



SUBMISSION BY THE CITIZENS' CONSTITUTIONAL FORUM

**PARLIAMENTARY STANDING COMMITTEE ON JUSTICE, LAW AND HUMAN
RIGHTS**

CYBERCRIME BILL NO. 11 OF 2020

Monday, 29 June 2020

INTRODUCTION

The Chairman Honourable Alvick Maharaj and Honourable Members of the Parliamentary Standing Committee on Justice, Law and Human Rights (Standing Committee).

The Citizens' Constitutional Forum (CCF) thanks the Standing Committee for the opportunity herein to provide a submission on the **Cybercrime Bill No. 11 of 2020** ("the Bill"). The CCF is an institution focused on a non-governmental organisation based in Suva with more than 20 years' experience in community education and advocacy on Fiji's Constitution, democracy, human rights and multiculturalism.

The CCF acknowledges that the Bill has been introduced and drafted to address; cybercrime and cyber issues and the prosecution of related offences in Fiji. The initiative to align the Bill to the International Convention on Cybercrime (Budapest Convention) is also commended noting the intention to cover; procedural requirements, collection of electronic evidence, remedies to cybercrime offences and international cooperation with external agencies or governments.¹

¹Paragraph 1.3-1.5, Explanatory Note, Cybercrime Bill No. 11 of 2020

KEY POINTS ON THE CYBERCRIME BILL NO. 11 OF 2020

1. Balancing Human Rights and Power of National Security

In this day and age, it is imperative to understand that technology is ever evolving and as such the legislations in place must consider the same when addressing cybercrime offences. However, in doing so, we must not lose focus on inherent rights of individuals as recognised under the 2013 Constitution of the Republic of Fiji and the ratified international conventions.

There have been numerous arguments on the balancing of the right to privacy and the law enforcement powers for the purpose of prosecution and investigations. Section 24 of the 2013 Constitution of the Republic of Fiji provides for the right to privacy which includes:

- Confidentiality of personal information;
- Confidentiality of communications; and
- Respect for private and family life.

CCF emphasizes that such rights are also enshrined in Article 17 of the International Covenant on Civil and Political Rights (ICCPR) of 1966:

“1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.”

Fiji is now a party to the ICCPR and as such, CCF reminds the Standing Committee of the need to reflect these rights in drafting of domestic laws and in action. This is also supported in the Budapest Convention in accordance to Article 15 whereby consideration must be made to domestic laws (providing for protection of human rights) and international human rights instruments that incorporate the principle of proportionality.²

² 1 Each Party shall ensure that the establishment, implementation and application of the powers and procedures provided for in this Section are subject to conditions and safeguards provided for under its

2. Law Enforcement Access to Traffic Data

CCF commends the efforts to reflect the Convention in the proposed Bill. However, there should be further time provided to the public in dissecting, analysing and putting forth submissions on the laws proposed herein not forgetting the application in the context of Fiji. Nevertheless, CCF makes a reference to provisions such as those on “Traffic Data” defined in section 2 of the Bill as:

“...any computer data relating to a communication by means of a computer system, generated by a computer system that formed a part in the chain of communication, indicating the origin, destination, route, time, date, size or duration of the communication or type of underlying service.”

The case of **Benedik v. Slovenia** of the European Court of Human Rights³ provides further explanation on a few words used in the definition above:

- Origin refers to: “...a telephone number, Internet Protocol (IP) address, or similar identification of a communications facility to which a service provider renders services.
- Destination refers to “...a comparable indication of a communications facility to which communications are transmitted.”
- Type of underlying service refers to “...the type of service that is being used within the network, e.g., file transfer, electronic mail, or instant messaging.”

domestic law, which shall provide for the adequate protection of human rights and liberties, including rights arising pursuant to obligations it has undertaken under the 1950 Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, the 1966 United Nations International Covenant on Civil and Political Rights, and other applicable international human rights instruments, and which shall incorporate the principle of proportionality.

2 Such conditions and safeguards shall, as appropriate in view of the nature of the procedure or power concerned, inter alia, include judicial or other independent supervision, grounds justifying application, and limitation of the scope and the duration of such power or procedure.

3 To the extent that it is consistent with the public interest, in particular the sound administration of justice, each Party shall consider the impact of the powers and procedures in this section upon the rights, responsibilities and legitimate interests of third parties.

³ <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-182455%22%5D%7D>, [Accessed: 29 June 2020]



The said case discussed on a key issue of disclosure of information from an internet service provider (ISP) which led to the identification of the Applicant due to Police reliance on procedures in domestic laws. It also discussed on whether information such as subscriber information should be treated any different from traffic data. The actions taken by Police in the said case was concluded to be a breach to the right to a private life by the European Court of Human Rights.

In application to the Bill at hand, the CCF submits that proper safeguards must be incorporated to ensure that acts or information which invades or restricts the right to privacy without legitimate cause and proportionality does not take place. It is noted that certain sections in the Bill require the use or acquiring of traffic data.⁴ CCF submits that certain provisions could still fall under the issues raised in the abovementioned case. For instance, the use of the term “sufficient amount of traffic data to identify” [Emphasis is mine] service provider and the path of communication under section 30 of the said Bill. What could qualify as a “sufficient amount” of traffic data? There must be no gaps for vaguely drafted requirements that could risk the infringement of a right to privacy.

On the same note, section 33 refers to mutual assistance regarding real-time collection of traffic data. Subsection 1 stipulates that there may be “limitations specified by the Government”⁵ that will need to be considered with requests received for the provision of assistance. CCF submits that it is pertinent to expressly indicate that limitations to such requests must also include domestic laws in place and the rights of individuals in Fiji instead of solely relying on specifics by the Government. This is to ensure further safeguarding of individual rights, good governance and rule of law in Fiji.

⁴ Section 20, 23-25, 30, 33 and 35

⁵ The same use of words are found in section 34 (1) of the Bill



3. 24/7 Network

In upholding good governance, transparency and accountability, CCF refers to the need for specified capacities and qualities in which a 24/7 network⁶ must be established. There is a required “point of contact” to be available on a twenty-four hour, seven day a week basis to provide immediate assistance for the purpose outlined in section 35 (1) of the Bill.⁷

CCF submits there is insufficient provision and clarity on the procedures for appointment of the point of contact, who or what comprises as the point of contact and the qualifications that a person(s) must have to be appointed as a point of contact. These elements are critical in ensuring a trust by the public in the independence, impartiality and effectiveness of person(s) allocated such responsibilities or powers and in adhering to domestic laws and the protection of the rights of individuals.

RECOMMENDATIONS

In light of the above issues, the CCF submits that the following recommendations be considered:

- i. There must be a balance in human rights and the responsibility of national security when providing additional powers that could infringe human rights;
- ii. A holistic application or reflection of the Budapest Convention must be made on the proposed Bill to mitigate gaps or lack of clarity in legislative drafting. This must also include due consideration and incorporation of principles enshrined in the international human rights instruments and lessons from relevant case laws;

⁶ Section 35 of the Bill

⁷ “...of investigations or proceedings concerning criminal offences related to computer systems and data, or for the collection of evidence in electronic form of a criminal offence, which assistance must include facilitating, or, if permitted by written law and practice of Fiji, directly carrying out the following measures--
(a) the provision of technical advice;
(b) the preservation of data pursuant to expedited preservation of stored computer data and expedited disclosure of preserved traffic data;

(c) the collection of evidence, the provision of legal information, and locating of suspects;
(d) within expeditious timelines to be defined by regulations.”

- iii. There must be a clear provision on the roles and responsibilities assigned or to be appointed within the proposed Bill. For instance, the point of contact under section 35 of the said Bill has little or no clarity on the basis and composition of appointment; and
- iv. The inclusion of various and relevant non-state actors such as civil society must be considered in future during discussions in the drafting stages of such proposed laws noting that the aspect of human rights, good governance and rule of law needs to be reflected at all times.

