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08 February 2019

Dear Honourable Avhikrit Alvick Maharaj,

Re: Submission on the Code of Conduct Bill No. 33 of 2018

Please find attached the submission from the Office of the United Nations High Commissioner for Human Rights (OHCHR) on the ***Code of Conduct Bill 2018 (Bill No. 33 of 2018)***.

OHCHR would be available for any future engagement including an audience with the Standing Committee on our written submissions.

We thank the Standing Committee on Justice, Law and Human Rights, Parliament of Fiji for the opportunity.

Yours sincerely,

Dr. Chitrlekha Massey

Regional Representative for the High Commissioner in the Pacific

Honourable Avhikrit Alvick Maharaj
The Chairperson
Standing Committee on Justice, Law and Human Rights
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**SUBMISSION TO
STANDING COMMITTEE ON JUSTICE, LAW & HUMAN RIGHTS,
PARLIAMENT OF FIJI
ON
CODE OF CONDUCT BILL 2018 (BILL NO.33 OF 2018)**

**Office of the United Nations High Commissioner for Human Rights
Regional Office for the Pacific (OHCHR)**

I. INTRODUCTION

The Office of the United Nations High Commissioner for Human Rights Regional Office for the Pacific (OHCHR, ROP) presents its submission on the *Code of Conduct Bill 2018 (Bill No.33 of 2018)*, referred to hereinafter as “the Bill”.

Honourable Chairman, this submission highlights the main human rights concerns arising from the bill from the perspective of international human rights law.

II. BACKGROUND

This Bill stems out of a legal requirement for legislation to be made under section 121 of the 2013 Constitution of Fiji which establishes an Accountability and Transparency Commission and section 149 which constitutionally binds the Fijian Government to enact legislation to bring Code of Conducts into effect. A legislation requiring a Code of Conduct was mentioned under Section 156 of the 1997 Constitution but no Bill had been brought forward by the former Fiji Governments to effect this. Sections 121 (9), (14) and (15) of the 2013 Constitution gives powers to the Commission to receive and investigate complaints against Permanent Secretaries and all persons holding a public office. Pursuant to Section 149 of the 2013 Constitution, this Bill also brings about Code of Conducts governing different levels of officials such as the President, Speaker, Deputy Speaker, Ministers, members of Parliament, permanent Secretaries, ambassadors or other principal representatives of the state, heads of Commissions and statutory bodies and other public officers.



This Code of Conduct Bill was tabled in Parliament in 2016 but had lapsed and efforts are being made to re-table it again in 2019. A motion was put forward in Parliament to refer the Code of Conduct Bill to the Standing Committee on Justice, Law and Human Rights after consultations, before it is tabled in Parliament's next sitting.

Public consultations are currently being held around Fiji with final round of consultations in Suva held on 28th to 30th January 2019.

III. MAIN FEATURES OF THE BILL

The Bill establishes an Accountability and Transparency Commission ("Commission") that will primarily monitor compliance and enforcement of the Codes of Conduct. Part 2 of the Bill provides for the functions and powers of the Commission. One of the express functions of the Commission as provided under the Bill is to receive and investigate complaints and refer matters with merit to FICAC for prosecution. There are criminal offences listed under the Bill with its accompanying fine and imprisonment term upon a finding of guilt by the court of law.

Part 3 of the Bill prescribes five separate Codes of Conduct through its Schedules. These are as follows:-

- (a) Code of Conduct for the President, Prime Minister and Ministers (Schedule 1),
- (b) Code of Conduct for the Speaker and members of Parliament (Schedule 2),
- (c) Code of Conduct for judicial officers (Schedule 3),
- (d) Code of Conduct for members of Commissions and statutory bodies (Schedule 4)
- (e) Code of Conduct for all public officials (Schedule 5).

Part 4 of the Bill provides provisions for the investigation of complaints made to the Commission and for the referral of complains to the prosecuting authority.

The Commission can summarily dismiss complaints and there are provisions that deal with the prosecution of complainants that lodge "malicious" complaints. Part 5 of the Bill provides for protection of complainants and ensures that a person who makes a complaint to the Commission is given immunity and that the person's identity is protected.

Part 6 requires specific officials to declare their assets, liabilities and income to the Commission on a yearly basis. This financial disclosure is also accessible to members of the public upon payment of a fee. Part 6 also imposes penalties for failure to declare income, assets, other interests and liabilities.

Part 7 of the Bill empowers the line Minister in consultation with the Commission to make regulations necessary for its implementation.



IV. LEGAL FRAMEWORK AND CONCERNS

The Code of Conduct Bill has several issues of interest concerning the limits on the rights and freedoms available to Fijians. However, the 2013 Constitution of Fiji allows for limitations to be placed on certain human rights and freedoms, including freedom of expression, speech and publication and right to privacy and access to information if it is prescribed by, or by actions taken under the authority of a legislation.

A. Discriminates Against People With Strong Political Beliefs And Opinions

Matters of concern from the human rights perspective are raised concerning Section 12 of the Code of Conduct Bill which states as follows:-

- “12.—(1) *The Commission must investigate any complaint received by the Commission, unless the Commission is of the opinion that—*
- (a) *the complaint is trivial, frivolous, vexatious, lacking in substance or not made in good faith;*
 - (b) *the complaint is malicious or is politically motivated or is made for the purpose of discrediting, defaming, or causing reputational damage to, the person the subject of the complaint;...*”

(Underlining for emphasis)

This provision stipulates that the Commission has a discretion to investigate a complaint based on its “opinion” and not upon any actual establishment of fact. The Commission can dismiss any complaint solely based on its opinion in this regard. It can give an opinion that a complaint has no substance without carrying out an actual investigation.

Such a provision leaves fertile ground for abuse of power or interference by the members of the Commission in the access to justice and needs to be amended. The Bill is meant to bring about transparency and accountability of public office holders but there is no transparency in the way complaints will be handled or dismissed. There should be recognition that if a complaint was submitted in good faith, it cannot be malicious. The wordings of this provision should be relooked and amended. The terms ‘malicious’ and ‘politically motivated’ needs to properly defined in the Bill, otherwise it will lend themselves to broad interpretation and abuse.

Section 23 of the 2013 Constitution enshrines freedom to make political choices and the right to people to campaign for a political party, participate in the activities for a political party and / or join a political party of their choice. The constitution does not allow a limitation of this right for the purposes described under the Code of Conduct Bill.

One of the reasons for dismissing a complaint without any investigation by the Commission, is if the Commission finds that the complainant was “politically motivated”. The words “politically motivated” or “malicious” are not defined under the Bill.



The words “politically motivated” can be ordinarily interpreted as a person who holds strong political views in the interest of a political body or who is a strong supporter of an opposing political party to the Government or who may write or publish stories about the Government or the Commission or who expresses anti Government sentiments. Such complainants who are classed as “politically motivated” by the Commission, not only risk their complaints to be not investigated or taken seriously, they also risk being investigated by the Commission themselves and getting charged by FICAC.

Article 19 of the UDHR states that everyone has the right to freedom of opinion and expression which right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. Sections 12, 13 and 14 make a distinction and discriminate people based on their political beliefs.

Article 26 of the ICCPR states that all persons are equal before the law and are entitled without any dissemination to the equal protection of the law.

In this respect, the law in Fiji should prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on grounds such as holding political or other opinion amongst others. Therefore, the Code of Conduct Bill that includes provisions such as being politically motivated as a ground for criminal prosecution should be amended to conform to the standards and principles of the UDHR and ICCPR to which Fiji is a party.

Section 26 of the 2013 Constitution of Fiji states that every person is equal before the law and has the right to equal protection, treatment and benefit of the law. However, the Code of Conduct Bill seems to discriminate against people holding strong political views or opinions and does not accord them similar privileges such as getting their complaints investigated.

It is submitted that the words “malicious” be properly defined within the boundaries and aspirations of the human rights conventions. The drafters should consider omitting or removing the words “politically motivated” from the Bill entirely.

B. Vague and undefined Provisions

Interestingly, Section 3 of the Bill states that the power, authority, duty and function of the Commission is said to be prescribed under the Bill. For example, the Bill as is worded is currently dependent on someone filing a complaint. It would be prudent to add an obligation on the Commission to open a complain *motu proprio* when it suspects violations of the code of Conduct. However, neither the Bill nor its Schedules provide any clarity on the rules, procedures or limits on the way the Commission will function or process of implementation of the Code of conduct as it is required to under Section 149 (b) of the 2013 Constitution.



Section 4 of the Bill provides discretion to the Commission to make ad hoc guidelines and directions from “time to time” for the performance of the Commission’s functions and for the handling of complaints but this is not the intention under Section 149 (b) of the 2013 constitution as there is no transparency.

The lack of definition to the words “politically motivated” is of concern from a human rights angle especially if there is a criminal penalty attached to such complainants and goes to the heart of human rights. The Preamble of the Universal Declaration of Human Rights (UDHR) states that the highest aspiration of the common people is enjoying freedom of speech and belief and freedom from fear. Section 12(b) of the Code of Conduct Bill is against public interest and may deter meritorious complaints being put forward against persons of power for fear of being prosecuted under Section 13 of the Code of Conduct Bill.

Section 13 of the Code of Conduct Bill states: -

“13. Any person who makes a complaint which is malicious or is politically motivated against the person the subject of the complaint or is made for the purpose of discrediting or defaming, or causing reputational damage to, the person the subject of the complaint commits an offence and is liable upon conviction to a fine not exceeding \$10,000 or imprisonment for a term not exceeding 5 years or both.”

This provision deters complaints being made to the Commission based on fear of being prosecuted especially by people who are known to have strong political opinions and views. Article 2 of UDHR states that everyone is entitled to all rights and freedoms without distinction of any kind, including “political or other opinion”.

Section 16 of the Bill states of situations of exceptions where disclosure of certain matters is not required and one such exception is if the answering of question involves disclosure of proceedings, deliberations or decisions of Cabinet which relate to matters of ‘a secret or confidential’ nature. The terms ‘secret and confidential’ needs to be defined properly in the Bill. There should be a presumption against governmental information being secret and confidential. Otherwise, it will be very easy for Government officials to decline providing information based on what they consider “State secrets”. The Bill as is worded and by virtue of section 16 (4), requires either the Attorney General or the Prime Minister to decide whether the information falls under “State secrets” or is confidential in nature.

It is respectfully submitted that for clarity, the terms be properly defined in the Bill.



C. Inconsistency of Provisions with the 2013 Constitution

Section 20 of the Bill of Code makes provisions of immunity for complainants. This section is however limited given that immunity is forfeited for the reasons outlined in Section 12 and Section 24. These provisions limiting immunity on the grounds expressly stated in the Bill do not provide protection for whistle-blowers, being persons who, in good faith are making disclosures that a public officer or a person having high rank authority as covered under the Bill has breached the code of conduct or has engaged in fraudulent or corrupt practices.

The limits on immunity provisions contravene section 149(e) of the 2013 Constitution and has an effect of creating fear in people for highlighting a complaint to the Commission or a relevant authority.

It is also submitted that Section 17 (2) of the Bill is problematic as it does not seem to consider the situation of whistleblowers within the Commission. If a Commission member detects corruption, nepotism or violations of due process of investigation, what protection does that officer have? Why will he /she be unable to speak out? We submit that the whistleblower provisions of the 2013 Constitution should not be contradicted.

There are several provisions that question the independence of the members of the Commission. A general concern is that the Commission is made of members appointed by the President (see section 121(2) of the Fiji Constitution), and yet, they are supposed to investigate the President. Their independence could be in question.

D. Interferes with Judicial independence and separation of powers

The Bill through Schedule 3 prescribes the code of conduct for judicial officers. It defines 'judicial officer' its interpretation clause to "include" the Chief Justice, a Judge of the Supreme Court, the President of the Court of Appeal, Judges, Masters, magistrates and members of Tribunals.

Judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial. Judicial officers must be kept independent of the legislative and executive branches of the Government and are subject only to the provisions set out in the Constitution and in Fiji's case, the 2013 Constitution.

The 2013 Constitution layout is reflective of this separation of powers as it divides its provisions under legislature, executive and judiciary separately. The independence of the judiciary in Fiji is guaranteed by the State and enshrined in the Constitution and should be reflected in the laws of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary. International human rights instruments and the 2013 Constitution recognizes the guarantee of an independent and impartial tribunal as a human right to fair trial. Judicial independence safeguards the judiciary against any interference by state organs or private persons with the performance



of judicial duties and describes functional and structural safeguards against extraneous intrusion into the administration of justice.

It is essential that the judiciary inspires confidence in the public that judicial proceedings are actually carried out in conformity with these principles.

Under this Bill, the judicial officers are required to submit their assets, income and finances to a body that can also investigate complaints against them and a lay person can obtain these statements upon payment of a fee. Safeguards against such situations where there is legitimate doubt that the court acts in an independent and impartial manner are necessary.

To maintain separation of powers, the 2013 Constitution, under its section 104, setup a Judicial Services Commission that could receive and investigate complaints against the judicial officers. The Judicial Services Commission can regulate its own procedures and processes and has several obligations to regulate and facilitate the performance of the functions of the judiciary.

It is submitted that the Bill interferes with the impartiality and independence of the Judiciary by duplicating the work of the Judicial Services Commission and seeking disclosures from the judicial officers.

We are in agreement to Section 19 as it importantly states that the investigation by the Commission does not preclude judicial action and access to justice.

V. CONCLUSIONS

In conclusion, the Code of Conduct Bill seems to discriminate against people holding strong political views or opinions and does not accord them similar privileges or benefits given to the rest of the community such as getting their complaints investigated. Sections 12, 13 and 14 of the Code of Conduct Bill can be construed by members of the Fijian society to punish people having opposing views, opinions and political beliefs. It is submitted that such clauses that may create fear of prosecution by complainants is detrimental to good governance, public interest and access to justice as people will not be willing to raise complaints against persons holding power in high office.

It is submitted that the words “malicious” and “state secrets” be properly defined within the boundaries and aspirations of the human rights conventions and the 2013 Constitution. The drafters should consider omitting or removing the words “politically motivated” from the Bill entirely as it is discriminatory to right to have political opinions and beliefs.

The burden of proof in case of prosecution is also omitted from the Bill. It is submitted that the burden of proving that the complainant was infact malicious or politically motivated should rest upon the prosecution and the burden of proof be expressly stated in the Bill.



Section 14 (4) is a repetition of Section 12 (4) and one of the provisions should be omitted. The Bill needs to be amended to ensure that the provisions relating to protection of whistleblowers do not contradict the provisions as outlined in the 2013 Constitution.

The Bill should not contain any provisions dealing with the judicial officers and all such provisions with Schedule 3 should be omitted. It is suggested that the Judicial Services Commission, which is set up of capable and competent board, continue to deal with complaints concerning judicial officers and govern the affairs of the judicial officers. Bodies already set up such as FRCA and national tax bodies can seek disclosures concerning income, assets and other liabilities. This will ensure that there is no duplicity and wastage in resources as well as keep administration of judiciary separate from the legislative and executive.

Respectfully submitted.

Dated this 8th day of February 2019.

A handwritten signature in black ink, appearing to read 'Chitrlekha Massey'.

Dr Chitrlekha Massey

Regional Representative for the High Commissioner in the Pacific