arrangements with Government to support particular affirmative action programmes. For example the Chambers of Commerce and Industries in the main cities recognised the need for greater Fijian participation in commercial activity, and made it clear that they were ready to help if asked.

8.101 Non-governmental organisations are, of course, already fully involved in efforts to help the disadvantaged members of all communities. There are opportunities for Government to enter into fruitful partnerships with a variety of organisations, as a way of implementing effective affirmative action and social justice programmes. These programmes require human input as well as money. Through such organisations, it should be possible to find ways of harnessing the energies of people who are willing to share with others the benefit of their practical experience, particularly in the field of commerce. We accept that it may take time to build the sense of mutual confidence that will enable practical help to be given and accepted freely across racial lines.

8.102 Women's groups, too, are a necessary stimulus and conduit for bringing to women of all communities the sense that they have the ability to make an all-important contribution to changing their conditions of life and those of their communities, as well as to the life of the nation. We believe there are ways in which Government could work with a variety of women's organisations in delivering programmes to improve material conditions and equal outcomes for women in comparison with men.

## RECOMMENDATIONS

191. **The Constitution should require the Government to put in place not only affirmative action programmes for the benefit of the Fijian and Rotuman people, but also similar programmes for other ethnic communities, and for women, and for all other disadvantaged citizens or groups in the Republic of the Fiji Islands.**
192. **The Constitution should include new provisions for this purpose. Sections 18 and 21 should be repealed.**

193. The new provisions should treat on exactly the same basis, programmes for affirmative action for the benefit of communities or groups identified by their *race, ethnic origin* or *gender*, and individuals who need assistance on account of their *economic status, age* or *disability* - all of which are recommended as prohibited grounds of discrimination under the Bill of Rights.
194. The programmes for the purposes mentioned should be required to be “reasonable and necessary” for securing “effective equality of access” to education and training, land and housing, participation in commerce and all aspects of service of the Republic of the Fiji Islands, at all levels, and to other opportunities, amenities and services essential to an adequate standard of living.
195. The Constitution should authorise the limitation of the right to equality under the law and freedom from discrimination on a prohibited ground for the purpose of putting in place affirmative action and social justice programmes on the condition that each programme is authorised by an Act of Parliament.
196. Such an Act must specify the goals to be achieved by the programme, the persons or groups it is intended to benefit, and the means through which the goals are to be achieved. The Act must also set out the performance indicators for judging the efficacy of the programme in achieving its goals, and the criteria for selecting the individuals who will be entitled to the privileges or advantages. The selection criteria must be applied without discrimination on a prohibited ground not relevant to the identity of the benefited group or the application of the selection criteria.
197. The Constitution should lay down monitoring and reporting requirements enabling the Government and Parliament to assess the efficacy of each programme.
198. An Act authorising a particular programme will lapse automatically after 10 years (if it has not sooner been repealed or expired), but the programme may be re-enacted, with or without amendment, unless the benefited persons or groups have demonstrably ceased to be in need of such a programme.

199. **The Constitution should provide that no programme may directly or in its effect deprive any person not entitled to its benefits of a position, place in an educational or training institution or right to carry on a business or profession or any other opportunity, amenity or service to which he or she has already become entitled.**
200. **The Constitution should not reserve particular appointive positions in the service of the state for members of a particular ethnic community. Nor should it specify the proportions in which particular ethnic communities should be represented in the public service or other state services.**
201. **The Constitution should include a provision that will point to the need to take appropriate affirmative action to improve the qualifications and training of members of particular ethnic communities so as to enlarge the pool of eligible candidates if those communities are found to be under-represented in any aspect of the service of the state, or at any level of that service.**
202. **The question of whether there is a need to establish affirmative action programmes to equip more women for appointment and promotion in the service of the state should be kept under constant review.**
203. **Government should explore the possibilities for entering into fruitful partnerships with a range of non-governmental organisations, as a way of implementing effective affirmative action and social justice programmes, with the object of encouraging practical help to be given and accepted freely, across racial lines.**
204. **The recommended constitutional provisions should be based on the following draft:**
  - # **Social justice and affirmative action**
  - (1) **The Government of the Republic of the Fiji Islands shall establish programmes which are reasonable and necessary to ensure for the Fijian and Rotuman people and other ethnic communities, and for women as well as men, and for all other disadvantaged citizens or groups of citizens, effective equality of access to**
    - (a) **education and training,**

- (b) land and housing,
  - (c) participation in commerce and all aspects of service of the Republic of the Fiji Islands at all levels, and
  - (d) other opportunities, amenities or services essential to an adequate standard of living.
- (2) A programme for the purposes of this section is valid notwithstanding the fact that it confers privileges or advantages on persons or members of a group on one or more of the grounds on which discrimination is prohibited by section # (Right to equality under the law and freedom from discrimination), if the programme complies with subsections (3) and (4).
- (3) The programme must be authorised by an Act which specifies:
- (a) the goals of the programme and the identity of the persons or groups it is intended to benefit;
  - (b) the means by which those persons or members of the benefited group are to be assisted to achieve the goals;
  - (c) the performance indicators for judging the efficacy of the programme in achieving its goals;
  - (d) if the programme is for the benefit of a group, the criteria for the selection of the members of the group who will be entitled to participate in the programme.
- (4) The participants in a programme for the benefit of a group must be selected without discrimination on any ground referred to in section #, other than a ground relevant to their membership of the group or the application of the selection criteria.
- (5) The administering department or other agency must monitor the efficacy of the programme by reference to the specified performance indicators. The responsible Minister must make an annual report to Parliament on the results revealed by the monitoring.

- (6) Unless it has sooner expired in accordance with its terms or has been repealed, an Act authorising a programme for the purposes of this section expires on the tenth anniversary of its entry into force, but the programme may be re-enacted, subject to compliance with subsection (2), unless the benefited persons or groups have demonstrably ceased to be in need of such a programme.
- (7) No programme for the purposes of this section shall, of itself or in its effect, deprive any person not entitled to its benefits of any position or seniority in any aspect of the service of the Republic, place in an educational or training institution, scholarship or other financial support, right to carry on any business or profession or to enjoy any other opportunity, amenity or service to which that person has already become, and would otherwise remain, entitled.

**# Definitions**

In this Chapter, "service of the Republic of the Fiji Islands" means service in any capacity on appointment by the President, the Cabinet, a Minister, a Commission or any public officer, or by resolution of Parliament or any Committee of Parliament, or by or on behalf of any local authority, whether or not the appointee is remunerated wholly or partly by public money, but does not include service as a member or employee of a body provided for in an Act referred to in section # (Entrenched legislation).