

Inter-Party Group on Electoral Reforms: Submission to Justice, Law & Human Rights Standing Committee (27 September 2017)



BRIEF

Introduction

Hon Chair and Members of the Justice, Law and Human Rights Standing Committee.
[Salutation]

We thank you for graciously allowing us as an Inter-party Group on Electoral Reforms comprising: SODELPA, NFP, FLP, PDP, FUPF and Unity to raise our concerns on the electoral rules, that in our view, do not enhance free, fair and credible elections in 2018.

We have been engaging with the Electoral Commission. Our engagement has been robust and frank -- that is our role as representatives of voters to ensure that they are given a level playing field for their political will to be made true and also to help ensure that their political rights are manifested.

A number of our proposed changes in our report's recommendations are legislative in nature. It is our hope that they can be addressed by your Committee.

We understand that the Committee is examining the 2014 report of the Multi-observer Group as well as the 2014 Annual Report of the Electoral Commission, and presently your focus is on the Electoral Commission Annual Report.

To aid your workload, we have structured our comments based on a tabulated format, that begins with the baseline of the 38 recommendations of the MOG Report, over which we have overlaid the 21 recommendations of the 2014 EC Annual Report, as well as OUR report recommendations that total 121 recommendations.

Our report was not concocted out of thin air -- but also based on the 2 reports, and further enhanced by our observations of loopholes that we witnessed in the 2014 elections, offering some practical and workable solutions to allay our concerns.

We urge this Committee to ensure that the necessary legislative changes we, the MOG and the EC Annual Report recommends to be tabled at the February 2018 sitting.

ISSUES AND CONCERNS WITH THE LEGAL FRAMEWORK

The EC Annual Report presented some precise legislative amendments required to be made, from the Constitution to the Electoral Decree (now purportedly Act), to the Political Parties Decree (now Act).

The scenarios cited in their report are sobering and warrant urgent attention.

The Electoral Commission Report 2014 said the changes it recommended should have been (with the assistance of donor partners), completed by mid-2016. However the 2014 Commissioner's terms lapsed and new Commissioners were appointed in early 2017.

With a shorter time frame left to the 2018 elections, the need to implement changes is urgent and we are encouraged that the new Electoral Commission is committed to regular meetings with stakeholders.

Without genuine consultations and joint concerted efforts based on mutual respect and

trust between the Fiji First Government, the Opposition Political Parties and other stakeholders within Fiji and from outside the country, our collective goal for a Free and Fair Election in 2018 will not be achieved.

THE FIJIAN ELECTIONS OFFICE

The Multinational Observer Group (MOG) made a specific recommendation to ensure the independence of the Electoral Commission as well as the Elections Office at page 9 of the Report, as outlined earlier.

We strongly support this recommendation for the following reasons:

* Opposition Political Parties and civil society organizations had, in 2014 expressed to the MOG their lack of confidence in the independence and impartiality of the Electoral Commission and the Elections Office which is borne out in the MOG and EC report that details some of the questionable aspects of the running of the 2014 elections and media statements from the previous Chair and members of the Electoral Commission.

* Further, at a meeting of the Electoral Commission and the Opposition Parties on 03 April 2017, the political parties were promised the data and statistics and projections that justified the Commission's announcement on the increase of MPs in Parliament from 50 to 51. The political parties are still awaiting this data and minutes of those meetings appear to side-step the assurances made by the EC Chair.

* The new Members of the EC should gain experience and the confidence to independently carry out their critical responsibility for the 2018 Elections as envisaged under the provisions in the Constitution. The new Chairperson of the EC, Mr Suresh Chandra, has stated publicly that the EC will follow the law "as it is and not what it should be", which means maintaining the status quo. Thus our hope that the Standing Committee can assist.

* The Electoral Commission expressed to Minister Khaiyum (and the MOG) in 2014 that it lacked sufficient funding for staff. It saw itself under the Electoral Decree and Section 75 of the Constitution as a separate office and therefore with its own complement of staff independent of the Supervisor of Elections Office. This is correct from reading Sections 4, 5, 6, 7, 8 of the Electoral Decree.

* The separate functions of the two offices are also clarified under Section 75 of the Constitution (establishing the Electoral Commission) and Section 76 that established the Supervisor of Elections. The legal and practical separation of these two bodies is vital for the conduct of "free and fair elections."

At present the EC is practically (because it lacks experience) and in the public perception, under the domination of the Supervisor of Elections who has recently been made its Secretary in a Bill rushed through Parliament in February 2017. Some believe the Electoral Commission and the Elections Office will be subject to the controlling influence of the Attorney General through the Electoral Decree.

* The government's response to the above recommendation of the MOG Report is a new subsection to Section 5 of the principal Decree [Electoral Act Amendment Act February 2017]. It reads;

"Subject to Section (8) the Supervisor shall act as Secretary of the Electoral Commission and must attend all meetings of the Commission"

Under Section 8 of the Electoral Decree, the Supervisor of Elections is required to comply with:

8.(a) The directions and instructions that the Electoral Commission gives him or

her concerning the performance of his or her functions.

This was further clarified by the Court of Appeal Judgment against Supervisor of Elections, Mohammed Saneem.

The SOE has appealed the Judgement of the Court of Appeal. This legal challenge is an added burden to the taxpaying public, and an unbudgeted expense and we hope is not a mere academic and egoistic exercise.

Consistent with the Constitution and the Electoral Decree, the Electoral Commission in 2014 wanted its own staff and secretariat and an independent legal adviser. The EC was under resourced throughout 2014 because it was dependent financially on the Elections Office headed by the SOE, which controlled finances and staffing. The few staff that served the EC as Secretariat were appointed by the Supervisor of Elections and answerable to the Supervisor in terms of their employment contract, (see page 10, para 2.3.1 Fiji Elections Commission Annual Report 2014). The Commission recommended in its annual report for 2014, that it must have a completely separate budget from the Elections Office and the Supervisor of Elections.

The EC Report said the consequence of understaffing was “The Commission had to review and attend to electoral matters that could only be done in their private time”. The EC remained under-staffed even in 2015 and donor partners were concerned about this [MOG para 4 page 15].

It is unclear why the Supervisor of Elections or the Attorney General could not have allocated the budget of the Electoral Commission from the \$21 million it had received from donors for the Election. The same pattern emerges after the new budget tabled in Parliament in July.

The Electoral Commissioners recognised the need to secure their independence and stated in their 2014 Annual Report: “To ensure its complete independence, the EC must have a completely separate budget allocation and ... it must have an independent legal adviser. “Repeated requests for an independent legal consultant to the Minister of Elections remained unanswered”.

In a letter dated 7 April 2014 on the issue of interpretation of the Electoral Decree, the Attorney General insisted all legal advice on the interpretation of the Decree must also be sought from the Solicitor General and his staff “because they drafted the Decree”. “The SG is an independent legal adviser “he said.” [EC Annual Report 2014 page 45].

The EC Report further observed:

“While [76(2)] of the Constitution clearly enables the EC to direct the Supervisor of Elections on matters concerning his or her performance, the current governance arrangement limits that EC role”.

The new EC chair, Mr Suresh Chandra, has said the EC now has a Task Force to review these two Reports and take action on them by June 2017. At this point, we have no clear oversight over what has been implemented and what remains in abeyance.

POLITICAL PARTIES

A level playing field for all participating parties is also a prerequisite for free and fair elections.

The MOG Recommendations at page 12 of its report, said:

* Consideration should be given to reducing requirements for party registration and activities

* Public office holders, including trade union officers should be allowed to be political party members

Section 57 (g) of the Constitution defines an officer in a registered Trade Union as persons holding “public office” and who therefore needs to resign if he or she is a candidate in an Election. No such provision existed in earlier Constitutions.

It merely reflects political bias and wholly unfair discrimination and is aimed at restricting the political rights of trade unionists and who have been formidable politicians in Fiji. This is another provision of the Constitution that both the MOG and the EC Reports recommend should be revoked. It is also inconsistent with the ICCPR.

The Registration of Political Parties (Conduct Funding Disclosures) Amendment Decree 2012

The Opposition Parties outline below examples of restrictive provisions of the Registration of Political Parties Decree that should be changed or revoked. The following provisions restrict people’s political freedom without reasonable justification.

2 (A) – Criminalises any media reports, about persons or political parties who identify themselves as a political party and who are not registered, with fines of up to \$50,000 or imprisonment of up to 5 years or both.

8 (g) – Requires all political parties to register under the provisions of the Decree and gives power to the Registrar of Political Parties to refuse registration. [The Supervisor of Elections is also the Registrar].

Parties or persons who fail to follow the directive of the Registrar to produce documents that are required in an investigation can be fined, upon conviction up to \$50,000 or imprisoned up to 5 years.

Why is the Supervisor of Elections, as Registrar of Political Parties given such powerful politically punitive roles to investigate and recommend prosecution of registered political parties and the news media? Are these powers appropriate for an official in a democracy?

The Political Parties Registration Decree require a minimum of 5,000 members drawn from all four-administrative divisions of Fiji. The MOG Report said in most democracies, to require by law minimum party membership registration of 5,000, is too steep. The Electoral Commission Report 2014 had also said the requirement is no longer relevant because the Electoral system is not based on the four divisional boundaries as originally recommended by the National Council for Building a Better Fiji 2009.

If a Political Party commits an offence under the Decree, the Registrar of Political Parties (i.e. the Supervisor of Elections) has the power to suspend registration for 12 months. The recent case between the Supervisor of Election vs the National Federation Party illustrates the capricious exercise of this power. No official should have the power to decide on whether elected representatives of a political party can continue in Parliament which is the practical effect of this power. Section 23 of the decreed Constitution on Political Rights states:

“23(1) Every citizen has the freedom to make political choice, and the right to: form or join a political party participate in the activities of a political party and campaign for political party, candidate or cause”

On limitations to the above freedom:

“23 (4) A law may limit, or may authorise the limitation of the right mentioned in this section:

“for the purpose of regulating the registration of political parties and prescribing the persons who do not have the rights prescribed under subsection (1) and subsection (3) (c) and (d) for the purpose of regulating persons who are not eligible to contest for a place in Parliament, or an office within a political party or....”

The Opposition Political Parties support the above recommendation of the MOG to review and considerably reduce the requirements of Registration of Political Parties, restrictions and penalties. In addition, we recommend:

* That the powers of the Registrar of Political Parties and the Political Parties Registration Decree should be entirely reviewed to be in line with good practice in similar institutions in reputable democratic countries.

* The registration requirement under the Registration Decree should be considerably cut down before the 2018 Elections including a review of the Registrar's powers.

* Under the Decree, Public office holders are prevented from being members of political parties. This is unjustifiable infringement of the political rights and freedom of people and conflicts with ICCPR. This should be removed.

* “Public Officers” definition includes officers of trade unions. This is to prevent trade union officers from standing for Elections. It is a politically prejudiced provision and should be deleted from the Constitution.

* The restrictions on donations to Political Parties under the Decree should also be reviewed because Government incumbency gives it advantage in an Election.

* The Registrar of Political Parties should be an office that is independent of the Supervisor of Elections and the Registration of Political Parties Decree be entirely reviewed for consistency with the ICCPR and International practices in reputable democratic countries.

* That the power of the Registrar of Political Parties (also the SOE) to suspend Political Parties be reviewed and that this provision require the Registrar to seek a court order for such suspensions.

MEDIA ENVIRONMENT

The Media Industry Development Decree should be amended to require that the Media Industry Development Authority (MIDA) must include members of the media and it will issue clear, timely and practical reporting guidance for the elections process.

The MOG Recommendations at page 18 said:

- * The media accreditation process should be simplified and all media outlets, including international media, should have sufficient advance notice of deadlines and timelines.
- * The Media Industry Development Authority should issue clear, timely and practical reporting guidance
- * Penalties for breaches of election related reporting rules should be reviewed
- * Should the Media Development Authority continue its role in future elections, there is a need for an independent institution to adjudicate complaints about its actions, consistently with Fiji's legal and Constitutional framework.
- * There is a need for regulations as well as an independent institution to prevent and adjudicate media biases, thus ensuring a level Playing field among election participants.

The above recommendations are based on evaluation of only two of the roles of the Media Industry Development Authority (MIDA) established under the Media Industry Development Decree 2010. Whilst the MOG recognises that the MIDA Decree is restrictive and punitive, it made only a diplomatic recommendation for a simplified accreditation process and practical reporting guidelines and a "review of the restrictions and penalties".

The MOG seems to expect that MIDA might not continue in future. This is a hint of its probable real view that MIDA'S existence is a negative blockage to responsible and independent Media Freedom in an Election. This restrictive MIDA environment prevailed before the Election and after the Election right up to the present time. The Media in Fiji are fearful of the punitive environment created by the existence of MIDA. The lack of freedom of expression during the 2014 General Election continues to this day.

MIDA's role created a climate of fear, self-censorship and restricted freedom of expression during the 2014 General Election.

The UN Human Rights Council UPR Report on the situation in Fiji in 2015 said: "During the UPRP, Seven member states called for the abolishment of the decree restricting Media Freedom".

"In response to questions regarding the Media Industry Development Decree (the "Media Decree") we deeply regret that Fiji refused to accept the recommendation. In this regard and simply refused to acknowledge concerns that the framework of rights and freedom of expression encourages censorship". (Statement 66 delivered under Item 6)

The Opposition Political Parties therefore do not agree with the view of the MOG that MIDA powers be merely amended. The continued existence of the Media Industry Development Decree restricts freedom of expression, and compels self-censorship by the Fiji news media.

The media in Fiji because of fear, discourages bold expressions of opinion of individuals and there are hardly any serious criticisms of the government published in the main news media (newspapers, Television and Radio) in the last 11 years. People flock to social media to express their frustrations and criticisms, and more worryingly there have been pronouncements by senior officials calling for the muzzling of freedom of expression via social media.

The Opposition Parties believe the repeal of the Media Industry Development Decree (MIDA), is essential to the conduct of a genuinely free and fair Election in 2018 and the full

restoration of freedom of expression, essential for democracy in Fiji.

The stipulated Media blackout in section 118 qualifies a 48-hour muzzle over the publishing, printing or broadcasting of "any campaign advertisement, debate, opinion or interview on any election issue or on any political party or candidate". This provision discriminates against the majority of voters who endure this media blackout and therefore cannot make fully informed decisions as to who can best represent their interest in Parliament over the pre-pollled voters. Further, this blackout must apply across the board and serving Ministers who are also candidates cannot pretend that their "ministerial duties" while on the campaign trail validates such free publicity.

That the MOG recommendations on MIDA, as outlined below, should be implemented without delay:

- * The media accreditation process should be simplified and all media outlets, including international media, should have sufficient advance notice of deadlines and timelines.
- * The Media Industry Development Authority should issue clear, timely and practical reporting guidance
- * Penalties for breaches of election related reporting rules should be reviewed
- * Should the Media Development Authority continue its role in future elections, there is a need for an independent institution to adjudicate complaints about its actions, consistently with Fiji's legal and Constitutional framework.
- * There is a need for regulations as well as an independent institution to prevent and adjudicate media biases, thus ensuring a level Playing field among election participants.
- * That each free to air and all print media be required to provide space and time of similar prominence for all political parties every day between issuance of writ and end of elections.
- * That all media organisations provide some free to air time to be allocated equally to all registered political parties.
- * That media organisations as per their social responsibility grant a number of free adverts to each registered political party.
- * That all parties to have the same amount of coverage on free to air television or radio coverage as a community service after the issuance of the writ of elections.
- * That Media accreditation should be processed and approved by the EC and not the MIDA

That the Media blackout in s118 - 48 hour - there should be no coverage of all candidates including ministers - the blackout should be applied equally.

Furthermore, the majority of voters who participate in the election day proper are grossly discriminated against in terms access to voting information by political parties through the imposed media blackout (section 118, Electoral Decree), whereas those undergoing pre-polling have the advantage of access to voting information by political parties right up until they step into the polling venue site. There is no equality for all voters in this provision, and the majority of voters are marginalised and unduly discriminated against.

The Media decree 2010 must be repealed as an essential condition for the holding of a genuinely free and fair Election in 2018.

MIDA should be abolished as strongly recommended by seven UN Human Rights Council Members. An appropriate accountable media regulatory body to be formed after public consultation building on the former Fiji Media Council that existed before.

PREPARATIONS FOR ELECTIONS

The MOG Report at page 7, said:

“It was unusual that there was no political party identification on either ballot paper or the National Candidate List, which were the only two sources of information available to voters inside polling stations. The ballot paper did not include candidates’ names, photos or party names or symbols.”

The MOG was probably not aware that the Electoral Commission had been engaged in discussions with the Attorney General Aiyaz Khaiyum on the need for guidance to voters in the 2014 General Election. The then Chairman of the EC, Chen Bunn Young, had written a letter to AG on 20 June 2014, in part observed:

“One of the fundamental components of a free and fair election is informed decision making by the voters. To arbitrarily deny voters a critical element in reaching their decision on whom to vote for would violate this principle. They need to be aware that in voting for a particular candidate they are voting for a particular party (unless that candidate is an independent candidate).”

The EC bolstered this argument by pointing out that under Section 6 (3) of the Political Parties (Registration Conduct and Disclosures) Decree 2013 a Party was required to register the name of the party, the symbol and the abbreviation or acronym of its name. The argument was this was an important part of the Election and needed to be included in the ballot papers. This plea was to no avail.

On Friday June 2, 2014, the Electoral Amendment (Decree No 23 of 2014) was published. It introduced a new subsection 6 to Section 36:

“(6) The National Candidate List must not contain any party name or symbol”

The question is why was this provision introduced 4 months after the Electoral Decree was published, and two and half months before the Poll? The Opposition Parties believe that the purpose of this provision was to ensure a redundant effort to audit allot paper results after the Election in terms of the identities of candidates and political parties they belonged to.

They could only be identified by their allocated numbers and there remains a loophole for replacement of ballots papers and/or the manipulation of electronic results. There was a possibility for such manipulation of the 549+ ballot boxes containing 51,037 pre-poll ballot papers of those who voted in pre-polling, before Election Day, September 17, 2014.

The appeals process to the Court of Disputed Returns as per section 122 of the Electoral Decree is clear. Petitions to the court of disputed returns must "set out the facts relied on to invalidate the election or return". It will be an exercise in futility and a technical impossibility to convince the court of the facts if a paper-trail cannot be determined because ballot papers are not identified with candidates and their political parties.

The 2017 iteration of the Electoral Act further compels the courts in a new section 18A to "promptly make a decision with respect to a charge led for an election related offence under this Act, the Electoral (Registration of Voters) Act 2012 and the Political Parties (Registration, Conduct, Funding and Disclosures) Act 2013."

Notwithstanding the dangerous precedent that such a clause presents to compel the judiciary, this gives no comfort to the underlying need to first establish the facts of a petition.

Similarly the unprecedented and unusually large sample size of those pre-pollled in 2014 do not in the strictest sense conform to the provisions of the powers of the Electoral Commission set out in section 82 of the Electoral Decree.

Opposition Political Parties strongly support the above recommendations of the MOG Report for the redesign of ballot papers to include on the candidate list, the identities of political parties and candidates' names and to be in numerical and alphabetical order and very importantly that serial numbers also be enumerated on every single ballot paper.

THE POLL, COUNTING AND RESULTS PROCESS

While a one day vote was promised in 2014, voting actually took place over 3 weeks from the beginning of voting in the "pre-poll", until voting day on Sept 17, 2014, and the almost 3 days of the verification of the count at the Central count center. Pre-polling was premised on the need for workers in the essential services to vote early, as well as those in remote and hard to reach locations around Fiji.

The five political parties agree that voting can take place on one day, with the ballots counted at each polling station. To this end, resources must be allocated to allow those in remote locations to vote on voting day. There were arguably sufficient resources in 2014 given the \$16m surplus or unused funds donated by development partners, so there is no logical excuse why the pre-poll was so extensive in 2014. Pre-poll should be limited only to essential services workers, in particular health and corrections services workers.

The five political parties also propose reducing the number of polling stations – this is possible especially in the more populated areas, if the number of voters allocated to each station is increased to 1,000 or 1,500. This will decrease the number of workers required in the populated areas and the surplus can be reassigned to polling stations in the remote locations, to carry out the vote on voting day in those venues.

We also consider that counting at the polling stations is essential to enable the result to be known on the same day. The result of the count at each polling station is to be known as the final count and not provisional count from that station. There is to be no verification at a central location as was the case in 2014 since the transportation of ballot boxes cannot be monitored and resulted in broken seals, the insertion of envelopes into ballot boxes etc as was seen in 2014. Verification is only necessary if there is a dispute. The reduction of polling stations will enable political parties to better monitor the vote and the count at each polling station.

Pre-polling

There was indeed a lot of confusion in 2014 about the Pre-Polling because most people understood there was only one Polling Day on which all voted. Some people thought "Pre-Poll", when it was announced, was a conspiracy by the Government to corrupt the Election

process, especially because most voters and Political Parties had not heard before of pre-poll. They were ill prepared for “pre-poll” and could not get their polling agents to many pre-polling stations.

As observed earlier, political parties could not send polling agent to many pre-polling stations because there were too many and they could not appoint their agents in time. There is a need to cut down considerably the number of early voting polling stations. Provisions of more postal ballots to remote areas could replace “pre-poll”.

The pre-poll also disenfranchised many voters who were attending various functions, festivals and conferences outside of their place of residence when pre-polling was announced, and they were unable to vote. The extension of pre-polling to even accessible areas is in breach of the law and its effect was to disenfranchise voters who expected to vote on voting day. The rules meant they were not able to cast their ballots in Suva and other locations because all voters are restricted to only their registered polling station.

We propose that pre-poll be limited only to essential service workers like police, health and corrections staff and those in their charge. Everyone else, including in remote, inland, highland, hard-to-access and maritime areas, should vote on voting day. Funds must be allocated in order that Fiji truly have one day polling.

In 2014, \$15m of funds donated by development partners for the poll were not used - this could have been used to establish polling stations in these areas and the confusion and disenfranchisement of thousands of voters would have been avoided.

We propose that the count at all polling stations be the final count unless there is a dispute that necessitates the transportation of ballots by helicopter if necessary to the national count tally center, for verification and re-count. We also propose increasing the number of voters at each polling station to 1000 or 1500. This will reduce the number of polling stations in populated urban centers and extra staff can be deployed to rural and maritime areas that were previously pre-poll or earmarked for prepoll in 2018. In any case, funding should be made available for truly one day poll with only police, health and corrections officers pre-poll.

Counting process on Election Day

Transparency: that elections are actually free and fair, and seen to be free and fair through transparent processes. The parties respectfully petition the following recommended changes to electoral processes, which will increase transparency.

It is said that in other jurisdictions, electronic counts data can possibly be manipulated through algorithms in the software of the vote counting machine. Elections data can also be interfered with through external hacks into computer. The algorithms are commercial or patent secrets of the manufacturer and legally, cannot be accessed. So, the electronic counting machine can be bought with knowledge that it has internal capacities to manipulate results.

Participation by people with disability

Recommendation of MOG at page 31 stated:

Voters with disability and elderly voters should be allowed to receive assistance, if they so wish, from friends and family members.

The Opposition Parties note the significant participation of women and person with disabilities in the Electoral Process and particularly the increased number of women

elected (eight elected women,16% of parliament as compared to 5% in the Pacific).
The Opposition Parties support this recommendation wholeheartedly.