STANDING COMMITTEE ON JUSTICE, LAW AND HUMAN RIGHTS

REPORT ON THE ONLINE SAFETY BILL 2018

(BILL NO. 7 OF 2018)

PARLIAMENT OF THE REPUBLIC OF FIJI
Parliamentary Paper No. 66 of 2018

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LIST OF ACRONYMS

CCF	-	Citizen's Constitutional Forum
CIU	-	Cybercrime Investigation Unit
FBC	-	Fiji Broadcasting Corporation
FLS	-	Fiji Law Society
FWCC	-	Fiji Women's Crisis Centre
NFP	-	National Federation Party
ODPP	-	Office of the Director of Public Prosecutions
PCPB	-	Pacific Centre for Peace Building
IP	-	Internet Protocol
SODELPA	-	Social Democratic Liberal Party
SCF	-	Save the Children, Fiji
SO	-	Standing Order

CHAIR'S FOREWORD

Fiji, like many other countries, is grappling with the irresponsible use of social media, the internet and other new technologies. Eighteen years into the 21st century and what was originally seen as impressive, modern tools for communication have now exposed a more complex issue as to how society communicates.

Digital technology has evolved greatly over the last half century and has become an increasingly large part of household budgets. By 2020, 52% of the world's population will be online. Fiji currently has about 48% internet penetration and by 2030 it is expected that 99% of Fiji's population will have access to internet.

Apart from being a convenient and instantaneous medium for the communication and exchange of important personal or business information and other content, the internet has also fostered the proliferation and spread of social media networks. Social Media sites such as Facebook and Twitter have offered access and opportunity to millions of connected users to share stories, images, points of view and other information.

While social media has facilitated communication, interaction and interconnectedness, it has also brought some negative impacts on society. Cyberbullying, cyber stalking, internet trolling and the spread of fake news are negative by products of social media. Bullying in any form whether online or offline can cause significant amount of emotional distress and psychological harm to victims and their families. Equally harmful are acts of defamation on social media. Defamation on social media cannot be disguised as freedom of speech.

Fijians are well aware through media reports of the exposure of intimate images online and the bullying of victims through text messages and social media. This has impacted all Fijians, but has an inordinate amount of impact on women and children.

In the Fiji Times report of 2nd April 2015, an 18 year old Lautoka student committed suicide after being a victim of cyberbullying perpetrated through social media message. The case has not been dealt with appropriately as there were no laws in place to deal with such situations of abuse. The victim's family is yet to be given proper closure of the matter.

Recently it was reported that intimate visual recordings of innocent and unsuspecting young children, teenagers, students and adult women alike were recorded and circulated on social media by their close friends as 'revenge porn' or just to humiliate and embarrass the victims. There have been cases where these victims are blackmailed for money, sex and other favours by the perpetrators under threat that their intimate visual recordings will be circulated on social media. This is criminal and it must be stopped.

There is an urgent need to take all the citizens of Fiji along the journey of self-realization about the ills of social media. Voices of survivors of cyberbullying and fake news victims need to be encouraged and a strong emphasis placed on remedial

actions. As citizens we cannot allow abuse of freedom of speech as an excuse to cause discomfort or harm to others.
Section 17 of the Fijian Constitution provides for freedom of speech and expression. That right however is not an absolute right. The right of one person to express himself or herself cannot be taken as a licence to impinge on the right of privacy and dignity of another person. That has been the position of law since time immemorial, hence, the volumes of civil and criminal case authorities both locally and internationally.

Section 17 of the Constitution more specifically provides that while every person has the right to freedom of speech, expression, thought, opinion and publication to the extent that it is necessary, a law may limit, or may authorise the limitation of those rights for public morality, protection of the reputation, privacy, dignity, rights of freedoms of other persons including the right to be free from hate speech, rights of persons injured by inaccurate or offensive media reports to have a correction published on reasonable conditions and preventing attacks on the dignity of individuals or groups.

The Fijian Government in its commitment to ensure access to connectivity for all Fijians, has embarked on promoting a safe online culture and environment in hindsight of the recent increase of reports on harmful online behaviour such as cyberbullying, cyber stalking, internet trolling and exposure to offensive or harmful content, including circulation of intimate visual recordings, particularly in respect of women and children.

As a result, the Government has introduced in Parliament the ***Online Safety Bill*** in March 2018. The Bill's intent is to promote the responsible use of social media and new communication tools and to allow for a process by which hateful and harmful content, images and messages can be removed expediently.

The Bill seeks to promote online safety to increase awareness and education on responsible online behaviour and the use and provision of personal information. The Bill provides a specific avenue which individuals can take to have their concerns dealt with. It also creates new offences to deter irresponsible and harmful online behaviour.

The Bill was referred to the Standing Committee on Justice, Law and Human Rights by this August House for review and scrutiny. Apart from its own deliberation on the Bill, the Standing Committee considered numerous submissions received by it that highlighted certain issues. In its pursuit for wider consultation, the Committee also conducted public consultations on the Bill in Labasa and Lautoka.

The Committee through the Parliament Research Unit also looked into other jurisdictions that have similar set ups to that which Fiji is aiming for by the introduction of the Bill.

The Committee in its observation also consulted the drafters of the Bill and this assisted the Committee in its deliberation of the Bill.

This Report will cover the Standing Committees' role in reviewing the ***Online Safety Bill*** to ensure that all due processes regarding the Bill has been followed and to also

ensure that the provisions contained in the Bill would contribute to the achievement of the Bill's objectives.

The Bill covers some very important areas which the public should make themselves aware of some of which are as follows:

- The power of the Online Safety Commission to investigate complaints on harmful online behaviour and content,
- The rights of individuals to report and take legal action against harmful online behaviour and content,
- The power of the Court to order fines up to $20,000 against individuals and $100,000 against entities and prison sentences up to 5 years against individuals and 7 years for officers of the entities,
- The balance between the rights of citizens to participate in political debate and communications in the public interest with those that promote hate against other identifiable groups and other electronic communication that expresses false allegations.
- The right of release of the identity of fake profiles and anonymous communication.

Amendments were made to various Sections and Subsections of the Bill and the amendments which were necessary have been made and marked in red in the copies of the Bill provided with this report.

The Committee also took into consideration the Bill's impact on gender and noted, including from submissions received, that the impact of hateful and harmful electronic communications and the posting of intimate visual recordings disproportionately impacts women and children as victims. At least one submitter noted that the Bill should reflect that many women do not feel safe coming forward with a complaint against a poster, especially one who is an intimate partner.

The Committee considered the points raised by submitters and has attempted to reflect the impact and benefits of this Bill on both men and women equally. This includes the need for the Commission to be mindful of the importance of time, when trying to make a determination concerning a complaint. It was also considered in the concern raised with regard to a statutory defence to the crime of posting intimate visual recordings.

The Committee is of the opinion that the Bill has benefited from the submissions made with regard to the impact of the Bill on women and girls and it has attempted to reflect the issues raised in their amendments to the Bill.

At this juncture I would like to thank the Honourable Members of the Justice, Law and Human Rights Committee for their deliberations and input, the alternate members who made themselves available when the substantive members could not attend, the staff and officers of the Research Unit and secretariat, the entities who accepted the invitation of the Committee and made themselves available to make submissions.

I would particularly like to thank the members of the public for taking an interest in the proceedings of the Committee and Parliament who took their time out to be present before the committee at the public hearings and for making valuable submissions which the committee took note of and adopted where necessary.

I would also like to acknowledge the invaluable assistance of Mr. Kevin Deveaux, a legal practitioner from Canada who assisted the committee in research, comparative analysis and drafting which was made possible by the support of the UNDP Fiji Parliament Support Project.

I, on behalf of the Committee, commend the ***Online Safety Bill*** **2018** to the Parliament and seek support of all the members of this August house for the Bill since it is designed for the greater good of all Fijians.

Hon. Ashneel Sudhakar
CHAIRPERSON

1.0 INTRODUCTION

1.1 Background and Committee Remit

The Standing Committee on Justice, Law and Human Rights, hereinafter referred to as the Committee, mandated by Standing Orders 109 (2) and 110 of the Standing Orders of Parliament, was referred the ***Online Safety Bill* 2018** for review on 15 March, 2018. After the second reading, the Bill was referred to the Committee pursuant to Standing Order 51 and was tasked with scrutinising the Bill and to report back to Parliament in the May Sitting.

1.2 Objectives of the Bill

Clause 3 of the Bill sets out the objectives of the Bill, which are to;

(a) promote responsible online behaviour and online safety;

(b) deter harm caused to individuals by electronic communications; and

(c) provide an efficient means of redress for such individuals[1].

1.3 Procedure and Program

In order to carry out its task, the Committee read through the Bill and conducted its own deliberation of the Clauses in the Bill. The Committee was briefed by the Office of the Attorney-General who are the initiators of the Bill. The Committee invited main stakeholders and called for submissions from the public and other interested stakeholders by placing advertisements through the local newspapers (Fiji Times and Fiji Sun) on 18 March, 2018, 30 March, 2018, 1 April 2018 and again on 21 and 22 April, 2018. The Committee also utilised a local radio broadcaster, FBC, to spread awareness of the Committee's intention to hear submission from the public.

The Committee also went out to conduct public consultations on the Bill in two main geographical divisions of the country – the Northern Division (consultation in Labasa) and the Western Division (consultation in Lautoka).

Details of the Committees deliberations are provided in this Report.

The Committee was also mindful of the provisions in Standing Order 111(1)(a) and ensured that its meetings were open to the public and the media, except during deliberations and discussions to develop and finalise the Committee's observations.

1.4 Committee Members

The substantive members of the Standing Committee on Justice, Law and Human Rights are:

[1] *Online Safety Bill* (Bill No. 7) 2018.

i. Hon. Ashneel Sudhakar (MP) (Chairperson)
ii. Hon. Mataiasi Niumataiwalu (MP) (Deputy Chairperson)
iii. Hon. Dr. Brij Lal (MP) (Member)
iv. Hon. Semesa Karavaki (MP) (Member)
v. Hon. Niko Nawaikula (MP) (Member)

For deliberation on the Bill, the following Hon. Members stepped in as alternate members, pursuant to Standing Order 115 (5):

i. Hon. Mikaele Leawere (MP) (Alternate Member for Hon. Niko Nawaikula)
ii. Hon. Alifereti Nabulivou (MP) (Alternate Member for Hon. Mataiasi Niumataiwalu)

2.0 *ONLINE SAFETY BILL* (BILL NO. 7) 2018

2.1 Introduction

The ***Online Safety Bill*** **2018** is the result of the review of the current legislation in Fiji by the Office of the Attorney-General to address the growing problem of inappropriate, hateful and harmful online content being posted through social media, text messages and other forms of electronic communication.

The Bill seeks to reflect in law the need for the responsible use of new communication tools and the efforts directed at trying to rapidly remove offensive posts. It is also intended to reflect recent legal interpretations of similar legislation in other jurisdictions related to the same issues.

2.2 Written and oral submissions received and heard

The Committee as part of its deliberation received and heard numerous submissions on the Bill.

The Committee received and heard submissions, from relevant stakeholders and interested individuals, on various dates falling between and including 27 March to 04 May, 2018. Organisations and individuals that made submissions to the Committee included:

Ordinary (concerned) citizens:

i. Group of concerned youths;
ii. Group of concerned young people;
iii. Lenora Qereqeretubua (ordinary citizen);
iv. Priyanka Ram (ordinary citizen);
v. Jaganath Sami (ordinary citizen);
vi. Jope Tarai (ordinary citizen);
vii. Hazrat Ali (Advisory Counsellor - Rakiraki)
viii. Salanieta Tamanikaiwaimaro (ordinary citizen);

Non-governmental organisations:

ix. Aspire Network, Fiji.
x. CCF;

xi. Consumer Council of Fiji;
xii. Fiji Law Society;
xiii. Fiji Human Rights Commission Against Corruption
xiv. FWCC
xv. Media Watch Group;
xvi. NGO Coalition on Human Rights;
xvii. OHCHR;
xviii. Pacific Centre for Peacebuilding;
xix. Save the Children, Fiji and Kids Link Fiji;

Political/Government organisations:
xx. NFP;
xxi. Ministry of Education;
xxii. Ministry of Women, Children and Poverty Alleviation;
xxiii. Ministry of Defence and National Security;
xxiv. SODELPA Youth Council - Suva Constituency Youth Forum;

The Committee took into consideration the submissions made by the above mentioned organisations. The Committee would like to extend its gratitude to all those who participated and provided essential contribution to the Committee's work.

The submissions of the above-mentioned organisations are summarised and provided in this Report and copies of the submissions are attached as 'APPENDIX A'.

3.0 COMMITTEE'S OBSERVATIONS/DELIBERATION AND ANALYSIS OF THE BILL

3.1 Impact of the Bill

The Committee noted that the Bill aims to provide for the establishment of a civil process for the removal of:

i) intimate video recordings without consent; or
ii) electronic communications that have caused harm (defined as "serious emotional distress")

The civil remedy process starts with a complaint, to the Online Safety Commission managed by an Online Safety Commissioner, by an individual who has been harmed or, where that person is a minor, by their parent or guardian or a school administrator (with the individual's consent). The Commissioner can investigate and try to resolve the matter, including by issuing a request to remove material posted.

Where a person who has been asked to remove material refuses to do so, the Commissioner or the complainant can apply to the High Court for an order requiring the removal of the material that has been posted.[2] The police, where they believe there

[2] Clause 22; *Online Safety Bill,* No. 7 of 2018.

is a threat to the safety of an individual, can apply directly to the High Court for the same order.

Where the High Court agrees that harm has been caused by the electronic communication or intimate images have been posted without consent, the Court can order the removal of the posted material through an interim or final order. Where a person to whom an order has been issued by the Court refuses to comply, that person can face a penalty of up to $5,000 and/or up to six months in prison[3].

The Bill also provides for criminal offences for the posting of an electronic communication with intent to harm another person or the posting of intimate visual recordings without consent.[4] If convicted, a person may face a fine of up to $20,000 and/or imprisonment of up to 5 years. For a corporation the fine is up to $100,000 and for the director or manager of the company a fine of up to $50,000 and/or a prison term of up to 7 years.

3.2 Initial Reading of the Bill and Deliberation by the Committee

Given the expectation that the Bill would be reported back by the May 14 session of Parliament, the Committee noted some key issues and, at the same time, initiated a request for submissions. Therefore, the Committee's initial review and the issues identified, along with the issues raised by the submitters were aggregated and sent to the Office of the Solicitor-General (the drafters of the Bill) for comment.

In its initial clause-by-clause review, the Committee identified a few key issues:

- *The role and powers of the Online Safety Commission/Commissioner*: The Commission/Commissioner has broad powers to investigate a complaint, yet there are few details in the Bill with regard to any criteria or limits on these powers.

- *The definition of "harm"*: The current definition is subjective, as the issue of whether or not there is harm for a civil complaint, is based on "serious emotional distress" and this will vary from person to person.

- *The use of fake or anonymous accounts on social media*: The Committee noted that if the Bill is to be effective, there must be a process by which the Commission or a court can identify the person behind electronic communications that are posted by anonymous or fake online accounts.

The Committee noted that these issues needed clarification thus resolved to formulate questions and suggestions on these, which were sent to the Solicitor-General's Office along with issues raised by submitters that the Committee identified as needing a comment from that Office.

[3] Clause 23; *Online Safety Bill*, No. 7 of 2018.
[4] Clause 24; *Online Safety Bill*, No. 7 of 2018.

The Solicitor-General's Office, who are the drafters of the Bill, responded and advised the Committee accordingly. The response assisted the Committee in its deliberation.

3.3 Issues noted from Submissions

Submissions heard from the above mentioned organisations greatly assisted the Committee in its deliberation. The main points noted from the submissions are summarised as follows:

i. Group of Concerned Youths

A group of concerned youths, made up of individual youths submitted on the Bill and a summary of the main points noted from the submission is provided as follows;

- The group proposed that there should be a wider consultation for the Bill (in terms of reach of the Committee and also the time given for consultation);
- The Bill should guarantee freedom of speech in Fiji and should not threaten freedom of expression; and
- The Bill should guarantee online safety measures for children and processes that allow for this.
- It was recommended that a Special Commissioner to look after Children's Rights be appointed within the existing Fiji Human Rights Commission by amending the Human Rights Commission Decree.
- The proposed Commissioner be given power to give "**a Take Down**" notice to the offender and that mediation should not be allowed.
- The criminal offences in the Bill should be reviewed and it is suggested that the provisions be clarified.
- It was recommended that the Bill be shelved, redrafted and wider consultation be done after it is redrafted.

ii. Group of Concerned Young People

Another group of concerned young people submitted on the Bill and a summary of the main points noted from the submission is provided as follows:

- The digital ecosystem has increased rapidly in the last decade, especially with regards to social media.
- Two main issues have been noted from the explosion of the current social media community: one is the misinterpretation of information and the other is the predation activities by social media users specifically towards children (both males and females) and the vulnerable.
- The internet medium seems to be anonymous by these predator-type end users.
- With Fiji's current population of above 800,000, it is seen that about half the population are active users on *Facebook* where most are located in the main urban centres.
- Statistically in Fiji, access to the internet has grown substantially since 1998, from 1.6% of the population to 46.5% in 2016.
- According to Fiji's National Development Plan, the country plans to achieve 99% reach of internet users by 2030.

- With the current pace of influence on social media and given the rise of criminal activities occurring due to it, there is no need to delay the Bill – it should be passed and implemented as soon as possible.
- The group supported the idea that there be should be a separate Commission established and for it to work closely with the Police Cyber Crime Unit in sharing of information and training.
- Putting penalties will be a deterrent to those irresponsible social media users.
- It was suggested that strong penalties should be given to crimes such as installing hidden cameras in a room, child sexual abuse and deliberate sharing of content that is private in nature.
- It was also noted that there is trend that has been occurring that needs to also be covered in the Bill, and this is the 'sexual grooming' of a person especially young children. Sexual grooming is the grooming of a person to be susceptible to sexual activities.
- Group administrators that own pages on *Facebook* should be held accountable for harmful posts that are published on their group pages. The rationale for this is that they are accountable for allowing harmful posts to be published since they give the green light for posts to be published.
- Identification address, signature analysis and IP address would be a tracking method to locate fake account user.
- There was a question posed to the Committee on how do we draw a line in identifying between the informed and ill-informed user. The Bill needs to be passed to protect everyone including the vulnerable/ordinary citizen who cannot defend themselves.
- The multiplication-effect of a post is much larger than what it is thought to be, for example a post on one's Facebook page can viewed by the 5, 000 friends and also those friends of the friends.
- Fiji needs to pair with and utilise overseas expertise to develop a well-structured policing mediums and also IT specialists. It is suggested that a firm (a group) would be better when thinking of utilising overseas expertise.

iii. Mrs. Lenora Qereqeretabua (presented as a concerned citizen)

A summary of the main points noted from the submission is provided as follows:

- The Bill as it is drafted falls short of the achieving all of its objectives, specifically, objective (a).
- Certain key institutions such as the Ministry of Education seem to be excluded from the Bill. Such institutions should be included as they can assist in awareness for children. Clause 8 (b) is inadequate.
- Protection of children should also be made specific in the Bill.
- Existing laws should be amended and strengthened.
- The Bill should also protect a person who is said to have a public life – for example a candidate for an election. It was suggested that reputable organisations such as the UK Committee on Standards in Public Life (CSPL), should be studied as they publish learned publications which could assist the Committee. One such publication is the UK Committee Report in 2017 which published recommendations to address the threats and intimidation experienced by Parliamentary candidates and others.

- It was also noted that Clauses 3 and 4 should not be included as this somewhat goes against trying to have an online environment that is free from harmful contents.
- The Commission is redundant and that existing institutions such as the Police should be empowered and have more resources.
- Existing partnerships should also be strengthened, for example, the relationships between the Dept. of Social Welfare, the Police and other Ministries, Departments, and NGOs. This would ensure the protections of children and the vulnerable.
- Existing laws should be amended and strengthened.
- The Bill in its current should be abandoned.

iv. Ms. Priyanka Ram (presented as a concerned citizen)

A summary of the main points noted from the submission is provided as follows:

- It is important to have a clear understanding of what constitutes the right to safety for children when striking a right balance for ensuring the protection of children in a world where exchange of information is done virtually.
- Safety and privacy is also important and there should be a balance. Privacy is only mentioned once in the Bill and is with respect to 'intimate visual recording'. The wording of the provision related to 'intimate visual recording' could be misconstrued and the scope of its application be used to rope in innocent online postings such as new parents sharing photos and videos of their new born baby for the benefit of relatives overseas; these parents could be considered as breaching the law.
- With respect to offences as specified in Clause 24(3), it is suggested that consideration should be given to when minors commit an offence and the operational considerations in this Clause. The wordings in this Clause should be concise which relate to 'offences to deter irresponsible and harmful online behaviour'.
- There is also the issue of whether a post is true or false and also the issue of fake account users.
- Clause 5, which states that the 'Act binds the State', seems to lack the actual objective of the Clause. The Bill should be made to hold social media providers accountable for protecting children. There should be clear definitions of the legal obligations placed on social media sites.
- New developments in technology has made the online world more and more difficult to track and elimination of harmful online behaviour is harder as well.
- Instead of wide investigations powers, the Commission should be compelled to investigate specific data, statistics or research that is publicly available to give credibility to their efforts – so as to distinguish the real harm from just ad hoc or anecdotal evidence.
- The Cyber-Crime Unit should be strengthened and enhanced. And the Commission to also be able to work other international like-minded entities, such as in Australia and NZ.

v. Mr. Jagath Sami (presented as a concerned citizen)

A summary of the main point noted from the submission is provided as follows:

- One thing that is vital for this Bill, is the timeframe for the court to respond to any complaint.

vi. Mr. Jope Tarai (presented as a concerned citizen

A summary of the main points noted from the submission is provided as follows:

- Time for consultation should be expanded and this should be at least 6 – 7 months public consultation.
- The Bill should protect responsible free speech via digital means. There should be clear guidelines to equally protect responsible free speech and protect Fijian against irresponsible free speech.
- Free speech which aims to Resist/Disagree with the State's agenda should not be held accountable under the Bill.
- Clarification was sought on the different role that the Commission will play compared to the role that the Cyber Crime Investigations Unit of the Fiji Police Force has.
- It was recommended that it would be more effective to expand the provision that caters for the Commission's role (Part 2 of the Bill) to specifically state that the already established Cyber Crime Investigation Unit of the Fiji Police Force will be responsible for carrying out the role of the Commission.

vii. Mr. Hazrat Ali (Advisory Counsellor – Rakiraki - presented as a concerned citizen)

A summary of the main points noted from the submission is provided as follows:

- The Bill is a good initiative of the State.
- The penalty for offenders should be increased from $50,000 to $1M (FJD), this would be a good deterrence for people from posting harmful online behaviour.

viii. Ms Salanieta Tamanikaiwaimaro

Ms. Tamanikaiwaimaro submitted via a teleconference on the Bill and a summary of the main points noted from the submission is provided as follows:

- Ms. Tamanikaiwaimaro is said to be an expert in cyber-crime laws and she commended the Committee and the Government for taking the initiative in coming up with a proposed law concerning online safety, via the ***Online Safety Bill*, No. 7 of 2018**.
- Fiji National Cyber Security Working Group ('Working Group'), noted that back in 2009 - 2011 that the laws in Fiji, specifically the Crimes Act, did not adequately cover some important aspects of internet governance and the various categories of offences that relate to cyber space. Online is virtually anything that one accesses with intermittent connectivity. The Working Group mapped out the regulatory framework that covers Fiji's cyber space.
- Different categorisation of offenses depends on the diverse context and the landscape. It is critical to understand the peculiar features across the different landscapes and jurisdictions.
- When there is a move to make the online space safer, laws are put in place and this leads to criminalising certain acts. This then leads to ensuring that there is adequate evidence to support this. There has been push for the ratification of the

Budapest Convention (Convention on Cybercrime), but Fiji is not yet ready to ratify it as a lot still needs to be put in place.

- In terms of adducing evidence and advocating in court – it is critical to carefully consider how courts will deduce electronic evidence. There is also the concern of contaminating electronic evidence. The current draft of the Bill is commendable, but there is still room to include more categories of offences. There should also be provisions to '**take down**' when necessary certain online communications are seen to be harmful.
- Constitutional rights in Fiji should also be considered when the Bill becomes an Act. Specifically that concerning right to freedom of speech. It was advised that collaboration with the Ministry of Defence would be beneficial – specifically with respect to what other things need to be added into the Bill, particularly with regards to the types of offences that exist within the cyber environment.
- There was a question on the change of IP addresses and how these can affect electronic evidence, especially since there are concerns on contamination of electronic evidence and fake profiles. There are 2 types of IP addresses: the fixed IP addresses and the non-fixed (dynamic) ones. Countries have different approaches to regulating online content, but usually, there are in-built mechanisms on the online social platforms that can assist people that see harmful content online. However there is also the issue concerning privacy and how over-the-top providers such as Google and Facebook, can be controlled by regulations; this is evident in Europe, for example Germany, has regulations in place that controls what can be viewed via Google Earth.
- Facebook reporting mechanism, does not really stop the harm, as people online can keep circulating the harmful content. There is also the concern that civil actions take time to have fruition thus this remedy comes after the harm has already been done.
- Remedies such as shutting down or banning certain online environments such as Facebook, this is a draconian way of trying to remedy issues concerning cyber law. For Fiji, the law enforcement agency, should have a sit down with these online platform providers such as Facebook to come to a solution such as having MOU's on how these platforms will operate in Fiji. Blocking should be the last option.
- In some jurisdictions, they have the 3-strikes rule, whereby these online platforms are given three chances with respect to breaching any regulatory conditions governing their operations within that jurisdiction.
- The online space is an ecosystem, thus it should be handled with the lightest-hand as possible.
- There was a question on freedom of expression and how some people can use the online space to post harmful contents and argue that its freedom of expression as provided for by international laws such as Article 19 of the International Covenant on Civil and Political Rights (ICCPR). It should be noted that the freedom of expression is not an absolute right and that there are 3 exceptions to this freedom and these are:
  - National security;
  - Public morality; and
  - Public order.

- Things such as xenophobia, hate speech and racism are considered exceptions to the principle of freedom of expression. People have the right to freedom of expression but they should not abuse others in the exercise of this freedom. Freedom of expression is allowed as long as it does not hurt someone else, for e.g. in California, during the Vietnam drafting (whereby Americans were drafted to fight in Vietnam), a man protested in front of the Californian courts, by wearing a black t-shirt with profanity printed on it and he was arrested and charged with incitement. As the years went by, the courts changed its mind on this and ruled that he was only practicing his freedom of expression since he was not hurting anyone.
- There was also a question on the challenges faced by other jurisdictions that have similar laws to the *Online Safety Bill*. One of the challenges is that different countries have different contexts. It was advised that we should not simply copy legislation from other jurisdiction and think it'll fit into Fiji's context. The other is that of electronic evidence and the capacity of judges to understand the elements of the offence. There are two types of evidence; qualitative, which can be easily seen and the other are those evidence that are not that obvious. The biggest challenge is to understand Fiji's context.

ix. Pacific Centre for Peacebuilding (PCP)

A summary of the main points noted from the submission is provided as follows:

Advantages of the Online Safety Bill 2018

- The Bill aims to protect women, children and disadvantaged groups from acts of violation and online abuse.
- Defamatory activities that may not cause actual physical harm but can cause significant emotional and psychological harm are equally important factors to address.
- The Bill provides for criminal offences that are not covered under section 336 of the *Crimes Act* 2009. This is particularly important as far as criminal law is concerned for it is based on proving elements of an offence beyond a reasonable doubt.[5]
- Generally the Bill makes up for the deficiencies of the Crimes Decree pertaining to the prosecutorial and procedural requirements to name a few.[6]

Disadvantages of the Online Safety Bill 2018

- Freedom of Speech could be something that is affected by the Bill and this is evident in the wide drafting of what constitutes an electronic communication.
- This may be a concern for people commenting on Government policies and others engaging in political processes as such postings may be misused by those in authority, especially nearing elections. The absence of a platform for

[5] https://www.diplomacy.edu/sites/default/files/IGCBP2010_2011_Tamanikalwalmaro.pdf:Accessed: 18/04/18:12.30am

[6] Ibid.

communication and free expression will encourage the spread of false news and sensationalisation.

- The intention of what the law is intended to achieve is unclear as stipulated under section 3. Harm under this provision is interpreted to mean "serious emotional distress". What does serious emotional distress constitute exactly as far as the provision is concerned? This is not clearly defined.
- The Fiji Police force has a Cybercrimes Unit that is already tasked with looking after online safety, so there is really no need for another unit to be created that basically deals with the same issues. The Fiji Police Force should be empowered and be better resourced.

Recommendations

- *"Poor quality of legislation is often the consequence of inadequate scrutiny".* Public consultation should therefore be encouraged for at least another 5 to 6 months.
- It was encouraged that a working group be established to to jointly cooperate and identify categories of cybercrime so that discussions can revert to the drafting of the Cyber Security Bill, which was a hot topic in 2016. The Cyber Security Bill encapsulated a wide range of cyber related issues from the misuse of devices, computer-related forgery, fraud as well as the production and distribution of child pornography over the Internet to name a few.[7]
- Further research is needed into the status of cyber security in Fiji and development of a report to assess whether there is a need for a specific Cybercrimes Decree or to strengthen the existing legal instruments such as s.340-346 of the Crimes Act to include content related offences, apart from the computer related traditional crimes that it currently covers.

x. Save the Children, Fiji (SCF) and Kids Link Fiji (KLF)

A summary of the main points noted from the submission is provided as follows:

- The definition of the term '*harm*' needs to be expanded to cover any violence that may be encountered during online posting as this would cover all the perimeters including sexual, physical and psychological abuse.
- It was recommended that the Bill be amended to ensure that the objectives of the Bill which deals with preventative measures be recognised. This could be achieved by including compulsory educational programmes on online safety, which are to be set by the Ministry of Education.
- It was also recommended that the existing entities and mechanisms in place, such as the Ministry of Education's, National Substance Abuse, Advisory Council, the Fiji Police Force Cyber Crime Unit and other initiatives by other Ministries such as the Ministry of Women, Children and Poverty Alleviation, be empowered and be better resourced. The expected Commission that will be established under the Bill would impact the already scarce resources available to the existing entities.

[7] https://www.diplomacy.edu/sites/default/files/IGCBP2010_2011_Tamanikalwalmaro.pdf: [Accessed]: 18/04/18:12.30am

- The power given to the Commission to regulate its procedures as stated in Clause 9(2) should be clearly defined to avoid abuse of powers.
- The Commission if established should be able to file a criminal complaint with the police (Clause 14(1)).
- Allegations that may be brought for legal proceedings undermines the function of the Fiji Police Force to investigate and provide substantial evidence of the harm suffered.
- There is also concern that the Bill is somewhat silent on child offenders and there is a question on how a child may be able to pay the fine of $20K (FJD) as stated in Clause 24 (2).
- The interpretation of the offences prescribed in the Bill should be made more explicit. A good starting point would be the 10 principles stated in the *NZ Harmful Digital Communications Act 2015*. This would ensure that even the rights of children who use social media for their freedom of expression is promoted and not suppressed.

xi. Fiji Human Rights and Anti-Discrimination Commission (FHRADC)

A summary of the main points noted from the submission is provided as follows:

- The Bill is commended and is a good initiative of the State, however there are a few aspects that need to be given careful consideration.
- One such aspect is finding a balance between freedom of speech, expression and publication and what is considered a harmful act. In Fiji's current context, the sort of acts being published online have gone beyond what the Bill defines as 'harm'. These acts constitute an assault on human dignity and the deprivation of the right to reputation and privacy and the right to be free from hatred.
- Regulation of the online world is needed but one should tread carefully.
- There is also a question on regulation and jurisdiction. Thus the question arises of whether it is possible to hold someone responsible for publishing harmful online contents from a foreign jurisdiction. There was a case in Australia that dealt with the extra-territorial application of laws – the Dow Jones Case, defamation case – where the High Court held that defamation exists where the harm was done. Thus meaning that even though the post was done in the US, Australian law will apply if the damage done was experienced in Australia.
- Special consideration should also be given to Section 17 of the ***Constitution of the Republic of Fiji (2013)*** ("Constitution"), which does not differentiate between the types of media.
- It is vital that the Commission and the Commissioner understand the jurisprudence that would be created as a result of the law. It was also noted that consideration should be given to the actual process that will arise once the Bill becomes law – for example, serving orders to persons that have fake accounts.
- Intermediaries such as online platforms should be regulated and the law should allow for compelling them to provide necessary information for investigation purposes.
- Delegation powers should be made to specialised and adequately qualified persons and it would be advisable that the Commission also engage periodically with expert panels.
- The fines prescribed reflects the seriousness of the transgressions.

- The scope and purview of the Bill is specific and this should be understood by the public. It was recommended that the public should know the limits of freedom of expression with in mind the democratic dissent.
- It should also be noted that people should not confuse the Bill with the implication of Section 66 of the ***Crimes Act***, which provides for seditious intention.

xii. Fiji Law Society (FLS)

A summary of the main points noted from the submission is provided as follows:

- The Bill is a reaction and a quick fix to harmful online acts that have come to light recently.
- The appointment of the Commissioner should be carefully considered – the Commissioner should be appropriately qualified. Personnel of the Commission should also be well qualified and have the necessary expertise.
- The powers and functions of the Commission seem to overlap and it is cautioned that this could hinder the Police and even the ODPP specifically with regards to the function regarding investigations.
- Clear guidelines should be put in place for the Commission and the Commissioner to follow and the 10 principles in the NZ law could be a good guideline.
- The Bill should adopt the Australian approach and adopt certain aspects of the law in Australia – the *Enhancing Online Safety Act.*
- 'Natural persons' should include legal entities such as corporations and companies.
- All the elements of the offence in the Bill are to be met in order for an offence to exist.
- The Bill as it is currently drafted is not ready to be tabled.

xiii. Fiji Women Crises Centre (FWCC)

A summary of the main points noted from the submission is provided as follows:

- The Bill should be scraped as it was drafted without consultation with NGOs and CSOs and that it lacks the gender perspective.
- Existing laws can always be expanded on, such as the Crimes Act, which can cater for such offences that may be created through the Bill.
- The definition of harm should be amended to cater for the differences between the genders and also between adults and children.
- The qualification of the Commissioner should be vital and this should be specified in the Bill.
- The Commission is a redundant initiative and it was suggested that existing entities such as the Cyber-crime Unit should be empowered and be better resourced.
- The Bill should also have guidelines of how to treat victims and perpetrators when it comes to the school environment.
- The definition of harm is too broad that it creates a concern of there being censorship of the rights to freedom of speech and expression.

- Clause 24 and 25 are duplicates and should be incorporated into one – and this is specifically with regards to the intimate visual recordings.
- The Bill should ensure that the Commission and courts are also gender sensitised.
- The Bill is not ready to be tabled as an act as it lacks time for proper consultation.

xiv. Citizen's Constitutional Forum (CCF)

A summary of the main points noted from the submission is provided as follows:

- The powers and functions of the Commission seems to overlap and this is a sign that the Commission is redundant. The existing institutions should be expanded and invested on.
- The Bill also seems to be redundant, therefore it was suggested that existing laws should be amended rather than having a new piece of legislation.
- Bill should specifically include the rights encompassed in the Bill of Rights provided in the ***Constitution of the Republic of Fiji (2013)***.
- The 10 Communication principles in the ***NZ Harmful Digital Communications Act 2015*** should be included in the Bill as it provides further criteria to be considered apart from whether a harm has been caused. It was also suggested that these principles should be vetted so as to ensure that the principles do not allow a low threshold, for example, Principles number 3 and 4 could be specified as to who qualifies to be a "reasonable person" and the definition of the terms "indecent" or "obscene".
- Interpretation of harm should be vetted, given the recent developments in NZ whereby the courts have had issues with the interpretation – different hierarchy of courts have different interpretations of the same facts and evidence and the law applied to it.
- Powers of the Commission as specified in Clause 9 (c) is too broad.

xv. Media Watch Group (MWG)

A summary of the main points noted from the submission is provided as follows:

- The Bill as it is currently drafted is not ready to be tabled. There should be more time for consultation.
- The Bill to include the 10 Communications Principles in the ***NZ Harmful Digital Communications Act 2015***.
- Technical advisers should be included and mentioned in the Bill.
- The Bill should not suppress free speech as this is a fundamental aspect of democracy.
- The Bill should allow for the individual themselves to take steps to try and get the publisher to take the posts down and if this fails, then the Commission can be involved to assist.

xvi. Consumer Council of Fiji

A summary of the main points noted from the submission is provided as follows:

- The digital economy has evolved immensely over the last half century and it is predicted that by 2020, 52% of the world's population will be online.

- This growth has seen many positive outcomes, but it has also meant increase of negative impacts on society, such as cyberbullying, cyber stalking, internet trolling and the spread of fake news.
- Statistics show that many people are utilising social media which shows the impact of the internet. Therefore caution should be given to the problems of social media. Specifically with regards to online bullying, which has cost more than just emotional distress for some Fijians – where a life of a person was lost.
- No laws currently in Fiji specifically provide for online bullying and fake news.
- The public need to be protected offline and online as well. And it unacceptable that defamation online or social media is treated as freedom of speech or expression.
- It is a positive development that there is a law that will deal with online harassing, intimidation, trolling and exposure to offensive and harmful contents. And it commended that the Bill covers everyone and not just children.
- There are also issues with the Bill that need consideration and these includes – the Bill does not address the root cause of the problem, there is no clear articulation of the nature of proceedings – whether it is criminal or civil and there is no clear specification as to how the Commission will resolve complaints.
- It is advised that policy makers think of how to incorporate education and awareness about online media literacy and responsible online behaviour.
- There should also be appropriate counselling for children.
- Certain Clauses in the Bill should be re-considered to make the Bill more effective.

xvii. NGO Coalition on Human Rights.

A summary of the main points noted from the submission is provided as follows:

- There is a lack of guiding principles in the Bill – the ten Communications principles in the NZ *Harmful Digital Communications Act* is a good starting point as this will set the perimeters for the Commission and enable it to know what type of complaints it would/should investigate.
- The Bill could potentially create an atmosphere of censorship amongst the people of Fiji.
- Investigation by the Commission must be done with caution and it should be something that is acceptable in a free and democratic society and to be proportionate to the public interest aim.
- There would be 'teething problems' specifically with regards to how the Judiciary will interpret new legislation – just as in NZ and this should be carefully considered.
- The existing institution such as the Fiji Police Force Cybercrime Unit should be better resourced and supported instead of having a new Commission.

xviii. Office of the United Nations High Commissioner for Human Rights

A summary of the main points noted from the submission is provided as follows:

- Definition of 'harm' is too vague and broad, which could rope in certain postings to be considered as harmful, for e.g. innocent reporting of certain criminal acts which would cause emotional distress to the person whose acts are being revealed.

- Since the term 'harm' is vaguely defined, functions of the Commission such as the authority to seek removal of a post could be questioned in terms of legality.
- The Bill fails to provide for any measures to protect truthful communications, public interest, news report, artistic expression, expressions of honest opinions based of facts etc.
- Clauses 17 and 32 fails to make reference to any harmful act of which individuals may be the victim, which could lead to potential complaints on behalf of a broad range of individuals.
- Clause 24 gives rise to several concerns, which include, possibility of criminalising legitimate expression due to the subjective nature of the element of harm, it could potentially cover defamatory acts, it fails to contain any protections for communications that are in the public interest, it fails the proportionality test, it could create a risk to any person that posts any communication which could affect sensitive persons, it is somewhat not compliant with international human rights law and it fails to differentiate between acts committed by adults and children.

xix. Aspire Network, Fiji

A summary of the main points noted from the submission is provided as follows:

- Clarification was sought on what happens in the case where a minor posts something that could be considered harmful against another minor?
- Clarification was also sought on whether freedom of expression will be restricted as a result of the implementation of the Bill?
- There was concern that under-aged children use social media as a means of venting or taking out their frustration, thus it was not done with the intention to really harm the person who is the subject of the frustration.

xx. National Federation Party (NFP)

A summary of the main points noted from the submission is provided as follows:

- The Bill should be delayed by six months to ensure proper and thorough consultation.
- The term '*responsible*' in the sentence '*responsible online behaviour'* in the Objectives is not defined and this should be changed.
- The Bill seems to be a duplication of the New Zealand and a few parts of the Australian Act.
- The Bill is to set a commencement date that is not retrospective in nature. The dates stated in Clause 1(2) should be clarified.
- The party proposed that the Bill should adopt the 10 Communication Principles from the New Zealand Act - *Harmful Digital Communications Act 2015"* in order to strengthen the term '*responsible online behaviour'* on the *Objective* of the Bill.
- The term '*requisite experience and skills'* of the Commissioner to be briefly defined so that it meets the criteria and brings credibility to the agency.
- The scope of the Bill is too broad and that the legislature should assist in the interpretation of the Law.

xxi. SODELPA Youth Council – Suva Constituency Youth Forum

A summary of the main points noted from the submission is provided as follows:

- The Bill should be scrapped as it could give rise to political exploitation and suppression to free speech and democratic political debate.
- The objectives of the Bill should be replaced to also ensure that freedom of speech is controlled.
- The Bill is not ready to be tabled as an Act as it lacks time for proper consultation – 2 months of consultation is not enough.

xxii. Ministry of Education

A summary of the main points noted from the submission is provided as follows:

- Clarification was sought on the implication of expanding the definition of harm to also include "reputational damage".
- Clarification was sought on the implication of amending the interpretation of the word "individual" to include or differentiate between 'individual' and 'individuals' since the implications of the Bill could either be on an individual or individuals (plural). For example, given that the meaning of intimate visual recording states that it should be of an 'individual', what happens if;
  - more than one person is recorded and all feel that this posting causes harm;
  - more than one person is recorded and only a few feel that the posting causes harm and the others don't;

  Is there redress for such circumstances?
- The powers of the Commission should also include having the power to cease materials and to compel the disclosure of evidence.
- Fiji has a lack of well-qualified psychiatrists or psychologists that are suitable for counselling positions. There are existing measures for combating the issues that arise out of online exposure, but this needs to be developed. Therefore there is a need for such development on this end as this will ultimately ripple into other aspects such as moral building for people, especially children who are more vulnerable to the growing online environment.

xxiii. Ministry of Women, Children and Poverty Alleviation

A summary of the main points noted from the submission is provided as follows:

- The definition of 'harm' should be clarified as there are instances whereby a person who is subject of a post which can be considered as harmful cannot actually feel serious emotional distress, for e.g. a baby or very young child and a person with mental disability.
- The Ministry questioned whether the Bill will have an avenue for penalising persons who use fake accounts or those that authorise such posts, for e.g. administrators of pages in social media platforms?
- The term 'intimate visual recording' should be better defined as it seems to inculcate gender stereotyping by singling out body parts which are mainly associated with females.
- The inclusion of the defence as provided in Clause 25(3) seems to pose the question whether we are legalizing the posting of pornographic materials. This should not be allowed.

- The Bill should have stronger mechanisms to protect children from cyber-bullying.
- Clause 24 is too broad and may lead to potentially hindering freedom of expression.

xxiv. Ministry of Defence and National Security

A summary of the main points noted from the submission is provided as follows:

- Clause 3 should include provisions that protect and avoid the exploitation of children.
- Clause 8 should be reconsidered, since the proposed Commission will not have the expertise to investigate online crimes – the Police Force Cybercrime Unit should be involved in this.
- Clause 13 and 14 to be reconsidered to allow the Police to play an oversight role in investigation of offences committed online.
- Penalties provided in Clause 23, 24 and 25 is supported and Fiji must enter into agreements with foreign jurisdiction in order share information concerning online complaints and this should extend to assistance in investigating online crimes.

3.4 Research into foreign jurisdictions

The Committee noted that the Bill would have an impact on the people of Fiji, thus resolved that it would also be prudent to look into other jurisdictions to see how their laws have impacted online communication.

The Committee considered similar legislation in other jurisdictions, including Australia (Commonwealth *Online Safety Act*), New Zealand (*Harmful Digital Communications Act)*, Singapore (*Protection from harassment Act*) and Canada (Nova Scotia *Cyber Safety Act* (2013)). A tabulated format of the country comparison is attached to this Report as 'APPENDIX B'. The pertinent points noted by the Committee with regards to these countries were as follows:

Australia:

The Committee noted that the Act provided detailed qualifications for the Online Safety Commissioner (s.50), thus ensuring that the Commissioner would have the capacity to effectively fulfil the role of investigator and promoter of online safety.

The Act also provided a specific clause that clarified that the Act was not intended to interfere with constitutionally provided political communication (s.100), thus ensuring the focus of the Act is on hateful and harmful communication and not to interfere with political debate.

New Zealand:

The Committee noted that the Act was very similar to the Bill before them. Many of the provisions were identical and, therefore, the Committee relied heavily on the comparison between the Bill and this Act. However, there were some differences, including:

- The listing of ten "Communication Principles" which clarify the type of communication that is prohibited under the Act (s.6)
- Test for civil liability in New Zealand is a two-part test which requires both
  - a subjective test of harm (same definition as in the Bill); and
  - a serious or repeated breach of one of the ten communication principles (s.12(2))
- Consenting to the posting of intimate visual recordings is not a statutory defence under the New Zealand Act (as it is in the Bill)
- The Commission and the Court under the New Zealand Act can access technical expertise in the process of making a determination (s.17).

Singapore:

The Committee noted that the Act in Singapore had specific provisions that limited the application of the Act to an electronic communication that was linked to a person residing in Singapore – either the victim or the poster must be a resident of Singapore, even if the posting occurs outside of the country (s.17).

Malaysia:

The Committee noted this Act as recently passed by the Parliament of Malaysia. It seemed to be less relevant to the Bill than the other legislation.

Canada:

The Committee noted that the Act provided for a statutory tort for cyberbullying and this, in turn, enabled citizens to seek remedy in court as with any other tort (common law or statutory).

The Committee also noted that the Act was struck down by the Nova Scotia Supreme Court in 2015 as it was found to be in violation of the Canadian *Charter of Rights*. In particular, the expedited process for the issuing of an order to remove material was found to violate the Charter's fundamental rights to a fair hearing and the rules of natural justice. The Act was revised in 2017 but has yet to be proclaimed.

3.5 Outcome of deliberation

The following is the outcome of the Committee's extensive deliberation.

Main observation made by the Committee:

The Committee noted the rapid acceleration in access to the internet in Fiji. In 1998 just 0.6% of Fijians had access to the internet. In 2006 the rate was 10% of Fijians. In 2016 that rate had risen to 46.5%. It is expected to be over 50% by 2020 and nearly 99% by 2030.

Responsible use of social media is an issue globally. The rapid adoption and access to new technology has created unforeseen challenges to how people interact and communicate. Prior to the internet, hateful comments would travel no further than a

few people or, at worst, a neighbourhood or community. Now, with one click of a button, intimate details and hate speech can be transmitted nationally and globally and it is almost impossible to wipe out such communications once posted.

In addition, prior to the arrival of the internet and social media, over centuries, the concepts of defamation and the principles of responsible journalism were developed and these ensured that certain communications, such as hate language, were not published and disseminated broadly. With the ability to circumvent mainstream media has anyone can engage directly in political debates and others make their opinion known. However, this has also resulted in some who abuse this new media. It is critical that limits be in place and enforced to ensure Fijians use the internet, social media and text messaging in a responsible manner.

The Committee is of the opinion that the Bill must be surgical in its approach to online communication. A test as to a violation of the Bill must find the line between communication that is hateful, harmful or pornographic and, on the other hand, allow the space for communication online that is constitutionally protected with regard to political communication, disagreement with political decisions and actors and otherwise acceptable in a democratic society.

Apart from these observation, there were also pertinent issues the Committee gave much consideration to. These issues, provided below, were discussed at length by the Members of the Committee and considered with the assistance of the drafting team. This ensured that all these relevant issues were appropriately addressed.

Should the Bill include a fourth objective under s. 3 that reflects the comments of the Attorney-General during the 2nd Reading debate in Parliament on the Bill and as is indicated in 1.1 of the "Explanatory Note"?

In the Explanatory Note to the Bill, it states:

> "1.1 The Fijian Government in its commitment to ensure access to connectivity for all Fijians, has embarked on promoting a safe online culture and environment in hindsight of the recent increase of reports on harmful online behaviour such as cyberbullying, cyber stalking, Internet trolling and exposure to offensive or harmful content, particularly in respect of children."

However, neither the objectives of the Bill nor the substantive sections note this as a key component of the Bill. Given that cyberbullying, cyber stalking, "trolling" and exposure of harmful content to children are all prevalent in Fiji, the Committee is of the opinion that a fourth objective should be added to Clause 3 of the Bill to clarify the need to address these issues in the application of the Bill. Therefore amendments were to be made accordingly in Clause 3.

Should the Bill be amended by expanding the definition of harm to also include "reputational damage"?

Reputation damage is not covered as this also has aspects relating to legal entities, which can be covered under defamation. There are other laws and mechanisms in place that address the issue of defamation, hence why it is advised that this not be included as part of the definition of harm (serious emotional distress). Inclusion of this might influence the interpretation of harm which is intended to have a broad application. Therefore no change to this part of the Bill.

Clarification is sought on the different role that the Commission will play compared to the role that the Cybercrime Investigations Unit of the Fiji Police Force has. Should the Bill be amended by expanding the provision that caters for the Commission's role (Part 2 of the Bill) to specifically state, that the already established Cyber Crime Investigation Unit of the Fiji Police Force, will be responsible for carrying out the role of the Commission?

Although the Commission's functions include the investigations of complaints, it would be the Commission's role to liaise with the Police and other relevant agencies to assist the Commission in looking into matters that may fall within what is termed as "cybercrime". Hacking into computers or computer systems or the use of computer systems, computers or the internet to commit crimes is primarily where the Cybercrime Investigation Unit of the FPF comes in. There is a difference in approach by the two entities, nevertheless the Commission is tasked to liaise with the CIU for this purpose.

The Commission deals more in the civil aspects of a complaint and where necessary, it is tasked to liaise with the CIU for complaints that is submitted before it. It also does not have prosecutorial powers which vests only with FPF for the purposes of cybercrimes and the Office of Director Public Prosecutions (ODPP). Therefore no change to this part of the Bill.

Should the Bill be amended by expanding the powers of Commission to also include having the power to cease materials and to compel the disclosure of evidence?

It is advised that the Commission will only be able to do this upon a bench warrant or a court order. However to have absolute powers to seize materials or compel the disclosure of evidence particularly from service providers may raise privacy issues. It is advised that this should be considered with caution since the right to privacy should be protected and there is also the aspect of contractual obligations between an online service provider and the user.

Therefore, there is no express power to the Commission to seize materials or to compel the disclosure of evidence and this should be maintained.

Should the Bill be amended to specifically state that free speech which aims to Resist/Disagree with the State's agenda should not be held accountable under the Bill?

It is advised that this does not fall within the intention of the Bill, and reference is made to Section 17(2) and 17(3) of the ***Constitution***, which caters for limitations and outlines limitations to freedom of speech, particularly where there is advocacy of

hatred or something which constitutes incitement to cause harm. Therefore this Bill does not apply to such statements made against the State.

The Bill only applies to the harm, which is serious emotional distress, caused by electronic communications. Therefore no changes to this part of the Bill.

Clarification was sought on the implication of amending the interpretation of the word "individual" to include or differentiate between 'individual' and 'individuals' since the implications of the Bill could either be on an individual or individuals (plural). For example, given that the meaning of intimate visual recording states that it should be of an 'individual', what happens if;

- *more than one person is recorded and all feel that this posting causes harm;*
- *more than one person is recorded and only a few feel that the posting causes harm and the others don't;*

Is there redress for such circumstances?

It is advised that in Section 24 of the Fiji - *Interpretation Act* 1967, the singular version of the word 'individual' is provided for and it further states that unless a contrary intention appears, it would also include the plural version of the word and therefore it would not make sense to make amendments to this part. Therefore no change to this part of the Bill.

Should the Bill have a test for a civil order that requires more than the subjective determination that harm has or will be caused by a posting? A more objective and stringent test would ensure that the Bill addresses those types of bad online behaviour (i.e. – posting intimate images, hate language, false allegations) while not infringing on communication related to political discourse and the public interest.

In order for the Bill to address hateful and harmful communications yet allow space for political communication and disagreement, the test for the issuing of civil order by the High Court must ensure that it captures the former and not the latter.

The Committee is of the opinion that the current test within the Bill is too vague and subjective to allow for a test that ensures responsible online communication and the elimination of hateful and harmful communications. This will require a more stringent test. The Committee was of the opinion that the test in the New Zealand *Harmful Digital Communications Act* does thread the line between electronic communication that is to be encouraged and communication that is to be prohibited.

However after extensive deliberation, it was noted that the definition of harm should remain broad. This would ensure that the Bill applies to all aspects of serious emotional distress and will apply to everyone. Additionally Section 17 (2) and Section 17 (3) of the ***Constitution*** that outlines the limitations to the freedom of speech will also be considered as this will set the perimeters on what sort of speech is limited. It is also advised that the court would have the discretion of various considerations before coming to a determination. The Bill itself already has imbedded in it a few of the pertinent principles from the ten communication principles of the NZ *Harmful Digital Communications Act* 2015, for e.g. the principle of confidentiality.

Therefore no change to this part of the Bill.

Clause 4 of the Bill state that the Act will apply to actions both inside and outside Fiji. Should the Bill require some link to Fiji in order for it to apply, such as either the victim or poster is a resident of Fiji or in Fiji at the time of the posting?

The current wording of Clause 4 of the Bill is ambiguous as to whether or not the Bill is to apply to any act of electronic communication outside of Fiji. This could be troublesome for the Bill, as it may open it up to complaints that have limited linkage to Fiji or a citizen of Fiji. When comparing other similar legislation, the Committee noted that in Australia and Singapore, the legislation is applicable where there is a victim who is resident of the respective country. In case of Singapore, it also allows for the application of the Act where the poster is a resident of Singapore, even if the posting occurred outside the country.

However it was advised that the text remain as is, given it is applicability to the whole of Fiji in Clause 4, meaning its territorial jurisdiction and it would generally apply to Fiji citizens. An individual who is linked to Fiji in that sense and is not in Fiji at the time in question would then have the option of making a complaint under the relevant laws in Fiji or the other jurisdiction where relevant.

Therefore no change to this part of the Bill.

Should the power of the Commission to resolve disputes be more clearly and specifically defined, as in the New Zealand Harmful Digital Communications Act?

The New Zealand *Harmful Digital Communications Act* in s. 8 (1)(c) states that the Commissioner under that Act can:

> "use advice, negotiation, mediation, and persuasion (as appropriate) to resolve complaints"

Based on submissions received, the Committee notes that the current wording of the Bill does not specify how the Commission will attempt to resolve a complaint (s.8 (e)).

However after further extensive deliberation on this point, the Committee resolved that it is advisable that the provision of the Bill remain as is so as not to limit the Commission on ways to resolve the complaints before it. The Commission's hand should not be tied since listing specific dispute resolutions could restrict the Commission from carrying out its functions. Therefore no changes to this part.

Should the power of the Commission to access information and do all things necessary (s.9 (1)) be more clearly defined to limit potential violations of natural justice?

More than one submitter raised the concern that the current broad definition of the powers of the Commission are too vague and can lead to possible abuse and the

violation of constitutional rights, such as the right against unreasonable search and seizure.

The Committee extensively deliberated on this point and have resolved that it is advisable that the provision remain as is, given that this general power is linked to these specified functions under clause 8, where assessing information is necessary for the performance of assessing application before it, or carrying out an investigation, the Commission must ensure that all information, all material it obtains is obtained in a way that may be used as admissible evidence.

Therefore no change to this part.

Should the Bill reflect a set time period or, at the very least, include wording (e.g. - "as soon as practicable") to express the legislative intent that time is of the essence in making a determination after a complaint or application for an order has been filed?

Submitters noted that the Bill did not provide for a time period by which a decision had to be made by the Online Safety Commission or the High Court. This was a concern, as time must be of the essence when dealing with the posting of an electronic communication. The Committee notes that for Fijians, especially women, to have confidence in the new law, it is vital that the Bill provide a time frame for decision-making by the Commission or Court.

However after further deliberation, the Committee resolved that this is already covered in the Bill where the courts can order the removal of such harmful communications. Therefore no change to this part.

How will the powers of the Commission be linked to other government agencies and authorities that do work in the same field (e.g. – Cyber Crime Unit of FPF; Ministry of Education online safety curriculum)?

Numerous submitters raised the concern that the new Online Safety Commission and its powers seem to overlap with the authority and powers of other government agencies, such as the Ministry of Education with regard to promoting responsible online safety or the Cyber Crime Unit of the FPF and its investigation of cybercrimes.

The Committee notes these concerns. The issue was raised with the OSG and clarification was sought as to how the Online Safety Commission would collaborate and cooperate with other government agencies.

It is important to note that the Bill does allow for the Online Safety Commission to delegate its mandate to other entities (Clause 8 (f)). The Committee believes that this may include the delegation of the educational mandate to the Ministry of Education (where appropriate) or to the Cyber Crime Unit of the FPF. Therefore no change to this part.

Should there be legislatively defined qualifications for the Commissioner?

A number of submitters raised a concern with the lack of defined qualifications for the Online Safety Commissioner. This was juxtaposed with the Australian *Online Safety Act* (s.50(2)) which provides the following qualifications:

> "A person is not eligible for appointment as the Commissioner unless the Minister is satisfied that the person has:
>
> (a) substantial experience or knowledge; and
> (b) significant standing;
>
> in at least one of the following fields:
>
> (c) the operation of social media services;
> (d) the operation of the internet industry;
> (e) public engagement on issues relating to online safety;
> (f) public policy in relation to the communications sector;
> (g) child welfare or child wellbeing."

The Committee was initially of the opinion that such qualifications are reasonable thus similar qualifications may be useful when listed in the Bill.

However, after further deliberation, it was noted that the in contrast to the Australian approach, the qualification was for the e-Commissioner who is an individual whereas in Fiji's case, it is a body corporate, which would be made up of various personnel with various special skills. It was also noted that every jurisdiction has a different set up thus the current form as is provided in the Bill, suffices for now.

To go a step further, the Committee believed, for clarity purpose, that even though the Commission would be a body corporate, there was a need to also demarcate between the Commission and the Commissioner. Thus it was resolved that there be a specific provision to clearly specify what the Commission is and who the Commissioner will be. This could inadvertently lead to misconstrued authority and possibilities of judicial review since it would relate to the carrying out of the functions of the Commission by the Commissioner. Therefore clear specification of the authority of both the Commission and the Commissioner be added and this to be reflected in the amendments to the Bill.

The Bill has limited powers assigned to the Commission or a Court to access information to identify a poster of an electronic communication or to require a service provider or social media host to remove a post or text if the poster cannot be found or is unwilling to remove the offending communication.

The Committee had noted early in its review of the Bill that the system for the removal of offensive electronic communications was missing a key component. The Bill does allow for the Online Safety Commission or the High Court to gather evidence and, in the case of the Court, to order the removal of a violating post (among other actions).

However, the Committee is of the opinion that where a poster cannot be identified, the Court must have the power to obtain information from the online content host or the service provider to identify the poster. In addition, the Court should have the power to demand that the online content host remove an offensive post where the poster fails to do so.

In particular, the Committee notes that the Bill is quite similar to the legislative framework in place in New Zealand in the *Harmful Digital Communications Act* (ss.23-25), in which the Court can obtain information from an online content host or a service provider and, under certain circumstances, can order an online content host to remove a post.

Therefore amendments were to be made accordingly in Clause 22 but with modification to suit Fiji's context.

For a criminal offence of posting a harmful electronic communication (Clause 24 of the Bill) is the intent that the test be a three-part test – which would mean that Clause 24 (1) (a) – (c) have to be met in order for a conviction to be imposed?

The Committee notes that the wording of the test for an offence under the Bill for posting a harmful electronic communication is very similar (yet not identical) to the similar offence under the New Zealand *Harmful Digital Communications Act* (s.22(1)).

Fiji Bill - s.24(1)	**New Zealand Act – s.22(1)**
A person who— *(a)* posts an electronic communication with the intention to cause harm to an individual; *(b)* posts an electronic communication where posting the electronic communication would cause harm to an ordinary reasonable individual in the position of the individual; and *(c)* posts an electronic communication where posting the electronic communication causes harm to the individual, commits an offence.	A person commits an offence if— (a) the person posts a digital communication with the intention that it cause harm to a victim; and (b) posting the communication would cause harm to an ordinary reasonable person in the position of the victim; and (c) posting the communication causes harm to the victim.

The New Zealand clause has been the subject of judicial consideration[8] and it has been interpreted as a three-part test with all three components having to be found before a conviction can be imposed.

All the elements prescribed in Clause 24 need to be met in order for an offence to be created.

Should the Bill allow for the Commission and the Court to have access to technical expertise and advice as they are making their determination with regard to an application?

More than one submitter on the Bill noted that the Online Safety Commission and the Court envisaged in the Bill could benefit from technical expertise as it makes a determination. The issues that will be raised during an investigation or court hearing could be complex and highly technical with regard to how an electronic communication is posted and the capacity of an online content host or service provider to access specific information about the post or the poster.

The Committee notes that s.17 of the New Zealand *Harmful Digital Communications Act* provides for the Court in that Act to have access to technical expertise as required during a hearing and the decision-making process. The final decision still rests with the Court (i.e. – decision-maker), but the access to expertise can be of value in gaining a full understanding of the detailed workings of IT and social media.

However, after further deliberation it was noted that for Fiji's case we are of the view that clause 9 (a) of the Bill suffices for whether the Commission may invite experts to assist in its assessment. And currently, we may or may not have the necessary expertise for there to be an actual panel of experts from which the court may draw on. New Zealand has it, however, for Fiji's case, it is believed that clause 9 (a) suffices. Therefore no change to this part of the Bill.

Should the Bill be amended to consider having specific enabling provisions that provide for the maximum penalties that can be prescribed in the Regulations?

It was noted that the current regulation making power provided in Clause 28 could cover for all this instances. However, after further deliberation, it was noted that the regulations are an extension of the enabling provision. Therefore, this would ensure that there no gaps and also that there are no ultra vires instances of the application of the provision.

Therefore it was resolved that an amendment be made accordingly to Clause 28.

There was concern raised on the statutory defence provided in Clause 25 (3), and how such a provision could be seen as something that would encourage immoral behaviour. Should this Clause be amended or removed so as not to give rise to such immoral questions?

[8] Police v. B. [2017] 3 NZLR 203

It was initially noted that the Bill provides a statutory defense to the crime of posting of intimate visual recordings if the alleged victim of the offence had consented to the posting. The Committee believes that such a defense may be available to any defendant and there is no need to make it a statutory defense. In addition, in the New Zealand *Harmful Digital Communications Act*, such a statutory defense is not provided for in the Act.

However after further deliberation, it was noted that the issue of consent under clause 25 of the Bill was included to ensure that the harm caused by the posting of an intimate visual recording is authentic or genuine as a reasonable person in the circumstance would feel and this would be determined by the court upon consideration of various factors.

With respect to posting an intimate visual recording about an individual; it is specific to the individual and it is also defined. The intimate visual recording is also very specifically defined in this Bill and it is actually quite broadly defined. So, it is different to something that is under the Crimes Act which would have more specific elements.

There should also be consideration regarding 'consent' which relate to posts which are not intended to fall under the definition of intimate visual recording, for e.g. fitness advertisements; and if consent is removed, this could potentially mean that any post that could come under the definition, would be considered an offence and this would defeat the whole intention of the Bill.

Therefore no change to this part of the Bill. But as a consequence of the above deliberation it was noted that the definition of intimate visual recording should be amended to cover for all aspects of visual recordings and to also be gender sensitive.

Apart from the above deliberation and outcomes, the Committee with the assistance of the drafting team made amendments pertaining to drafting style, grammar and misplaced and redundant words and phrases.

Below is a tabulated form of the **main amendments** made to the Bill:

CLAUSE	**NEW CLAUSE - AMENDMENT**	**RATIONALE**
PART 1- PRELIMINARY Clause 2 - Interpretation	i. Addition of a new phrase: "… "online content host", in relation to an electronic communication, means the person who has control over the part of the electronic retrieval system, such as a website or an online application, on which the electronic communication is posted and accessible by the user; and	This amendments are a consequence of the main amendments made to substantive content of the Bill, as provided below.

	..." ii. Amendment of the interpretation of "intimate visual recording" by replacing the word 'female' with the word 'chest'.	
Clause 3	Addition of a new paragraph as follows: "3.- (b) promote a safe online culture and environment that addresses cyberbullying, cyber stalking, Internet trolling and exposure to offensive or harmful content particularly in respect of children; ..."	The Committee noted that the objective needed to expanded to specify the need to also cover for the such harmful online behaviour that are prevalent in today's society and it would also make specific reference to the protection of children.
Clause 6 (3)	Amendment of the provision to read as follows: "...The Commission consists of the Commissioner who is appointed by the Minister and may hold office for a term not exceeding 3 years, and is eligible for reappointment..."	The Committee noted that there needs to be a demarcation between the Commission and the Commissioner, and also specify the authority which lies between the two figures. This will would lessen the inadvertent possibility of people misunderstanding whether something done by the Commissioner is indeed a function that was sanctioned by the Commission.
Clause 6	Addition of a new sub-clause as follows: "6. (5) The Commissioner may appoint such other staff as necessary to assist the Commissioner in the performance of the Commission's functions under this Act, on such terms and conditions as the Commissioner thinks fit."	Same rationale as above in Clause 6(3).
Clause 17	Amendment to the provision	The Committee with the

	by adding a new paragraph as follows: "17. (c) ...the legally appointed representative, if the individual has mental incapacity; ..."	assistance of the drafting team noted that the Bill should also cover for persons who have a mental incapacity when it comes to reporting and bringing proceedings to court.
Clause 22	Amendment of the provision by adding a new sub-clause as follows: "22. (2) The court may, on an application made under section 17, make one or more of the following orders against an online content host— *(a)* an order to take down or disable public access to material that has been posted or sent; *(b)* an order that the identity of the author of an anonymous or pseudonymous communication be released to the court; *(c)* an order that a correction be published in any manner that the court specifies in the order; or *(d)* an order that a right of reply be given to the individual making the application in any manner that the court specifies in the order. ..."	The Committee noted that there is a need for the Bill to also cover for fake accounts and this would also mean provisions that cover online hosts.
Clause 28	Amendment to the provision by "28. (2) Without affecting the generality of subsection (1), the Minister may	The Committee noted that having an enabling Section in the Bill will ensure the Regulations are effective and this would also cover for instances where the question of ultra-vires

	make regulations prescribing offences and penalties not exceeding— *(a)* in the case of an individual, a fine of $50,000 or imprisonment for a term of 7 years or both; or *(b)* in the case of body corporate, a fine of $100,000. …"	applications of the law arises.

3.6 Gender analysis

The Committee took into account the provisions of Standing Order 110(2), where a committee conducts an activity listed in clause (1), the committee shall ensure that full consideration will be given to the principle of gender equality so as to ensure all matters are considered with regard to the impact and benefit on both men and women equally.

During its deliberation the Committee noted, including from submissions received, that the impact of hateful and harmful electronic communications and the posting of intimate visual recordings disproportionately impacts women and children as victims. At least one submitter noted that the Bill should reflect that many women do not feel safe coming forward with a complaint against a poster, especially one who is an intimate partner.

The Committee has considered the points raised by submitters and has attempted to reflect the impact and benefits of this Bill on both men and women equally. This includes the need for the Commission to be mindful of the importance of time, when trying to make a determination concerning a complaint. It was also considered in the concern raised with regard to a statutory defence to the crime of posting intimate visual recordings.

The Committee is of the opinion that the Bill has benefited from the submissions made with regard to the impact of the Bill on women and girls and it has attempted to reflect the issues raised in their amendments to the Bill.

4.0 CONCLUSION

After adhering to due process and the requirements of the Standing Orders of Parliament, the Committee in its deliberation saw that there was a need for the Bill. These deliberations led to consultations with the drafters so as not to upset the objectives of the Bill. Certain amendments were made as a result of the Committees deliberations and those amendments are reflected in red text in the amended copy of the Bill presented with this Report.

The Committee through this report commends with certain amendments, the *Online Safety Bill* (Bill No. 7) 2018 to the Parliament.

APPENDIX A

COPIES OF SUBMISSIONS RECEIVED BY THE STANDING COMMITTEE ON JUSTICE, LAW AND HUMAN RIGHTS

Submission on the Online Safety Bill No. 7 of 2018

Introduction

Ni sa bula vinaka. We thank the Chairman and members of this Committee for the opportunity to give our views on this Bill. We are a group of individual youth concerned about the effect of this Bill on free speech in Fiji. While we appreciate the need to protect children and men and women against revenge porn or unauthorised sharing of their intimate images or videos, we are concerned that this Bill is too widely drafted, that it can be misused by those in authority to punish and prosecute those who share their views, who do not share the same political views. i.e. it can be misused to prosecute political opponents, rather than serve its purpose to protect children against cyberbullying or other online abuse. When it comes to racism and religious vilification, we believe there are existing laws sufficient in the Crimes Decree and Public Order Decree to deal with religious and racial vilification, so the offence in the Bill in section 24 is unnecessarily wide and needs to be reviewed.

Process

We are concerned that this Bill has been railroaded through Parliament, under Standing Order 51. The Ministry should have had consultations with the public, prior to the Bill's surprise tabling in Parliament.

Why the subterfuge with the drafting of this Bill? It is worrying and seems to have been tailored by the Government as a clever way to prosecute opponents. Of equal importance, is the threat to freedom of expression posed by the ambiguous offences listed in this Bill.

Given the worrying implications for freedom of speech, particularly given it is election year, it is our main recommendation for this Bill to be shelved, reviewed and to undertake consultations after it is redrafted. In our view the AG's Office should have held wide public consultations before this Bill was tabled in Parliament, and now the Committee has been given only 2 months to carry out consultations before the Bill is to be passed in the May sitting of Parliament.

Cyber Bullying

Cyber bullying is only a small part of the widespread bullying faced by Fijian children. In recent years, we have seen the rise of child suicide as a result of bullying, online and offline. Therefore, we see that Child protection and communication is the issue that needs to be addressed.

We support (CEDAW), the Convention on the Elimination of Discrimination against Women and the (CRC) Child's Rights Convention, which were, as a matter of information, ratified by Fiji in 1992 and 1995, respectively.

While it is important to protect them, it is equally important that the laws are, properly drafted, not rushed through and be fit for the purpose of protecting victims and bringing offenders to task.

Recommendation

Rather than setting up another Commission for Online Safety, we recommend that a Special Commissioner to look after Children's Rights could be appointed within the existing Human Rights Commission, by amending the Human Rights Commission Decree. The Commission already has a Unit carrying out investigations into human rights violations and a Unit carrying out human rights promotion and awareness, rather than duplicating functions by creating a special Online Safety Commission, and unnecessarily wasting already scarce taxpayer funds. We believe that augmenting an existing body is more efficient than creating yet another statutory commission.

The criminal offences in the Bill should be reviewed so that they are fit for purpose, and must be inserted into the Crimes Decree. They should be legislated by an Act to amend the Crimes Decree and must come under the responsibility of the Fiji Police Force, who are constitutionally authorised to conduct criminal investigations.

- The Special Commissioner at the Human Rights Commission should be the Child's advocate for welfare and rights, given the alarming prevalence of offences against children, in particular heinous sexual offences against children.
- The Special Commissioner shall receive complaints of cyber bullying against Children and have the power to give a **"Take Down" notice** to the alleged offender. We do not agree with mediation in this case, given the alleged abuse to the child victim and mediation can again re-victimise the child victim through enforced mediation process. We believe the priority should be to protect the child victim, rather than enforcing mediation which would inappropriate in this instance of cyber-bullying or revenge porn or non-consensual image sexual assault.
- We also recommend that the Commissioner shall have the power to communicate with the owner of the online platform to take down the offensive content.

Education

The need also exists for parents to be educated on the advantages and dangers of Internet use by their Children. They also need to actively monitor their children. We cannot throw kids into the deep end by just giving them a phone and not pay attention to what they do with it.

Police Spokesperson Ana Naisoro, recently, stated that, "It has also been noted that the age of account holders are getting younger. Parental supervision is vital so that they know who

they're online with," unquote. The best way to deal with bullying is not, necessarily, to have a law that punishes the end product but to have preventative measures in place like:

- Educating parents and Children and encouraging them to communicate better with each other.
- Educating teachers and guardians to identify the signs of bullying, depression, suicidal tendencies and identify Children at risk of self-harm.

Conclusion

We thank the Chairman and Members of the Committee for giving us this time to present our views and for dutifully listening to them.

We hope what we have communicated will be taken into consideration when this Committee presents their findings to Parliament.

We reiterate the need for:

- The need for a wider consultation period on this Bill.
- The guarantee of freedom of speech in Fiji.
- The guarantee of online safety measures and processes for our children.

There are specific laws in place for religious and racial vilification and we believe that there should be specific laws for the protection of children, online and offline.

Given the worrying implications for freedom of speech, particularly given it is election year, it is our main recommendation for this Bill to be shelved, reviewed and to undertake consultations after it is redrafted. In our view the AG's Office should have held wide public consultations before this Bill was tabled in Parliament, and now the Committee has been given only 2 months to carry out consultations before the Bill is to be passed in the May sitting of Parliament.

We appreciate this opportunity of participating in democracy and we look forward to voting in this year's General Elections.

Vinaka Vakalevu,

Samuela Savu

Amoni Kepa

[redacted]
Moape Rokotuibau

Submission to the Standing Committee on Justice, Law and Human Rights - Online Safety Bill 2018

Submitted by:
Damien Whippy
Arnold Chanel

Introduction

Humanity is at a crux, now more than ever before. The rise of digital ecosystems utilising the technology of the World Wide Web as a free and ubiquitous information curation and storage mechanism has been extraordinarily rapid in the past decade. Governments around the world quickly grasped the importance of the World Wide Web as a cluster of information nodes available to be accessed at any time; utilising the internet as an efficient (at that time) transfer medium. All of this is now achieved without introducing the significantly larger time lag that results from using traditional (physical) methods of moving information. Information that used to spread in months and days; is now spread in minutes and hours.

The digital age was born, and a majority of us became digital citizens in an online landscape that is abundant in knowledge, filled with adventure and fraught with terrors.

Societal problems are often traditionally spread through social groups through the assimilation of and interaction with individuals promoting negative viewpoints that are desirable to those with similar mindsets. Misinformation hastens the spread of these societal problems to a significant degree. The catalyst for proliferation of societal problems is conflict; either tangible or perceived. The resulting behavioral repercussions from this mass induced effect are manyfold and its effect on society is staggering.

Billions of transactions of social interaction occurs between users worldwide in realtime on a daily basis. Misinformation now spreads within social groups in minutes. The effect that this has on a mass scale for Fijians on a daily basis is astounding.

Access to the Internet for the Fijian people has grown rapidly since its advent; from 0.6% of our population in 1998 under the Rabuka government, to 1.6% of our population in 1999 under the Chaudhry government and then to 9.6% of our population under the Qarase government. Under the current Bainimarama government, our internet penetration rate in 2016 has increased to 46.5% of our population.

Misinformation and predation quickly became manifest within this digital landscape, and with the blitzing speed of the Internet, combined with this unprecedented level of access to the Internet as a mass instantaneous communication medium; the problem is magnified by many orders of magnitude.

Fiji's population is now in excess of 880,000.[1] Of this; more than 46.5% or more than 400,000 people have access to the internet and are using it daily.[2] We now have more mobile subscribers than our population and our consumption of the social networking site Facebook through mobile devices is 77%.

Facebook statistics verify that the total population of active users in Fiji is above 400,000. No longer are Fijians using the Internet primarily to learn or communicate effectively. Attention

spans have been shortened in millennials since the advent of social media. In fact, a top level former Facebook executive and investor, Chamath Palihapitiya, who was vice-president for user growth at Facebook before he left the company in 2011, said: "The short-term, dopamine-driven feedback loops that we have created are destroying how society works. No civil discourse, no cooperation, misinformation, mistruth."

This statement rings true to those of us that see the effect that misinformation on social media and websites is having on our younger generations. Sean Parker, Facebook's founding president recently confessed that when Facebook was being developed the objective was: "How do we consume as much of your time and conscious attention as possible?"

It was this mindset that led to the creation of features such as the "like" button that would give users "a dopamine hit" to encourage them to upload more content. "It's a social-validation feedback loop ... exactly the kind of thing that a hacker like myself would come up with, because you're exploiting a vulnerability in human psychology".
"It literally changes your relationship with society, with each other. It probably interferes with productivity in weird ways. God only knows what it's doing to our children's brains," he said.

We as young Fijians who have watched these trends, believe that this is a danger to those with a lack of developed metacognitive ability, particularly in a society like Fiji fragmented by ethnocentric tendencies. We have even seen a prominent politician: Mosese Bulitavu, knowingly spread fake doctored videos on the social networking site Facebook about Prime Minister Voreqe Bainimarama, specifically cut to portray him saying 'Forget about the iTaukei' and other mistruths. In a media interview he further increased the effect by making a false assertion that the video was real.

Within 19 hours, 26,667 Fijians were deliberately misled by these premeditated actions which led to a large amount of misguided public and online backlash against the Prime Minister. Thousands more were exposed to this fake news through; the carriage of content via traditional mediums, the constant sharing of content by the citizen concerned, and the assertion by Mosese Bulitavu that it was true. Days later, most of Fiji's online and offline population were discussing and watching this video, many of whom still believe it is legitimate. This is just one example of how a prominent citizen with a lack of knowledge and ill intent can influence the spread of misinformation and help this festering problem grow.

While the Prime Minister is more than capable of defending himself against fake news publicly, there are countless vulnerable Fijians who fall victim to misinformation and fake news daily. There are stories of many Fijian women, children and men who have been victimised, and aspects of their private lives put on display or abused without their consent or knowledge. The nature of the internet makes this content available to anyone with internet access to consume at any time, especially those with predatory intent.

It is clear that the internet and social networking technology, while being very beneficial for learning and proper information dissemination; is also being adopted by unscrupulous elements to target vulnerable Fijians, especially women and children. Our young Fijians have been desensitized against sex and violence, in particular. Methods used by online predators, such as sexual grooming, are now easier to execute due to this.

Indeed, the attention and awareness that social media steals from our young and old Fijians alike is dominant in its nature. Nothing else has grasped so many mindsets at once and induced a culture of ignorance and opinion based upon mistruths. It is chilling to note that this is having a heavy impact upon the morals of Fijians.

With the Fijian Government's plan to achieve 99% internet penetration by 2030 (Fiji National Development Plan), the number of Fijians who use the internet to access popular social media platforms such as Facebook, YouTube, Twitter, Snapchat and Instagram will only increase. Global trends around the world have indicated a rise in criminal activity and abuse targeting the vulnerable, particularly on social media. A comprehensive Research conducted by RMIT and Monash University showed that one in five Australians have suffered some form of 'image based abuse' commonly known as revenge porn. The study also showed victims of 'image based abuse' experience high levels of psychological distress, depression and even develop suicidal tendencies. How much more so will this impact us Fijians who are traditionally close knit in our communities?

Fiji is not immune from this global phenomenon and just recently had a case where hundreds of nude images of unsuspecting young females, some in primary school, were shared to a dropbox folder and circulated amongst students of the University of the South Pacific. While many people in the community at large condemned this act and many others like it, this Online Safety Bill is the first active step taken to actually protect vulnerable young Fijians like these. We need more than just words: we need to expedite this important addition to our law and the formation of the Online Safety Commission. We as Fijians should wage war against those that attempt to abuse, harass or bully the vulnerable online. We all have a duty as responsible Fijians to be the wardens of our generations for the future; our innocent children, our women and men.

Whether by email, social media, websites or other online mediums, it is a Governmental responsibility to safeguard vulnerable citizens and punish criminals who target them. It is reassuring to see that active steps like this Online Safety Bill are being taken to address this cross-cutting issue and very disconcerting to us as young citizens to know that there are Fijians who wish to delay these laws simply because of their inability to grasp the subject matter at hand and the inherent risk that we face as Fijians in future. This inefficient mode of thinking leaves our vulnerable at the mercy of abusers and predators.

With this, and with tremendous faith in our government's ability to safeguard all Fijians, we submit our input as concerned citizens with a hope that we can stop this dangerous rending of our society.

Submissions

1. We agree that the Commission should be a separate individual entity because of the enormity of Fiji's online community and the specialized attention required to curb the growing problem of irresponsible behavior and harmful content online.
2. The Commission to be set up and made operational as soon as possible as any delay enables criminal elements to get away with victimising vulnerable Fijians. This is currently happening daily.
3. The Commission as a safeguarding arm for citizens should consider working with the Fiji Police Force in terms of information sharing and training.
4. The Bill should consider online Sexual Grooming as a serious offence. This is already happening in Fiji. Sexual Grooming is befriending and establishing an emotional connection with a child, and sometimes the family, to lower the child's inhibitions with the objective of sexual abuse. A common example in Fiji is 'bus girls' who are commonly underage and perform sexual favours for bus drivers in exchange for free rides and other rewards. A similar exchange system exists for taxi drivers. Grooming is also prevalent in communal settings and is often highlighted in court. Social networking and online chat tools make this easier for the predator to execute.
5. Stronger punishments should be dished out for crimes such as installing hidden cameras in a room, child sexual abuse, sexual grooming, and deliberate sharing of content that is private in nature to the subject being recorded.
6. We would like the committee to consider taking action against entities which share harmful electronic communication from other sources and contribute to these being massively disseminated (going viral). This could apply to entities which have a public profile and following or news media. An example is the fake video which was shared by former MP Mosese Bulitavu on Facebook.
7. Facebook has features which allow members to create groups and pages. We would like the Commission to consider taking the administrators and owners of these groups and pages to task if harmful content is shared in them even if it was not shared by the administrators and admins themselves. Allowing members of groups to share content while having the power to remove or moderate this content as a group owner is active sharing of this type of information. An example is given earlier where prominent political activist Lynda Tabuya allowed a member of her group to post about and offer to furnish members nude images of a young Fijian woman who had already been vilified, humiliated and solicited in public.

Correlations

1. A young Fijian woman, Mereia Tuiloma, a hibiscus festival contestant and dancer, was a victim of image based abuse. Her images, of a highly sensitive nature, were shared by her former partner online. It quickly proliferated via the social networking site Facebook. Many began ridiculing her online and in public and she and her family faced constant abuse and humiliation. She has since appeared on Radio, Television and publications to tell her horrific story.

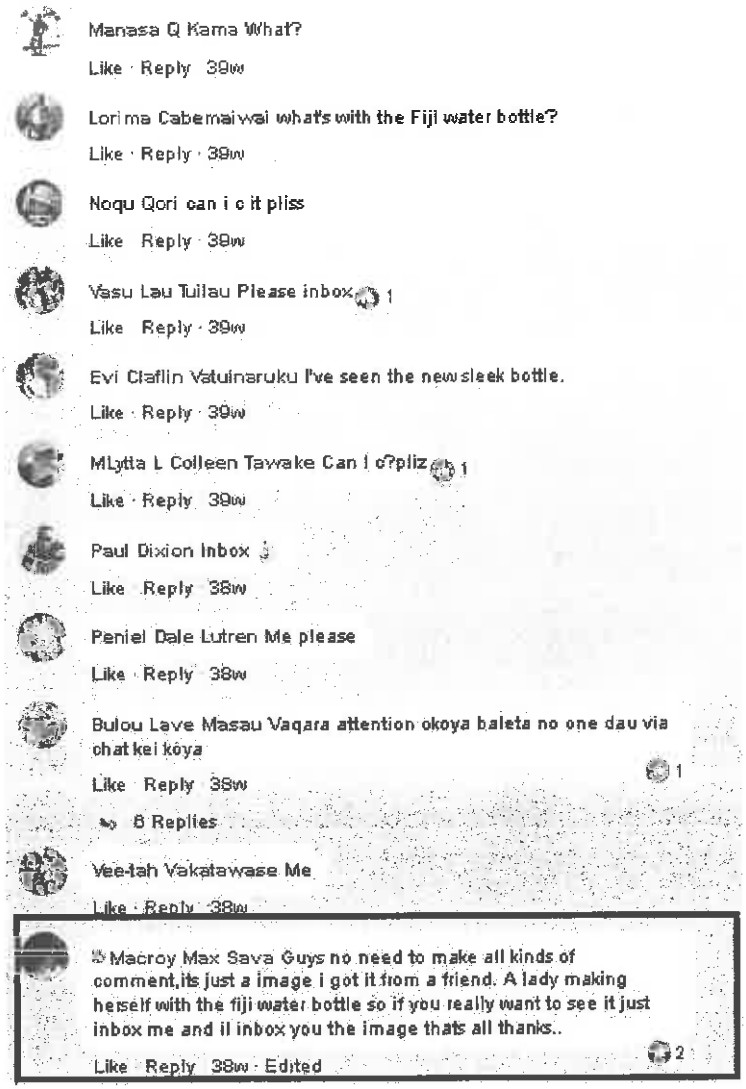
EXCLUSIVE

'My Story'

How Mereia Tuiloma overcame the pain and the humiliation regarding her infamous nude photos

2. A man offers to furnish highly private images which were sexual in nature, of a young Fijian woman (the same woman in 1 above) on the Facebook group "Chat Fiji" which is a political group with more than 116,000 Fijian members. This is owned and run by Lynda Tabuya and Sitiveni Rabuka. Her private images circulated through Facebook groups such as this spread very quickly to thousands of Fijians and is still circulating. The group owners actively allowed the sharing of this post by approving the post submission to be published.

3. Comments on the post highlighted above. The post was never removed by Lynda Tabuya and Sitiveni Rabuka, and is still present on the group. (7th April 2017)



Manasa Q Kama What?
Like · Reply 39w

Lori ma Cabemaiwai what's with the Fiji water bottle?
Like · Reply · 39w

Noqu Qori can i c it pliss
Like · Reply · 39w

Vasu Lau Tuilau Please inbox 1
Like · Reply · 39w

Evi Claflin Vatuinaruku I've seen the new sleek bottle.
Like · Reply · 39w

MLytta L Colleen Tawake Can I c?pliz 1
Like · Reply 39w

Paul Dixion Inbox
Like · Reply 38w

Peniel Dale Lutren Me please
Like · Reply 38w

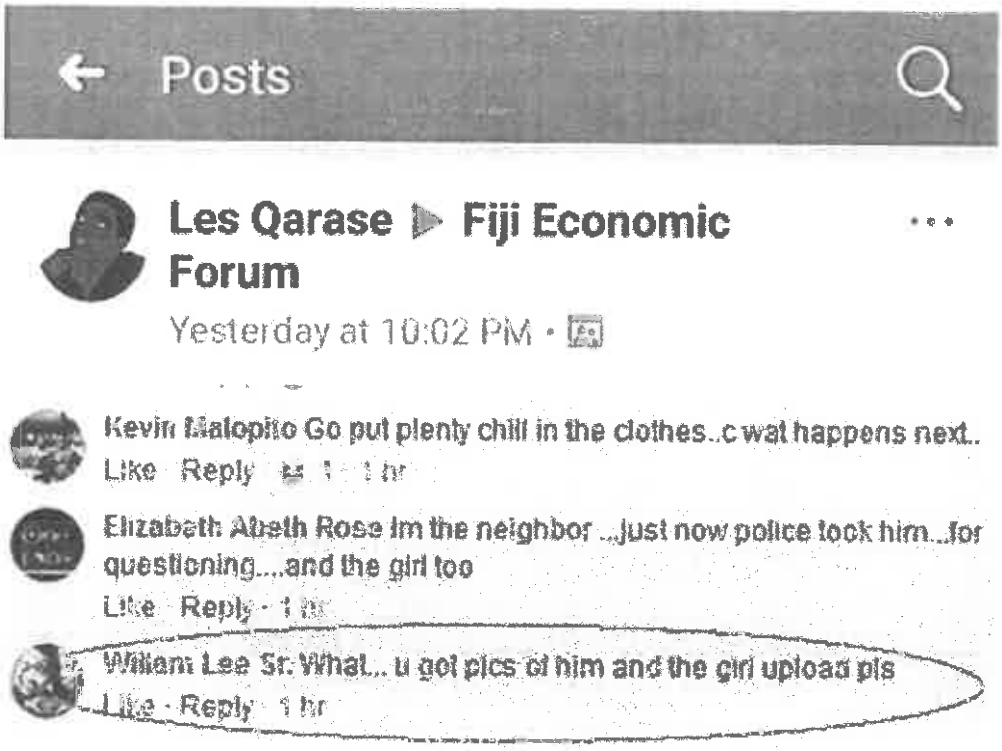
Bulou Lave Masau Vaqara attention okoya baleta no one dau via chat kei koya 1
Like · Reply 38w
8 Replies

Vee-tah Vakatawase Me
Like · Reply 38w

Macroy Max Sava Guys no need to make all kinds of comment,its just a image i got it from a friend. A lady making herself with the fiji water bottle so if you really want to see it just inbox me and il inbox you the image thats all thanks..
Like · Reply 38w · Edited 2

4. A former Member of Parliament Mosese Bulitavu shares a fake doctored video which reached 26,667 people within 19 hours of being published on Facebook.

5. An NFP provisional candidate, William Lee requests for pictures of underaged schoolgirls to be uploaded in a Facebook Group.



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Glossary

Dropbox: Dropbox is a file hosting service operated by American company Dropbox, Inc., headquartered in San Francisco, California, that offers cloud storage, file synchronization, personal cloud, and client software.

Entities: Any individual, company, group, organisation, facebook page, facebook group.

Facebook: Facebook is a social networking site that makes it easy for you to connect and share with your family and friends online. Originally designed for college students, Facebook was created in 2004 by Mark Zuckerberg while he was enrolled at Harvard University.

Image Based Abuse (revenge porn): revealing or sexually explicit images or videos of a person posted on the Internet, typically by a former sexual partner, without the consent of the subject and in order to cause them distress or embarrassment. While most image-based abuse is about the sharing of images without consent, it can also include the threat of an image being shared.

Instagram: Instagram is a social networking app made for sharing photos and videos from a smartphone. Similar to Facebook or Twitter, everyone who creates an Instagram account has a profile and a news feed. When you post a photo or video on Instagram, it will be displayed on your profile.

Trolling: The art of deliberately, cleverly, and secretly pissing people off, usually via the internet, using dialogue. Trolling does not mean just making rude remarks: Shouting swear words at someone doesn't count as trolling; it's just flaming, and isn't funny. Spam isn't trolling either; it pisses people off, but it's lame.

Social interaction: A social interaction is an exchange between two or more individuals and is a building block of society. Social interaction can be studied between groups of two (dyads), three (triads) or larger social groups. By interacting with one another, people design rules, institutions and systems within which they seek to live.

Sexual Grooming: Child grooming is befriending and establishing an emotional connection with a child, and sometimes the family, to lower the child's inhibitions with the objective of sexual abuse. A common example in Fiji is 'bus girls' who are commonly underage and perform sexual favours for bus drivers in exchange for free rides and other rewards. A similar illegal exchange system exists for taxi drivers.

Snapchat: Snapchat is a mobile messaging application used to share photos, videos, text, and drawings. It's free to download the app and free to send messages using it. It has become hugely popular in a very short space of time, especially with young people.

Oral Submission to the Standing Committee on Justice and Human Rights on the Sexual Offenders Registry Bill

Priyanka Ram, Personal Submission

4th, May 2018

The Online Safety Bill 2018

Be it online tweets, phone calls, texts, emails, posts on social media, technology has a way of carrying messages across interfaces. Monitoring, controlling, accessing statuses, locations enables one to go over the context of understanding "harm."

It becomes crucial to set forth legal boundaries and standards that define what actual 'harm' and 'safety' in the context of the online safety bill actually constitutes.

As a young person, a young woman, and as a youth candidate for the National Federation Party, I am putting forth my reservations on the proposed online safety bill

To begin with:

3 (a) to promote responsible online behaviors and online safety

1. A clearer understanding of what constitutes the right to safety, for children becomes important when striking a right balance to ensure protection for children within a world that deals with information exchange virtually.
2. Safety and privacy as a freedom within society and privacy as a dignity that protects community norms where it becomes impossible to disentangle concerns relating to intimate relationships and public reputation.

The "Responsible" part falls short as no further expansion on what actually constitutes:

a. ***Responsible online behavior.***

The right to privacy is enshrined in the Universal Declaration of Human Rights and the Convention on the Rights of the Child (Article 16, CRC). We live in a world where the influx of information sharing is confused with the understanding of what actually constitutes the right to privacy both in international and regional translations, where standards are sought to define operational boundaries in regards to the right to privacy.

In an earlier submission on the 27th of March 2018, the National Federation Party did propose the "10 Communication Principles from the "Harmful Digital Communications Act 2015" and in fact gives a clear intention of what can be operationally defined as 'responsible online behavior", this definition lets the context sit in as not being "subjective" when understanding 'responsible online behavior'.

Within this bill, the only mention of 'Privacy' is relating to the interpretation for "intimate visual recording":

Intimate visual recording (i) an individual who is in a place which, in the circumstances, would reasonably be expected to provide privacy and the individual is-

a. Naked
b. Engaged in sexual activity
c. Showering, toileting, dressing, undressing
d. Visual recording- is carried beneath an individual's clothing

What about a situation where new parents share photos of their new born baby having his/her first bath for the benefit of families abroad? In the strictest sense of the world, the parents could be breaching this law!

Furthermore, in the same situation of the new parents, what is cute and cuddly to them and their relatives, may be gravely offensive to someone else--where do we draw the lines? WHO draws the lines? Are we at risk at creating new societal norms by an unelected commission?

Part of Offences

24(3) in determining whether posting an electronic communication would cause harm, the court may take into account any factor it considers relevant, including:

(a) *The extremity of language , images or videos used;*
(b) *The age and characteristics of the individual concerned;*
(c) *Whether the electronic communication was anonymous;*
(d) *Whether the electronic communication was repeated;*
(e) *The extent of the circulation of the electronic communication;*
(f) *Whether the electronic communication is true or false; and*
(g) *The context in which the electronic communication appeared;*

It is of importance too for the Committee to look into instances where a child commits an offence, how does protection and law define operational considerations for these sections of person's online offences that constitute harm?

The Steubenville rape case, (Ohio 2012) can be a point of contention where commentary on a rape assault was disseminated in public media - it was a case of accessing network on mobile devices and highlighted a cultural shift in which minors sexually violated a 16 year old victim (minor).

Nearly every stage of the violation was disseminated digitally via photographs, video recordings by the perpetrators as well as witnesses to the assault. If it was not for social media, the real culprits would have gotten away with rape. The media glared its lens on each and every aspect to cover the case.

So if a similar case had to happen here, section *24(3) (b) advices the court to look at "the ages and characteristics of the individuals concerned" In the Steubenville case referenced here, who were they? Children! Children played the role of offenders.*

We see the precedence of newer technologies evolving, mobile applications, live streaming where the press of a button duplicates and sends raw data across the seven seas. Social media becomes a platform to go beyond communication to connect with individuals be it interaction or the creation of knowledge sharing. In the above mentioned case, technology played the role of a witness that documented the assault in its entirety.

Not only was the victim assaulted physically, she was assaulted digitally. Without the digital captures shared, this assault would never have been acknowledged as the victim was unconscious throughout the whole ordeal, and the physical ordeal was not remembered.

Again if we transpose the Steubenville case to this bill for the courts, section 24(c) "Whether the electronic communication was anonymous or not" would be difficult to ascertain, as well as section 24 (3)(e) "the extent of electronic communication".

People actually witnessed the incident but instead of stopping the heinous crime, they recaptured and passed on the scene with their cellphones. There was a "complicity of physical witnesses in the production of technological witnesses". While there remained some who recorded the scene but deleted the records' and if the records were found, it would have resulted in prosecution. This was not just a case of sexual assault but shows the actions of violent communication that gets recorded and made viral, which is just as dangerous.

In this instance, social media and new communication technologies acted as a witness and a threat, "reporting gave more agency to the technology than was given to the rape victim herself".

It is my humble suggestion that the Standing Committee on Justice, Law and Human Rights should ensure very concise terminologies that relate to *"offences to deter irresponsible and harmful online behavior"*.

24(3) (f) whether the electronic communication is true or false;

To cite an example of the influence of social media, in Fiji's case nearly half of its population use Facebook, with over 200,000 people accessing daily. Distinctions can be made in which 45% of users falling under the 25 years of age category. (June 13th 2017, Newswire) this shows the popularity of Facebook as a user interface.

But in fact to explain- section *24 (3) (f) "whether electronic communication is true or false"* , there is no clear cut methodology that the proposed bill elaborates on to identify actual users as opposed to fake account holders, this is where the true and false rationale becomes ambiguous to start off with.

Section 5: The Act to Bind the State

This section in my view fails to highlight how the Act binds the State. How are they grievous?

For example a concerted promotion for "education" would move the policy beyond self-regulation and holding social media providers accountable for protecting children.

This would be a better opportunity for establishing "clear definitions of the legal obligations placed on social media sites" so as to draw protection measures for each account holder's privacy.

How does the law apply where 3rd, 4th, 5th etc. parties redistribute offensive images or material?

There is a need to link "harm" to those not directly involved in these situations and the link to the Child Welfare Decree, ensure mandatory reporting of cases possible, likely or actual harm in relation to events discovered by a professional, to be affecting the health and welfare of children. [1]12 Australian & New Zealand Journal of Criminology 48(1) at PENNSYLVANIA STATE UNIV on September 18, 2016

In relation to another bill before this Committee, will such offences for Online Safety by minors, automatically become an entry into the proposed Sexual Offenders Registry?

The Committee is invited to seriously consider the issue of deepfakes that technology is now making more possible, and worrying the world over. This is where digital technology like Artificial Intelligence (AI) automates pornography or, very possibly political updates and news by manipulating faces, voices and mannerisms such that they are believable.

I don't believe even INTERPOL is up to speed with tracking and eliminating this new online risk and the onus is on the Commission to think about how it would treat these horrible crimes, if such activities and the tools for it become so available so as to become entertaining to target either anybody OR a paid service targeting specific individuals.

The Police Cyber Crimes Unit has a recent relationship with INTERPOL in relation to cyber related crimes.

Furthermore, deepfake productions of promoting fake news or fake political satire is LABELLED as satire- how would the Commission treat that?

Part 2 Online Safety Commission

Section 14 (2) On Investigation of Complaints says - investigation under this section is to be conducted as the commissioner thinks fit –

Instead of giving the Commission such wide- ranging powers, this section should compel investigations based on specific data, statistics or research that is publicly available , to give credibility to their efforts,-- not just ad hoc issues or anecdotal stories. Otherwise, this can lead to a dictatorial approach that taxpayers pay for, especially when no civil or criminal proceedings can be brought against them.

In fact, it would be far more cost-effective for taxpayers if the Police Cyber Crime Unit is enhanced and strengthened.

In closing, Hon Committee, may I add further points for guidance and consideration that I do not believe have been adequately captured in the proposed Online Safety Bill?

1. Forensic technology and capabilities need to be considered as well as resources to up- skill the Police's cyber-crime capabilities.

2. The proposed Commission should be given the mandate to work with other international like-minded entities, such as in Australia and New Zealand.

Therefore I urge the committee to, re-explore, re-think and place a wider emphasis on consultation. This proposed bill in its raw form, certainly isn't ideal.

Vinaka

Online Safety Bill

Chairperson and members of the Committee on Justice, Law and Human Rights,

I ***Jope Volavola Tarai*** present this submission to you as Fijian Citizen. The sentiments expressed in this submission do not represent my employers or anyone else but me, myself and I.

This submission is informed by my research on digital technologies and social networking sites, specifically focusing on Fiji and Melanesia in the Pacific region. Using digital ethnography as a methodology, I and in conjunction with other researchers have followed Fiji's online sphere or digital landscape in the last 4 years. Most of the cultivated research work has been published and publicly available online.

This submission focusses on three aspects;

1. **Timing – duration**
2. **Responsible Free Speech** – Digital discussions – digital dissent
   - Context – the underlying context of Fiji's political landscape – which has an implication on its digital landscape.
3. **Clarifying the role of the commission** – in light of other established departments such as the Cyber Crime Unit

Before elaborating on these aspects it is worth noting that the claimed intent of the bill is admirable in so far as protecting children and the victims of cyber-harassment and bullying.

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1. Timing and duration

In a country of over 800,000 people there are over half a million estimated FB account users active in Fiji. This indicates that majority of Fijians are online and specifically on SNS sites, like FB majority of the time at any given time of the day. This is even more enabled with the use of handheld devices.

To put this into context on the month of September, in 2014, there were an estimated 298,000 FB accounts active in Fiji, now there are a total of over half a million accounts. In 2014, majority

of those online (FB) were between 18-35 (otherwise classified as the youth), a similar trend can be seen in the present situation.

In light of this **huge digital audience**, there is a statistical argument to be made for more time to be given or at least considered by this committee to consult widely and in a greater expanse on this premise, especially considering the fact that majority of these users are young people. Therefore, this submission requests for at least 6-7months public consultation. In addition to this, the call for submissions should specifically target and appeal to (through innovative means) to what I like to call as **'Digital Communities'** online that have become prominent since 2014. This is because; these are the Digital Communities that have a huge audience base. Take **Chat Fiji** for instance, which boasts over 200k active accounts. While the accusation of *'fake accounts'* becomes a convenient argument to undermine estimated audiences, it does not deny the fact that account users are still digital citizens and citizens are taxpayers, who surely must be given a chance to be heard.

- Digital literacy

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2. Responsible free speech

The Bill needs to acknowledge the underlying context of Fiji's political and media landscape of the last decade or so.

The Bill needs a clause that asserts and acknowledges the need to protect RESPONSIBLE, free speech (Digital). In other words it needs an assurance that it will NOT undermine RESPONSIBLE free speech in the pursuit of online safety. Responsible free speech has been seen and has become a turning point in the course of our so called "genuine democracy". The bill needs clear guiding principles to equally protect RESPONSIBLE free speech, as it also claims to protect Fijians against IRRESPONSIBLE free speech. Responsible FREE speech, can and has contributed to the ends of constructive governance, however its means can be undertaken through DISAGREEING

WITH the state. In this regard, the act of resisting the state agenda, responsibly as a DIGITAL CITIZEN of this country must be protected.

Take for instance, late last year when one of Fiji's most iconic public personalities at that point, and still is now (Lenora Qereqeretabua), using RESPONSIBLE FREE SPEECH via an online SNS, queried and in a way DIAGREED with why there was a need to have a planned 35,000FJD post COP 23 celebrations. This compelled a form of clarification from the Minister of Climate Change, AG, Aiyaz Said Khayium. This in itself exemplifies a form of active digital citizen engagement and social accountability, which has been over looked in the current discourse on this bill. The protection of such forms of responsible free speech and digital discontent must be guaranteed. The fear that, I and skeptics now have is that disagreeing with the state agenda online, in a responsible manner can be perceived or misconstrued as an abuse of free speech. While we can all agree that racial hatred and incitement must not be tolerated, it must not become the 'trojan horse' for clamping down on healthy digital discontent and dissatisfaction. Therefore, there must be a clause or an **inserted section of guiding principles** that protects responsible digital discussions – responsible free speech.

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3. The Bill introduces an Online Safety Commission – whose functions are detailed in part 2.point 8

The functions appear to mimic the roles and functions administered by an already established body in Fiji – which is the Cyber Crime Investigations Unit. Under the framework of the Crimes Decree # 43 of 2009 - Sec. 53 – Sec. 64 – Computer Crime Offences - Criminal Procedures Decree # 44 of 2009 - Telecommunications Promulgation 2008 - Telecommunications Act Cap 173.

Current Framework

- Crimes Decree # 43 of 2009
  - Sec. 53 – Sec. 64 – Computer Crime Offences
- Criminal Procedures Decree # 44 of 2009
  - Procedural
- Telecommunications Promulgation 2008
- Telecommunications Act Cap 173

The Cybercrime unit already receives and investigates complaints on online crimes, while the Bill states that the commission "will investigate complaints". [1]This exposes a fundamental aspect in this bill in terms of it duplicating already established functions of the Cyber Crime Unit. Considering that the Unit has had a number of years of experience and technical resource, why not support that Unit in in terms of its resource limitations as oppose to risking tax payers funds in duplicating functions.

This point raises simple, yet pertinent questions; such as, why reinvent the wheel? Or why risk duplicating established functions in the cybercrime unit?

Why not support and expand the Cybercrime unit to help it overcome its technical and resource limitations in investigating complaints about online crimes?

The already established work of the Cyber Crime Unit could be further exacerbated or constrained by this component of the online commission, if it is not clarified.

[1] (However, it is notable that the functions of the bill states the commission will "work with relevant agencies, organizations or govts" it does not clarify the fact that there is a risk of duplicating already established functions)

In conclusion, having examined and observed Fiji's digital landscape in the last few years there are two central aspects in this issue of **RISKS** and **REWARDS.**

Consider our digital landscape as a fruitful lush garden that can be overgrown with weeds and unwanted parasites. The weeds and unwanted parasites exemplify the risks and dangers of an expanding online sphere, which the Bill claims to protect us against. On the other hand the other hand we must not forget that there are the rich **FRUITS** of rewards that come from an expanding digital sphere derived through the **responsible use**. I hope, the Bill does not endanger the **rewarding fruits of responsible digital discussion** while targeting **risks (weeds)** that come with online expansion.

Vinaka.

Oral Submission to the Standing Committee on Justice & Human Rights

on Bill 7 of 2018 - Online Safety

Lenora Qereqeretabua

3rd May, 2018

Honourable Chair and Honourable Members of the Committee, I am here to make my personal submission on the proposed Bill 7 as I strongly believe in safeguarding my freedom of expression so I thank you for this opportunity. I note that today is World Press Freedom Day.

My submission will focus on the following;

1. **My opinion of the Bill**
2. **My reservations with the proposed Online Safety Commission**
3. **My suggestions on alternatives**

1. My opinion on the Bill

Fiji's recent history has seen the arbitrary arrest and detention, assault and murder of Fiji Citizens.

This recent history has included and resulted in what many will agree is the curtailing of many of our rights and freedoms, including and not limited to, the freedom of the media to carry out investigative journalism without the threat of victimisation, the freedom of citizens of Fiji to protest without the threat of victimisation, and the freedom of speech of citizens of Fiji without the threat of victimisation.

These restrictions have led directly to the venting of opinions and feelings via the only media which still affords us freedom of expression; Electronic and Social Media.

Hon Chair and Members of the Committee, in PART 1 of the Bill — the PRELIMINARY states the objectives of the Bill are to—

(a) promote responsible online behaviour and online safety;

(b) deter harm caused to individuals by electronic communications; and

(c) provide an efficient means of redress for such individuals.

I believe the Bill falls short right here at the beginning by failing to expand on the very first of the three objectives.

Instead of explaining in detail HOW it will "promote responsible online behaviour and online safety", a very necessary exercise, the Bill goes not much further than to mention the word Education twice and instead jumps straight to Punishment; "Fines" - mentioned nine times and "Imprisonment" - which appears six times.

Yes, I completely agree that the internet should be made safer, for everyone. However, the omission of any clear mention of the role of the Ministry of Education in this Bill should be a cause for concern as the Bill seems intended more to scare than to develop capacity for responsible online behaviour and online safety.

How important is teaching young children about online safety?

There is no mention and therefore no convincing commitment in the Bill to satisfy me of the inclusion of the Ministry of Education in the purported objective to promote responsible online behaviour and online safety. Yes, there are two rather weak and ambiguous uses of the word Education in the sentence,

"**1.2** The Online Safety Bill 2018 ('Bill') therefore seeks to promote online safety to increase awareness and **education** on responsible online behaviour and the use and provision of personal information"., and

In addressing the functions of the Commission on Online Safety, in itself in my opinion a waste of govt machinery already in place, the Bill offers as one of the nine functions of the Commission, **8 (b) on page 6** and I quote, "to organise awareness and education programmes, including the provision of online safety material;" This is only 1 of the 9 Functions of the proposed Commission, under this Bill.

Forgive me for my lack of faith but this sounds rather like yet another waste of tax payers' resources; at worst churning out ill-informed and ill researched material that will get lost in the deluge of posters and handouts so typical of government-style mass communication.

Hon Chair and Members of the Committee, I strongly believe if the Bill genuinely seeks to promote responsible online behaviour and online safety, then there must be, in the very least, a clearly-worded commitment within the language of this Bill which includes the Ministry of Education and other stakeholders in the said promotion of responsible online behaviour.

1.2 and 8 b are, in my opinion, inadequate.

In relation to Public Life

Hon. Chair and Members of the Committee, in regards to those members of the population engaged in Public Life, and in light of the opinions, statements and other online posts, sometimes vitriolic in their nature, their intention and language, lobbed at members of Parliament, aspiring candidates for public office and other public figures, I believe the Bill in its current form attempts to offer them protection from abuse of the electronic kind.

Hon. Chair and Members of the Committee, at this point I wish to declare my interest; I am a Provisional Candidate, I have been in the public eye for 30 years out of my 50 and have been the target of several online attacks. In regards the recent online-trolling aimed at me personally, the anonymity of being an Online - Troll emboldens cowardly people, but what they post say more about them than it does about me. One learns to grow a thick skin.

However, may I suggest that the authors of this proposed Bill take a page out of the government of the UK's Committee on Standards in Public Life (CSPL) which published a report in December 2017.

Earlier in 2017, the UK's Electoral Commission suggested that their Government consider introducing new offences to bring UK election laws up to date to reduce the wave of abuse often faced by candidates and to provide specific support for Parliamentary candidates during election campaigns.

The independent Committee on Standards in Public Life, which advises the UK Prime Minister on standards of conduct across public life, in December 2017, made several recommendations to address the threats and intimidation experienced by Parliamentary candidates and others. These recommendations include, and please indulge me, Hon Chair; these are important points which ring true for Fiji;

- Government bringing forward legislation to shift the liability of illegal content online towards social media companies,
- Social media companies ensuring they are able to make decisions quickly and consistently on the takedown of intimidatory content online,
- Government consulting on the introduction of a new offence in **electoral law** of intimidating Parliamentary candidates and party campaigners,
- All political parties working together to develop a joint code of conduct on intimidatory behaviour during election campaigns. The code should be jointly enforced by the political parties,

(Hon. Chair, as I am sure you are aware, this last statement is in direct reference to Online Trolls.)

The National Police Chiefs Council ensuring that local police forces have sufficient training to enable them to effectively investigate offences committed through social media.

Lord Bew, Chair of the Committee, said:

> *"This level of vile and threatening behaviour, albeit by a minority of people, against those standing for public office is unacceptable in a healthy democracy. We cannot get to a point where people are put off standing, retreat from debate, and even fear for their lives as a result of their engagement in politics. This is not about protecting elites or stifling debate, it is about ensuring we have a vigorous democracy in which participants engage in a responsible way which recognises others' rights to participate and to hold different points of view."*

(Again, in relation to Online Trolls, Hon. Chair)

> *'We believe that the parties themselves must show greater leadership. They must call out members who engage in this appalling behaviour, and make sure appropriate sanctions are imposed swiftly and consistently. They have an important duty of care to their candidates, members and supporters. Intimidation takes place across the*

political spectrum, both in terms of those engaging in and those receiving intimidation. The leadership of political parties must recognise this."

"We have heard evidence that intimidatory behaviour can stem from of our current political culture, with low levels of trust in politicians and a feeling of frustration and alienation by some people. Against that backdrop, it is down to all in public life to play their part in restoring and protecting our public political culture by setting a tone which respects the right of every individual to participate and does not, however inadvertently, open a door to intimidation."

In the UK, as is the case in Fiji electoral offences already come with the threat of the imposition of special sanctions, such as the person convicted losing their elected office, being disqualified from voting or being banned from standing.

It also suggested that an overhaul of **electoral law** would help in "clarifying and strengthening" existing offences and closing any gaps in the current rules.

The UK Committee on Standards in Public Life also recommended updating **electoral laws** to take proper account of social media posts, so people can find out who is responsible for abusive material posted online.

If the Bill is indeed designed in part to protect those in Public Office and aims to provide an efficient means of redress, I would like to suggest that the afore-mentioned penalties could be applied to trolls found guilty of abusing candidates on social media.

What I have read is just one part of the big issue which is **responsible online behaviour and online safety**.

May we now jump to **PART 4—OFFENCES**

Quite apart from the use of the word "Harm", the meaning of which is ambiguous and subjective, a fact which other submission presentations have highlighted,

Hon. Chair and Committee members, I am baffled by Part 4, Sections 3 and 4,

"(3) Subsection (1) does not apply if the individual, who is the subject of the electronic communication concerned, consents to the specific post of the intimate visual recording.

(4) In this section, "consent" must be voluntary, expressed and informed, and does not include the consent of a child."

Does this proposed Bill mean to make it okay for people to allow the posting of "intimate visual recording"/ recordings of themselves, provided they are not a child, and provided they give consent in the manner mentioned in Section (4)?

If so, Hon. Chairman, this cannot be allowed and I object strongly.

How does this proposed Bill **align with, complement** or indeed **overlap** current laws including the Crimes Decree, Media Decree, the Child Welfare Decree of 2010 (which mandates reporting) and any United Nations convention endorsed by Fiji?

Hon. Chair and Committee members, I urge you to allow more time for consultation, more opportunity for debate outside of parliament, re-thinking, amendment and above all, scrutiny.

I think the Bill in its current form should be scrapped and existing legislation strengthened to include but not limited to, the offences in Part 4 of this Bill.

2. My reservations with the proposed Online Safety Commission

Why set up a new body which in my opinion will only complicate the process of finding and punishing the perpetrators, drawing out the suffering of the victims of cyber-attacks, most of which tend to be women, and their family?

A Commission as proposed by this Bill will only delay justice and redress for the victim. And to be honest; when faced with the threat of action by the Police versus action by the proposed Commission, I dare say the threat of action by a Commission would be a very weak deterrent.

The Bill in its current form risks overlaps of responsibilities and even worse, gaps in protection if the proposed Commission is set up.

How confident can the public be in the impartiality of the Commissioner?

3. My suggestions on alternatives without the Commission

Law

Update and amend laws.

Hon Chair, it is my understanding that Child Pornography is not an offense in the Crimes Decree/Act. It is also my understanding that in 2012 a provision to make child pornography illegal was included in a draft Cybercrime Law that has been sitting on someone's table since November 2012.

Instead of setting up a new Commission it would be logical and less painful for taxpayers who will be heading to the polls this year, to instead bring that draft in and strengthen the police cyber-crimes unit.

Police

I believe increasing the resources of the Police Cyber Crimes Unit and widening their powers would be wiser than setting up a whole new entity to *police* online behaviour.

Instead of spending already scarce financial resources on the set up and operation of a new Commission; a Commissioner, Staff and Offices, why not boost the resources of the Police Cyber Crimes Unit and widen their mandate?

The Fiji Police Force through its Cyber-Crimes Unit should continue to be tasked with receiving and investigating complaints as they have currently been doing. Case in point the appalling sharing online of images of a 14-year-old female after having been raped by a 21-year-old. I believe this case came to light on the weekend of the Coca Cola games and one of the perpetrators is already before the courts. Kudos to the Fiji Police Force and those who helped in his apprehension.

Strengthen Existing Partnerships

Further, strengthen the existing partnerships between the Dept of Social Welfare, Police and other Ministries & Departments, and NGOs to protect children and the vulnerable.

What part does the National Coordinating Committee on Children (NCCC) play in its role as the coordinating agency for the implementation of the Convention on the Rights of the Child (CRC) in as far as this proposed Bill is concerned?

Education

Unfortunately, we cannot legislate Common Sense, Good Manners and Decency, but we can teach **Values** and we can teach **Online Safety.**

On February 6th, this year, the UK Government outlined steps to make the UK the safest place to be online.

I quote from the UK Government's website,

> *"In line with these initiatives, Matt Hancock, secretary of State for Digital, Culture, Media and Sport announced an online safety guide developed by the UK Council for Child Internet Safety for those working with children, including school leaders and teachers, to prepare young people for digital life."*

The UK's Council for Child Internet Safety is a policy advisory group chaired by government ministers and representing organisations from government, industry, law, academia and charity sectors that work in partnership to help keep children safe online.

Hon. Chair and Members of the Committee, here is where the MoE can take centre stage in terms of the Bill's objective of "promoting responsible online behaviour and online safety" by including Online Safety in our school curriculum. Equip school communities; staff, parents and children with the knowledge they need to understand online dangers and what to do in case of an incident.

To end Hon Chair and members of the Committee, I believe the proposed Bill in its current form should be abandoned.

I know there is a different committee holding consultations on the International Convention on Civil and Political Rights (ICCPR) which Fiji has not ratified; has enough consideration been given to the implications and complications that will arise if we ratify and if the Bill is passed as is?

With regards the proposed Bill 7, therefore, I ask that more time be allowed for scrutiny, consultation, re-thinking and its amendment.

Honourable Chair and Committee members, I do look forward to reading all the submissions made on this Bill in your report.

Vinaka. **(end)**

SUBMISSION BY THE CITIZENS' CONSTITUTIONAL FORUM

PARLIAMENTARY STANDING COMMITTEE ON JUSTICE, LAW AND HUMAN RIGHTS

ONLINE SAFETY BILL NO. 7 OF 2018

THURSDAY 03 May 2018

INTRODUCTION

The Chairman Honourable Ashneel Sudhakar and Honourable Members of the Parliamentary Standing Committee on Justice, Law and Human Rights.

We thank you for this opportunity to present the Citizens' Constitutional Forum (CCF) submission on the **Online Safety Bill No. 7 of 2018** ("the Bill"). The CCF is 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 for the following purposes pursuant to Section 3:

"(a) promote responsible online behaviour and online safety;
(b) deter harm caused to individuals by electronic communications; and
(c) provide an efficient means of redress for such individuals."[1]

Need For Responsible Internet Usage

CCF notes the need for a more safe and responsible usage of online communication. On the same note, pressing issues have surfaced concerning online posts ranging from written to visual communications (to name a few). For instance, a recent incident involving a picture being circulated on social media which shows a female student half nude and in another picture she was shown to be hugging a male.[2] We do not know the shame or the emotional distress in which the persons in the pictures are experiencing nor

[1] Online Safety Bill No. 7 of 2018, Section 3
[2] http://fijisun.com.fj/2018/04/25/nude-photos-uproar/ [Accessed: 26 April 2018]

the intentions of the pictures captured and circulated but CCF submits that it does not condone the usage of online platforms for the purpose of bullying, shaming, threatening and harming any person.
In September 2017, there was a discovery of 900 nude images and videos of young Fijian women posted online.[3] The Cyber Crime Unit has confirmed that such acts regarding revenge porn continue to increase. Therefore, such rising online incidents are revolting and require the enforcement of law to regulate a more responsible usage of electronic and online mediums.

According to Internet World Stats, Fiji had about 421, 958 internet users by March 2017 and about 380,000 Facebook users on June/2016.[4] Fiji's population was about 884, 887 in 2017.[5] This was also reported by the Fiji Times in an article titled "421,000 internet users in Fiji" published on 15 March 2018.[6] The Internet World Stats is an international website which provides updated world internet usage and social media statistics to name a few.

With only 900 nude images discovered since September 2017, it is concerning to note how many more victims of internet, cyber bullying and or revenge porn exists. The Bill addresses these sort of online issues which CCF commends however, there are also a few pressing issues which CCF highlights below for consideration by Parliament.

ISSUES ON THE ONLINE SAFETY BILL NO. 7 OF 2018

1. UNDER-UTILIZATION OF EXISTING LAWS AND INSTITUTIONS

The Bill is said to promote and encourage responsible online behavior with the help of an Online Safety Commission and an avenue is provided for individuals who have been victims of targeted harmful electronic communication where they can lodge complaints with the Commission.

However, there are legislations and institutions in existence that could be utilized to uphold the same notion moved by the government through the Bill. Firstly, with respect to institutions; the Cyber Crime Unit ("Unit") which is a part of the Fiji Police Force oversees investigations regarding offences

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[3] http://fijisun.com.fj/2018/02/08/police-condemn-new-nude-video-posted-online/ [Accessed: 26 April 2018]
[4] https://www.internetworldstats.com/pacific.htm [Accessed: 26 April 2018]
[5] http://www.statsfiji.gov.fj/census [Accessed: 26 April 2018]
[6] http://fijitimes.com.fj/421000-internet-users-in-fiji/ [Accessed: 26 April 2018]

committed with the usage of computers as per the Crimes Act of Fiji. During the 19th Attorney General's Conference in 2017, the Commissioner of Police Brigadier-General Sitiveni Qiliho stated that a major drawback for the Unit was that they could not progress further as a result of the absence of specific laws with cyber crime and that they do not have lawful authority with regards to certain investigating elements. [7]The CCF submits that the issues or challenges faced by the Cyber Crime Unit would be best resolved by way of utilizing the institution instead of creating an Online Safety Commission.

Fiji already has an institution focused on Cyber Crime, why not focus relevant resources to address the issues faced by the Unit whilst effectively using the Unit to combat the rising cyber problems as earlier mentioned. Another question would be; why not have an Online Safety Commission to solely focus on the offences to be legislated. In using existing institutions, this could effectively help and improve the current resources and capacity building for the purpose of best practice in addressing cyber issues. The creation of a new Commission will not benefit the country as resources will not be effectively or efficiently used if we cannot utilize what we already have. Utilizing existing institutions will allow a more timely implementation and enforcement of newly legislated laws. Therefore, it is our submission that existing institutions such as the Cyber Crime Unit be efficiently and effectively used instead of the creation of a new institution.

Secondly, there are existing legislations in place that address some aspects of Cyber Crime and related issues. The Crimes Act of 2009 ("Crimes Act") addresses cyber-crimes although the offences substantially involves the usage of computers only in Division 6 of the Act. Nowadays, other electronic gadgets are used to conduct similar offences and other irresponsible online communications previously mentioned. The Police Commissioner during his speech at the conference also stated that the Crimes Act was silent on other digital devices like mobile phones, tablets that have the capacity to store and disseminate data. We submit that rather than introducing a whole new legislation, the Crimes Act be utilized by way of review and amendment to incorporate the offences purposed for regulating responsible online use.

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[7] https://www.youtube.com/watch?v=Jsz5E_hAFIY , 19th Attorney-General's Conference 2017 - Presentation by Brigadier-General Sitiveni Qiliho [Accessed: 1 May 2018]

2. *GUIDING PRINCIPLES*

A. Inclusion and Protection of Bill of Rights- Constitution of the Republic of Fiji 203

The only threshold or key element for a person to be investigated or charged and convicted with an offence in the Bill is mainly whether harm is likely to be caused or has been caused to the complainant. A substantive amount of the content in the Online Safety Bill appears to be taken from the Harmful Digital Communications Act 2015 of New Zealand.

Unlike the New Zealand Act, the Bill does not in any way expressly consider the Bill of Rights under the 2013 Constitution of Fiji ("the Constitution"). The Bill will undoubtedly touch on certain rights of a person such as the Freedom of Expression in the Constitution.[8] The absence of this factor in the Online Safety Bill and there only being the guideline of the term "harm" to be considered could be problematic. There would be an underlying issue of whether a person's right to express himself freely is restricted. For instance, matters of public interest in terms of State Officials. Would one still be caught by the offences or mechanism currently under the Bill if a Member of Parliament, who is elected by the people therefore is to act for the people, is publically scrutinized and commented on social media for statements made in Parliament or merely his/her questionable decision making ways. The CCF submits that a person's rights under the Constitution be considered as a factor or element in the Online Safety Bill along with the element of "harm."

B. Communication Principles

Further, CCF submits that the "Communication Principles"[9] in the New Zealand Act be implemented as well in the Bill for guidance purposes. The said Principles refer to digital communications which should not:

1. Disclose sensitive personal facts about an individual;
2. Be threatening, intimidating or menacing;
3. Be grossly offensive to a reasonable person in the position of the affected individual;

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[8] Constitution of the Republic of Fiji 2013
[9] Harmful Communications Act of New Zealand 2015, Section 6

4. Be indecent or obscene;
5. Be used to harass an individual;
6. Make a false allegation;
7. Contain a matter that is published in breach of confidence;
8. Incite or encourage anyone to send a message to an individual for the purpose of causing harm to the individual;
9. Incite or encourage an individual to commit suicide;
10. Denigrate an individual by reason of his or her colour, race, ethnic or national origins, religion, gender, sexual orientation, or disability.

The above communication principles provide further criteria to be considered apart from whether harm could be or has been caused in the New Zealand Act. If these Principles are implemented, these could further provide assistance to the intended institution who would be receiving complaints. The institution would be assisted by way of carefully deciding on whether a complaint should be considered if any of the above principles have been breached in conjunction with the element of the harm caused (if any).

It would also be effective to further review those principles to ensure that they do not allow a low threshold for unnecessary or unsubstantiated complaints being made due to disagreements. For instance, Principles No. 3 and 4 could be specified as to who qualifies to be a "reasonable person" and the definition of the term "indecent" or "obscene." The suggested review and consideration of the Communication Principles would provide for a more robust and effective law.

3. INTERPRETATION OF THE BILL

A. The Unknown "Harm"

The interpretation of the term "Harm" as widely used throughout the Bill has been viewed as problematic in the case of **Police v B [2017] NZHC** which draws a conclusion that the interpretation of "harm" itself by Courts is questionable.

The cited case is an appeal case by the Complainant against the lower court's decision where it had found that the electronic communication did not cause harm. The appellate court found that the Judge

in the lower court did not consider the evidence in totality.[10] With that being said, the CCF submits that the Bill be carefully revised to consider possible issues relating to the interpretation of key elements.

B. Powers of the Commission

The Powers of the Commission under section 9 of the Bill includes the following:

> "9.—(1) The Commission has the following powers—
> (a) to request for information to assist in any assessment or investigation of a complaint under this Act;
> (b) to invite experts to assist in any assessment or investigation of a complaint under this Act; and
> (c) to do all things necessary for the performance of its functions." (clarify)

The CCF is concerned on the Section 9 (c) with regards to the words; "to do all things necessary." Again, there is no clarification as to what is deemed "necessary" in the context of offences under the Bill. Instead, the said section is left to be widely interpreted and there appears to be no limitation expressly stated to regulate or control the powers of the intended institution. As aforementioned, the issue of whether a person's rights under the Constitution are protected is questionable in this section as well.

RECOMMENDATIONS

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

i. Instead of introducing and diverting resources to a new institution, existing institutions such as the Cyber Crime Unit be utilized to address the cyber or online issues;
ii. The Crimes Act 2009 of Fiji be reviewed and amended to incorporate the proposed laws addressing current and pressing online issues instead of passing a new legislation, the Online Safety Bill;
iii. The Communication Principles and the Bill of Rights be expressly included in the proposed law as key factors to be considered when a complaint is lodged apart from the element of "harm;"

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[10] "The Judge considered more detailed evidence was required in relation to this ingredient, as the evidence had not crossed the threshold from emotional distress to serious emotional distress. But this is because the Judge approached the issue by isolating the various descriptions of how the complainant felt, rather than—as required—assessing the evidence in its totality" New Zealand Police v B [2017] NZHC 526, Para 35.

iv. Revising the interpretation of the word "harm" when being considered by the Commission or the Court of law; and

v. The powers of the Commission and the interpretation of Section 9 (c) of the Bill be revised to clearly outline what is considered to be a necessary action of the Commission. The Commission or the relevant institution is to consider the protection of a person's rights in exercising its powers and this is to be expressly stated in the provision concerned.

25 April 2018

SUBMISSION

ONLINE SAFETY BILL NO. 7 OF 2018

INTRODUCTION

- **The Bill is necessary but not in its current form**

In this age of advanced technology and immediate access to persons and information, the World has truly become a smaller place. The Fiji Law Society **(FLS)** agrees that the Bill is necessary but does require a thorough consideration of the mechanics of its operation before it is passed as law. In its current form, it address but a narrow part of the problem with online safety.

The Bill appears to be a reaction to recent releases of intimate visual recordings. It does **not** suggest pro-active guidelines that could help promote safe online behaviour and address issues such as cyber bullying, cyber trolling and so forth. While it is a step in the right direction, this Bill if passed as drafted would be a quick fix for curtailing the release of intimate visual recordings.

If there is a need to specifically criminalise online behaviour in as far as intimate visual recordings are concerned (which as drafted it suggests – see below) then the issues could be better dealt with via an amendment to the Crimes Act 2009.

If creating a separate Commission is the answer to promoting a safe on line culture and environment then it must not be done in isolation. The Bill must address online safety but also the rights of the individuals who use and provide information. The Commission's work must compliment the legal frameworks in place including the functions of the ODPP and Police.

- **Does the Bill in its current form address all its objectives?**

The Bill as drafted does **not** achieve the objectives as set out to address in the Explanatory Note to the Bill. That is to "*promote a safe online culture and environment...such as cyber bullying, cyber stalking, internet trolling and exposure to exposure of offensive or harmful content, particularly in respect of children.*" The Bill in its current form does not do any of the things in the explanatory note. It only focuses on harmful behaviour which has a specific focus on intimate visual recordings posted on an electronic platform.

The FLS implores the Committee to review the Bill to address the types of online behaviour the Bill set out to regulate i.e. *cyber bullying, cyber stalking, and internet trolling and exposure to exposure of offensive or harmful content, particularly in respect of children.*

The Bill should also promote safe online behaviour for public relation companies who use online platforms, agencies who report natural disasters, etc. It should exclude the already regulated industries including broadcasting and telecommunications sectors who have their own commissions/authorities to review their conduct.

- **Is there a need for a Commission to investigate?**

The FLS does not see why the course of justice should be delayed by a separate Commission who appears to be charged with investigating complaints and making recommendations for proceedings. The Bill is silent as to whether the Commission is meant to do both investigating and prosecuting or whether that will then be referred to the ODPP – in which case the Commission should not be allowed to investigate at all.

- **Does the Bill encourage censorship?**

In its current form the Bill seeks to regulate electronic communication of intimate visual recordings that causes "serious emotional distress". To avoid any doubt, should the scope of the Bill be extended to address the matters in the Explanatory Note then an exclusion of application of the law to free speech and freedom of political communication

should be expressly be stated, particularly if the scope of the Bill is extended to cover those matters it intended – see above. The Bill cannot be used to deter free speech.

- **What are other specific issues with the Bill in its current form?**

ANALYSIS			
No.	**SECTION**	**COMMENTS**	**RECOMMENDATION**
1.	N/A	The Bill is stated to be: A BILL FOR AN ACT TO ESTABLISH THE ONLINE SAFETY COMMISSION FOR THE PROMOTION OF ONLINE SAFETY, DETERRENCE OF HARMFUL ELECTRONIC COMMUNICATION AND FOR RELATED MATTERS	The Bill should be amended to include cyber bullying, cyber stalking, and internet trolling and exposure to exposure of offensive or harmful content, particularly in respect of children or give local law recognition to the UN Convention on the Rights of the Child. The scope needs to widen to these activities and also provide guidelines on safe online behaviour.
2.	N/A		Consider if the Bill is to include or exclude the Telecommunications and Broadcasting industries to the

ANALYSIS			
No.	**SECTION**	**COMMENTS**	**RECOMMENDATION**
			extent that they have their own oversight authority and guidelines – if necessary.
3.	Part I, Section 2 Definition of "**harm**"	Harm is defined in the Bill as "serious emotional distress". This test is very subjective and it will become too unclear what constitutes "serious emotional distress". What may be seriously emotionally distressing for one person may not necessarily be the same for another in the same situation. You cannot subjectively measure serious emotional distress or grief or fear or anger; it will require both fact and value-judgment. As drafted the Bill leaves the courts the discretion to determine or measure harm. The Courts would undoubtedly struggle to apply this definition evenly on cases brought under the Bill.	Propose to take the approach similar to Australia's Enhancing Online Safety Act 2015. Instead the test is what an ordinary reasonable person would conclude that: (i) it is likely that the material was intended to have an effect on a particular child; and (ii) the material would be likely to have the effect on the child of seriously threatening, seriously intimidating, seriously harassing or seriously humiliating the child; (c) such other conditions (if any) as are set out in the regulations; then: (d) the material is cyber-bullying material targeted at the child; and (e) the child is the target of the material.

ANALYSIS			
No.	**SECTION**	**COMMENTS**	**RECOMMENDATION**
4.	Part I Section 2 Definition of **"individual"**	Is defined as a natural person.	Extend this definition to also capture corporates (including marketing or PR companies) or the service provider of such online platform.
5.	Part I Section 3 Definition of **"Objectives"**	The objectives of this act are to— (a) promote responsible online behaviour and online safety; (b) deter harm caused to individuals by electronic communications; and (c) provide an efficient means of redress for such individuals. The Bill as drafted does **not** achieve the objectives as set out to address in the Explanatory Note to the Bill. That is to "*promote a safe online culture and environment...such as cyber bullying, cyber stalking, and internet trolling and exposure to exposure of offensive or harmful content, particularly in respect of children.*"	The FLS implores the Committee to review the Bill to specifically address the types of online behaviour the Bill set out to regulate. If that is the intention then all that is required is for the Crimes Act to be amended.
6.	Part I Section 4 **Application**	This Act applies to— *(a)* the whole of Fiji and, except as otherwise provided, to any acts, omissions, matters or things outside Fiji; and	If this is intended to be the application then the Bill should be amended to refer to *Fiji citizens/Fijian Adults/ Fiji Children*,

ANALYSIS			
No.	**SECTION**	**COMMENTS**	**RECOMMENDATION**
		(b) an electronic communication posted on or after the commencement of this Act.	so that online activity or electronic communication concerning them in or out of Fiji can be caught by the legislation – if that is the intention of the section.
7.	Section 2 Definition of **"posts an electronic communication"**	Definition in the Act refers to *(a) to transfer, send, publish, post, disseminate or otherwise communicate by means of an electronic communication—* *(i) any information, whether truthful or untruthful, about an individual; or* *(ii) an intimate visual recording of an individual; and* *(b) includes an attempt to do anything referred to in paragraph (a),* *and a corresponding meaning applies where "post", "posted" and "posting" appear in relation to an electronic communication.* The definition is too far reaching and will catch the honest opinions of individuals on any matter and private conversations. Casts too wide a net on monitoring online behaviour that goes beyond the scope/application of the Bill.	Exceptions should be made for honest opinions, facts and expression of any political or socio-economic views. FLS proposes the following drafting to avoid doubt: *"This Act does not apply to the extent (if any) that it would infringe any constitutional doctrine of implied freedom of political communication or freedom of speech."*

ANALYSIS			
No.	**SECTION**	**COMMENTS**	**RECOMMENDATION**
8.	Part 2 Section 6 (3)-6 (4) **Online Safety Commission**	The Law Society has serious concerns about the establishment of the Commission and the lack of independence and transparency between the Commission and Minister under the Bill. There are no specifics on: • who may qualify as Commissioner • whether the Commissioner can gain meaningful employment outside the Commission – we think not if the legislature is serious about this Bill • whether the Commissioner is eligible for reappointment of a further term • whether the Commissioner's remuneration should be determined in accordance with government salary bands for similar roles and if so refer to the law that stipulates that • whether there can be an acting commissioner • whether the Commissioner may tender in resignation before the expiry of his term • whether the Commission would be subject to review by a separate oversight committee particularly when it comes to reviewing policies and procedures	FLS proposes some of the following drafting on the role of the Commission and Commissioner. ***Appointment of Commissioner*** *A person is not eligible for appointment as the Commissioner unless the Minister is satisfied that the person has:* *(a) substantial legal experience or knowledge; and* *(b) significant standing;* *in at least one of the following fields:* *(c) the operation of social media services;* *(d) the operation of the internet industry;* *(e) public engagement on issues relating to online safety;* *(f) public policy in relation to the communications sector;* *(g) child welfare or child wellbeing.* ***Other employment***

ANALYSIS			
No.	**SECTION**	**COMMENTS**	**RECOMMENDATION**
		• what can constitute dismissal of the Commissioner or employees of the Commission, should they also be held to PSC standards and Code of Conduct – if so the Bill should say so.	*The Commissioner must not engage in paid employment outside the duties of his or her office without the Minister's approval.* ***Resignation*** *(1) The Commissioner may resign his or her appointment by giving the Minister a written resignation.* *(2) The resignation takes effect on the day it is received by the Minister or, if a later day is specified in the resignation, on that later day.* ***Acting appointments*** *(1) The Minister may appoint a person to act as the Commissioner:* *(a) during a vacancy in the office of the Commissioner (whether or not an appointment has previously been made to the office); or* *(b) during any period, or during all periods, when the Commissioner:* *(i) is absent from duty or from Fiji; or*

ANALYSIS			
No.	**SECTION**	**COMMENTS**	**RECOMMENDATION**
		◦ Section 6(3) provides for who the Commission consists of and this is limited to the Commissioner and such other staff appointed by the Commissioner. ◦ There is no criteria and qualifications for the specialised staff for the specific functions of the commission such as investigations.	*(ii) is, for any reason, unable to perform the duties of the office.* *(2) A person is not eligible for appointment to act as the Commissioner unless the person is eligible for appointment as the Commissioner.*
9.	Part I Section 8 (e) **Functions of the Commission**	While the Bill reefers to the functions and powers of the Commissioner, there is no clear provisions for the powers and functions of the **Commissioner** In terms of the functions and powers of the Commission, these should be limited to those	***Functions of the Commissioner*** *1) The functions of the Commissioner are:* *(a) such functions as are conferred on the Commissioner by this Act; or* *(b) to promote online safety for Fijians; and*

ANALYSIS			
No.	**SECTION**	**COMMENTS**	**RECOMMENDATION**
		functions and powers ancillary to the Commissioner. It should not be an investigative role or a prosecutorial or legal role – that should be left to the ODPP and Police. In that way, we ensure these issues are dealt with in a timely manner and prosecuted timely rather than going through a Commission to determine whether a complaint is valid under the Bill.	*(c) to support and encourage the implementation of measures to improve online safety for Fijians; and* *(d) to coordinate activities of authorities and agencies relating to online safety for children; and* *(e) to collect, analyse, interpret and disseminate information relating to online safety for Fijians; and* *(f) to support, encourage, conduct, accredit and evaluate educational, promotional and community awareness programs that are relevant to online safety for Fijians; and* *(g) to make, on behalf of the State, grants of financial assistance in relation to online safety for Fijians; and* *(h) to support, encourage, conduct and evaluate research about online safety for Fijians; and* *(i) to publish (whether on the internet or otherwise) reports and papers relating to online safety for Fijians; and* *(j) to give the Minister reports about online safety for Fijians; and* *(k) to advise the Minister about online safety for Fijians; and* *(l) to consult and cooperate with other persons, organisations and*

ANALYSIS			
No.	**SECTION**	**COMMENTS**	**RECOMMENDATION**
			governments on online safety for Fijians; and *(m) to advise and assist persons in relation to their obligations under this Act; and* *(n) to monitor compliance with this Act; and* *(o) to promote compliance with this Act; and* *(p) to formulate, in writing, guidelines or statements that:* *(i) recommend best practices for persons and bodies involved in online safety for Fijians; and* *(ii) are directed towards facilitating the timely and appropriate resolution of incidents involving cyber-bullying material targeted at an Fijian child; and* *(q) to promote guidelines and statements formulated under paragraph (p); and* *other functions (if any) as are specified in the legislative rules; and* *(r) to do anything incidental to or conducive to the performance of any of the above functions.* *Grants*

ANALYSIS			
No.	**SECTION**	**COMMENTS**	**RECOMMENDATION**
			(2) Financial assistance may be granted under paragraph (1)(g) to: *(a) a State; or* *(c) a person other than a State.* *(3) The terms and conditions on which financial assistance is granted under paragraph (1)(g) are to be set out in a written agreement between the State and the grant recipient.* *(4) An agreement under subsection (3) is to be entered into by the Commissioner on behalf of the State.* *Guidelines and statements are not legislative instruments* *(5) Guidelines and statements formulated under paragraph (1)(p) are not legislative instruments.* ***Powers of the Commissioner*** *The Commissioner has power to do all things necessary or convenient to be done for or in connection with the performance of his or her functions*
10.	N/A	If as per our recommendation the Commission only sets up guidelines and is not involved in prosecution of offences then our recommendation	An example of such provision is as follows:

ANALYSIS			
No.	**SECTION**	**COMMENTS**	**RECOMMENDATION**
		is that the Commission set out guidelines on online safety	*For the purposes of this Act, the **basic online safety requirements** for a social media service are as follows:* *(a) the service's terms of use must contain:* *(i) a provision that prohibits end-users from posting cyber-bullying material on the service; or* *(ii) a provision that may reasonably be regarded as the equivalent of a provision covered by subparagraph (i);* *(b) the service must have a complaints scheme under which end-users of the service can request the removal from the service of cyber-bullying material that breaches the service's terms of use;* *(c) there must be an individual who is* *(i) an employee or agent of the provider of the service; and* *(ii) designated as the service's contact person for the purposes of this Act;* *(d) the contact details of the contact person must be notified to the Commissioner.* *(2) For the purposes of this section, **cyber-bullying material** has its ordinary meaning.*

ANALYSIS			
No.	**SECTION**	**COMMENTS**	**RECOMMENDATION**
11.	Part 2 Section 11 **Commission to maintain confidentiality**	We agree with the provisions as drafted but there should be permitted disclosures to ODPP, school, teachers, parents/guardians and that already in public domain.	If necessary add in provisions for the Commission to de-identify details and any statistics to maintain confidentiality of parties.
12.	Part 2 Section 12 **Protection from liability**		It should also be an offence for the Commission and Commissioner to breach their confidentiality provisions under the Bill. This protection should be removed and the Commission should be answerable for its actions.
13.	Part 2 Section 13	The complaints to be lodged are to be in a form and manner as prescribed as regulations. However these regulations are yet to be provided for.	
	Section 14(1)	The lack of time provided for the investigation has to be addressed. With such power, the Commission needs to have guidelines and time.	
	Section 15(2)	The commissioner should notify in writing his decision not to take further action and a time period provided.	

ANALYSIS			
No.	**SECTION**	**COMMENTS**	**RECOMMENDATION**
14.	Part 2 Sections 15 and 17	There are just some drafting issues, maybe these could be simplified rather than being cross referenced around the legislation: S15 refers to S22 which refers back to S17 which refers us back to S22 S18 talks about S17 and S22 S19 talks about S17 and S18	Clean up referencing in drafting/simplify.
15.	Part 3 Clause 22 **Orders that a Court may make**	The role and purpose of the Commission is really unclear except to hinder one's right to seek remedies from the Courts as early as possible. S18(1) says that a person cannot apply to Court for final orders under S22 unless the Commission has received and assessed the complaint first. FLS is unclear as to the reason for the Commission to be involved when we have the ODPP and Police to manage such matters. Especially if the Commission does not have legally qualified persons and investigators – refer comments above on functions of Commission and Commissioner.	People should be able to lodge their complaints direct with ODPP or Police to investigate and pursue criminal charges than rely on a Commission that on the face of it does not have the necessary qualification to deal with such matters.

ANALYSIS			
No.	**SECTION**	**COMMENTS**	**RECOMMENDATION**
		FLS is concerned that this clause may cause more harm because the unacceptable online behaviour etc will be ongoing until Orders are given under S22.	
16.	Part 4 Clause 24 **Causing harm by posting an electronic communication**	The element of an offence under S24 consists of both an objective test 24(1)(b) and a subjective test 24(1) (c).	Refer comments above re definition of harm and recommendation to use "reasonable person" test.
17.	Part 4 Clause 25 **Posting an intimate visual recording**	This should not be the sole objective of the Bill. It's application becomes narrow and restrictive and not fulfilling the objectives stated.	