



STANDING COMMITTEE ON JUSTICE, LAW AND HUMAN RIGHTS

Review Report on the Patents Bill 2020 (Bill No. 46 of 2020)



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CHAIRPERSON'S FOREWORD



The Government of the day has put in remarkable efforts to undertake reforms and review of its legislative framework to create an inclusive business environment, both in public and private sector. Through this undertaking, a review was carried out on the Intellectual Property regulatory framework, including the current Act that governs patents in Fiji. From this, it was identified that the current Intellectual Property regulatory framework needs substantial changes.

The *Patents Bill 2020* is the realisation of this reform work carried out by the Fijian Government. The Bill was referred to the Standing Committee on Justice, Law and Human Rights, by the Parliament following the first reading, by the Hon. Attorney-General, for it to be scrutinised and reported on.

At the outset, the Committee made preliminary deliberations on the Clauses of the Bill and noted that the key objectives of the Bill include:

- providing an efficient and effective patent system that:
 - promotes innovation and economic growth while providing an appropriate balance between the interests of inventors and patent owners and the interests of society as a whole; and
 - complies with Fiji's international obligations;
- ensuring that a patent is granted for an invention only in appropriate circumstances by:
 - establishing appropriate criteria for the granting of a patent; and
 - providing for procedures that allow the validity of a patent to be tested;
- providing greater certainty for patent owners and the users of patented inventions that patents will be valid after they are granted;

The Bill seeks to modernise the laws of Fiji relating to Patents and repeal the current Act, which is the *Patents Act 1879*.

As part of the review the Committee held public consultation on the Bill; whereby the Committee received support from majority of the public and key stakeholders that had participated in the public consultation. There were also comments and suggestions for changes put forth by submitters, which the Committee placed reasonable emphasis on. The salient issues, which were highlighted by the general public were as follows:

It was noted that there are certain provisions in the Bill that raise questions of consistency and alignment when comparing the Bill to the Agreement on Trade-Related Aspects of Intellectual Property Rights ('**TRIPS**'). Additionally, it was also highlighted that the Bill is designed to contribute to the development of the economy.

Consideration was also given to the impact of the Bill on Fiji's effort in achieving the targets set out in the national development plan, which in turn contributes to Fiji's overall commitment and obligation towards the global agenda, which are the sustainable development goals. It was encouraging to note that the Bill was introduced for the

purpose of putting in place a modern regulatory framework for patents, which provides an efficient and effective patent system and creating and protecting locally produced brands, which in turn boosts economic growth. Furthermore, the objective of the Bill is as such that it applies equally to all persons, irrespective of gender.

The Committee acknowledges that there were a few issues identified and in addressing the issues, the Committee noted that the Bill aligns to international best practices. The Committee also sort legal clarifications pertaining to these issues; this ensured that the primary objectives of the Bill are preserved.

The Committee extensively deliberated on all the issues highlighted from the review and endeavoured to come to a position that not only preserves the objective of the Bill but also takes into consideration the necessary viewpoints of the public. This Report will provide details on how the Committee addresses each of the issue highlighted from the review. At the end of the review, the Committee believes that all issues identified have been adequately addressed and thus recommends that the Bill is sufficient as it is and that no substantive amendments be made to the Bill. The only amendments made to the Bill are those grammatical in nature and these are captured in the magenta coloured text in the copy of the Bill tabled with the Committee's Report. Additionally, the Committee is of the opinion that as we start implementing this law, this would be an opportune moment to gauge the implications of the Bill on Fiji's business sector and that a review of these may be initiated after gathering lessons learnt.

My appreciation goes to Honourable Members of the Committee; Hon. Rohit Sharma (Deputy Chairperson), Hon. Ratu Suliano Matanitobua, Hon. Dr. Salik Govind, and Hon. Mosese Bulitavu, for their input. The Committee would also like to acknowledge the public and entities that provided their views on the Bill and for taking an interest in the proceedings of the Committee and Parliament.



Hon. Alvick Avhikrit Maharaj
Chairperson

Committee Composition



Hon. Alvick A. Maharaj (Chairperson)

- Assistant Minister of Employment, Productivity, Industry Relations, Youth and Sports
- Chairperson of Public Accounts Committee
- Government Whip
- Pharmacist



Hon. Rohit Sharma (Deputy Chairperson)

- Former Civil Servant – Education Sector
- Deputy Chairperson of the Standing Committee on Justice, Law and Human Rights
- Deputy Government Whip



Hon. Ratu Suliano Matanitobua (Member)

- Shadow Minister for Youth and Sports
- Former State Minister of Fijian Affairs
- Former Military Territorial Officer



Hon. Dr. Salik Govind (Member)

- Public Health Specialist – United Nations (World Health Organisation)
- Deputy Chairperson of the Standing Committee on Foreign Affairs and Defence Committee



Hon. Mosese Bulitavu (Member)

- Shadow Minister for Defense, National Security, Immigration and Correction Services
- Former Opposition Whip
- Business Consultant/Farmer
- Territorial Military Officer – Republic of Fiji Military Forces
- Law Graduate and Researcher

Committee Secretariat Team

Supporting the Committee in its work is a group of dedicated Parliament Officers who make-up the Committee Secretariat, and are appointed and delegated by the Secretary-General to Parliament pursuant to Standing Order 15 (3)(i). The Secretariat team is made of the following Parliament officers:

- Mr. Ira Komaisavai – Senior Committee Clerk
- Mr. Jackson Cakacaka – Deputy Committee Clerk
- Ms. Darolin Vinisha – Committee Assistant

1.0 INTRODUCTION

1.1 *Background*

As a way of background, the Committee noted that the Fijian Government has been undertaking reforms of regulatory frameworks of vital sectors of the nation. Through this undertakings, it was identified that certain laws are quite archaic, including that relate to business in Fiji. One such law that was then brought to forefront is law on Patents. This then resulted in the review of this regulatory framework governing Patents in Fiji.

The Fijian Government has held numerous consultations on the reforms to the Patents laws. The result of the reform work carried out is the *Patents Bill 2020*.

The Standing Committee on Justice, Law and Human Rights, hereinafter referred to as the Committee, was referred the *Patents Bill 2020* for review on 11 December 2020. The Bill was referred to the Committee pursuant to Standing Order 51 of the Standing Orders of the Parliament of Fiji, whereby the Committee was tasked with scrutinising the Bill and to report back on the Bill in the April 2021 Parliament Sitting.

The Bill aims to provide an efficient and effective patent system that promotes innovation and economic growth while providing an appropriate balance between the interests of inventors and patent owners and the interests of society as a whole and complies with Fiji's international obligations.

The Bill also aims to ensure that a patent is granted for an invention only in appropriate circumstances by establishing appropriate criteria for the granting of a patent and providing for procedures that allow the validity of a patent to be tested. Additionally it seeks to provide greater certainty for patent owners and the users of patented inventions that patents will be valid after they are granted.

1.2 *Committee's Review Procedure*

The Committee's review process was through the resolution of the Committee and the following provides brief summary of the agreed upon procedure and program.

The first step in the Committee's review process was the formulation of its program with regards to its review process. The Committee's agreed upon review program was as follows:

i) Initial Analysis of the Bill

The Committee began with an initial reading of the Bill and conducting its own deliberation of the Clauses in the Bill. An in-depth deliberation of the Bill was conducted by the Committee, whereby pertinent issues were identified.

ii) Identification of mode of public consultation

The Committee then discussed, which mode of public consultation would be suitable for the review the Bill. The Committee resolved to rely on two main modes of public

consultation, which is to call for written submission and conducting in-person public consultation.

iii) Awareness on the Committee's public consultation through advertisement

The Committee then conducted awareness on its proposed public consultations, through advertisements via newspaper advertisements and televised advertisements.

iv) Conducting of public consultation

The Committee was also committed to upholding public trust in Parliament, by ensuring that there is public participation and that all such participation is given due consideration. The Committee was mindful of the provisions in Standing Order 111(1)(a) and ensured that its meetings were open to the public and the media, except during such deliberations and discussions to develop and finalise the Committee's observations and this Report.

The Committee called for written submissions from the public and other interested stakeholders by placing an advertisement through the Parliament website and Parliament social media pages on social media platforms; Facebook, Twitter and Instagram. The Committee received a written submission on the Bill from relevant stakeholders. A summary of these submissions is provided in a later part of this report, under the heading '*Committee's Deliberation and Analysis of the Bill*'.

The Committee then visited various communities to conduct in-person public consultation. A list of the areas visited by the Committee is appended to the Appendices of this Report. All the face-to-face submissions conducted during the public consultation were recorded and open to the public and the media.

v) Review of evidence collected and seeking legal clarification on pertinent issues

The Committee reviewed all the evidence received from the public consultation and to maintain due diligence, the Committee also relies on legal clarification on technical issues identified from the Bill, which is obtained from the Office of the Solicitor-General. These clarifications also assist the Committee in deliberating on these pertinent issues and in deciding whether there would be recommendations for any changes to the Bill.

vi) Drafting of Committee Report

The final step of the review process is the compilation of all issues identified from the evidence received from the public consultation. This is then deliberated on with the necessary legal clarifications and the Committee forms its own independent view on all issues identified.

2.0 COMMITTEE'S DELIBERATION AND ANALYSIS OF THE BILL

2.1 Initial Deliberation

The Committee commenced its analysis of the Bill going through, Clause by Clause. From this initial reading, it was noted that the Bill aims to repeal the *Patents Act 1879* and its subsidiary legislation and put in place a regulatory framework, which is modern and addresses current issues on patents in Fiji.

The Committee had extensive discussions on the provisions of the Bill and resolved that given the time provided to the Committee to review the Bill; that it be prudent to firstly hear the views of the public on this very important piece of proposed legislation. This public consultation would then allow the Committee to gauge the public's perspective on the Bill before deliberating further, whilst also bearing in mind the requirements as set down by Parliament in referring the Bill to the Committee.

2.2 Bill Summary

By way of consensus, the Committee believed that it be prudent to also capture in this Report the necessary provisions that the proposed law is intending to bring about to the patents regulatory framework. This would be achieved by providing a brief summary of the Clauses of the Bill in this part of the Report. This would conveniently provide the reader of this Report with the aforementioned information about the Bill. The Bill summary is provided below¹.

Clause 1 of the Bill provides for the short title and commencement. If passed by Parliament, the new legislation will come into force on a date or dates appointed by the Minister by notice in the Gazette.

Clause 2 of the Bill provides for the definitions of the terms used throughout the Bill.

Clause 3 of the Bill provides the objectives of the Bill.

Clause 4 of the Bill defines the term 'novel'. This is one of the key terms that determine whether an invention is patentable. An invention, so far as claimed in a claim, is novel, if it does not form part of the prior art base.

Clause 5 of the Bill defines the expression 'inventive step'. This is another key term that determines whether an invention is patentable. An invention, so far as claimed in a claim, involves an inventive step if it is not obvious to a person skilled in the art having regard to any matter which forms part of the prior art base.

Clause 6 of the Bill defines the expression 'prior art base'. Prior art base means all matter (whether a product, a process, information about a product or process, or anything else) that has at any time before the priority date of the claim been made available to the public

¹ Explanatory Note to the *Patents Bill*; *Patents Bill 2020* (Bill No. 46 of 2020), pages 87-107.

(whether in Fiji or elsewhere) by written or oral description, by use, or in any other way. In deciding whether or not an invention is novel, prior art base also includes the information contained in a complete specification filed in respect of another patent application in certain circumstances.

Clause 7 of the Bill provides that a disclosure must be disregarded for the purposes of the definition of prior art base in certain circumstances.

Clause 8 of the Bill defines the term ‘useful’. This is the third key term that determines whether an invention is patentable. An invention, so far as claimed in a claim, is useful if it has a specific, credible and substantial utility.

Clause 9 of the Bill provides that a computer program is not an invention. A patent cannot be granted for anything that is not an invention.

Clause 10 of the Bill provides that the new legislation would bind the State.

Clause 11 of the Bill provides that a patent may be granted only if the invention is a patentable invention.

Clause 12 of the Bill sets out when an invention is a patentable invention. An invention is a patentable invention if the invention, so far as claimed in a claim: (i) when compared with the prior art base, is novel and involves an inventive step; (ii) is useful; and (iii) is not excluded from being a patentable invention.

Clauses 13 and 14 of the Bill contain exclusions from what is patentable. An invention is not a patentable invention if the commercial exploitation of the invention, so far as claimed in a claim, is contrary to public order or morality. Also, the following are not patentable inventions: (i) human beings, and biological processes for their generation; (ii) method of treatment of human beings by surgery or therapy; (iii) method of diagnosis practised on human beings; (iv) plant varieties.

Clause 15 of the Bill sets out the nature of a patent. A patent is personal property.

Clause 16 of the Bill sets out the exclusive rights given by a patent. A patent gives the patentee the exclusive rights, during the term of the patent, to exploit the invention and to authorise another person to exploit the invention.

Clause 17 of the Bill sets out the extent, effect and form of a patent. A patent has effect throughout the Republic of Fiji. A patent has the same effect against the State as it has against a subject. This, however, is subject to the other provisions of the Bill and section 4 of the State Proceedings Act 1951.

Clause 18 of the Bill provides for the term of a patent. The term of every patent is 20 years from the patent date (which is generally the filing date of the complete specification). A patent ceases to have effect on the expiry of the period prescribed for the payment of any renewal fee if that fee is not paid within that period or within any extended period.

Clause 19 of the Bill provides for the extension of the prescribed period for paying renewal fees provided that the extension is not more than 6 months after the expiry of the prescribed period.

Clause 20 of the Bill sets out who may be granted a patent. A patent for an invention may be granted to a person regardless of whether the person is a Fijian but it may only be granted to a person who: (i) is the inventor; (ii) derives title to the invention from the inventor; or (iii) is the personal representative of a deceased person in paragraph (i) or (ii).

Clause 21 of the Bill provides that a patentee may deal with the patent as the absolute owner of the patent and give good discharges for any consideration for the dealing. This is subject to any rights vested in other persons that are entered in the patents register, and protects those purchasers in good faith for value and without notice of any fraud on the part of the patentee.

Clause 22 of the Bill provides that if a patent is granted to 2 or more persons, each patentee is entitled to an equal undivided share in the patent and also to exercise the exclusive rights given by the patent for the person's own benefit without accounting to the others, subject to any agreement between the patentees.

Clause 23 of the Bill sets out the rights of buyers from co-owners of a patent.

Clause 24 of the Bill empowers the Commissioner to give directions to co-owners of a patent. The directions of the Commissioner must relate to: (i) the sale or lease of the patent or any interest in it; (ii) the grant of licences; (iii) the exercise of any right under clause 22 of the Bill in relation to the patent. If a patentee fails to do anything required to carry out a direction within 14 days after another patentee requests so in writing, the Commissioner is empowered to direct any person (other than the defaulting patentee) to carry out the direction in the name of the defaulting patentee.

Clause 25 of the Bill sets out miscellaneous provisions concerning directions by the Commissioner under clause 24 of the Bill.

Clause 26 of the Bill empowers the Commissioner (or the Employment Relations Tribunal ('Tribunal') if the matter is referred to it by the Commissioner) to determine disputes between an employer and employee as to an inventions made by the employee.

Clause 27 of the Bill allows the Tribunal or the Commissioner to apportion the benefit of an invention made by the employee and of a patent relating to the invention.

Clause 28 of the Bill allows the Tribunal to review the decisions of the Commissioner under clauses 26 and 27. The Tribunal must not review any decision (or part of a decision) under clauses 26 and 27 of the Bill that is not part of an application made to the Tribunal.

Clause 29 of the Bill provides that any person may apply for a patent either alone or jointly with another person, but the patent may only be granted to those listed in clause 20 of the Bill.

Clause 30 of the Bill provides that every patent application must be made in accordance with the Act and regulations made under the Act.

Clause 31 of the Bill empowers the Commissioner to post-date patent applications but this power must not be exercised after the acceptance of the complete specification. A patent application must not be post-dated later than 6 months after the day the application was actually made or would be treated as having been made. A convention application must not be post-date to a date later than the last date that the application could have been made.

Clause 32 of the Bill provides that if a patent application has been made, the applicant may, before acceptance of the complete specification and in accordance with prescribed requirements, make a fresh patent application for any part of the subject matter of the original application. The Commissioner may direct that the fresh patent application be given an earlier date that is not earlier than the filing date of the original patent application.

Clause 33 of the Bill requires an applicant to pay a prescribed maintenance fee. A patent application must be treated as abandoned if the prescribed maintenance fee has not been paid.

Clause 34 of the Bill requires every patent application to be accompanied by a: (i) complete specification or provisional specification (unless the patent application is a convention application); and (ii) complete specification if the patent application is a convention application.

Clause 35 of the Bill provides that if a patent application is accompanied by a provisional specification, one or more complete specifications must be filed within the following allowable period or the patent application will be treated as having been abandoned: (i) within 12 months from the filing date of the patent application; or (ii) within the extended period not exceeding the prescribed period.

Clause 36 of the Bill sets out the contents of a provisional specification. Every provisional specification must describe the invention and include any other prescribed information.

Clause 37 of the Bill sets out the contents of a complete specification. Every complete specification must: (i) disclose the invention in a manner that is clear enough and complete enough for the invention to be performed by a person skilled in the art; (ii) disclose the best method of performing the invention that is known to the applicant and for which there is an entitlement to claim protection; (iii) end with a claim or claims defining the scope of the invention claimed (which must relate to one invention only, be clear and concise and be supported by the matter disclosed in the complete specification); and (iv) include any other prescribed information.

Clause 38 of the Bill allows an applicant to amend a complete specification before the acceptance of the complete specification.

Clause 39 of the Bill provides for the supply of drawings for the purposes of any specification.

Clause 40 of the Bill allows a convention applicant to make a convention application in relation to a basic application within 12 months of the day which the basic application is first made in a convention country. A basic application is an application for protection that is made in a convention country. A convention country is an entity declared by order to be a convention country. A convention applicant is a person who has made a basic application or is the assignee or personal representative of the person.

Clause 41 of the Bill sets out how a convention application is made and dealt with. A convention application must be made and dealt with in the same manner as any other patent application. A patent application that is a convention application must: (i) include the prescribed information relating to the relevant basic application; (ii) be accompanied by a complete specification in accordance with clause 34(1); and (iii) be made and dealt with in accordance with any other requirements prescribed for convention applications by this Act or regulations.

Clause 42 of the Bill provides that if more than one basic application has been made for an invention, a previously filed basic application must be disregarded and a subsequently filed basic application must be substituted for the previously filed basic application in certain circumstances.

Clause 43 of the Bill allows a single convention application to be made in certain circumstances where basic applications have been made in one or more convention countries for two or more cognate inventions. The requirements of clause 41(2)(a) will apply separately to the basic applications for each of the inventions.

Clause 44 of the Bill provides that every claim of a complete specification has effect from the date prescribed by the Division as the priority date of the claim. The priority date of the claim is important when considering the extent of the prior art base for the purposes of the novelty and inventive steps in clause 12 of the Bill.

Clause 45 of the Bill provides for the priority date of a claim if the complete specification is filed for a single application that was accompanied by a provisional specification. The priority date is the filing date of the patent application if the claim is supported by the matter disclosed in the provisional specification.

Clause 46 of the Bill provides for the priority date of a claim if the complete specification is filed for two or more applications that were accompanied by provisional specifications. The priority date is the filing date of the patent application that is accompanied by the specification that first disclosed the matter on which the claim is supported.

Clause 47 of the Bill provides for the priority date for convention applications if the claim is supported by the matter disclosed in an application for protection. The priority date is the date of the relevant application for protection.

Clause 48 of the Bill provides that if a claim would, but for this clause, have two or more priority dates, the priority date of the claim is the earlier or earliest of those dates.

Clause 49 of the Bill provides for the priority date in case of lack of entitlement in respect of another patent application.

Clause 50 of the Bill allows an applicant to request for an examination of the patent application and the complete specification relating to the application.

Clause 51 of the Bill provides that the Commissioner must examine a patent application and the complete specification relating to the application and report on— (i) whether the application and specification comply with the requirements in the Bill or of the regulations; (ii) whether the invention, so far as claimed, is a patentable invention under clause 12; and (iii) any other prescribed matters. Examinations by the Commissioner must be carried out in the prescribed manner.

Clause 52 of the Bill allows the Commissioner to refuse to proceed with an application or require the application or specification to be amended if the Commissioner reports that— (i) the application or specification do not comply with the requirements of the Bill or of the regulations; (ii) the invention is not a patentable invention; or (iii) there is any other lawful ground of objection to the grant of a patent in respect of the application.

Clause 53 of the Bill requires an applicant, by the deadline set by the Commissioner, to provide a substantive response to the Commissioner's report. After each response, the Commissioner may issue a further report.

Clause 54 of the Bill provides that an application must be treated as having been abandoned if the applicant has failed to comply with clause 53.

Clause 55 of the Bill provides that the Commissioner must examine an amended complete specification in the same manner as the original specification if the specification is amended following the issue of a report.

Clause 56 of the Bill imposes a duty on applicants to inform the Commissioner of any documentary searches by, or on behalf of, a foreign patent office carried out for the purpose of assessing the patentability of an invention disclosed in the complete specification or a corresponding application filed outside Fiji. A foreign patent office is an office, organisation or other body that may grant protection in respect of an invention in a country outside Fiji.

Clause 57 of the Bill provides that a patent application is void unless, within the prescribed period, the applicant ensures that— (i) the application and the complete specification comply with the requirements of the Bill and of the regulations; (ii) the invention is a patentable invention; and (iii) there is no other lawful ground of objection to the grant of a patent.

Clause 58 of the Bill allows the High Court to extend the period allowed under clause 57 if an appeal to the court is pending or the time within which an appeal may be brought has not expired.

Clause 59 of the Bill requires applicants to file a notice stating the entitlement of the nominated person to the grant of the patent before the expiry of the period allowed under clause 57. A patent application is void if the applicant does not comply with this requirement. The nominated person is the person identified as the person to whom the patent is to be granted. The applicant may be taken to be the nominated person.

Clause 60 of the Bill provides that the Commissioner must accept the complete specification relating to a patent application if the Commissioner is satisfied, on the balance of probabilities, that— (i) the application and the complete specification comply with the requirements of the Bill and of the regulations; (ii) the invention is a patentable invention; and (iii) there is no other lawful ground of objection to the grant of a patent. The Commissioner must, after acceptance of a complete specification, give notice of the acceptance to the applicant and publish the acceptance in the Gazette.

Clause 61 of the Bill allows an applicant to request that the Commissioner postpone acceptance of the complete specification until a date that is specified in the notice given by the applicant to the Commissioner.

Clause 62 of the Bill requires the Commissioner to publish a notice in the journal stating that a complete specification is open to public inspection if— (i) the specification has been filed for a patent application other than a Treaty application; and⁹⁵ (ii) a period of 18 months after the earliest priority date has ended; and (iii) the specification is not already open to public inspection. The clause also provides for the Commissioner, if asked to do so by the applicant, to publish a notice in the journal stating that the complete specification is open to public inspection.

Clause 63 of the Bill provides publication requirements in the case of divisional applications under clause 32.

Clause 64 of the Bill provides that if a notice is published under clause 62 or 63, the specification concerned, and the other prescribed documents, are open to public inspection. If acceptance of a complete specification is published, certain documents (being documents that have not already become open to public inspection) become open to public inspection. A document must be taken to have been made available to the public on the day on which it becomes open to public inspection unless it has been made available otherwise before that day.

Clause 65 of the Bill provides that, except as provided by the Bill, documents of the kind mentioned in clause 64 must not be published by the Commissioner or be open to public inspection, and are generally not liable to be inspected or produced.

Clause 66 of the Bill provides that after a complete specification has become open to public inspection, the nominated person has the same privileges and rights as the nominated person would have had if a patent had been granted when the specification became open to public inspection. However, this does not give the nominated person the right to institute proceedings in respect of any act unless a patent has been granted.

Clause 67 of the Bill provides that the High Court must, in considering the amount of damages or an account of profits for an infringement, consider whether or not it would

have been reasonable to expect, from a consideration of the complete specification that became open to public inspection, that a patent would be granted that would confer on the patentee protection from an act of the same description as that found to infringe the rights conferred.

Clause 68 of the Bill provides that after the acceptance of a complete specification, an amendment to that specification is not allowable, except for the purpose of correcting an obvious mistake, if the effect of the amendment is that— (i) the specification as amended would claim or describe matter that was not in substance disclosed in the specification before the amendment; or (ii) a claim of the specification as amended would not fall wholly within the scope of a claim of the specification before the amendment.

Clause 69 of the Bill provides for the publication of amendments in the Gazette.

Clause 70 of the Bill allows the Commissioner, on request, to allow the complete specification to be amended subject to any conditions that the Commissioner thinks fit.

Clause 71 of the Bill requires every request for leave to amend a specification under clause 70 of the Bill to be published in the Gazette.

Clause 72 of the Bill allows any person to oppose a proposed amendment.

Clause 73 of the Bill provides that the provisions concerning amendments with the leave of the Commissioner do not apply in certain circumstances.

Clause 74 of the Bill allows the court, in any relevant proceeding, to allow the patentee to amend the patentee's complete specification.

Clause 75 of the Bill allows any person to assert to the Commissioner that an invention is not novel or does not involve an inventive step. These assertions must be made within the prescribed period after a complete specification becomes open to public inspection.

Clause 76 of the Bill provides that the Commissioner must inform the applicant in writing of any matter of which the Commissioner is notified under clause 75 of the Bill, and send the applicant a copy of any document accompanying the notice.

Clause 77 of the Bill provides that a person may oppose the grant of a patent on certain grounds.

Clause 78 of the Bill provides for the hearing and decision by the Commissioner of an opposition to the grant of a patent under clause 76 of the Bill.

Clause 79 of the Bill requires the Commissioner, if requested, to re-examine a patent application and the complete specification relating to the application on or after the date of the publication of the accepted complete specification if the patent has not been granted.

Clause 80 of the Bill requires the Commissioner, if requested, to re-examine a patent application and the complete specification relating to the application if the patent has been granted.

Clause 81 of the Bill provides the relationship between re-examination and other proceedings.

Clause 82 of the Bill provides that the Commissioner must consider and report on whether the Commissioner is satisfied, on the balance of probabilities, that any of the relevant grounds, described in this clause, is established.

Clause 83 of the Bill provides that if the Commissioner reports on a re-examination under clause 79 of the Bill (before the patent is granted) and is satisfied that any of the relevant grounds is established, the Commissioner may refuse to grant the patent. However, the Commissioner must not refuse to grant the patent without having given the applicant an opportunity to amend the relevant specification to remove any lawful ground of objection.

Clause 84 of the Bill provides that if the Commissioner reports on a re-examination under clause 80 of the Bill (after the patent is granted) and is satisfied that any of the relevant grounds is established, the Commissioner may revoke the patent. However, the Commissioner must not revoke the patent without having given the patentee an opportunity to amend the relevant specification to remove any lawful ground of objection.

Clause 85 of the Bill provides that a person who has made a request under clause 79(1) or 80(1) of the Bill does not have: (i) the right to be heard in relation to the re-examination; (ii) any other right to participate in the re-examination proceeding after the request is made; and (iii) the right to appeal to the court against any decision of the Commissioner under any of sections 79 to 84.

Clause 86 of the Bill provides that the Commissioner must grant a patent to the nominated person or persons as soon as is reasonably practicable after the date that is 3 months after the date of the publication of the accepted complete specification if— (i) there is no opposition to the grant; or (ii) there is opposition to the grant, the Commissioner's decision, or the decision on appeal, is that a patent should be granted.

Clause 87 of the Bill provides that nothing done under the Bill guarantees the granting of a patent or that a patent is valid.

Clause 88 of the Bill provides that every patent must be given a patent date that is the filing date of the relevant complete specification or, if the regulations provide for the determination of a different date as the patent date, the date determined under the regulations. The patent date of every patent must be entered in the patents register.

Clause 89 of the Bill provides that a patent may be granted for one invention only.

Clause 90 of the Bill provides for the amendment of a patent that was granted to a deceased person or to a person that has been liquidated or wound up.

Clause 91 of the Bill applies if a patent application is made in respect of any improvement in, or modification of, an invention and the applicant also applies, or has applied, for a patent for that invention or is the patentee of that invention. The clause allows the Commissioner, on request, to grant the patent for the improvement or modification as a patent of addition.

Clause 92 of the Bill allows the Commissioner to revoke a patent for an improvement in, or modification of, an invention and to grant a patent of addition in substitution if it is the same patentee.

Clause 93 of the Bill contains certain restrictions on the granting of patents of addition.

Clause 94 of the Bill provides that a patent of addition must be granted for a term equal to that of the patent for the main invention, or as much of the term of the patent for the main invention that is unexpired. If the patent for the main invention is revoked, the court or the Commissioner may order that the patent of addition continue in force as an independent patent for the remainder of the term of the patent for the main invention.

Clause 95 of the Bill provides for renewal fees in relation to patents of addition.

Clause 96 of the Bill provides that the grant of a patent of addition must not be refused, and a patent of addition must not be revoked or invalidated, on the ground only that the invention does not involve an inventive step having regard to any publication or use of the main invention or any improvement in, or modification of, the main invention.

Clause 97 of the Bill allows the Commissioner or the court to revoke a patent on any of the grounds set out in clause 99 of the Bill.

Clause 98 of the Bill contains provisions concerning applications for revocation that are made to the Commissioner, including a provision that allows the Commissioner to refuse an application that is frivolous or vexatious.

Clause 99 of the Bill provides that a patent may be revoked on one or more of the following grounds: (i) that the invention is not a patentable invention; (ii) that the patentee is not entitled to the patent; (iii) that the complete specification does not comply with Division 2; (iv) that the patent was obtained by fraud, false suggestion, or a misrepresentation; (v) that the invention was secretly used in Fiji before the priority date; (vi) that the patent has been granted contrary to law.

Clause 100 of the Bill allows the court to revoke a patent on the application of a Government department if the court is satisfied that the patentee has failed on reasonable terms to comply with a request of the Government department to exploit the invention for the services of the State on reasonable terms. This is also a defence in any proceeding for the infringement of the patent.

Clause 101 of the Bill provides for the surrender of a patent by the patentee.

Clause 102 of the Bill allows the Commissioner to restore a patent that has ceased to have effect by reason of a failure to pay a renewal fee if the Commissioner is satisfied that the failure to pay the renewal fee was unintentional.

Clause 103 of the Bill requires a request to restore a patent to describe the circumstances that led to the failure to pay the renewal fee.

Clause 104 of the Bill sets out who may make a request for the restoration of a patent.

Clause 105 of the Bill requires a request for the restoration of a patent to be made within the prescribed period. However, the Commissioner may extend the period within which a request may be made if the Commissioner is satisfied that there was no undue delay in making the request.

Clause 106 of the Bill requires the Commissioner to give the applicant a reasonable opportunity to be heard if the Commissioner is not satisfied that a prima facie case has been made out for an order under clause 102 of the Bill.

Clause 107 of the Bill requires the Commissioner to publish a request to restore a patent in the Gazette if the Commissioner is satisfied that a prima facie case has been made out for an order under clause 110.

Clause 108 of the Bill allows any person to give notice to the Commissioner of opposition to a restoration order.

Clause 109 of the Bill provides that a restoration order must be made if— (i) all unpaid renewal fees are paid; (ii) all other prescribed additional penalties (if any) are paid; and (iii) either no notice of opposition is given or the decision of the Commissioner is in favour of the applicant.

Clause 110 of the Bill allows an applicant to make a request to the Commissioner for an order to restore a void or an abandoned patent application and to extend the period for complying with the requirements imposed on the applicant by or under the Bill.

Clause 111 of the Bill provides that a request under clause 110 of the Bill must be made within the prescribed period. However, the Commissioner may extend the period within which a request may be made if the Commissioner is satisfied that there was no undue delay in making the request.

Clause 112 of the Bill allows any person to give notice to the Commissioner of opposition to a restoration order under clause 13 of the Bill.

Clause 113 of the Bill relates to the Commissioner's determination of a request to restore a patent application.

Clause 114 of the Bill provides for those who are entitled under an assignment or agreement, or by operation of law, to the patent, an interest in the patent or an undivided share in the patent or an interest in the patent.

Clause 115 of the Bill provides that if an applicant dies before a patent is granted on the patent application, the applicant's personal representative may proceed with the application.

Clause 116 of the Bill allows the Commissioner to give directions that the Commissioner thinks fit for an application to proceed if a dispute arises between interested parties in relation to a patent application on whether the application should proceed.

Clause 117 of the Bill provides for directions in relation to inventions concerning defence.

Clause 118 of the Bill provides that the Commissioner must give notice of the patent application and of the direction to the Minister responsible for defence.

Clause 119 of the Bill provides that the Minister responsible for defence must consider whether publication would be prejudicial to the defence of Fiji.

Clause 120 of the Bill provides that the Commissioner must revoke directions on receipt of notice from the Minister responsible for defence.

Clause 121 of the Bill provides for the acceptance of a complete specification while directions given under clause 117 are in force. If it appears to the Minister responsible for defence that the applicant for the patent has suffered hardship by reason of the directions being in force, the Minister responsible for finance may pay to the applicant reasonable compensation.

Clause 122 of the Bill provides that no maintenance fees or renewal fees are payable for any period during which directions are in force.

Clause 123 of the Bill provides that a failure to comply with the directions is an offence punishable on conviction to a fine not exceeding \$20,000 or imprisonment for a term not exceeding 2 years or both.

Clause 124 of the Bill provides for the liability of an officer of a body corporate that commits an offence against clause 131.

Clause 125 of the Bill provides that a person infringes a patent if (other than under a licence or with the consent or agreement of the patentee) the person does anything in Fiji that the patentee has the exclusive right to do under clause 16 (which relates to the exploitation of the invention).

Clause 126 of the Bill provides that a person also infringes a patent if the person supplies another with the means for putting an invention into effect if doing so would infringe a patent and the person knows (or ought reasonably to have known) that the supplied means are suitable and intended for that purpose.

Clause 127 of the Bill sets out that a new product is presumed in infringement proceedings to have been obtained by the patented process for obtaining that product.

Clauses 128, 129, 130 and 131 of the Bill provide the following exceptions: (i) it is not an infringement to do an act for experimental purposes relating to the subject matter of an invention (which includes determining how the invention works, its scope, or the validity of the claims, or seeking an improvement of the invention); (ii) it is not an infringement to use an invention in the stated ways on foreign vessels, aircraft, or vehicles; (iii) it is not an infringement to make, use, import, or sell, hire or otherwise dispose of an invention solely for uses reasonably related to the development and submission of information required under Fijian law, or other law, that regulates the manufacture, construction, use, or sale of any product; (iv) it is not an infringement to do an act that exploits an invention, and that would infringe a patent apart from clause 131 of the Bill if immediately before the priority date of the relevant claim, the person was exploiting the invention in Fiji or had taken steps to exploit the invention in Fiji.

Clause 132 of the Bill provides that a defendant may counterclaim for revocation of a patent in infringement proceedings.

Clause 133 of the Bill provides that infringement proceedings may be brought in court by the patentee or by an exclusive licensee for any infringement that occurs during the term of the licence.

Clause 134 of the Bill sets out when an infringement proceeding may be brought. Infringement proceedings may not be brought until the patent is granted.

Clause 135 of the Bill sets out when an infringement proceeding may be brought if registrable assignment or licence has occurred.

Clause 136 of the Bill makes specific provision for infringement proceedings brought by exclusive licensees. The patentee (if not joined as the plaintiff) must be added as a defendant, but is not liable for costs unless the patentee actually defends the proceedings.

Clause 137 of the Bill sets out that the court may grant an injunction and, at the option of the plaintiff, damages or an account of profits for an infringement of a patent. This is not an exhaustive list of the relief available.

Clause 138 of the Bill prevents the court from awarding damages or an account of profits if the defendant proves that they did not know, and ought not reasonably to have known, that the patent existed. There is a presumption that the defendant ought to have known the patent existed if it is marked as patented in Fiji and with the Fiji patent number and the person knew, or ought reasonably to have known, of the product.

Clause 139 of the Bill requires the court to refuse damages or an account of profits for an infringement before an amendment to an accepted complete specification unless the specification, as accepted, was framed in good faith and with reasonable skill and knowledge or the amendment was only to correct an obvious mistake.

Clause 140 of the Bill allows the court to refuse damages or an account of profits for an infringement that occurs after renewal fees are not paid.

Clause 141 of the Bill states that clauses 138 to 140 do not affect the court's power to grant injunctions in infringement proceedings.

Clause 142 of the Bill enables the court to grant relief for a partially valid patent, but in the case of damages, an account of profits, or costs, the plaintiff must first prove that the invalid claim was framed in good faith and with reasonable skill and knowledge.

Clause 143 of the Bill enables a successful party to infringement or revocation proceedings to obtain reasonable legal practitioner-client costs if the party relied on the validity of the claim of a specification and the court has certified that the claim's validity was contested in earlier proceedings.

Clause 144 of the Bill enables a person to apply to the court for a declaration of non-infringement with the patentee or nominated person joined as a respondent.

Clause 145 of the Bill provides for proceedings for non-infringement.

Clause 146 of the Bill provides that costs are at the court's discretion.

Clause 147 of the Bill clarifies that the validity of a patent is not at issue, and is not affected by, a declaration of non-infringement.

Clause 148 of the Bill provides for application for registration of assignment, licences and other interests in patents.

Clause 149 of the Bill allows the Commissioner to register assignments, licences and other interests in patents.

Clause 150 of the Bill allows the Commissioner to vest patents or patent applications without probate or letters of administration.

Clause 151 of the Bill provides for the termination of sales, leases and licences of patented products and processes, on 3 months' notice, after the patent ceases to be in force.

Clause 152 of the Bill allows an interested person to apply to the court for the grant of a licence under a patent on the grounds that a market for the patented invention is not being supplied, or is not being supplied on reasonable terms, in Fiji.

Clause 153 of the Bill allows the court to order the grant of a licence in accordance with an application on any terms that the court thinks fit. A licence granted under this clause is not exclusive and, generally, must not be assigned.

Clause 154 of the Bill allows the court to order the grant of a licence for the export of pharmaceutical products in certain overseas countries.

Clause 155 of the Bill provides for requests by non-WTO member countries to the Government for pharmaceutical products.

Clause 156 of the Bill provides that an order granted under clause 154 must specify the terms of the licence.

Clause 157 of the Bill provides that a copy of the order granted under clause 154 must be sent by the Registrar of the court to the Commissioner and the Permanent Secretary responsible for foreign affairs, who must publish the order on an Internet site maintained by, or on behalf of, the Ministry responsible for foreign affairs.

Clause 158 of the Bill provides that if a licence is granted to a person, that person must pay certain remuneration to the patentee.

Clause 159 of the Bill prevents a licence from being granted in certain circumstances if the person applying for the licence has made effort to obtain a licence from the patentee on reasonable commercial terms and conditions and has been unable to obtain a licence.

Clause 160 of the Bill provides that the powers of the court on an application under clauses 152, 154 or 158 must be exercised with a view to ensuring that the inventor or other person beneficially entitled to a patent receives reasonable remuneration.

Clause 161 of the Bill provides that an order for the grant of a licence has effect as if it were a deed.

Clause 162 of the Bill allows any Government department and those authorised by a Government department to exploit any patented invention for the services of the State.

Clause 163 of the Bill allows an order to be made that may declare a particular use of an invention to be a State use.

Clause 164 of the Bill protects the buyers of products sold in the exercise of powers conferred by clause 162 of the Bill.

Clause 165 of the Bill provides the rights of third parties in respect of a State use of an invention.

Clause 166 of the Bill provides for the referral of disputes concerning a State use of an invention to the court.

Clause 167 of the Bill allows the court to refer matters relating to a State use of an invention to a special or official referee or arbitrator.

Clause 168 of the Bill contains special provisions as to a State use of an invention during an emergency.

Clause 169 of the sets out the nature and scope of right under clause 162 of the Bill. The right to use a patented invention under clause 162 of the Bill is not exclusive and, generally, must not be assigned.

Clause 170 of the Bill provides that if any use of a patented invention is made under clause 162, the Government department must, as soon as practicable after the use of the

patented invention has begun, notify and provide the nominated person or patentee with information concerning the extent of the use as the patentee may from time to time require.

Clause 171 of the Bill provides that the State must, if an act is done under clause 162, pay certain remuneration to the patentee.

Clause 172 of the Bill provides for the mention of an inventor in a patent by the Commissioner.

Clause 173 of the Bill allows a person to make a request or claim to be mentioned as inventor in a patent.

Clause 174 of the Bill provides the requests or claims that may not be considered by the Commissioner.

Clause 175 of the Bill requires the Commissioner to give notice of requests or claims made under clause 173 of the Bill.

Clause 176 of the Bill provides that a person who alleges that another person should not have been mentioned as inventor under clauses 172 to 175 may apply to the Commissioner for a certificate to that effect.

Clause 177 of the Bill requires the Commissioner to keep a patents register in Fiji.

Clause 178 of the Bill sets out the purpose of the patents register, which is to enable the public to know what patents are in force and their key dates, know who is the patentee and has other interests in the patent and the addresses for service of those persons, find out about the scope of a claim, and find out other matters affecting the validity and ownership of the patent and patent licences. The purpose is also to facilitate the Commissioner's functions under the Bill.

Clause 179 of the Bill allows the patents register to be an electronic register or kept in any other manner the Commissioner thinks fit.

Clause 180 of the Bill sets out what must be contained in the patents register.

Clause 181 of the Bill allows a person to search the patents register in accordance with the Bill or the regulations.

Clause 182 of the Bill requires the Commissioner to give a person certain information if requested in the prescribed manner.

Clause 183 of the Bill allows the Commissioner to make changes to the patents register in accordance with the Bill or the regulations.

Clause 184 of the Bill allows the Commissioner to correct his or her own mistakes in the patents register, in a patent or in any other document issued.

Clause 185 of the Bill allows the Commissioner to correct other persons' mistakes in the patents register, in a patent, in a patent application, in a document filed in connection with a patent application, or in proceedings before the Commissioner in connection with a patent or patent application.

Clause 186 of the Bill allows the court to rectify the patents register.

Clause 187 of the Bill makes the patents register prima facie evidence of its entries. Certified copies or extracts are admissible in evidence to the same extent as the original.

Clause 188 of the Bill makes the Commissioner's certificate on various matters prima facie evidence of those matters. These matters include entries in the patents register.

Clause 189 of the Bill requires the Commissioner to periodically publish a journal on patents, patent applications and other matters. It may be published electronically.

Clause 190 of the Bill allows the Commissioner to publish indexes, specifications, and other works relating to inventions, patents and patent applications. The Commissioner may keep classifications, by subject matter, of specifications and printed publications to determine the patentability of inventions. These indexes and other documents may be kept and published electronically.

Clause 191 of the Bill provides that the Commissioner exercise any of his or her discretionary powers adversely to any applicant without having given the applicant a reasonable opportunity to be heard.

Clause 192 of the Bill requires evidence to be given by affidavit or statutory declaration unless the Commissioner directs otherwise.

Clause 193 of the Bill allows the Commissioner to receive evidence on oath.

Clause 194 of the Bill allows the Commissioner to summon persons to attend a hearing before the Commissioner.

Clause 195 of the Bill allows the Commissioner to award costs in proceedings before him or her.

Clause 196 of the Bill allows the Commissioner (or the court, on appeal) to require security for costs if the person does not reside and does not carry on business in Fiji.

Clauses 197 and 198 of the Bill entitle a person to appeal the Commissioner's decisions under the Bill to the High Court, and then to the Court of Appeal in certain cases.

Clause 199 of the Bill provides that the Commissioner's costs are at the discretion of the relevant court in any proceedings before that court.

Clause 200 of the Bill provides that the Solicitor-General will perform the functions and exercise the powers of the Commissioner of Patents.

Clause 201 of the Bill sets out the functions of the Commissioner.

Clause 202 of the Bill enables the Commissioner to delegate the Commissioner's functions and powers.

Clause 203 of the Bill removes liability of the Commissioner and others for good faith performance of the Commissioner's functions or exercise of the Commissioner's powers.

Clauses 204, 205 and 206 of the Bill provide for the Fiji Intellectual Property Office and its opening and closing hours.

Clause 207 of the Bill allows the Commissioner to extend any time limit if something will not be done in time due to a delay by the Commissioner.

Clause 208 of the Bill allows the Commissioner to extend time limits for certain filing requirements or for delivery failures.

Clause 209 of the Bill provides the requirements for applying and granting extensions of time limits.

Clause 210 of the Bill sets out the requirements for service of notices.

Clause 211 of the Bill sets out the requirements for a summons.

Clause 212 of the Bill provides that a witness appearing before the Commissioner under a summons is entitled to be paid witnesses' allowances and expenses in accordance with the scales prescribed by regulations under the Criminal Procedure Act 2009.

Clause 213 of the Bill provides offences for failure to comply with a summons.

Clause 214 of the Bill provides that fees and penalties must be paid for any matter arising under the Bill if required by the Bill or the regulations.

Clause 215 of the Bill provides that payment and application of fees and other money are to be paid to the Consolidated Fund.

Clause 216 of the Bill provides for the protection of the Coat of Arms of Fiji.

Clause 217 of the Bill provides that certain provisions do not affect the operation of the Personal Property Securities Act 2017. Clause 218 of the Bill empowers the Minister to make regulations prescribing matters that are required or permitted by the Bill to be prescribed, or are necessary or convenient to be prescribed for carrying out or giving effect to the Bill and generally for achieving the purposes of the Bill.

Clause 219 of the Bill repeals the Act.

Clause 220 provides for transitional matters.

2.3 Evidence received via public consultation

As part of the review, the Committee conducted public consultation on the Bill, in various key locations around Fiji and also called for written submissions from interested persons or entities. This consultation ensured that the public participated in the legislative process, which is fundamental to democracy. All the submissions received were considered and deliberated on extensively. The main points and issues noted from the submissions are summarised below.

Members of the public commended and supported the introduction of the Bill given that it aims to promote economic development by putting in place modern business regulatory frameworks.

Apart from this commendations from the members of the public, there were also a written submissions, which highlighted a few pertinent issues, which the Committee placed reasonable emphasis on.

To begin with, certain submissions noted that Clause 9(1) states that a “computer program is not an invention for the purposes of this Act.” Thus it was queried how the Clause is consistent with TRIPS, Clause 27.1, which requires that patents “shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application”.

It was noted that Clause 14(2) states that “methods of doing business” are not patentable inventions. Thus it was queried how the Clause is consistent with Clause 27.1 of the TRIPS Agreement, which requires that patents “shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application”.

It was noted that Clause 16(1) states that the patentee has the exclusive rights, during the term of the patent, “to exploit the invention and to authorise another person to exploit the invention.” The submitter recommended that this Clause be revised to align with the text of Clause 28 of the TRIPS Agreement, which provides that a patent gives the patentee the right “to prevent third parties not having the owner’s consent from the acts of: making, using, offering for sale, selling, or importing for these purposes that product” or process.

Submission received also queried about Clause 91 and whether a “further patent for an improvement in, or modification of, the main invention” and “a patent of addition” under Clause 91 must meet the requirements in Clause 4 (meaning of novel), Clause 5 (meaning of inventive step), Clause 12 (patentable inventions), and has the term described in Clause 18 (term of patent). To ensure against double patenting, the submission from the Office of the Trade Representative of the United States made a suggestion that the subject matter sought to be patented must be sufficiently different from what has been used or described before that it may be said to be non-obvious to a person having ordinary skill in the area of technology related to the invention.

Additionally, the submitter queried about Clauses 152-171 and how Fiji intends to comply with the procedural requirements of Clause 31 of the TRIPS Agreement, including, but not limited to, Clauses 31(h)-(j) of the TRIPS Agreement.

Moreover, Clause 154(1)(b) states that a court may grant a compulsory license for export of pharmaceutical products to certain countries if the pharmaceutical product is “needed to address a serious public health problem” The submitter suggests that this Clause be revised to align with the text of Clause 31 of the TRIPS Agreement and Clause 1(b) of the Annex to the TRIPS Agreement, including defining the public health problem as a “national emergency or other circumstances of extreme urgency.”

A copy of the written submissions received can be obtained from the online Appendices of this Report, which can be accessed via the parliament website: www.parliament.gov.fj.

2.4 Sustainable Development Goals/National Development Plan Impact Analysis

In reviewing the Bill, the Committee was mindful of the Bill’s impact on Fiji’s efforts in achieving the targets set out in the national development plan, which in turn contributes to Fiji’s overall commitment and obligation towards the global agenda - the sustainable development goals.

As a starting point, the objectives of the Bill aim to put in place a modern regulatory framework for patents, which provides an efficient and effective patent system, ensures that a patent is granted for an invention only in appropriate circumstances and provide greater certainty for patent owners and the users of patented inventions that patents will be valid after they are granted.

This objective relates to the ambitious development plan and goal by the Government of Fiji in reviewing and modernising the business sector regulatory framework², which aims to develop the economy. The Bill will bring about the necessary regulatory framework, which is envisioned to also boost business activities in Fiji.

The Committee was also mindful of the requirements of the Standing Orders of Parliament regarding gender, which is also a key goal in the sustainable development goals. The Committee ensured that full consideration will be given to the principle of gender equality so as to ensure all matters are considered with regard to the impact and benefit on both men and women equally. Despite the lack of gender-related information during the review, it is evident from the deliberations on the Clauses of the Bill that it was designed to impact all Fijians and the people living in Fiji, irrespective of gender.

² Fijian Government 5-Year & 20-Year National Development Plan, “*Mordernising the Business Regulatory Environment*”, page 87.

3.0 KEY ISSUES IDENTIFIED

Coming to the final stages of the review, the Committee identified a few key issues, which the Committee placed reasonable emphasis on and which the Committee believed, need legal clarification. The following are these key issues that were identified:

- That there are certain provisions of the Bill that raise questions of consistency and alignment to the Agreement on Trade-Related Aspects of Intellectual Property Rights (**TRIPS**); and
- That the Bill is designed to contribute to the development of the economy and that it caters for all persons irrespective of gender.

4.0 OUTCOME OF REVIEW

After extensive deliberation, the following outlines some of the main outcomes of the Committee's deliberation and review.

The Committee weighed all options concerning the issues that had been identified and had extensive discussions on these. Legal clarification was then sought on the implication of these issues from the legal team at the Solicitor-General's Office, so as to ensure that all these relevant issues were appropriately addressed and that the objectives of the Bill were preserved.

The following is a summary of the clarifications that were noted regarding the identified issues and the Committee's view and stance on the issues.

The Committee, in consultation with the Office of the Solicitor-General, also sought legal clarification on the implication of these issues, so as to ensure that all these relevant issues were appropriately addressed and that the objectives of the Bill were preserved. After extensive deliberation, the Committee came to a consensus on its stance on the key issues that had been identified from the review.

In regard to the issue relating Clause 9; the Committee identified that the interpretation of the provision has been the subject of reports of the World Trade Organisation Dispute Settlement Body and there are certain points to take note of when dealing with exclusion from patentability and complying with the TRIPS Agreement. Firstly, it is inappropriate to interpret a treaty as literally as a statute. Interpretation of an article of the TRIPS Agreement must take into account the relevant context, which includes Article 10 - the only direct reference to computer programs in the TRIPS Agreement. Article 10 provides that computer programs must be protected as copyright literary works. This suggests that if the TRIPS Agreement had intended that, in addition to copyright protection, patents must be available for computer programs, the TRIPS Agreements would have expressly said so.

Secondly, the TRIPS Agreement allows exclusions from, and exceptions to, patent protection. The Convention on the Grant of European Patents (EPC) includes a computer software exclusion, which was in force when the TRIPS Agreement was negotiated. The European Union was not required to reverse its exception, and some have argued that it cannot therefore be said that the TRIPS Agreement confirmed computer software had to be patentable and could not be subject to an appropriate exclusion. Thirdly, Fiji's exclusion, which is the same as New Zealand's exclusion, is from the concept of invention. Article 27 does not require that everything is an invention. The threshold of invention has to be met before the rest of the Article 27 can come into play. Fiji has the potential to benefit from New Zealand's and the European Union's litigation in interpreting the exclusion - it does not have to reinvent the wheel.

Additionally, in regards to Clause 14; the Committee noted that there is no formal definition of business methods, but with such terminology, we currently refer to a particular way of doing business. On the patentability of business methods, two main approaches can be adopted. According to one approach, these methods do not present the technical character needed in order to qualify as an invention: therefore, they should be

excluded from patent protection. The majority of jurisdictions around the world include such an exception into their patent law.

On the other hand, another approach acknowledges their patentability if certain criteria are met. For example, in Australia "a patent may be granted for a business method where the method directly involves a physical form or device to bring about a useful product. The application of technology for conducting a business method must be directly involved in a substantial way, not an incidental way. In other words, technology used to implement a business method should be improved in some technical way." As another example, in the United States of America, where patents on business methods may be granted under certain circumstances, the approach is to check on a case-by-case basis if a business method presents patentability requirements, which are inventiveness, novelty and industrial application.

In respect of the issue on Clause 16; the Committee noted that Clause 16(1) of the Patents Bill 2020 ('Patents Bill') gives the patentee the exclusive rights, during the term of the patent, to exploit the invention and to authorise another person to exploit the invention. Clause 16(1) of the Patents Bill is not inconsistent with Article 28 of the TRIPS Agreement. Therefore, the wording in clause 16(1) of the Patents Bill should remain as it is.

Furthermore, regarding the issue on Clause 91; the Committee noted that patents of addition are a form of protection that has been introduced in many jurisdictions, mainly Common Law countries, following the model of the ancient version of the United Kingdom (UK) Patents Act. This type of patent gives the opportunity to the patent applicant or patent owner to ask for protection for further improvement(s) on the invention within the scope of the patent application filed/patent granted for their first invention. Nowadays, even if the current patent legislation of the United Kingdom does not contemplate anymore patents of addition, the latter are still granted in many Common Law countries, for example, Australia, New Zealand and South Africa. The inventive process is far from start to finish in one, single moment. On the contrary, it is an ongoing process, which often continues after the application for a patent. For that reason, it could happen that inventors manage to improve their own inventions which are already the subject of a filed patent application or granted patent. Patents of addition aim at targeting these incremental inventions and provide them with a form of protection. Therefore, we can say that the main requirement in order to apply for a patent of addition is that the invention has to consist of an improvement of a previous invention for which patent protection was already requested or granted. The patent of addition depends on the main patent and this is reflected into three main aspects of patents of addition protection and these include:

- the person entitled to apply for a patent of addition;
- the period of protection;
- and the fee.

Regarding the patentability requirements of patents of addition, the main approach is that the object of the invention should be an increment or modification of the main invention for which patent protection has been already requested or granted. Inventive step is often explicitly not required. This is the approach used in the Patents Bill, and for instance in New Zealand where section 111 of the New Zealand Patents Act 2013 mentions that the

lack of inventive step could not be a ground to refuse a patent of addition. If the subject of a patent of addition meets all patentability requirements, it could be also the object of a new, different, patent application/patent.

Moreover, in respect of the issue on Clauses 152-171; the Committee notes that at the Doha Declaration in November 2001, the World Trade Organisation reaffirmed that a member could grant compulsory licences to a manufacturer, and that each member country of the WTO had the right to determine what constitutes a national emergency or other circumstance of extreme urgency. A serious public health problem constitutes a national emergency or circumstance of extreme urgency.

The Committee therefore is of the opinion that the Bill is sufficient as it is and that all issues raised are addressed adequately in the current wording of the Bill.

5.0 APPRECIATION

The Committee, by way of consensus, during the drafting of this Report resolved that it would be appropriate to acknowledge all those that had provided great support to the Committee during the review of the Bill.

Firstly, the Committee acknowledges the Parliament of the Republic of Fiji for realising the vital aspect of public participation in the legislative making process, thus supporting and encouraging the Committee to conduct extensive public consultation. Moreover, appreciation goes to the UNDP Fiji Parliament Support Project, for its financial support, which enabled the Committee to conduct extensive awareness on its public consultations. The awareness included advertising on the daily newspapers that are in circulation in Fiji.

Furthermore, the Committee would also like to acknowledge the Parliament IT Team for its support, which enabled the Committee to have virtual meetings and continue to carry out its constitutionally mandated functions, despite the impact of Covid-19.

6.0 CONCLUSION

After adhering to due process and the requirements of the Standing Orders of Parliament, the Committee in its deliberation and review noted that there was great support for the Bill.

The review highlighted a few issues on the Bill, which were considered extensively by the Committee through consultations with the legal team from the Solicitor-General's Office so as to address all the issues raised and to ensure the objectives of the Bill are not affected. The Committee notes that all issues identified have been addressed adequately and therefore recommends that the Bill is sufficient as it is and that no substantive amendments be made. The Committee only made amendments to the Bill, which were grammatical in nature and does not have any effects on the provisions of the Bill.

The Committee is also of the view that this piece of legislation needs to be reviewed periodically as the business environment relating to Patents continuously changes with time and circumstances. An up to date business environment is vital for the economy of the nation, therefore the legal framework governing such business environments should be in par at all times to ensure economic development in Fiji.

The Committee, through this bi-partisan report and consensus, commends the *Patents Bill 2020 (Bill No. 46 of 2020)* to the Parliament.

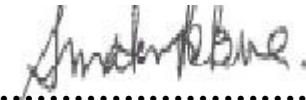
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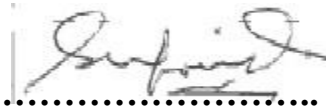
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(CHAIRPERSON)**



**HON. ROHIT SHARMA
(DEPUTY CHAIRPERSON)**



**HON. RATU SULIANO
MATANITOBUA
(MEMBER)**



**HON. DR. SALIK GOVIND
(MEMBER)**



**HON. MOSESE BULITAVU
(MEMBER)**

DATE: 13 AUGUST 2021

