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SENTENCING AND PENALTIES DECREE 2009

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GOVERNMENT OF FIJI

SENTENCING AND PENALTIES DECREE 2009
(DECREE NO. 42 OF 2009)

A DECREE TO MAKE COMPREHENSIVE PROVISION FOR THE SENTENCING OF PERSONS FOR CRIMINAL OFFENCES AND TO REFORM PROCESSES APPLICABLE TO THE PRESCRIPTION OF PENALTIES IN THE LAWS OF FIJI AND THE DETERMINATION AND ENFORCEMENT OF A RANGE OF SENTENCING OPTIONS IMPOSED BY THE COURTS, AND FOR RELATED PURPOSES.

In exercise of the powers conferred upon me as Vice-President of Fiji by virtue of the Office of the Vice-President and Succession Decree 2009 (No. 8 of 2009), I hereby make the following Decree:

PART I — PRELIMINARY

Short title and commencement

- 1.—(1) This Decree may be cited as the Sentencing and Penalties Decree 2009.
- (2) This Decree shall come into effect on a date appointed by the Minister by notice in the *Gazette*.

Interpretation

2. In this Decree, unless the context otherwise requires:—

- “community work order” means a sentence imposed by a court under the Community Work Act 1994 that an offender is to perform community work;
- “court” includes all courts in Fiji lawfully vested with jurisdiction to hear criminal prosecutions and appeals;
- “fine” means the sum of money payable by an offender under an order of a court made when the offender is convicted or found guilty of an offence, and includes any costs ordered to be paid by the court, but does not include any money payable as restitution or compensation;
- “guideline judgment” means a judgment made in accordance with sections 6 - 9 that is expressed to contain guidelines to be taken into account by courts in sentencing offenders;
- “instalment order” means an order made under section 34 that a fine may be paid by two or more instalments, and includes any lawful variation of such an order;
- “Minister” means the Minister of Justice;
- “non-parole period” means any period fixed under Part V during which an offender who is sentenced to a term of imprisonment is not eligible to be released on parole;
- “probation order” means a probation order made by a court under the Probation of Offenders Act [Cap. 22];
- “victim” means a person who, or body that, has suffered injury, loss or damage (including grief, distress, trauma or other significant adverse effect) as a direct result of an offence, whether or not that injury, loss or damage was reasonably foreseeable by the offender.

Application of this Decree and other Acts

- 3.—(1) This Decree applies to all courts exercising jurisdiction in relation to criminal offences.
- (2) This Decree shall apply, subject to the requirements of the Juveniles Act [Cap. 56], to criminal proceedings undertaken in accordance with that Act.
- (3) Except where expressly stated in this Decree, the provisions of this Decree do not affect the powers of courts to make orders under the Community Work Act, the Probation of Offenders Act or any other law which empowers a court to impose any type of sentencing option.
- (4) Any penalty for any offence prescribed by law shall be deemed to be the maximum penalty that a court may impose for that offence after taking account of the provisions of this Decree.

PART II — SENTENCING GUIDELINES

Sentencing Guidelines

- 4.—(1) The only purposes for which sentencing may be imposed by a court are—
- (a) to punish offenders to an extent and in a manner which is just in all the circumstances;
 - (b) to protect the community from offenders;
 - (c) to deter offenders or other persons from committing offences of the same or similar nature;
 - (d) to establish conditions so that rehabilitation of offenders may be promoted or facilitated;
 - (e) to signify that the court and the community denounce the commission of such offences; or
 - (f) any combination of these purposes.
- (2) In sentencing offenders a court must have regard to—
- (a) the maximum penalty prescribed for the offence;
 - (b) current sentencing practice and the terms of any applicable guideline judgment;
 - (c) the nature and gravity of the particular offence;
 - (d) the offender's culpability and degree of responsibility for the offence;
 - (e) the impact of the offence on any victim of the offence and the injury, loss or damage resulting from the offence;
 - (f) whether the offender pleaded guilty to the offence, and if so, the stage in the proceedings at which the offender did so or indicated an intention to do so;
 - (g) the conduct of the offender during the trial as an indication of remorse or the lack of remorse;
 - (h) any action taken by the offender to make restitution for the injury, loss or damage arising from the offence, including his or her willingness to comply with any order for restitution that a court may consider under this Decree;
 - (i) the offender's previous character;
 - (j) the presence of any aggravating or mitigating factor concerning the offender or any other circumstance relevant to the commission of the offence; and
 - (k) any matter stated in this Decree as being grounds for applying a particular sentencing option.
- (3) In sentencing offenders for an offence involving domestic violence, a court must also have regard to—
- (a) any special considerations relating to the physical, psychological or other characteristics of a victim of the offence, including—
 - (i) the age of the victim;
 - (ii) whether the victim was pregnant; and
 - (iii) whether the victim suffered any disability;
 - (b) whether a child or children were present when the offence was committed, or were otherwise affected by it;
 - (c) the effect of the violence on the emotional, psychological and physical well being of a victim;
 - (d) the effect of the offence in terms of hardship, dislocation or other difficulties experienced by a victim;
 - (e) the conduct of the offender towards the victim since the offence, and any matter which indicates whether the offender—
 - (i) accepts responsibility for the offence and its consequences;
 - (ii) has taken steps to make amends to a victim, including action to minimise or address the negative impacts of the offence on a victim;
 - (iii) may pose any further threat to a victim;
 - (f) evidence revealing the offender's—
 - (i) attitude to the offence;

- (ii) intention to address the offending behaviour; and
- (iii) likelihood of continuing to pose a threat to a victim; and
- (g) whether the offender has sought and received counselling or other assistance to address the offending behaviour, or is willing to undertake such counselling or seek such assistance.

Factors to be considered in determining offender's character

5. In determining the character of an offender a court may consider (amongst other matters)—
- (a) the number, seriousness, date, relevance and nature of any previous findings of guilt or convictions recorded against the offender;
 - (b) the general reputation of the offender; and
 - (c) any significant contributions made by the offender to the community, or any part of it.

Guideline Judgments

6.—(1) On hearing and considering an appeal against sentence the Court of Appeal and the Supreme Court may, on its own initiative or on an application made by a party to the appeal, consider whether to give a guideline judgement, or to review a guideline judgment that has already been given.

(2) A guideline judgment given by the Court of Appeal or the Supreme Court shall be taken into account and applied by the High Court and the Magistrates Court when considering cases to which the guideline judgment applies.

(3) On hearing an appeal from a sentence given by a Magistrate, a judge of the High Court may, on its own initiative or on an application made by a party to the appeal, consider whether to give a guideline judgment, or to review a guideline judgment that has already been made under this sub-section.

(4) A guideline judgment given under sub-section (3) shall be taken into account by all magistrates when sentencing offenders for offences to which the guideline judgment applies.

Content of guideline judgments

7. Guideline judgements made under section 6 may set out—
- (a) criteria to be applied in selecting among various sentencing alternatives;
 - (b) the weight to be given to the various purposes for which a sentence may be imposed as stated in section 4(1);
 - (c) the criteria by which a sentencing court is to determine the gravity of an offence;
 - (d) the criteria which a sentencing court may use to reduce the sentence for an offence;
 - (e) the weighting to be given to relevant criteria; and
 - (f) any other matter consistent with the principles contained in this Decree.

Relevant matters for guideline judgments

8.—(1) In considering whether to exercise its power under section 6, a court so empowered shall notify the Director of Public Prosecutions and the Director of the Legal Aid Commission of its intention to consider making a guideline judgment and provide an opportunity for a lawyer representing them to make submissions on the matter.

(2) In addition to any submissions made under sub-section (1), a court considering the making of a guideline judgment must have regard to—

- (a) the need to promote consistency of approach in sentencing offenders; and
- (b) the need to promote public confidence in the criminal justice system.

(3) A court exercising its power to give a guideline judgment under section 6 may take into account any evidence given to it or to the court from where the appeal has been taken, and may otherwise inform itself as it sees fit.

Relationship between guideline judgments and other sentencing matters

9. A guideline in a guideline judgment—
- (a) is additional to any other matter that is required to be taken into account under section 4, or any other requirement stated in this Decree in relation to a specific sentencing option; and

- (b) does not limit or detract from any such requirement.

PART III — HABITUAL OFFENDERS

Application of this Part

10. This Part applies to a court when sentencing a person determined under section 11 to be a habitual offender for—

- (a) a sexual offence;
- (b) offences involving violence;
- (c) offences involving robbery or housebreaking;
- (d) a serious drug offence; or
- (e) an arson offence.

Determining a person to be a habitual offender

11.—(1) A judge may determine that an offender is a habitual offender for the purposes of this Part—

- (a) when sentencing the offender for an offence or offences of the nature described in section 10;
- (b) having regard to the offender's previous convictions for offences of a like nature committed inside or outside Fiji; and
- (c) if the court is satisfied that the offender constitutes a threat to the community.

(2) The powers under this Part may be exercised by the Court of Appeal and the Supreme Court when hearing an appeal against sentence.

Factors relevant to length of prison sentences

12. Where any court is proposing to impose a sentence of imprisonment on a person who has been determined to be a habitual offender under section 11 for an offence of a nature stated in section 10, the court, in determining the length of the sentence—

- (a) shall regard the protection of the community from the offender as the principal purpose for which the sentence is imposed; and
- (b) may, in order to achieve that purpose, impose a sentence longer than that which is proportionate to the gravity of the offence.

Prison sentences to be served consecutively

13. Every term of imprisonment imposed by a court on a person determined to be a habitual offender under section 11 for an offence of a nature stated in section 10 shall, unless otherwise ordered by the court, be served consecutively on any uncompleted sentences or any other sentence imposed on the offender.

Noting status of habitual offender on the record

14. A court that sentences a habitual offender for an offence of a nature stated in section 10 must, at the time of doing so, cause to be entered in the records of the court in respect of that offence the fact that the offender was sentenced for it as a habitual offender.

PART IV — GENERAL SENTENCING PROVISIONS

The range of sentencing orders

15.—(1) If a court finds a person guilty of an offence, it may, subject to any specific provision relating to the offence, and subject to the provisions of this Decree—

- (a) record a conviction and order that the offender serve a term of imprisonment;
- (b) record a conviction and order that the offender serve a term of imprisonment partly in custody and partly in the community;
- (c) record a conviction and make a drug treatment order in accordance with regulations made under section 30;
- (d) record a conviction and order that the offender serve a term of imprisonment that is wholly or partly suspended;

- (e) with or without recording a conviction, make an order for community work to be undertaken in accordance with the Community Work Act 1994 or for a probation order under the Probation of Offenders Act [Cap. 22];
- (f) with or without recording a conviction, order the offender to pay a fine;
- (g) record a conviction and order the release of the offender on the adjournment of the hearing, and subject to the offender complying with certain conditions determined by the court;
- (h) record a conviction and order the discharge of the offender;
- (i) without recording a conviction, order the release of the offender on the adjournment of the hearing, and subject to the offender complying with certain conditions determined by the court;
- (j) without recording a conviction, order the dismissal of the charge; or
- (k) impose any other sentence or make any other order that is authorised under this Decree or any other Act.

(2) All courts may impose the sentences stated in sub-section (1) notwithstanding that a law may state that a penalty is to be imposed upon the conviction of an offender.

(3) As a general principle of sentencing, a court may not impose a more serious sentence unless it is satisfied that a lesser or alternative sentence will not meet the objectives of sentencing stated in section 4, and sentences of imprisonment should be regarded as the sanction of last resort taking into account all matters stated in this Part.

(4) Notwithstanding the provisions of the Community Work Act 1994 and the Probation of Offenders Act [Cap. 22] a court may impose a sentence under sub-section (1)(e) upon finding an offender to be guilty of an offence but without recording a conviction.

(5) When sentencing or dealing with offenders who, by reason of their mental state have been found to be unfit to plead or have established a defence under law related to their mental impairment, the provisions of this Decree may only be applied subject to any law which makes specific provision for dealing with such offenders.

Conviction or non-conviction

16.—(1) In exercising its discretion whether or not to record a conviction, a court shall have regard to all the circumstances of the case, including—

- (a) the nature of the offence;
- (b) the character and past history of the offender; and
- (c) the impact of a conviction on the offender's economic or social well-being, and on his or her employment prospects.

(2) Except as provided by any law, a previous finding of guilt without recording a conviction in the exercise of a power under section 15 must not be taken into consideration for any purpose.

(3) A finding of guilt without recording a conviction in the exercise of a power under section 15—

- (a) does not prevent a court from making any other lawful order that is authorised under any law as a consequence of the finding of guilt; and
- (b) has the same effect as if a conviction had been recorded for the purpose of—
 - (i) appeals against sentence;
 - (ii) proceedings for variation or breach of a sentence; and
 - (iii) proceedings against the offender for a subsequent offence.

PART V — SENTENCES OF IMPRISONMENT

Aggregate sentences of imprisonment

17. If an offender is convicted of more than one offence founded on the same facts, or which form a series of offences of the same or a similar character, the court may impose an aggregate sentence of imprisonment in respect of those offences that does not exceed the total effective period of imprisonment that could be imposed if the court had imposed a separate term of imprisonment for each of them.

Fixing non-parole period by sentencing court

18.—(1) Subject to sub-section (2), when a court sentences an offender to be imprisoned for life or for a term of 2 years or more the court must fix a period during which the offender is not eligible to be released on parole.

(2) If a court considers that the nature of the offence, or the past history of the offender, make the fixing of a non-parole period inappropriate, the court may decline to fix a non-parole period under sub-section (1).

(3) If a court sentences an offender to be imprisoned for a term of less than 2 years but not less than one year, the court may fix a period during which the offender is not eligible to be released on parole.

(4) Any non-parole period fixed under this section must be at least 6 months less than the term of the sentence.

(5) If a court sentences an offender to be imprisoned in respect of more than one offence, any non-parole period fixed under this section must be in respect of the aggregate period of imprisonment that the offender will be liable to serve under all the sentences imposed.

(6) In order to give better effect to any system of parole implemented under a law making provision for such a system, a court may fix a non-parole period in relation to sentences already being served by offenders, and to this extent this Decree may retrospective application.

(7) Regulations made under this Decree may make provision in relation to any procedural matter related to the exercise by the courts of the power under sub-section (6).

Fixing non-parole period by appeal courts

19.—(1) The failure of the sentencing court to fix a non-parole period under section 18 does not invalidate the sentence but any court hearing an appeal against the sentence may fix a non-parole period in accordance with section 18.

(2) The High Court may, on the application of the offender, fix a non-parole period in accordance with section 18 in respect of a term of imprisonment being served by a person who is serving a life sentence and in respect of which no non-parole period has been fixed.

Fixing new non-parole period for multiple sentences

20.—(1) If a court has sentenced an offender to a term of imprisonment with a non-parole period and the offender is sentenced to a further term of imprisonment before the expiration of the non-parole period, the court must fix a new single non-parole period in respect of all sentences the offender is to serve or complete.

(2) The single new non-parole period fixed at the time of the subsequent sentence—

- (a) supersedes any previous non-parole period that the offender is to serve or complete; and
- (b) must not be such as to render the offender eligible to be released on parole earlier than would have been the case if the subsequent sentence had not been imposed.

(3) Nothing in this section prevent a court from exercising its power under section 18(2) to decline the fixing of a non-parole period in relation to the subsequent sentence.

Order of service of sentences

21.—(1) If an offender has been sentenced to several terms of imprisonment in respect of any of which a non-parole period was fixed, the offender must serve—

- (a) firstly, any term or terms in respect of which a non-parole period was not fixed;
- (b) secondly, the non-parole period;
- (c) thirdly, unless and until released on parole, the balance of the term or terms after the end of the non-parole period.

(2) If during the serving of a sentence a further sentence is imposed on the person for another offence, service of the earlier sentence shall, if necessary, be suspended in order that the sentences may be served in the order provided for in sub-section (1).

Concurrent or consecutive sentences

22.—(1) Subject to sub-section (2), every term of imprisonment imposed on a person by a court must, unless otherwise directed by the court, be served concurrently with any uncompleted sentence or sentences of imprisonment.

(2) Sub-section (1) does not apply to a term of imprisonment imposed—

- (a) in default of payment of a fine or sum of money;
- (b) on a prisoner in respect of a prison offence or as a result of an escape from custody;
- (c) on a habitual offender under Part III;
- (d) on any person for an offence committed while released on parole; or
- (e) on any person for an offence committed while released on bail in relation to another offence.

(3) Every term of imprisonment imposed on a person in default of payment of a fine or sum of money shall, unless otherwise directed by a court, be served—

- (a) consecutively on any uncompleted sentence imposed on the person in default of payment of a fine or sum of money; but
- (b) concurrently with any other uncompleted sentence imposed on that person.

(4) Every term of imprisonment imposed on a prisoner by a court in respect of a prison offence or an escape offence must, unless otherwise directed by the court based on exceptional circumstances, be served consecutively on any uncompleted sentence of imprisonment.

(5) Every term of imprisonment imposed on a prisoner by a court in respect of an offence committed while released on parole in relation to another sentence of imprisonment imposed on that person must, unless otherwise directed by the court based on exceptional circumstances, be served consecutively on any uncompleted sentence of imprisonment which the offender may be required to serve in custody on cancellation of the parole order.

(6) Every term of imprisonment imposed on a prisoner by a court in respect of an offence committed while released on bail in relation to any other offence must, unless otherwise directed by the court based on exceptional circumstances, be served consecutively on any uncompleted sentence of imprisonment.

Commencement of sentences

23.—(1) A sentence of imprisonment commences on the day that it is imposed.

(2) If an offender lawfully imprisoned escapes or fails to return after an authorised absence, the period between then and the day on which the offender is returned to custody does not count in calculating the term to be served.

Time in custody before trial to be deducted

24. If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matter or matters shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender.

Accurate official records of sentences served to be kept

25. All persons having lawful responsibility for maintaining records of sentences imposed by courts on offenders shall ensure that the records disclose—

- (a) the actual term served by an offender in prison in addition to the length of the sentence imposed; and
- (b) any other matters relating to the sentence which are prescribed by Regulations made under this Decree.

PART VI — SUSPENDED SENTENCES OF IMPRISONMENT

Suspending imprisonment

26.—(1) On sentencing an offender to a term of imprisonment a court may make an order suspending, for a period specified by the court, the whole or part of the sentence, if it is satisfied that it is appropriate to do so in the circumstances.

(2) A court may only make an order suspending a sentence of imprisonment if the period of imprisonment imposed, or the aggregate period of imprisonment where the offender is sentenced in the proceeding for more than one offence,—

- (a) does not exceed 3 years in the case of the High Court; or
- (b) does not exceed 2 years in the case of the Magistrate's Court.

(3) A court proposing to make an order suspending a sentence of imprisonment must before making the order explain, or cause to be explained, to the offender in a language likely to be readily understood by the offender—

- (a) the purpose and effect of the proposed order; and
- (b) the consequences that may follow if the offender commits another offence punishable by imprisonment during the operational period of the sentence.

(4) A wholly suspended sentence of imprisonment shall be taken for all purposes to be a sentence of imprisonment.

(5) A partly suspended sentence of imprisonment shall be taken for all purposes to be a sentence of imprisonment for the whole term of imprisonment stated by the court.

Effect of suspended sentence

27. An offender in respect of whom a suspended sentence has been imposed under section 26 only has to serve the sentence or part of the sentence which is suspended if he or she is ordered to do so in accordance with section 28.

Breach of order suspending sentence

28.—(1) If at any time during the operational period of a suspended sentence of imprisonment, the offender commits another offence punishable by imprisonment, the offender is guilty of an offence against this section.

(2) A proceeding for an offence under sub-section (1) may be commenced at any time up to 3 years after the date on which the offence is alleged to have been committed.

(3) Upon charging an offender with an offence under sub-section (1) a warrant to arrest the offender may be issued.

(4) If on the hearing of a charge under sub-section (1) the court finds the offender guilty of the offence, it may impose a fine not exceeding 100 penalty units and in addition the court must restore the sentence or part sentence held in suspense and order the offender to serve it, but if the court considers that exceptional circumstances exist that make this unjust, the court may instead—

- (a) restore part of the sentence or part sentence held in suspense and order the offender to serve it; or
- (b) in the case of a wholly suspended sentence, extend the period of the order suspending the sentence to a date not later than 12 months after the date of the order under this sub-section; or
- (c) make no order with respect to the suspended sentence.

(5) Any order for an offender to serve a term of imprisonment under sub-section (4) must be served—

- (a) immediately; and
- (b) unless the court orders otherwise, consecutively on any other term of imprisonment previously imposed on the offender by that court or any other court.

PART VII — OTHER SENTENCING ORDERS

Orders under other Acts

29. Nothing in this Decree affects the power of a court to impose any sentence, penalty on an offender, or to make any other order as a consequence of the finding of guilt against, or conviction of the offender.

Regulations to give effect to schemes for sentencing orders

30.—(1) Regulations made under this Decree may empower courts to impose sentencing orders against offenders which provide for—

- (a) arrangements for the treatment of offenders for drug or alcohol addiction or dependency;

- (b) combined custody and drug or alcohol treatment orders;
 - (c) home detention orders; or
 - (d) any other appropriate order which may meet the objectives of sentencing stated in section 4.
- (2) The Regulations made under sub-section (1) may make provision for—
- (a) the offences for which any sentencing orders of the nature referred to in sub-section (1) may be made;
 - (b) powers of the courts to make such sentencing orders without proceeding to conviction in certain circumstances;
 - (c) any other pre-condition or limitation applying to the imposition of such sentencing orders;
 - (d) the requirement that reports be prepared by designated agencies or officers prior to the imposition of any such sentencing orders;
 - (e) the conditions which are to apply to any such sentencing orders, or which may be applied to them;
 - (f) the power of courts to impose fines or other penalties in addition to making any such sentencing order;
 - (g) the grounds upon which any such sentencing orders may be varied, suspended or cancelled, and the procedures for considering such matters;
 - (h) dealing with offenders who breach such sentencing orders; and
 - (i) any other matter to give full and proper effect to sentencing orders of the nature referred to in sub-section (1).

PART VIII — FINES

Power to fine

31.—(1) If a person is found guilty of an offence the court may, subject to any specific provision relating to the offence, fine the offender in addition to or instead of any other sentence to which the offender may be liable.

(2) The maximum fine that a court may impose under sub-section (1) is the maximum amount specified in the provision which prescribes the relevant offence, and a court may impose any lesser fine than the maximum.

(3) Where no fine is fixed for an offence the fine which a court may impose is unlimited, but a court shall not impose an excessive fine.

Exercising the power to fine

32.—(1) If a court decides to fine an offender it must determine the amount of the fine and the method of payment by taking into account, as far as is practicable, the financial circumstances of the offender and the extent of the burden that its payment will impose.

(2) A court is not prevented from fining an offender in circumstances where it is unable to determine the financial circumstances of the offender.

(3) In considering the financial circumstances of an offender the court must take into account any other order that it or any other court has made, or proposes to make—

- (a) providing for the forfeiture of the offender's property, or for its automatic forfeiture under any law; and
- (b) requiring the offender to make restitution or to pay compensation.

(4) If the court considers—

- (a) that it would be appropriate both to impose a fine and to order restitution or compensation; but
- (b) the offender has insufficient means to pay both—

the court must give preference to restitution or compensation, but may order the payment of a fine also.

(5) A court in fixing the amount of a fine to be paid by an offender may have regard to (among other matters) —

- (a) any loss or destruction of, or damage to, property suffered by any person as a result of the offence; and
- (b) the value of any benefit derived by the offender from the commission of the offence.

Aggregate fines

33. If a person is found guilty of more than one offence founded on the same facts, or which form a series of offences of the same or a similar character, the court may impose one fine in respect of those offences that does not exceed the sum of the maximum fines that could be imposed for each of them.

Instalment orders

34. If a court decides to fine an offender it may order that the fine be paid by instalments.

Time to pay

35. If a court does not make an instalment order under section 34, it may at the time of imposing the fine order that the offender be allowed time to pay the fine.

Variation of instalment orders and time to pay

36. On the application of the offender, or by an officer of the court on behalf of an offender, a court may make an order varying any order made under section 34 or section 35 if the court is satisfied that—

- (a) the circumstances of the offender have changed so as to affect the ability of the offender to comply with the order;
- (b) the offender has indicated a commitment to pay the fine on the varied terms; and
- (c) it is reasonable and just in the circumstances to vary the order.

Terms of imprisonment in default of payment of fines

37.—(1) The term for which a person in default of payment of a fine or an instalment order may be imprisoned is 10 days for each penalty unit or part of a penalty unit then remaining unpaid, with a maximum of 24 months.

(2) A term of imprisonment applying to an offender shall be increased by 10 days for each \$100 of costs and expenses arising from the issuing and execution of a warrant of distress in accordance with this Part.

(3) Regulations made under this Decree may make provision for persons in default of payment of fines, costs and expenses to avoid serving a term of imprisonment in accordance with this section by the performance of a specified amount of unpaid community work for each penalty unit or amount of costs and expenses unpaid.

Application of fines

38.—(1) The whole or any part of a fine imposed by a court on an offender must be paid to the court and then into the Consolidated Fund, if no other way of paying the fine or applying it is provided by any law.

(2) Any costs incurred in the execution of a warrant for the payment of a fine, or otherwise in the recovery of fines in accordance with any lawful process, may be retained by the police or other agency authorised by law to enforce the order to pay the fine and recover any unpaid fine.

Enforcement of fines etc. against natural persons

39.—(1) If for a period of more than 1 month a natural person defaults in the payment of a fine (or any instalment of a fine under an instalment order), or an order to pay costs or expenses, the court may—

- (a) issue a warrant to arrest the offender in default; and
- (b) issue a warrant for the levy of the amount in default on the property of the offender by distress and sale under warrant.

(2) The term of imprisonment applying to an offender who is in default in the payment of a fine, costs or expenses shall commence on the day on which the offender is arrested and shall terminate whenever the fine, costs and all expenses are paid or recovered, or when the period of imprisonment is served.

(3) No distress warrant may be issued under sub-section (1)(b) if the court has ordered that an offender shall be imprisoned for default in the payment of a fine, and the offender has undergone the whole of such imprisonment.

Enforcement of fines etc against corporations

40.—(1) If for a period of more than 1 month a body corporate defaults in the payment of a fine (or any instalment of a fine under an instalment order), or of an order to pay costs or expenses the court or an officer of the court may issue a warrant to seize property against it.

(2) A warrant issued under sub-section (1) must not be executed unless the fine (or instalment, or any part of them), or the costs or expenses, together with all lawful costs of execution remain unpaid for 7 days after demand is made on the body corporate by a person authorised to execute the warrant, and the body corporate has not within that time obtained an instalment order or time to pay.

(3) The person making the demand under sub-section (3) shall deliver to the body corporate a statement in writing setting out a summary of the amounts due to be paid, including costs of execution, and the rights of the body corporate to seek an instalment order or time to pay.

Executing warrants

41.—(1) No land belonging to an offender shall be sold by distress or sale under warrant if there is sufficient other property to satisfy the fine, costs or expenses which are in default and the costs of execution.

(2) The execution of a warrant and the sale of property by distress shall—

- (a) cease if the amount of the fine, costs or expenses which is in default, and the costs and expenses of the execution, are tendered by or on behalf of the offender;
- (b) be stayed by written notice given by the court or an officer of the court, stating that another person is claiming to be entitled to the property being levied, or to an interest under law in the property;
- (c) cease if a court determines under this section that the person claiming ownership of the property, or an interest in the property, has a valid claim to it.

(3) A person claiming ownership of, or a lawful interest in any property that has been taken on the authority of a warrant issued under this Part must—

- (a) prior to the sale of the property give written notice to the court of his or her objection to the sale of the property stating the nature of the interest that is claimed in the property;
- (b) support the matters claimed in the written notice, and the alleged value of the property claimed, by affidavit;
- (c) appear before the court when notified to do so and establish his or her claim to the property.

(4) In determining a claim by a person to property that is to be sold on the authority of a warrant, the court shall—

- (a) cause to be served on the offender a copy of the notice given under sub-section (3), and specify the time and place at which the person making a claim to the property has been directed to appear before the court; and
- (b) investigate the claim and hear evidence in relation to the ownership of the property; and
- (c) determine that the person claiming the property has a valid claim, and in such a case order the return of the property to that person; or
- (d) determine that the person claiming the property has no valid claim, and in such a case order that the sale of the property under the authority of the warrant proceed, and make such order as to costs as the court thinks fit.

Imprisonment when distress fails

42.—(1) If the police officer or other authorised person having the execution of a warrant of distress reports that no, or no sufficient property has been taken to recover the amount of the fine, costs or expenses in default, and the costs and expenses of execution, a court may by the same warrant or another warrant commit the offender to a term of imprisonment in accordance with section 37.

(2) No Court may make an order depriving a person of personal liberty on the ground of failure to pay maintenance or a debt, fine or tax unless the court considers that the person has wilfully refused to pay despite having the means to do so, and for that purpose Regulations made under this Decree may provide for procedures by which a court can determine the means of a person and the reason for the non-payment of the fine, and such procedures may delegate powers of inquiry to court officers.

(3) An offender imprisoned under sub-section (1) shall be discharged upon the payment of the full amount of the fine, costs and expenses in default, and the costs and expenses of execution.

(4) After the commitment of an offender to a term of imprisonment under sub-section (1), the term of imprisonment shall be reduced upon part payment of the amounts outstanding by —

- (a) 10 days for each penalty unit paid in reduction of the arrears of the fine; and
- (b) 10 days for each \$100 of costs and expenses.

PART IX — DISMISSALS, DISCHARGES AND ADJOURNMENTS

Purpose of orders under this Part

43.—(1) An order may be made under this Part—

- (a) to provide for the rehabilitation of an offender by allowing the sentence to be served in the community unsupervised;
- (b) to take account of the trivial, technical or minor nature of the offence committed;
- (c) to allow for circumstances in which it is inappropriate to inflict any punishment other than nominal punishment;
- (d) to allow for circumstances in which it is inappropriate to record a conviction;
- (e) to allow for the existence of other extenuating or exceptional circumstances that justify a court showing mercy to an offender.

(2) The orders that may be made under this Part are in substitution for the powers under the common law for courts to release offenders on a recognisance or bond to be of good behaviour and to appear for sentence when called upon.

Release after conviction

44.—(1) A court may discharge a person whom it has convicted of an offence.

(2) A court, on convicting a person of an offence, may adjourn the proceedings for a period of up to 5 years and release the offender upon the offender giving an undertaking to comply with the conditions applying under sub-section (3), and any further conditions imposed by the court.

(3) An undertaking under sub-section (2) shall have conditions—

- (a) that the offender shall appear before the court if called on to do so during the period of the adjournment, and if the court so specifies, at the time to which the further hearing is adjourned;
- (b) that the offender is of good behaviour during the period of the adjournment; and
- (c) that the offender observes any special conditions imposed by the court.

(4) A court may make an order for restitution or compensation in accordance with Part X in addition to making an order under this section.

(5) An offender who has given an undertaking under sub-section (1) may be called upon to appear before the court—

- (a) by order of the court;
- (b) by notice issued by a court officer on the authority of the court.

(6) If at the time to which the further hearing of a proceeding is adjourned the court is satisfied that the offender has observed the conditions of the undertaking, it must discharge the offender without any further hearing of the proceeding.

Release without conviction

45.—(1) A court on being satisfied that a person is guilty of an offence may dismiss the charge and not record a conviction.

(2) A court, on being satisfied that a person is guilty of an offence, may (without recording a conviction) adjourn the proceedings for a period of up to 5 years and release the offender upon the offender giving an undertaking to comply with the conditions applying under sub-section (2), and any further conditions imposed by the court.

(3) An undertaking under sub-section (2) shall have conditions that—

- (a) that the offender shall appear before the court if called on to do so during the period of the adjournment, and if the court so specifies, at the time to which the further hearing is adjourned;
- (b) that the offender is of good behaviour during the period of the adjournment; and
- (c) that the offender observes any special conditions imposed by the court.

(4) A court may make an order for restitution or compensation in accordance with Part X in addition to making an order under this section.

(5) An offender who has given an undertaking under sub-section (1) may be called upon to appear before the court—

- (a) by order of the court;
- (b) by notice issued by a court officer on the authority of the court.

(6) If at the time to which the further hearing of a proceeding is adjourned the court is satisfied that the offender has observed the conditions of the undertaking, it must discharge the offender without any further hearing of the proceeding.

Variation of order for release on adjournment

46.—(1) A court which has made an order for the release of an offender on an adjournment under this Part may vary the order or cancel it and deal with the offender for the offence or offences with respect to which it was made if it is satisfied that—

- (a) circumstances have arisen which make it impossible for the offender to comply with the conditions; or
- (b) the circumstances of the offender were wrongly stated or not accurately presented to the court before the order was made; or
- (c) the offender is no longer willing to comply with the conditions of the undertaking.

(2) In dealing with an offender under sub-section (1) the court must take account of the extent to which the offender had complied with the conditions of the undertaking.

(3) An application to the court to exercise its powers under sub-section (1) may be made by—

- (a) the offender; or
- (b) the Director of Public Prosecutions, or an officer acting on his or her authority.

(4) A court may order that a warrant of arrest be issued against an offender who does not attend before the court on the hearing of an application under this section.

Breach of order for release on adjournment

47.—(1) An offender who fails to comply with a condition applying to an undertaking given under this Part during the period in which the undertaking is in force is guilty of an offence.

(2) A proceeding for an offence against sub-section (1) may be commenced at any time up to 3 years after the date on which the offence was committed.

(3) Upon charging an offender with an offence under sub-section (1) a warrant to arrest the offender may be issued.

(4) If on the hearing of a charge under sub-section (1) the court finds the offender guilty of an offence under sub-section (1) it may —

- (a) vary the original order;
- (b) confirm the original order; or
- (c) deal with the offender for the offence or offences with respect to which the original order was made, which may involve the substitution of the original order with a new sentence for the original offence—

and in addition may impose a fine not exceeding 100 penalty units in respect of the offence under sub-section (1).

Magistrates may defer sentencing

48.—(1) If a Magistrate's Court finds a person guilty of an offence, the Magistrate's Court may defer sentencing the offender for a period not exceeding 6 months if—

- (a) the offender at the time of the finding is aged 17 years or more but under 25 years; and
- (b) the Magistrate's Court is of the opinion that sentencing should, in the interests of the offender, be deferred; and
- (c) the offender agrees to the deferral of the sentence.

(2) A Magistrate's Court may also defer sentencing an offender for such period as may be necessary (but not exceeding 6 months) for the offender to undertake any treatment, counselling or course aimed at rehabilitation.

(3) If a Magistrate's Court defers sentencing under this section the court must adjourn the proceeding for a period of up to 6 months, and may

- (a) release the offender on an undertaking to appear before the court on the date fixed for sentence;
- (b) notwithstanding any limitation applying under the Bail Act; the court may release the offender on bail or extend the offender's bail, for the period of the adjournment;
- (c) order that a report on the offender be prepared by an appropriate person or agency determined by the court;
- (d) impose any additional conditions to be observed or undertaken by the offender during the period of adjournment.

(4) On the adjourned hearing the Magistrate's Court must, in determining the appropriate sentence for an offender, have regard to—

- (a) the behaviour of the offender during the period of deferral;
- (b) the proper attendance of the defendant at any treatment, counselling or course ordered by the court under sub-section (2), and the outcomes and effects of such treatment, counselling or course on the offender; and
- (c) any other matter that the court considers relevant.

(5) If an offender is found guilty of an offence during a period of deferral under this section, the Magistrate's Court may—

- (a) re-list the adjourned proceedings; and
- (b) make any order that could have been made if the sentence had not been deferred.

(6) A warrant may be issued against an offender who does not attend before the court on an adjourned hearing or any re-listed hearing under sub-section (5).

(7) Nothing in this section removes any requirement or power under any law to order the cancellation or suspension of any licence held by the offender, or make any other lawful order consequent upon the finding of guilt, and for such purposes the finding of guilt shall have the effect of a conviction.

PART X — RESTITUTION AND COMPENSATION ORDERS

Restitution Orders

49.—(1) If goods or property have been stolen and a person is found guilty or convicted of an offence connected with the taking of the goods or property, the court may make—

- (a) an order that the person who has possession or control of the stolen goods or property restore them to the person entitled to them;
- (b) an order that the offender deliver or transfer to another person goods or property that are the proceeds of any disposal or realisation of the whole or part of the stolen goods or property; or
- (c) an order that a sum not exceeding the value of the stolen goods or property be paid to another person out of money taken from the offender's possession on his or her arrest.

(2) An order under sub-section (1)(b) or (c) may only be made in favour of a person who, if the stolen goods or property were in the offender's possession, would be entitled to recover them from the offender.

(3) The court may make an order under both sub-section (1)(b) and (c) provided that the person in whose favour the order is made does not recover more than the value of the stolen goods or property.

(4) An order may be made under this section may be made as soon as practicable after the offender has been found guilty or convicted of the offence, and may be made—

- (a) by the person who has suffered the loss of the goods or property; or
- (b) on that person's behalf by a representative of the Director of Public Prosecutions.

(5) A court shall not exercise the powers conferred by this section unless it is of the opinion that the relevant facts appear from the evidence given at the hearing or from admissions made by or on behalf of the offender that support the making of such an order.

Enforcement of restitution orders

50.—(1) An order made under section 49(1)(c) may be enforced as a judgment debt due by the offender to the person in whose favour the order is made.

(2) An order made under section 49(1)(a) or (b) may be enforced by a court by any means available to that court in a civil proceeding.

Compensation Orders

51.—(1) Regulations made under this Decree may empower courts to make orders for compensation to be paid by offenders to persons who suffer any loss, damage or injury as a direct result of the offence for which the offender who is found to be guilty or is convicted.

(2) The Regulations made under sub-section (1) may make provision for—

- (a) the nature and extent of the compensation that may be ordered;
- (b) the means by which applications for compensation may be made to a court;
- (c) time limits for making applications for compensation, and powers of a court to extend the time limits;
- (d) any matter of procedure for determining an application for compensation by a court;
- (e) the grounds upon which a court may or must refuse to hear an application for compensation;
- (f) any matter of evidence to be applied in relation to the determination of applications for compensation;
- (g) any matter to be taken into account by courts when determining applications for compensation;
- (h) powers to award costs arising from such procedures; and
- (i) powers to enforce compensation orders.

(3) Nothing in this section or the Regulations made under it affect the right of any person to take action to recover damages for losses, damage or injury against an offender by way of civil proceedings.

(4) At the time of awarding compensation in any subsequent civil suit relating to the same matter, the court shall take into account any sum paid or recovered as compensation under this section.

Recovery of costs by emergency response agencies

52.—(1) Regulations made under this Decree may empower courts to make orders for the costs incurred by emergency response agencies to be paid in certain cases by offenders.

(2) The Regulations made under sub-section (1) may make provision for—

- (a) the designation of the emergency response agencies which may be entitled to payment or reimbursement of their costs and expenses arising from a criminal offence by an offender;
- (b) the offences for which courts may make orders for the payment or reimbursement of costs to designated emergency response agencies;
- (c) the nature and extent of the payments and reimbursements that may be ordered;
- (d) the means by which applications for such orders may be made to a court;
- (e) time limits for making applications for such orders, and powers of a court to extend the time limits;
- (f) any matter of procedure for determining an application for such orders by a court;
- (g) the grounds upon which a court may or must refuse to hear an application for such orders;
- (h) any matter of evidence to be applied in relation to the determination of applications for such orders;
- (i) any matter to be taken into account by courts when determining applications for such orders;
- (j) powers to award costs arising from such procedures; and
- (k) powers to enforce such orders.

PART XI — PARTICIPATION OF TRADITIONAL AND COMMUNITY LEADERS IN SENTENCING PROCESSES

Objectives of this Part

53. The objectives of this Part are to—

- (a) implement procedures for courts to involve traditional and community leaders in identifying and reviewing appropriate sentences for certain offenders found guilty of certain types of offences;
- (b) enhance the effectiveness of the range of sentencing options provided for under this Decree;
- (c) involve traditional and community leaders in the sentencing processes to facilitate the attainment of the objectives of sentencing stated in section 4; and
- (d) make certain offenders account to their traditional and community leaders, and to involve those leaders and leadership structures in the supervision of offenders after sentences have been imposed.

Prescribed procedures and powers

54.—(1) Regulations made under this Decree may prescribe procedures and powers for courts to involve community representatives in the sentencing of offenders in order that the objectives of this Part may be facilitated.

(2) The Regulations made under sub-section (1) may make provision for—

- (a) the selection of traditional and community leaders to be involved in the sentencing processes, including processes to ensure that both male and female leaders are actively involved in the processes;
- (b) the procedures of the courts in relation to the involvement of traditional and community leaders in the sentencing processes;
- (c) any limitations on the types of offences or the character of offenders to which these arrangements may be applied;
- (d) any additional matter to promote the effectiveness of particular sentencing options provided for by this and any other law through the involvement of traditional and community leaders in the supervision of offenders after their sentence, including—
 - (i) the supervision and monitoring of offenders after sentence, and the submission or presentation of reports in relation to them; and

- (ii) the variation of any sentence based upon a report made in relation to the offender;
- (e) any particular arrangements that may be applied in any specific area or in relation to any specific community group taking account of all relevant circumstances including—
 - (i) the nature of the traditional and community leadership structures applicable to the area or group;
 - (ii) the prevalence of certain types of offence or criminal behaviour in the particular area or amongst the group;
 - (iii) any particular facilities or resources existing in the particular area or available to the group that may permit the effective implementation of arrangements made in accordance with this section; and
- (f) any other matter which may facilitate the effective recognition of and involvement of traditional and community leadership structures in the sentencing processes under this Decree.

Powers of courts in the absence of Regulations

55.—(1) Nothing in section 54 shall prevent a court from adopting processes to involve traditional and community leaders in sentencing processes in the absence of applicable regulations made under that section.

(2) Any processes adopted under sub-section (1) must be aimed at facilitating the attainment of the objectives stated in section 53, and must be modified to meet the requirements of any applicable Regulations made under section 54 when they take effect.

PART XII – PENALTY UNITS

Amendments to fine provisions in all Acts, Decrees, Promulgations and Regulations

56.—(1) In all Acts, Decrees, Promulgations and Regulations now or at any time in the future in force in Fiji—

- (a) a reference to the imposition of a fine or maximum fine of less than \$100 shall be deemed to impose a fine or maximum fine, as the case may be, of \$100, unless otherwise specified in Regulations made under section 58;
- (b) a reference to a fines expressed as dollars shall become a reference to an amount of penalty units being 1 penalty unit for each \$100 of the fine, and one penalty unit for a remaining amount of a fine that is less than \$100—

and all Acts, Decrees, Promulgations and Regulations are amended accordingly.

(2) Sub-section (1) does not apply to fines that are expressed to be for continuing offences, which shall be set at one-half of the substantive fine for each day that an offence continues, and these shall be expressed as penalty units in accordance with sub-section (1).

Fixing the amount of the penalty unit

57.—(1) In all Acts, Decrees, Promulgations and Regulations a reference to a “penalty unit” shall be the amount of \$100 for each penalty unit prescribed as a fine.

(2) The amount of each penalty unit may be amended by a Regulation made under this Decree.

Amendments to specific fines

58. Regulations made under this Decree may amend specific fines provided for in any Acts, Decrees, Promulgations or Regulations.

Application of this Part to proceedings already commenced

59.—(1) The penalties fixed by the operation of this Decree shall apply only to offences committed after the date of commencement of this Decree.

(2) The applicable fine for offences committed prior to the commencement of this Decree shall be the fine applying to the offence prior to the commencement of this Decree.

(3) In the event that the amount of each penalty unit is amended under section 57(2), the revised amount shall only apply to fines imposed in respect of offences committed after the amendment has come into force.

PART XIII — MISCELLANEOUS PROVISIONS

Savings provisions

60.—(1) Nothing in this Decree affects the validity of any sentence of any court made prior to the commencement of this Decree, and all such sentences shall be carried out in accordance with the laws applying at the time that they were made.

(2) No procedure used to enforce any sentence under this Decree shall be invalid by reason of the use of forms and processes applying to the enforcement of sentences prior to the commencement of this Decree, unless a Regulation made under this Decree requires the use of other forms or processes.

Transitional provisions

61.—(1) A court hearing any proceeding for an offence which was commenced prior to the commencement of this Decree shall apply the provisions of this Decree if no sentence has been imposed on the offender prior to the commencement of this Decree.

(2) On the hearing of any appeal against a sentence imposed by a court prior to the commencement of this Decree, the court hearing the appeal may—

- (a) confirm the original sentence to apply in accordance with any law under which it was made at the trial of the offence; or
- (b) vary the original sentence and impose any sentence in accordance with this Decree.

Regulations

62.—(1) The Minister may make regulations for the any purpose related to the implementation of this Decree.

(2) Without limiting the generality of sub-section (1), regulations made under this section may prescribe—

- (a) forms, fees and procedures for applications to be made to a court for any matter provided for under this Decree;
- (b) forms for any other purpose associated with the exercise of a power under this Decree;
- (c) forms and procedures for the enforcement of any sentences or the application of any orders permissible under this Decree;
- (d) powers of court officers to issue warrants and give notices in relation to any matter provided for under this Decree, and regulations made under this Decree.

GIVEN under my hand this 4th day of November 2009.

EPELI NAILATIKAU
Vice-President of the Republic of Fiji