Fiji Labour Party

Submissions to the Parliamentary Standing Committee on Justice, Law and Human Rights

Bills 50 and 52 of 2020

Mr Chairman, before I look at the proposed Bills I wish to make a few general observations.

You and I well know that this consultation process is just for show. We also know that when the Bills eventually find their way into Parliament, they will be fast tracked under Standing Order 51 and that will be the end of it all.

Even then, I consider it my duty to appear before you to record the Fiji Labour Party's position on the Bills for the sake of posterity.

The explanatory notes to the Bills state that they originate from the Multinational Observer Group's (MOG) report on the 2018 general elections.

That is not quite correct. Only 5, I repeat only 5 out of 21 of MOG's recommendations have been incorporated while the major part of the Bills originate from the Electoral Commission and the Fijian Elections Office.

It must also be stated that a number of the major recommendations of MOG have either been ignored or only partially acted upon. This is something I will be dealing with in detail when submitting on the specific clauses of the Bills.

But before I do that, it is important that I draw your attention to an observation made by the MOG regarding public perception of our electoral processes. I quote:

> *"Overall, conditions were in place for Fijians to exercise their right to vote freely. At the same time, the MOG observed there remains a lack of trust in Fiji's electoral processes in some quarters.*

The MOG considers that this remains an ongoing challenge that Fiji's electoral authorities must work actively to address, in partnership with Fiji's democratic institutions, political parties, civil society and citizens. The success of this election presents an opportunity for Fiji to strengthen its electoral system and institutions in ways that will sustain Fiji's electoral democracy into the future."

What it is saying in diplomatic language is that the people of Fiji lack faith in our electoral institutions. This is an extremely serious comment – central to the very threshold of our democracy. MOG says in "some quarters" but we all know that the majority of our people do not trust the system – there is widespread belief that the last two elections were not free and fair.

At the crux of the issue are the two principal oversight institutions that administer and manage the elections – the Office of the Supervisor of Elections and the Electoral Commission. The two institutions should be completely independent and apolitical. But they are not. I will look at each in turn.

<u>The Supervisor of Elections</u>

It is well acknowledged that the SOE does not enjoy public confidence – one only has to look at comments on the social media to realize the degree of distrust prevalent against him. Nor does he enjoy the confidence of opposition political parties.

At the time of his appointment in 2014 he did not meet the minimum requirements for the post. He was handpicked by the Minister for Elections, Attorney General Aiyaz Sayed-Khaiyum and has since been regarded as a hand-maiden of the Minister who is also the secretary general of the ruling Fiji First Party.

In the 2014 elections, the SOE gave several highly controversial rulings that were later overturned by the Court of Appeal. He had wrongly disqualified Labour candidate Steven Singh and allowed the nomination of Fiji First candidate Praveen Kumar (Bala) following challenges filed by political parties. Both decisions were thrown out by the Electoral Commission (EC) but the Supervisor refused to comply with the EC's ruling, using a technicality as an excuse. He later admitted that he was wrong in the Steven Singh case but still did not change his ruling.

Eventually the Commission headed by Lautoka lawyer Chen Bun Young took the matter to Court. The ruling went against the Supervisor and the Bench was highly critical of the Supervisor's insubordination to the Commission. Following this Supervisor of Elections Mohammed Saneem made public proclamations that he was to appeal against the Appeals Court ruling. However, I have checked with the Supreme Court Registry, no appeal was ever filed.

This is just one more instance of the duplicity we get from the Elections Office. Another incidence that eroded public trust in the Supervisor was his highly questionable decision to appoint the discredited Pakistani ITC company NADRA to provide elections software for the FEO. Wrongly or rightly, the move aroused deep suspicions regarding his motives to use a company that had featured strongly in serious malpractices uncovered in Pakistan, for which it was prosecuted.

The Electoral Commission

The Commission headed by Mr. Young was not re-appointed following the 2014 general elections. No doubt because it had a shown a degree of independence not appreciated by the powers that be.

It had also made a number of recommendations for changes to the electoral procedures and legislation in its 2014 Report but these were obviously not considered worthy by the powers that be.

The FLP has strong reservations about the independence and impartiality of the current Commission. To start off with it lacks physical independence. The Commission is housed in the same premises as the Supervisor of Elections. With due respect, the Chair of the Commission has to date not shown an independent streak but appears to be quite subservient to the decisions and actions of the Supervisor.

Secondly, in 2017 the Electoral Laws were amended to allow the Supervisor to function as Secretary to the Commission. This is absolutely preposterous and unheard of. The two offices must not only be independent of each other but must also be perceived to be so. The Commission is the review body – how can it credibly sit in review of the decisions and actions of the Supervisor when the SOE is the secretary to the Commission.

Little wonder the public has little trust in the two institutions. Besides, former members of the Commission have come out publicly pointing at the degree to which the Elections Minister interferes in the operations of the two bodies.

The integrity of the two electoral institutions also came under criticism from the UN High Commissioner for Human Rights, Zaid Ra'ad Al Hussein following his visit to Fiji in February 2018. He said, and I quote:

"*I am concerned about a basic structural flaw that bring into question whether these bodies are truly autonomous," he said referring to the Fiji Elections Office, the constitutional Offices Commission and the Human Rights and Anti-Discrimination Commission.*

Finally, it is important to point out that in the past it was constitutionally mandatory for members of the Electoral Commission to be appointed by the President, following consultations with the Prime Minister and the Opposition Leader. This practice was discontinued in the 2013 Constitution for no good reason.

Experience has shown that this government considers it is not in its interest to have truly independent electoral oversight institutions – ie the Supervisor of Elections and the Electoral Commission.

MOG's recommendation that the issue of trust - "an ongoing challenge" - should be actively addressed in partnership with political parties, civil society and the citizens, has obviously been ignored.

Thank you for your patience. I now come to the Bills proper.

Bill No. 52 of 2020

Amendments to the Political Parties Act

A close scrutiny of the Bill, seems to show that the underlying motive to most of the amendments appears to be to impose further restrictions on opposition political parties, particularly their ability to raise funds ahead of the 2022 general elections. They erode even further, the concept of a level playing field for all political parties.

This will be clearly evident in my comments as I go through the proposed amendments – I will focus on those that are of particular concern.

Clause 8 (s21)

I don't see the rationale behind this amendment. The Clause as it was originally worded was quite broad and covered all aspects.

Now 'assets' has been deleted and the scope of the Bill narrowed down to "income derived from any building owned by a political party". It makes no sense. I wonder if a particular Opposition political party with a building is being targeted here.

Clause 9 (s23)

This Bill refers to the publication of the financial statements of a political party. Under the present law the Registrar is required to publish the information in one of the daily newspapers.

The amendment shifts the onus for this on to political parties, requiring them to publish the information within 90 days of the end of their financial year.

I believe this is unfair. If the State requires the financial position of a political party to be made public, it should do so at its own expense. Why should political parties be required to pay for the publication of such information? The parties provide the information and that is where their responsibility must end.

Clause 10 (s24)

Two significant new subsections 2(A) and 2(B) have been inserted into this clause.

As amended, 2 (A) now requires a candidate standing for election to provide to the Registrar, within 30 days of polling day:

- an account of that person's, including his or her spouse and children's, total assets in Fiji or abroad as at polling day
- total income in Fiji or abroad at the time of nomination until polling day and the source of such income received by each of them during the period to which it relates
- directorships or other office held in a corporation or other organization, in Fiji or abroad, between the date of nomination and polling day
- assets acquired in Fiji or abroad during the stated period

Likewise, 2(B) requires a candidate, within 30 days of the Return of the Writ, whether elected to Parliament or not, to provide to the Registrar an account of any money received by him or her, the amount and source of any donation and the income and expenditure.

Mr Chairman, I am absolutely flabbergasted by these amendments. It is plainly a case of harassment of a candidate. Why are two sets of accounts required virtually for the same period?

The Fiji First Party was allowed to accumulate close to $7m in party donations between 2014 and 2019, under circumstances that are clearly suspect *vis a vis* prohibitions on donations to political parties from corporate organisations. I had asked the Electoral Commission to investigate the legitimacy of these donor funds but was told they were above board.

There is strong public perception that most of it was sourced "illegitimately" from corporate funds but disguised as personal donations. There is no way of knowing whether some of these were acquired voluntarily or through coercion by the ruling party. These are legitimate questions for which the Electoral Commission refuses to seek answers.

My concern is that now that the Fiji First has acquired its largesse, the bolts are being put in place for opposition parties and candidates from seeking campaign funds. For the 2022 general elections, the Elections Office is putting in place stringent regulations to scrutinize the campaign funding of other parties and candidates.

In my books, this is simply another form of rigging the elections by making it extremely difficult for other candidates and parties to fund their election campaign.

Secondly, it's simply a form of intimidation and harassment. There is absolutely no doubt that the new requirement is to deter and discourage qualified, competent people from contesting elections.

These amendments have to be seen in conjunction with Clause 8 (s21) which requires political parties to provide the full names and addresses of donors. In the current climate of fear and intimidation under the rule of Fiji First, how many donors will want to publicise their support and affiliation to opposition parties by giving donations now. They will fear victimisation.

No, Mr Chairman, these amendments have nothing to do with recommendations made by the MOG. It is simply the government, knowing how unpopular it has become, using all means at its disposal to make it very difficult for opposition parties to mount effective campaigns leading up to the 2022 elections.

My final point on these amendments 2 (A) and (B) is why bring in these stringent provisions for unelected candidates, when there are no such requirements for elected Members of Parliament.

The Fiji Labour Party has been agitating for Code of Conduct and Freedom of Information legislations to be enacted for at least 7 years now. The nation has been waiting in vain for these two pieces of constitutionally mandated legislation to hold their elected representative accountable.

In a country where Government Ministers and MPs are not being held accountable, isn't it an absurdity to hold unelected candidates accountable? It's absolutely clear where the Elections Office is coming from. It has never been independent and it is show casing it's lack of neutrality through such provisions.

Clauses 10 and 11 (s24 and s25) are similarly motivated. The Clauses are directed at candidates and political parties requiring them to submit to the Registrar, within 30 days after polling day:

- an account of their assets and liabilities as at polling day
- income and expenditure including all contributions, donations or pledges of contributions or donations whether in cash or kind from the date the Writ is issued to polling day etc.

It would make more sense to require candidates and parties to report campaign expenditure and to set a reasonable limit to such expenditure to provide a level playing field, as recommended by MOG.

This would be laughable if the issue wasn't so serious. I see it as a case of shutting the gate after the horse has bolted. The biggest offender (Fiji First) in this respect gets off scot free while the opposition parties which operate on comparably insignificant budgets, are being put to scrutiny.

The point I wish to make here is that the amendments are unnecessary unless they are meant to hound, which appears to be the case.

Clause 12 (s26)

This amendment requires the parties to publish their audited accounts in the media, at their cost. Once again, I believe if the State wants such matters publicized it should do so at its own expense. Why ask political parties to do so?

After all, all political parties except Fiji First present their audited accounts annually to their members at their general meetings. The Fiji First it seems does not have general meetings of members.

Clause 13 (s30):

This clause removes a person's right of appeal against the decisions of the Registrar to the High Court. It now requires all such matters to be dealt with by the Electoral Commission.

This is a grave issue. It is clearly another attempt to confer more powers on the Electoral Commission which we submit cannot be seen as independent of the Registrar who is the secretary to the Commission. There is a clear conflict of interest here.

The amendment is clearly unconstitutional. Section 15 (2) of the Bill of Rights in the 2013 Constitution states, and I quote:

15 (2) : *"Every party to a civil dispute has the right to have the matter determined by a court of law or if appropriate, by an independent and impartial tribunal.*

Delegating this right to the Electoral Commission, which I reiterate is not truly independent or impartial of the Office of the Registrar, is tantamount to denying the complainants their constitutional rights.

The right to appeal must remain with the High Court. This right cannot be removed.

Clause 14 (s30)

This is a new insert which deals with dispute resolution and suggests that a political party may write to the Electoral Commission asking it to mediate or arbitrate in case of dispute between political parties on any campaign issue.

We question the rationale behind this new insert. As a rule, for mediation or arbitration to take place, the dispute has to be referred by the consent of both parties. It should not be done at the request of just one of the disputing parties. So what is the point of inserting such a clause?

In any event, the Electoral Commission must not be permitted to compromise its independence by involving itself in disputes between political parties which relate not to electoral but political campaign issues.

This concludes our submissions on Bill No. 52. I now turn to Bill No. 50.

Bill No. 50 of 2020
Amendments to the Electoral Act 2014

This is largely a housekeeping Bill but there are some serious issues that the Labour Party finds unacceptable.

Clause 8 (s36)

To start off with we welcome the move to allow Party symbols or Party names to be included in the National Candidates List. This is something that opposition parties had been demanding since 2014. It was included in the recommendations of MOG in 2014 and in 2018. It was also recommended by the Young Electoral Commission of 2014.

However, the power to allow this must not be vested in the Supervisor of Elections as proposed in the Bill. It should be stipulated in the Act, providing for the Party symbol and name to appear on the List.

Clause 10 (9)

This intends to set up a special polling venue in Suva for overseas registered voters to cast their votes if they happen to be in Fiji at the time. FLP does not subscribe to this view. Overseas residents must cast their votes by postal ballot for which they should be allowed to apply while in Fiji.

Clause 35 (s144A)

This is a new insert regarding the publication of false statements by political parties which is likely to influence the outcome of an election or diminish public confidence in the performance of duty or function of the Supervisor and the Electoral Commission.

While we do not subscribe to the propagating of false information, we believe this carries with it the potential for abuse by the Elections Office. The offence carries a heavy penalty with a fine of up to $50,000 or a 5 year jail term or both, in contradiction of Recommendation 5 of the MOG Report which says that penalties for electoral offences should be proportionate and generally civil in nature rather than criminal.

The amendment does not state whether the offenders will not prosecuted if they take corrective action under s144 A (2). This needs to be clarified.

We believe this to be draconian. The appointed arbiter in this case is the Electoral Commission. The Commission may also be affected by the alleged false information.
FLP recommends the appointment of a completely independent arbiter to deal with the matter. Preferably, the matter should be referred to the Courts, as it would deem to fall in the category of a criminal offence..

The Supervisor's Office and the Electoral Commission are now closely aligned with the SOE functioning as secretary to the Commission. There is little likelihood of the Commission acting independently of the SOE in such instances.

As we have stated earlier, something that has also been raised by MOG, there is a lack of public trust in the electoral processes which primarily implies a lack of trust in the Fijian Elections Office and the Electoral Commission. This makes the case for an independent arbiter or referee even more crucial.

The existing Clause provides for a fine of $10,000 and/or up to a five year jail term for a similar offence against a candidate. Why such a steep fine when the Elections office is involved?

<u>Clause 36 (s153)</u>

The amendment allows the Elections Office to destroy election records in 6 months instead of the one year currently prescribed . This is not acceptable. Records should be kept for at least a year before they are destroyed.

In the case of electoral fraud, there is no time limit to a challenge being mounted. Records should therefore be kept for a longer period before they are destroyed.

Clause 27(s109)

This amendment allows the Supervisor three months to submit a report to the Commission on the election results instead of the existing one month. Elections are important processes. We do not see why it should take the Supervisor three months to submit his report on election results which is all the Act requires.

The results are announced within 2 days of the close of polling so why should one month not be sufficient?

MOG Recommendations

Mr Chairman, I had said earlier that only five (5) of the 21 Recommendations of MOG had been acted upon.

Of the 16 not acted upon are those that require a review of s18 of the Electoral Act to ensure that the Supervisor of Elections, the Registrar of Political Parties and the Electoral Commission can administer the law constructively, seeking compliance before redress, and with criminal investigation as a last resort (Recommendation 4).

As will be seen, nothing has been done to act on this important Recommendation even though the inference therein is that currently the Act is not being administered constructively.

Recommendation 5 called for a review of the electoral offences to ensure penalties are proportionate and generally civil in nature rather than criminal. This too has been ignored.

The penalties (fines and prison sentences) prescribed under both the Acts are grossly disproportionate to the offences and were deliberately so done in the Decrees in 2013 and 2014 to intimidate opposition political parties officials and activists.

Recommendation 14 called for a review of the provisions in the Political Parties Act (s14) regarding restrictions on public officers joining political parties. The current provisions violate their civil and political rights, in gross contravention of the International Convention on Civil and Political Rights.

More absurdly, officials and employees of trade unions and employer organisations are categorized as public officers and barred from exercising their political rights including the right to contest elections.

This restriction has been widely condemned internationally but remains entrenched in the 2013 Constitution and the Act because it is a deliberate move by the Fiji First government to suppress the unions.

Recommendations 20 and 21 were on the Media and Elections, calling for clarification of the restrictions on media reports during the blackout period, before and during polling and a review of the media regulatory framework, including penalties and reporting against public and national interest. Here too the status quo continues.

The other recommendations not specifically mentioned deal with enhancing transparency and inclusivity in the electoral processes. Most of these have also been ignored by the Electoral Commission.

Apparently, the FEO and the Electoral Commission have acted only on those recommendations which they found to be expedient, ignoring the others which called for proper democratic processes to be followed in the administration of our Electoral Laws.

Conclusion

Honourable Chair and Members, that concludes our submissions on the Bills.

Thank you for inviting the Fiji Labour Party to your consultation hearing. Our thanks also go to members of the Staff for the courtesy extended to us.