3 What are "non-negotiable" elements for the Draft Report?

1. Section 3 of Decree No. 98 sets out the purpose for the Commission.

2. While (d) 2 states that the draft constitution must have "respect for, and protection and promotion of, human rights", all the fundamental human rights as agreed to by the United Nations declaration on universal human rights are not included.

3. Section 3(e) on "non-negotiable principles and values" strangely omits all reference to several human rights which have been denied to numerous Fiji citizens by the Regime over the last six years, such as freedom of speech, freedom of assembly, the right to personal property, the right to go to court for perceived grievances, and many others.

4. This submission calls on the Commission to ensure that their Report MUST reaffirm the fundamental human rights such as freedom of expression, freedom of assembly, the right to personal property, the right to go to court with perceived grievances, and all other basic human rights ratified by The UN Convention on Human Rights, even if the current Regime has denied these basic human rights to many Fiji citizens and residents. It should also include the principles of the equality of all races and religions, and inclusivity, which this Regime has strongly and correctly espoused.

5. The Commission might wish to point out in its Report, that indigenous Fijian politicians could learn from the undoubted support given to the Bainimarama Regime by non-indigenous Fiji citizens (Indo-Fijians, kavilagis, and kailomas) who have felt victimized or marginalized or simply not used to their full national potential, by previous governments. In large measure this support has persisted because of the frequent repetition by the Bainimarama Regime that they believe in the equality of all races and religions. The latest example of this may be seen in the Fiji Day speech by the Regime's President where he reiterated this at length.

6. The irony of this phenomenon is that the economic welfare of Indo-Fijians in general has taken quite a battering during the last six years (see Section 12 on poverty), and to this economist, is hardly justified by the proclamation of racial and religious equality.

7. Nevertheless "man does not live by bread alone". The great psychological need for Indo-Fijians and others to feel that "they belong" and that the Fijian leaders say that "they belong", should not be under-estimated in national politics, and leaders like Bavadra in 1987, and in recent years Commodore Bainimarama have derived great benefit from it.

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1 This statement often cowers international opinion critics of the Regime: how could anyone disagree with this universal truth".
8. The Military Regime has publicised for months that the revised Constitution will be a "home grown" document representing what the people of Fiji genuinely want. This is commendable. Yet Decree No. 98 demands in Section 7 (which is titled "Functions and powers of the Commission") subsection (4) that the draft Constitution

(a) must provide immunity for the President, all members of the RFMF, Police, Prisons, and individuals appointed to Cabinet and any State Service, stretching from 5th December 2006 to the first sitting of the next Parliament (presumably in 1914 but could even be later).

(b) the Draft Constitution must give such immunity as is provided for in the Limitation of Liability for Prescribed Political Events Decree 2010, to all persons listed as "prescribed persons" under that decree, and for all events described as "prescribed political events" in that Decree.

(c) Decree 98 stipulates that this immunity is not to be challenged by any court, or any future Parliament!

9. Given that parliaments are universally deemed supreme, the paragraph to limit the powers of all future parliaments, suggests an abysmal lack of legal common sense from the Regime's legal advisers and drafters who seem to care little that their decrees make a mockery of the supreme powers of elected parliaments.

10. I wish to emphasize that 97 (b) above refers to all the events in the attempted 2000 coup and mutiny, and events thereafter up to April 2009 and the purported 2009 abrogation of the Constitution.

11. The Commission must ask itself, why would the Bainimarama Regime which took power in 2006, seek immunity for the events of 2000 (attempted coup and the mutiny) and other events between 2000 and 2006?

12. Why would "prescribed political events" include "all dialogue, discussions, correspondence between the Republic of Fiji Military Forces and the Government between September 2001 to December 2006"?

13. Why should immunity be granted for unknown future actions up till 2014?

14. Indeed, why would the Commission accept that part of their "function" and "powers" (as described in the decrees) is to recommend immunity, which the Constituent Assembly would then have to discuss and approve, with neither entities having any knowledge whatsoever of what the immunity is being granted for?

15. It is incongruous that the Yash Ghai Commission pamphlet\(^2\) publicizing their work, includes in their section on "Principles and Values" the sentence "The constitution

\(^2\) Personal communication from a key staff member in the Commission Secretariat.
must also give legal immunity to the government, members of the security services and civil servants”.

16. It would not be desirable for the Commission to recommend a "blanket immunity" of the form that is set out in the two decrees, without knowing exactly what acts or omissions in the past the immunity will be granted for. This must be clarified by the Commission in its discussions with the Regime.

17. It is of course quite impossible for the Commission or the Constituent Assembly or any submission to recommend immunity for unknown acts in the future, up to parliamentary elections in 2014.

18. The Commission should note that Decree 99 requires that their draft constitution be referred to a Tribunal chaired by the Regime’s Chief Justice (Anthony Gates) to ensure that the constitution not only follows the principles and values set out in Decree 98, but also subsection 3 of Section 8 which contain the demands for immunity.

19. This Submission calls on the Commission to inquire from the Regime whether the demands for immunity will also apply to the actions of Justice Anthony Gates when he was Acting Chief Justice following the Military’s removal of the former Chief Justice (Fatiaki), and any actions and activities of the Regime’s President (Ratu Epeli Nailatikau).

20. If the answer is in the affirmative, then there is a clear conflict of interest in that those required by the Regime's Decree No. 99 to approve the draft constitution and sign the final constitution will themselves be the direct beneficiaries of the immunity. That would make a mockery of the whole process and be akin to those accused of crimes, giving the judgement on themselves that they will not be held accountable for their actions, whatever they may have done.

21. This submission recommends that to have any ethnical validity, immunity provisions, if any, must be approved by the next elected parliament, and not a President and Chief Justice appointed by the current Regime.

22. This submission calls on the Yash Ghai Commission to be transparent with the Fiji public and the Constituent Assembly, and publicly clarify that the Regime is requiring immunity to stretch from 2000 to 2014.

23. This Submission recommends that it is essential that the Commission, before it makes any recommendation for immunity, recommend processes that will establish the truth concerning:

(a) the circumstances and the lawfulness of the Bainimarama takeover of government in 2006 and the 2009 purported abrogation of the 1997 Constitution; and
(b) equally important given that the immunity is to stretch back to 2000, to clarify the facts behind the 2000 attempted coup, and the later mutiny against Commodore Bainimarama.³

(c) Recommend processes which may effect (b) above before any immunity provisions are discussed by the next elected parliament.

(d) Obtain international legal advice on whether immunity can be granted for serious abuse of basic human rights abuses.

24. To refuse to face the facts behind the coups and mutiny of 2000, and the coups of 2006 and 2009, would be to continue to build our constitutions on deliberate national myopia about uncomfortable traumatic events in Fiji's history. Fiji has done this over the 1987 coups, and the aftermath resurfaces over and over again in the subconsciousness of the national psyche. These cancerous events must be exorcised from the conscience of Fiji's leaders once and for all, through an honest confrontation of the truth, however brutal the conclusions, even if many a leader has taken his/her skeletons to the grave or into the ether following cremation. [http://narseyonfiji.wordpress.com/2012/03/18/fijis-cancerous-conspiracies-of-silence-5-november-2011-on-blogs/]

25. This submission recommends that the Yash Ghai Commission, as part of their Draft Report, include the recommendation that one of the first acts of the newly elected Parliament would be to recommend a "Truth, Justice and Reconciliation Commission" whose task would be to elucidate honestly and transparently, the events of 1987, 2000, 2006 and 2009, and all events for which immunity is being sought by the Military Regime.

26. This submission calls on the Yash Ghai Commission to leave it to the next elected Parliament, following the Report of the Truth, Justice and Reconciliation Commission, to make recommendations on the nature and extent of immunity to be granted to those involved in the events between 2000 and 20014, for which immunity is being sought by the Regime.

³ Some conjectures are made later in this submission based on the publicly available Evans Board of Inquiry Report (which the Commission has in its possession).