

Code of Conduct Bill, No. 33 of 2018 – Submission template

Submission from the Office of the High Commissioner for Human Rights, Regional Office

**The provided data is an example of the format to be used when filling in the table:*

Part	Clause	Sub-Clause	Suggested changes (if any)	Explanation
*1	1	(1)	Insert any suggested changes	A brief explanation/rationale for the suggested change
Part 4	Section 12	12.—(1)(a)	<p>The words “opinion based on reasonable and substantiated grounds” must be added;</p> <p>Or the words “after an investigation” should be added</p>	<p>Such a provision “unless the Commission is of the opinion of” 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. As the Bill is worded, Commission can arrive at an opinion without actually carrying out an investigation. What exactly should the opinion be based on? The wordings of this provision should be relooked and amended.</p> <p>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.</p>
Part 4	Section 12	12.—(1)(b)	words such as “malicious” be properly defined within the	There should be recognition that if a complaint was submitted in good faith, it cannot be malicious. 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

			<p>boundaries and aspirations of the human rights conventions. The drafters should consider omitting or removing the words “politically motivated” from the Bill entirely.</p>	<p>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.</p> <p>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.</p> <p>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.</p> <p>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</p>
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				<p>investigated. Section 12 can be construed by members of the Fijian society to punish people having opposing views, opinions and political beliefs.</p> <p>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.</p>
Part 2	Section 3	Section 3	<p>The power, authority, duty and exact function of the Commission needs to be prescribed or stated explicitly in the Act.</p> <p>It would be prudent to add an obligation on the Commission to open a complain <i>motu proprio</i> when it suspects violations of the code of Conduct.</p>	<p>Section 3 of the Bill states that the power, authority, duty and function of the Commission is said to be prescribed under the Bill. Section 4 of the Bill does provide 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.</p> <p>Inferences for example, the Bill as is worded is currently dependent on someone filing a complaint.</p> <p>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.</p>
Part 4	Section 13	Section 13	The words “politically	<p>There should be recognition that if a complaint was submitted in good faith, it cannot be malicious. This provision deters complaints being made to the Commission based on fear of being prosecuted especially by people</p>

			motivated” be removed	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”.
Part 4	Section 16	Section 16 (1)(b)	The terms ‘secret and confidential’ needs to be defined properly in the Bill.	<p>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”.</p> <p>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. This is not being transparent.</p>
Part 5	Section 20		We submit that the whistleblower provisions of the 2013 Constitution should not be contradicted by the provisions in the Bill.	<p>This section outlining provisions for immunity 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</p> <p>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.</p> <p>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.</p> <p>It is also submitted that Section 1717(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</p>

				violations of due process of investigation, what protection does that officer have? Why will he /she be unable to speak out?
Part 7	Schedule 1	Schedule 1	<p>Members of the Commission must be independent from the person/ office appointing.</p> <p>Therefore the drafters should consider removing President from the Schedule 1.</p>	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.
Part 7	Schedule 3	Schedule 3	<p>The Bill Interferes with Judicial independence and separation of powers</p> <p>The Bill interferes with the impartiality and independence of the Judiciary by duplicating the work of the Judicial Services Commission and seeking</p>	<p>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.</p> <p>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</p>

			<p>disclosures from the judicial officers. There was no need for a duplication of the code of conduct and neither a need for a body that duplicates the work of the Judicial Services Commission.</p> <p>Everything to do with the Judicial officers should be removed from the Bill</p>	<p>judicial duties and describes functional and structural safeguards against extraneous intrusion into the administration of justice.</p> <p>It is essential that the judiciary inspires confidence in the public that judicial proceedings are actually carried out in conformity with these principles. The judiciary should be able to decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.</p> <p>The English maxim that "justice must not only be done, it must also be seen to be done" applies as a normal Fijian will question the integrity and impartiality of the judicial officers. 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. Independence safeguards against such situations where there is legitimate doubt that the court acts in an independent and impartial manner.</p> <p>It is trite to repeat that judicial independence is based on the idea of separation of powers and that it is therefore, mainly, a characteristic of the legal institutions. 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.</p> <p>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. There was no need for a duplication of the code of conduct and neither a</p>
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				need for a body that duplicates the work of the Judicial Services Commission.
				<p>For best practices, model law and international standards on freedom of expression and opinion please see the following documents:</p> <ol style="list-style-type: none"> 1. Special Rapporteur Report on the Promotion and protection of the right to freedom of opinion and expression (A/68/362) , attached as A. 2. Special Rapporteur Report No. A/HRC/7/14, attached as B 3. Tshwane Principles on National Security and the Right to Information https://www.opensocietyfoundations.org/sites/default/files/global-principles-national-security-10232013.pdf 4. Model Law on Access to information in Africa http://www.achpr.org/files/news/2013/04/d84/model_law.pdf 5. Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight (A/HRC/14/46)