Opinion prepared on instruction of Commission of Inquiry into the appointment of the Commissioner of the Fiji Independent Commission against Corruption

Introduction

1 The Commission of Inquiry (CoI) to inquire into matters relating to the appointment of the Commissioner of the Fiji Independent Commission against Corruption (FICAC) has instructed me to advise whether the Commissioner may be lawfully suspended from her duties pending the completion of the CoI's inquiries.

2 The CoI specifically seeks my opinion on the following issues:

(i) does the Judicial Services Commission (JSC), after consulting the Attorney-General, have the power under s 44 of the Interpretation Act 1967 to recommend to the President of Fiji, His Excellency Ratu Naiqama Tawakecolai Lalabalavu (HE), that the FICAC Commissioner be suspended for the duration of the CoI?

(ii) does HE have the power under s 82 of the Constitution, acting on the advice of the Prime Minister, Rt Hon Major-General Sitiveni Rabuka (PM), to suspend the FICAC Commissioner on an interim basis, for the duration of the CoI?

(iii) if HE is able to suspend the FICAC Commissioner on an interim basis acting under s 82 of the Constitution, is HE able to appoint some person as the Acting Deputy Commissioner in the interim without the recommendation of the JSC?

3 For purposes of organising my advice, I will call each of the above issues: Issue one, Issue two, and Issue three.

Executive summary

4 The JSC has the power under s 44 of the Interpretation Act 1967 to recommend that HE suspend the FICAC Commissioner from duties for the duration of the CoI. The power vested in HE to appoint the Commissioner imports also the power to suspend the Commissioner. Section 44 provides that a power to appoint imports also a power to suspend or revoke.

5 The President, acting on the advice of the Prime Minister, has the power to suspend the FICAC Commissioner in exercise of "the executive authority of the State" (s 81(2) of the Constitution). The vesting of these powers in the President internalises the

appointing power formerly exercised under the royal prerogative. The power to appoint to office under s 81(2) imports also the power to suspend from office.

6 The analysis set out in [24]–[45] applies equally to the appointment of a Deputy Commissioner. The executive authority vested in the President under s 81(2) embraces the appointing power that was formerly exercised under the prerogative. The exercise of executive authority under s 81(2) is on the advice of the PM (s 82), not on the recommendation of the JSC.

7 The CoI is a high-level body, established by HE on the advice of the PM. The CoI should not be beholden to the JSC, a subordinate body under the Constitution, in order to discharge its inquiry functions in the public interest. As matter of constitutional propriety, the JSC should grant its recommendation under s 44 of the Interpretation Act 1967 to secure the suspension of the FICAC Commissioner. The CoI must be free to perform its inquiry functions without hindrance or obstruction.

Issue one

8 This issue raises the question whether s 44 of the Interpretation Act 1967 provides the necessary authority for the JSC to recommend to HE the interim suspension of the FICAC Commissioner. I advise that s 44 provides the necessary authority.

9 The relevant part of s 44 reads:

> **44 Power to appoint to include power to suspend dismiss etc**
>
> Where by or under any written law, a power or duty is conferred or imposed on any person or authority to make any appointment … then, unless a contrary intention appears, the person or authority having such power or duty shall also have the power to remove, suspend, dismiss or revoke the appointment, of, and to reappoint or reinstate, any person appointed in the exercise of the power or duty … provided that where the power or duty of such person or authority so to act is exercisable on the recommendation, or is subject to the approval or consent, of some other person or authority, then such powers shall, unless a contrary intention appears, be exercisable only upon such recommendation or subject to such approval or consent.

10 Appointment of the FICAC Commissioner is made "under any written law" within the meaning of s 44. The appointment is not made under the Constitution but under the written law. Section 5(1) of the Fiji Independent Commission Against Corruption Act 2007 (FICACA) provides that the Commissioner shall be appointed by HE on the recommendation of the JSC, following that body's consultation with the Attorney-General.

11 Section 44 is a standard machinery provision found in most Interpretation Acts. In New Zealand, for example, the Legislation Act 2019 replicates s 44 in more compendious form:

> **45 Power to appoint persons to an office includes related powers**
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> The power to appoint a person to an office includes the power to –
> (a) remove or suspend a person from the office:
> (b) reappoint or reinstate a person to the office:
> (c) appoint (temporarily or permanently, and for all or limited purposes) another person in place of a person who –
>
> ...
>
> (v) has been removed or suspended from the office.

12 There is no obstacle to s 44 applying in the present matter. HE appointed the FICAC Commissioner, so HE may suspend the Commissioner. The one qualification is that HE must act on the recommendation of the JSC, following consultation with the Attorney-General. Following any suspension, HE can also reinstate the Commissioner, providing the JSC so recommends following consultations with the Attorney-General.

13 Section 44 is straightforward and unambiguous. Its terms do not support the view of the JSC, that the JSC lacks power to make a recommendation to suspend the FICAC Commissioner. I refer to the letter of the JSC to Counsel Assisting the CoI, Ms Janet Mason, dated 29 January 2025. The JSC stated in [3]: "The general view was that the Judicial Services Commission does not have the power to suspend the Commissioner of the Fiji Independent Commission Against Corruption."

14 The JSC is correct on one point: it does not have the power to suspend the FICAC Commissioner. HE is invested with that power (the power to appoint includes the power to suspend). The JSC intended to say that it lacks the power to make the *necessary recommendation* to HE. HE can exercise the power under s 44 to suspend only upon the recommendation of the JSC.

15 The JSC cited in support s 115(6) of the Constitution. With respect, this provision does not assist. It reads:

> "(6) In the performance of its functions or the exercise of its authorities and powers, the Commission shall be independent and shall not be subject to the direction or control of any person or authority, except by a court of law or as prescribed by written law."

16 This provision has no relevance to the present matter. It is an operational provision. Its purpose is to protect the operational independence of the FICAC against the untoward interference of persons in the discharge of its law enforcement functions.

The subsection speaks to "the performance of its functions or the exercise of its authorities and powers".

17 No *functions* or *authorities* or *powers* of the FICAC are in issue. The interim suspension of the Commissioner would not disable the FICAC from continuing to discharge its functions and powers. Under the FICACA, the Commissioner includes the Deputy Commissioner (s 2). A Deputy Commissioner would automatically stand in the shoes of the Commissioner and expedite the work of the FICAC (see further s 115(5) of the Constitution). Presently, there is no Deputy Commissioner but I am instructed that persons are available to fill that office, either on the recommendation of the JSC or, failing that, under the appointing power secured by s 81(2) of the Constitution (see below [24]–[45]).

18 There is a further problem with the JSC's explanation. Under s 115(6), the FICAC shall not be subject to direction and control, "except by a court of law *or as otherwise prescribed by written law*" (emphasis added). Section 44 of the Interpretation Act 1967 is "written law". If suspension of the FICAC Commissioner (relying on that provision) would be an interference in the FICAC's functioning, then it is authorised by "the written law" (s 44) within the meaning of s 115(5) of the Constitution.

19 For reasons best known to it, the JSC is reluctant to be implicated in this matter. In its letter to Counsel Assisting, dated 29 January 2025, the JSC expressed its "general view … to let the law take its normal cause [sic]". It observed that "the police are to be left to conduct their investigation independently, without the JSC unnecessarily complicating things by stepping in".

20 I am not asked to pass judgement on the JSC. However, I am instructed that the continuing presence of the FICAC Commissioner at FICAC is hampering the CoI's inquiry functions mandated by its terms of reference. HE, on the advice of the PM, established the CoI in the public interest to secure due process. The JSC is in dereliction of its duty by declining to assist the CoI.

21 The terms of appointment of the FICAC Commissioner are not relevant to proceedings to suspend the Commissioner. The Commissioner's terms of appointment provide that the holder of the office may be removed for cause, and adopt for that purpose the removal procedures for Judges under s 112 of the Constitution (letter of the President Ratu Williame Maivalili Latonivere to Ms Barbara Malimali, 4 September 2024, "Terms and Conditions of the Commissioner FICAC" attached). However, no removal process has been activated, or is proposed to be activated at this time. The CoI seeks the interim suspension of the Commissioner pending the completion of its hearings and inquiry functions. The need to establish cause applies to removal proceedings, not proceedings to suspend the Commissioner.

22 Section 5(1) of the FICACA confers the power to appoint FICAC Commissioners, and this power can be exercised only on the recommendation of the JSC. Any exercise of

the (lesser) power to suspend under s 44 of the Interpretation likewise requires the recommendation of the JSC.

23 For completeness, I mention that the CoI could not rely on s 112(4) of the Constitution to suspend the FICAC Commissioner. This provision authorises the suspension of Judges "or any other judicial officer appointed by the Judicial Services Commission". The Commissioner is not "a judicial officer" within the meaning of s 112(4). The JSC appoints Judicial Officers (Constitution, s 163(1)), whereas HE appoints the FICAC Commissioner on the recommendation of the JSC (FICACA, s 5(1)).

Issue two

Context

24 My instructions seek my opinion on whether HE has the power under s 82 of the Constitution, acting on the advice of the PM, to suspend the FICAC Commissioner. I advise that s 81(2) is the crucial empowering provision; s 82 regulates the exercise of the powers so conferred.

25 I advise that s 81(2) furnishes the power to suspend the FICAC Commissioner on an interim basis. That provision also furnishes the power to reinstate the Commissioner, once the CoI has completed its mandated task. Section 82 requires that those matters be achieved on the advice of the PM.

26 Sections 81(2) and 82 read:

> 81(2) The President is the Head of State, and the executive authority of the State is vested in the President.
>
> 82 In the exercise of his or her powers under executive authority, the President acts only on the advice of Cabinet or a Minister or some other body or authority prescribed by the Constitution for a particular purpose as the body or authority on whose advice the President acts in that case.

Executive authority of the State

27 Section 81(2) is the lynchpin of the executive branch of government. It vests the "executive authority of the State" in the President. The term "executive authority" is a compendious term that includes all of the established powers, prerogatives and authorities of executive government.

28 The term "executive authority" includes the power of appointment to executive or judicial office. The power of appointment is an ancient one secured historically under the royal prerogative. At common law (and by analogy to s 44 of the Interpretation Act 1967), this power imports also the incidental powers to revoke an appointment or to suspend it.

29 All of the Crown's prerogatives travelled with the expansion of the empire in colonial times. English and colonial authorities affirmed that the royal prerogative was as bountiful and extensive in the colonies as in Great Britian (*Kielley v Carson* (1842) 4 Moo PC 63 at 85; *Solicitor-General v Corp of the City of Dunedin* (1875) 1 NZ Jur (NS) 1 at 14-15; *Maritime Bank of Canada v Receiver-General of New Brunswick* [1892] AC 437 (PC)).

Prerogative accommodated under executive authority of the State

30 In *Iloilo v Commander, Republic of Fiji Military Forces* Judicial Review NO:HBJ of 2005 at [33], the High Court of Fiji considered it "clear that before 1970 Her Majesty exercised her royal prerogatives as Queen of Great Britain and its colonies in respect of Fiji". Following Fiji's accession to independence in 1970, Her Majesty exercised the royal prerogative henceforth "as Queen of Fiji and not as Queen of Great Britain" (at [33]).

31 Under the 1990 Constitution, the Court observed (at 34]), Fiji was declared a Republic, with executive authority vesting in the President exercisable on the advice of the PM or Cabinet. That position was carried over under the 1997 Constitution, and thereto the current Constitution of 2013. The current Constitution re-enacts verbatim the 1997 provision vesting the executive authority of the State in the President (see s 81(2) reproduced above at [25]).

32 In *Qarase v Bainimarama* [2009] FJCA 9, [2009] 3 LRC 614, the Court of Appeal observed that this vesting of authority in the President subsumed the prerogative power, as a separate source of constitutional authority. "The right question is," the Court observed (at [79]), "what is the scope of the [s 81(2)] power." That power undoubtedly includes the prerogative to make appointments to executive and judicial office.

33 The appointing power is the first of 13 political prerogatives listed in the New Zealand text, *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at 733–752. The appointing power is expansive and indispensable. It embraces the appointment of: the Prime Minister, Ministers comprising Cabinet, Judges, Kings Counsel, royal commissioners and commissions of inquiry, military officers, recipients of Royal Honours, diplomats and consular representatives, and national representatives accredited to international organisations.

34 In *Qarase v Bainimarama* [2009] FJCA 9, [2009] 3 LRC 614 at [127], the Court of Appeal affirmed that Fiji inherited the full suite of prerogative powers from its colonial beginnings. The Court drew a comparison with the list of prerogative powers in Australia, recorded in Quick and Carran *Annotated Constitution of the Australian Commonwealth* (1987) at 28–31.

Appointing power includes power to suspend

35 The appointing power subsumed under the executive authority of the State establishes incidental powers at common law and by analogy to s 44 of the Interpretation Act 1967. The power imports the incidental powers to suspend appointees to an office and to reinstate such persons to the office.

36 I advise that HE has the power under s 81(2) of the Constitution to suspend the FICAC Commissioner. Under s 82, that power must be exercised with the concurrence and advice of the PM. Similarly, HE, with the concurrence and advice of the PM, has the power to reinstate the FICAC Commissioner following any suspension HE might effect.

37 It would be a grave lacuna in Fiji's constitutional apparatus if the Constitution did not supply the power of suspension in circumstances such as the present. There is ample judicial authority that constitutions must be given a "generous interpretation", and applied expansively, avoiding what has been called "the austerity of tabulated legalism" (*Minister of Home Affairs v Fisher* [1980] AC 319 (PC) at 328). The Constitution mandated such an interpretation at s 3(1) which states:

> Any person interpreting or applying this Constitution must promote the spirit, purpose and objects of this Constitution as a whole, and the values that underlie a democratic society based on human dignity, equality and freedom.

38 The CoI will be seriously compromised if is unable to secure the interim suspension of the FICAC Commissioner. I am instructed that her continuing presence is seriously hampering the CoI's evidential and fact-finding functions.

39 My only caveat concerns s 5(1) of the FICACA. This provision stipulates that HE, acting on the recommendation of the JSC (in consultation with the Attorney-General), shall appoint the FICAC President. Does this requirement preclude the executive power of appointment under s 81(2) of the Constitution? Although the FICACA represents the written law, the Constitution is the supreme law that overrides and controls all law. I advise that s 5(1) of the FICACA does not pre-empt the appointing power (and thereto the suspending power) arising under s 81(2).

Judicial equivocation

40 The Courts have equivocated over the effect of s 82(1) and the vesting of executive power in the President. They have grappled with the question whether, and if so, to what extent, the prerogatives of the Crown have survived Fiji's transition to an independent Republic. That equivocation may be understandable, given the fraught context where these questions have arisen – principally in situations of national emergency following a coup d'état or military usurpation.

41 The equivocation is partly over the appropriate nomenclature. In *Qarase v Bainimarama* [2009] FJCA 9, [2009] 3 LRC 614 at [115], the Court of Appeal stated that the absence of any reference in the Constitution to prerogative is not a conclusive statement that prerogative powers do not exist. They do exist, in fact, but not as a separate source of law. The Constitution refers sub silentio to their subsumed existence as part of the executive authority of the State (s 81(2)).

42 Various decisions have either recognised or equivocated over the survival of the prerogative post-1990. In *State v Patel* 2002 FJCA 13, 2002 FLR 480 (Full Ct), the Court of Appeal held that the royal prerogative founded the common law principle that the State cannot be liable to pay costs in criminal proceedings. Similarly, in *Iloilo v Commander, Republic of Fiji Military Forces* Judicial Review NO:HBJ of 2005 at [27], counsel for the State conceded that prerogative powers continued to exist despite Fiji's independence as a Republic. The High Court held that the prerogative of the Commander-in-Chief had constitutionally survived intact and could only be ousted or restricted by "specific legislation".

43 In *Iloilo* the Court acknowledged the continuing operation of the prerogative of mercy (at [75]: see also *Qarase v Bainimarama* [2009] FJCA 9, [2009] 3 LRC 614 at [127]). This prerogative has constitutional standing under s 119 of the Constitution. This provision carries over the Commission on the Prerogative of Mercy (established under the State Services Decree 2009) and prescribes procedures for expediting petitions for mercy. Section 119 attests to the interrelationship of the Constitution and prerogative, which makes understandable the judicial equivocation.

44 The Constitution is the supreme law (s 2(1) of the Constitution). Pre-eminence must be given to it over all other sources of law. Any law that is inconsistent with the Constitution is invalid to the extent of the inconsistency (s 2(2) of the Constitution). The appropriate rationalisation of the prerogative today is through the lens of the Constitution. The former prerogatives of the Crown are now incidents of "the executive authority of the State" as that phrase is used in s 81(2).

45 There is little purpose, from a legal or constitutional perspective, referring to the former prerogatives of the Crown, except for informing the scope of "the executive authority of the State" (s 81(2)). In *Qarase v Bainimarama* [2009] FJCA 9, [2009] 3 LRC 614 at [79], the Court of Appeal affirmed that the content of executive authority under (what is now) s 81(2) "is informed by the common law", which includes the royal prerogative. In the same paragraph, the Court alluded to "common law prerogatives".

Issue three

46 In the event that the FICAC Commissioner is suspended, can HE appoint someone as Acting Deputy Commissioner in the interim, without obtaining the recommendation of the JSC?

47 Section 6 of FICACA provides the procedures for the appointment of the Deputy Commissioner. This section adopts the identical provisions set out in s 5(1) for the appointment of the FICAC Commissioner. HE appoints the Deputy Commissioner on the recommendation of the JSC, following consultation with the Attorney-General.

48 On the analysis set out in [24]–[45], I advise that HE, on the advice of the PM, can appoint an Acting Deputy Commissioner under the executive authority vested in the President under s 81(2) without obtaining the recommendation of the JSC.

49 In [39] above, I advise that the provisions of the FICACA do not restrict or limit the scope of executive authority vested in the President under s 81(2) (the supreme law). The exercise of executive authority under s 81(2) is on the advice of the PM, not on the recommendation of the JSC.

Philip A Joseph LLD, KC
Professor of Law
Barrister at Law
University of Canterbury

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