

1. I want to thank you Mr. Chairman and members of the Committee for giving this opportunity to the Electoral Commission to explain some of the matters it had outlined in its 2014 Report.
2. One of the challenges that the Electoral Commission has had to face was to be careful not to be drawn into a public debate through the medium of newspaper, television, radio or public or social gathering about issues that were related to the elections. The Electoral Commission feels that this forum is an appropriate forum and is really the first opportunity for the Electoral Commission to verbally express its position and we hope it will be an informative exercise to Parliament and the public which we endeavor to serve.
3. Apart from Commissioner David Arms, the rest of the members had little or no experience in the internal mechanics of an election before their appointment. Most certainly none of us had experience in politics. These factors along with the fact that the electoral legislation was not going to be put into place until 28<sup>th</sup> March 2014 through the Electoral Decree 2014 coupled with an election that was scheduled for September the same year, brings into perspective the mammoth task the Electoral Commission had to fulfill pursuant to its constitutional duty to conduct the elections.
4. The successful outcome of the elections was attributed to four factors. Indeed, they are not exhaustive and for the

sake of clarity, they are not necessarily mentioned in the order of importance.

- (i) Firstly, I just want to highlight the point that my fellow commissioners, Alisi Daurewa, David Arms, James Sowane, Jenny Seeto, Larry Thomas and Vijay Naidu, with whom I had the most distinct privilege of working alongside, are in their own respective rights the tip of the spear in the disciplines they hail from and there can be no doubt that this unique feature was translated to their commitment as members of the Electoral Commission. The public should not fail to recognize the great personal and professional sacrifice that these commissioners had to make when they accepted their appointment and the responsibilities which came with it.
- (ii) Secondly, the hard work of the Fijian Elections Office under the leadership of the Supervisor of Elections Mr. Mohammed Saneem and the then some 2000 staff who played an indispensable part in the election process. Long hours and personal sacrifices mainly kept and known to the individual and their families were the order of the day.
- (iii) The financial and technical support from our overseas friends.
- (iv) Finally, the Government of the day in appointing the commissioners I have mentioned and I feel it is right to

mention this as one of the four factors because it demonstrated the will of the then Government to leave their future as a government to the Electoral Commission's ability to carry out its responsibility of the electoral process without succumbing to national or international pressure and believe you me it is an understatement to say that these pressures were numerous and came in many forms.

5. This brings into play the independence of the Electoral Commission as set forth and clearly established under the Constitution. This issue of independence is very close to my heart and the hearts of my fellow commissioners.
6. It follows, unsurprisingly, that how this independence is to be exercised has been a point of controversy. It is not an unusual controversy. No doubt the three arms of our Government, the judiciary, the executive and the legislature face the issue of independence on a daily basis.
7. After our appointment, differences of opinion over what independence meant were expressed from many quarters. Those who had a vested interest in the electoral process had their own perception of what and how the Electoral Commission's independence ought to be exercised. The Electoral Commission had (what I think) healthy dialogues through meetings with political parties, the NGOs and even the Honourable Minister on this issue. These discussions were also held with the MOG observers. These interactions

were conducive in the sense that it caused us to constantly self examine our actions.

8. Let me say this, as a matter of record, that there was never an incident that I can recall where the Electoral Commission was unsure as to where the line of independence was drawn. The Electoral Commission was always clear with the demarcations of independence. I might venture to add that this is largely attributed to the instincts that came with the cutting edge qualifications and experience of the six commissioners I had mentioned earlier.
9. I think it would be an opportune time to provide some background details on some of the circumstances that went to the root of testing the independence of the Electoral Commission. The backdrop of the Supervisor of Elections' disagreement with the Electoral Commission's interpretation (or vice versa) of what "*three days*" meant in sections 30 and 31 of the Electoral Decree 2014 and the application of section 76(3) of the Constitution which accumulated into a court action is an example of such testing. From the outset let me disarm the rumors or perception that there is a rift between the Supervisor of Elections and my office. Of course I can not speak for the Supervisor of Elections but from my personal view there is no such rift. We would have you know that the argument before the Honourable Judge and while both parties were waiting for the delivery of the judgment, we were in constant communication and co-operated to ensure that the electoral process would

continue to progress and we had also catered for the contingency for the two possible outcomes.

10. It may not be a known fact that the Supervisor of Elections had taken a legal opinion on the interpretation of what "3 days" meant. This opinion was taken from the Solicitor-General's office. Due to the nature of the deliberations before the Electoral Commission at the time, the Electoral Commission thought it absolutely imperative that it had to assert its independence by taking independent advice on the issue which it did in the form of consulting Mr. Gerard McCoy QC from Hong Kong whose opinion eventually differed with that of the Solicitor-General. Mr. McCoy's opinion was furnished to the Solicitor-General who disagreed with the opinion. I pause for a moment to also mention that while deliberating with the 11 objections to candidate nominations and 10 appeals against nominations, the Electoral Commission had sought legal advice on certain issues arising thereto from Chen Palmer Law of Wellington, New Zealand.

As we now know, the High Court had ruled against the Electoral Commission and the case has been appealed to the Court of Appeal awaiting a hearing date. Due to the inflexible nature and very tight timetable that the Electoral Commission was laboring under, I had to personally appear for the Electoral Commission and in the last minute, the Electoral Commission was able to secure the services of Mr. Adish Narayan who agreed to appear before the court in return for a very nominal retainer.

11. Perhaps this is an opportune time to also make reference to other court proceedings where the Electoral Commission was named as a party. These were: *Steven Pradeep Singh & FLP v Electoral Commission, Supervisor of Elections, Attorney-General and Minister of Election - Suva High Court Action No. HBC245 of 2014* and *Makareta Waqavonovono v The Chairperson of the Fijian Electoral Commission and others - Civil Action No. HBM 92 of 2014*. These proceedings were filed after the Electoral Commission had filed its earlier proceedings.

Due to the nature of these two subsequent proceedings and along with the pressing responsibilities at that time upon the Electoral Commission, the Electoral Commission deliberated and felt that it should remain a neutral party and abide by the decision of the court. This resolution was relayed to the Court and accepted by the court and thus the Electoral Commission was excused from participating.

12. I think at this time it will also be helpful to provide some details leading up to the filing of the Petition by the Attorney-General in the Court of Disputed Returns in Action No. 40 of 2015 where the Electoral Commission was named the 1<sup>st</sup> Respondent with Mr. Mikeale Rokosova Leawere as the 2<sup>nd</sup> Respondent. The issues raised in this action relate to the interpretation of section 24 of the Electoral Decree 2014 and section 57 of the 2013 Constitution.



In line with section 116(2) of the Constitution<sup>1</sup>, the Electoral Commission had earlier sought advice from the Solicitor-General and a written opinion was rendered by the Solicitor-General's office on the interpretation of the aforesaid sections of the Electoral Decree. Upon the receipt of the opinion the Electoral Commission met to deliberate on the views expressed in the opinion. A further meeting was then arranged with the Solicitor-General's office to give their legal team an opportunity to expand on their initial opinion. After this subsequent meeting the Electoral Commission resolved that it should take an independent opinion and it was decided that an opinion be sought from Mr. B.C. Patel who was later able to render what the Electoral Commission felt was a more reasoned opinion than that of the Solicitor-General's. Mr. Patel's written opinion was then referred to the Solicitor-General for his comments. The Solicitor-General's response was that he disagreed. The Electoral Commission preferred the legal opinion of Mr. Patel and awarded the vacant seat to Mr. Leawere and by Government Fiji Gazette Notice dated 5<sup>th</sup> May 2015 this award was published.

The Petition was filed by the Honourable Attorney-General on 18<sup>th</sup> May 2015 and the matter was called on 22<sup>nd</sup> May 2015 before Justice Alfred. When the Electoral Commission became aware of the proceedings it initially intended to

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<sup>1</sup> "The Solicitor-General is responsible for -

(a) providing independent legal advice to Government and to the holder of a public office, on request,"

engage local counsel and had approached Mr. Devanesh Sharma of Suva who quickly informed us that he was already engaged by the Petitioner. At about that time Munro Leys also had offered to represent the Electoral Commission but their offer was declined as the Electoral Commission felt that it was important that each party should be separately represented if the Electoral Commission was required to be heard in the court proceedings.

On the first call before the Honourable Judge, one of my associates from my firm (at no cost to the Electoral Commission) was personally briefed by me to appear and inform the court that the Electoral Commission wished to adopt a neutral role and abide by the decision of the court. This submission when made to the court on behalf of the Electoral Commission was met with disagreement from counsel for the Petitioner and the Honourable Judge then went on to direct that the Electoral Commission should actively participate and was expected to present submissions. The timetables were then set by the Honourable Judge for affidavits and applications by 2<sup>nd</sup> Respondent to be filed and served within a short period and a hearing date was set for Thursday 28<sup>th</sup> May 2015. Of course, as we know the 2<sup>nd</sup> Respondent was represented by Mr. Jon Apted of Munro Leys and at that time Mr. Richard Naidu, a Partner of Munro Leys, being nominated by the Opposition Party, was sitting as a member of the Constitutional Office Commission.



13. My three legal colleagues who sit on this Committee, perhaps better than I, know that in situations such as this it was open to the Electoral Commission to decide for themselves which legal opinion they would prefer and the preference of a legal opinion that differed from the Solicitor-General's has now proven to be correct. May I add, even if the judgment of the Court of Disputed Returns disfavoured the Electoral Commission, the judgment, to our minds demonstrated the independence of the Electoral Commission and the court proceedings went a long way to confirming also the independence of the judiciary and the independent right of the Honourable Attorney-General to file the Petition.

In the circumstances it made plain sense to then approach Mr. Patel, who had rendered his opinion, to represent the Electoral Commission in these proceedings.

14. The hearing of the Petition took place over 4 days in a span of 2 weeks. Mr. Patel, representing the Electoral Commission, had to return to New Zealand during the interval after the first 2 days and then had to return for the final two days. The hearing dates were 28<sup>th</sup> and 29<sup>th</sup> May and 2<sup>nd</sup> and 3<sup>rd</sup> June 2015. Counsel then rendered a bill for NZ\$15,000.00 in November 2015. This bill of cost was then referred to the Supervisor of Elections for payment. Now, more than 6 months later, the bill remains unpaid because the Supervisor of Elections felt it necessary to refer the bill to the Ministry of Finance for its approval before payment. The Electoral Commission has written to the Minister expressing that such approval should not be necessary as it

undermines the independence of the Electoral Commission. The Electoral Commission has yet to receive a response.

15. I hope I can be excused for taking what may be viewed as a long route to support our submission that this Committee accept the recommendation sought by the Electoral Commission in requiring an independent budget that would allow the Electoral Commission to function and carry out its onerous responsibility by having its own secretariat, legal advisors and other personnel and to determine how it is to utilize its budget subject to the eventual independent scrutiny of the Auditor-General's Office.
16. In conclusion I want to express that it is the hope of the Electoral Commission today that whatever we have submitted will help in some way towards assisting the next Electoral Commission in fulfilling their responsibility in overseeing the 2018 elections.

**Dated** this 29<sup>th</sup> day of July 2016.

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Chen B Young